

INSURING U.S. PARTICIPANTS' INTERESTS IN COUNTERTRADE

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I. Introduction

Countertrade [1] has become big business [2]. Eastern European countries have long favored such transactions as a means of trading with the West for desired commodities and technology in the absence of convertible currency [3]. With its recent entrance into trade with the West, the People's Republic of China (the "PRC") has expressed a similar interest in countertrade [4]. Third World nations have also increased their reliance on countertrade in order to utilize available commodities [5], rather than expending scarce cash, to pay for purchases, while at the same time tying Western suppliers to continued support of their technical development.

The success of many countertrade agreements and the continued volatility of currencies and high interest rates indicate that countertrade deals will continue to grow in number and importance, particularly in trade with the East. From the point of view of U.S. firms, countertrade has several attractions. It allows them: (1) to sell goods or services in the foreign market, where buyers claim that they lack other resources to pay for purchases; (2) to develop long-term associations with foreign buyers who, in turn, serve as local producers or distributors, thereby excluding Western competitors from the foreign market; and (3) to license technology, often already thoroughly exploited in the West, with access to the licensee's operations or output, should that be desired.

Despite these advantages, critics have argued that countertrade transactions may be less efficient than cash sales [6]. This article, however, assumes that the phenomenon of countertrade will grow due to its attractiveness to the participants, even when their interests are not identical with national policies of resource allocation [7]. In addition, this article assumes that the United States has valid reasons for promoting exports. Therefore, it proposes that the government should initiate, and, if necessary, operate a program for insuring

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U.S. participants in, countertrade transactions. This insurance would protect exporters against political risks arising from acts of the U.S. Government that threaten these transactions. No separate program need be created to insure countertrade deals against the risks of acts by foreign governments; such insurance is, to some degree, presently available through the Export-Import Bank (the "Ex-Im Bank") [8].

2. The unique risks of countertrade

A countertrade transaction may be a simple barter deal. For example, aircraft made in the United States may be sold by a manufacturer to the government airline of Yugoslavia, in exchange for a quantity of Yugoslavia hams [9]. In such a transaction the time-span over which the parties perform their obligations may be brief, and the risk of adverse U.S. political actions disrupting the exchange would be relatively minor.

Such transactions may, however, require much longer commitments. The U.S. firm may be involved in the delivery and assembly of the aircraft over several months, the delivery of spare parts for many years, and the supply of technical services to train maintenance personnel and to provide safety and other improvements on a continuing basis. On the other side, the foreign purchaser may have contracted to ship products over several harvests. In these cases, U.S. export or import restraints may be imposed on the merchandise or services, moving in either direction, well before the entire deal is completed [10].

Most countertrade transactions are, in fact, long-term; this is particularly true of agreements to construct plants employing technology acquired in the West. Such transactions often involve the transfer abroad of technology and the provision of training and services during the years of construction and startup. Payments are partially made from the output of the facilities built, and these transactions may require 10 to 20 years to complete. The Occidental Petroleum transaction with the U.S.S.R. [11] is an example of such extended countertrade. Occidental exported technology to the U.S.S.R. in exchange for shipments of ammonia. The initial shipment of ammonia occurred five years after the contract was signed. The shipments were to continue during the next 20 years.

The Occidental case illustrates the high risk of long-term countertrade. Occidental faced the loss of payments from the U.S.S.R. due to actions initiated by U.S. competitors [12] to limit or prevent Occidental's receipt of payment. It is important to recognize that the Occidental situation may not differ from other long-term import relationships where expectations are jeopardized by a competitor's invocation of the unfair trade laws. Thus, a U.S. company that invests substantially in establishing a domestic sales network for

the U.S. distribution of a foreign product, pursuant to a long-term sales contract, may fairly argue that it too faces similar risks. Its investment may be jeopardized by competitors seeking U.S. Government imposed import restraints [13].

A difference does exist, however, in the countertrade context. In a countertrade transaction the importer is also furthering a goal of the U.S. Government – increased exports. The countertrading firms may, therefore, have a better claim to protection against the risk of government reaction to imports. The claim may be especially strong when the government has promoted and often insured the initial exports.

Another risk to countertrade transactions lies in the requirement for export licences. The Department of Commerce's Office of Export Administration must issue a validated export licence before a U.S. firm may export commodities or technology to the Council for Mutual Economic Aid (the "CMEA") countries [14] and the PRC. A U.S. supplier or its foreign affiliates may face the sudden revocation of a licence for political reasons quite beyond the firm's control. For example, in 1982 the U.S. Government revoked Dresser Industries' licence to export compressors to the U.S.S.R. because of political controversy over the Siberian pipeline [15]. While not publicly described as a countertrade transaction, *Dresser* raises the question of whether a company that received a licence, produced the goods, and was prepared to deliver them should be afforded the opportunity of acquiring protection against licence revocation for U.S. Government purposes.

Insurance issued by the U.S. Government could protect U.S. companies involved in countertrade transactions. Otherwise, the two greatest risks – competitor invocation of the U.S. unfair trade laws and revocation of U.S. export licences due to political disputes – may inhibit valuable countertrade deals.

3. Existing U.S. Government insurance programs

The principle that the U.S. Government should offer insurance to its nationals engaged in activities beneficial to the economy is hardly new. At the close of fiscal year 1979, the U.S. Government had issued insurance commitments in excess of \$2 trillion; over \$276 billion had been issued in loan guarantees [16]. These figures are largely off-budget because the published federal budget only indicates modest premium collections and claims paid by on-budget agencies. The government has protected citizens engaged in a variety of activities [17], insuring against defaults or disasters in the absence of commercially available protection of similar scope and affordable cost. Such programs are a relatively inexpensive and effective way of promoting public welfare [18].

In like manner, insurance may be a further incentive and a necessary protection to U.S. exports in the area of international trade. Three existing programs may serve as useful models on which to base a plan of countertrade insurance.

3.1. Overseas Private Investment Corporation ("OPIC")

OPIC was created as a government-owned corporation in 1969 to encourage private participation in the transfer of resources by developing Third World nations [19]. OPIC offers U.S. investors insurance against certain types of political risks which are particularly acute in lesser developed countries ("LDCs"): (1) inconvertibility of foreign currency that is received as profit or as a return of the initial investment; (2) expropriation, including the repudiation of contracts; and (3) war, rebellion, or insurrection ("WRI"). Additional insurance is also available for mineral projects that may be adversely affected by host government breaches of contract. This insurance may also include the consequential losses caused by the closing of operations for at least six months through acts of war or insurrection. Over \$3 billion of this insurance was written by OPIC in fiscal year 1982 [20], a marked increase from fiscal year 1981.

The scope and limits of the OPIC program need to be understood. First, OPIC insurance is only available for investments in a "less developed friendly country" with which the President of the United States has agreed to institute a program for insurance [21]. Thus, investments in the CMEA countries are ineligible for protection. Second, the insurance is solely aimed at investments in a foreign country and does not cover trade transactions. Third, the current maximum amount of insurance that OPIC can issue is \$7.5 billion, with individual policies subject to a variety of other limitations. Fourth, most OPIC insurance covers only 90% of the loss sustained; a 10% co-insurance risk must be retained by the investor. To receive payment, the investor must assign his entire interest in the claim to OPIC. Finally, there is uncertainty over OPIC's very existence over the long term, due to changes in political attitudes [22].

Premiums for protection under OPIC vary depending on the type of investment, the country, the size of the project, and whether the initial investment or the future profits are also sought to be insured. Expropriation protection for an entire investment is likely to cost no more than 1% of the investment. The Office of Management and Budget has adopted a principle that all federal loan guarantee fees and premiums should permit recovery of all costs associated with the program [23]. Such actuarial accuracy, however, may be difficult to calculate for political risks associated with countertrade [24].

For the present discussion, the important point is that OPIC, an agency of the U.S. Government, exists to insure U.S. investors against the risk of political decisions made by foreign governments, the effect of which may be to

“expropriate” the value of the investment. The expropriation need not be a complete taking of the assets; it may consist of “creeping takings” through the imposition of rules or the denial of privileges which have an adverse effect on the value of the investment. The expropriation insurance, however, only covers takings which are discriminatory or violative of the host country’s laws or international law. Therefore, OPIC insurance is not as broad as it might seem: it does not cover the revocation of a necessary licence achieved through a neutral rule applied for appropriate sovereign purposes [25]. Hence, an imposition of import restraints, as in the *Occidental* case, or a revocation of an export licence, as in the *Dresser* case, would not be insured under OPIC since both were applications of existing and presumably valid law.

3.2. *Export-Import Bank and Federal Credit Insurance Association*

While OPIC insures U.S. investors in foreign countries, the Ex-Im Bank and its private-sector affiliate, the Federal Credit Insurance Association (the “FCIA”), insure U.S. nationals who export merchandise made in the United States. Like OPIC, Ex-Im is an off-budget agency of the U.S. Government. The FCIA is an association of fifty private insurance companies that underwrite Ex-Im’s insurance program according to guidelines adopted by the Bank.

The Ex-Im and FCIA programs are not limited, as are OPIC’s by U.S. foreign policy interests in less developed nations, since exports need not be directed to LDCs to receive Ex-Im/FCIA insurance. However, like OPIC, Ex-Im and FCIA insurance is not available for shipments to some countries, especially those likely to be involved in countertrade. Ex-Im insurance does not cover sales to countries denied most-favored-nation status [26]; nor is it available for Communist countries, unless the President determines that insurance is in the national interest [27].

Ex-Im and FCIA insure against both political and commercial risks encountered in export sales or leases. This means that they will cover risks of WRI, inconvertibility, and expropriation – risks that are of particular concern to countertraders. These programs protect U.S. nationals against the risk of government action, whether foreign or domestic. In particular, they insure against revocation of required licences [28]. Because Ex-Im programs do not cover transactions to those countries for which validated export licences are generally required or for which licences have been revoked for political reasons, the protection under the program has never been tested [29]. Nevertheless, its general scope is the kind needed to promote countertrade.

3.3. *Agriculture and Food Act of 1981*

In theory, the type of insurance proposed here has been authorized for

certain agricultural exports. The Agriculture and Food Act of 1981 [30] contains a provision for compensating producers of agricultural commodities that are subject to foreign policy or national security export controls. These compensation provisions come into operation if: (1) the export controls affect only agricultural goods and not all exports to the country of destination, and (2) the exports of the particular commodity and the exports to the country of destination exceed three percent of aggregate exports of that commodity to all countries during the year prior to the one in which the restriction came into effect.

When this provision applies, the Secretary of Agriculture is required to make payments or loans to affected producers. The schedule of payments is set at the difference between the parity price of the commodity and its average market value during the 60-day period following the imposition of export controls. The payment is not contingent upon specific export sales lost as a result of the embargo; it is made to all affected producers of the commodity in proportion to their sales to others during the period that the export control is in effect. Producers pay no premium into the fund from which compensation is paid out.

This measure was proposed by the Senate Agriculture Committee because of its conviction that "action was necessary to protect [agricultural] producers from the adverse effects of future agricultural trade suspensions imposed for national security or foreign policy reasons" [31]. The Committee noted that it is unfair to single out exporters of agricultural exports to "bear the burden of embargoes" and suggested that this form of compensation might restrain embargoes "in the first place" [32].

Identical arguments can be advanced by any of the individual firms or industries that have conducted their business in reliance on the stability of their government's trade policy. The insurance plan for countertrade proposed here is not, however, a general program of compensation to all producers without regard to the actual effect of an embargo upon them [33] nor a program of payment without some prior contribution by its beneficiaries. The model proposed in this article is rather an expanded version of the insurance plan of the Ex-Im Bank.

4. An example: The Federal Republic of Germany

The need to protect the legitimate interests of exporters has been recognized by other countries. Insurance for German businesses against governmental interference in export sales is, for example, available through a program of the Federal Republic of Germany. This program provides insurance against embargoes on exports imposed by the West German Government under its Foreign Trade Law. In addition to embargoes, the Foreign Trade Law permits

withdrawal of export licenses for reasons such as the “protection of national security” or avoidance of “significant disturbance to the foreign relations” of the Federal Republic [34]. However, it is unclear whether its drafters intended a right to compensation for companies adversely affected by revocation of export licences [35].

German legal literature suggests that an affected company should have a right to compensation under the doctrine of eminent domain. In the Federal Republic, the law of eminent domain requires that a property owner be compensated when a governmental act directly imposes a “special sacrifice” (*Sonderopfer*) not imposed on the public at large [36]. Generally, the requirements of statutes governing foreign trade are not regarded as imposing “special sacrifices” on traders because the law anticipates the likelihood of licence revocation and, therefore, provides advance notice that risks exist in export trade [37]. But it has been convincingly argued that these measures actually affect only selected companies, those with contractual agreements, and, therefore, they do impose a “special sacrifice” under the principle of eminent domain [38].

The theory has not been tested because, through government sponsorship, two West German companies [39] have been empowered to provide insurance against the risk of embargo. The insurance covers losses resulting from the imposition of export controls and the revocation of export licences by the West German Government when government action is based on national security or similar foreign policy grounds. Broad questions remain to be answered. It is, for example, unclear whether this program will also cover export sanctions imposed by directives or regulations of the European Economic Community (the “EEC”). It seems appropriate to cover actions by the EEC since one of the purposes of the EEC is to impose a common commercial policy for all member states. On the other hand, it seems clear that import restraints imposed on goods likely to be used in countertrade transactions in exchange for exports are not covered by the West German plan.

5. Is insurance practical and feasible for this purpose?

An argument may be made that the proposed insurance is unnecessary because countertrade is expanding. After all, there have been many countertrade agreements by U.S. firms, even in the absence of protection from the actions of the U.S. Government that threaten payments. Nevertheless, despite the willingness of exporters to take risks, the proposed insurance will be a useful addition to trade policy if ways are needed to promote exports that do not violate international accords on trade-distortive subsidies [40].

Three possible objections should be considered, however:

5.1. *The U.S. should not insure against a self-created risk*

By sponsoring this form of insurance, the United States may be seen as violating the general principle of the insurance trade that an insurer should not insure against risks that it controls and creates.

But this principle has not hampered the operation of Ex-Im insurance for exports to non-CMEA countries nor the protection provided agricultural exports. Moreover, it should be viewed as inapplicable because the U.S. Government need not be considered the party that both provides the insurance and creates the risk. The insurance is to be provided by an off-budget, semi-independent agency like the Ex-Im Bank or a private consortium like the FCIA. Because decisions on insurance coverage and on export policy are not to be made by the same parties, there is no identity of personality between the insurance carrier and political agencies, such as the Office of Export Administration, that act to revoke export licences. Indeed, it may be said that the existence of insurance for U.S. parties will free political decision-makers to act without concern for adverse effects on innocent traders [41].

5.2. *The insurance may constitute an “export subsidy” proscribed by the General Agreement on Tariffs and Trade Subsidies Code*

Article 9(1) of the Subsidies Code of the General Agreement on Tariffs and Trade (the “GATT”), to which the United States adheres, proscribes any grant of “export subsidies” on industrial goods [42]. It may be argued that a U.S. program to provide exporters with insurance against risks constitutes a subsidy. However, a basic feature of the present proposal is that this coverage be self-sustaining, like that provided by OPIC and Ex-Im. No federal funds would be expended unless the operating agency were in default.

The pledge of the United States to guarantee the insurance obligation could be regarded as subsidy, but so long as the premiums are calculated on the basis of realistic assessments of risk and actually collected, no actual subsidy should be found. According to the determination of the Commerce Department’s International Trade Administration in *Certain Steel Products from Belgium* [43], only guaranty programs extended to “uncreditworthy” beneficiaries or offered at noncommercial rates constitute subsidies. In an earlier decision, *Certain Iron Metal Castings from India*, export credit insurance provided by a government-created agency at commercial rates was held not to be a subsidy within the meaning of the countervailing duty law [44].

5.3. *An adequate remedy exists under U.S. law*

The proposed insurance program may be regarded as an unnecessary expenditure at a time when efforts are being made to reduce federal spending.

It may be argued that a company whose export licence is revoked or which has been prevented from receiving payment for a sale by an import limitation, has suffered a taking of its property by the U.S. Government for which just compensation is required under the Fifth Amendment. The cause of action for such compensation in the U.S. Claims Court may be regarded as an adequate remedy.

No extensive study has been made of the question of whether a countertrade participant whose agreement is frustrated by an export licence revocation or an import limitation has a valid Fifth Amendment claim. No court has sustained such a claim; a few have suggested that the claim would not be frivolous [45]. An analysis of recent Supreme Court decisions on the taking of an interest in real property suggests that a right to compensation might be recognized in the case of a company that had received a valid licence, produced goods to be shipped, and then found the licence revoked for political reasons while the goods awaited actual delivery [46]. The principle of government action and government taking would seem equally to apply to the case of a single adversely affected party suffering a reduction in the value of his property as it would to the case of a chicken farmer prevented from continuing use of his property because of military overflights [47].

Even if the courts are found to provide a remedy, the provision of insurance may be a way of avoiding additional litigation in overcrowded courts and of limiting the recovery against the government to amounts agreed upon in advance and paid for, in part, by the insured party. It seems sensible to follow the principles used in the management of commercial insurance where protection is financed by the premiums of all potential beneficiaries. A further virtue of this approach is that taxpayers are spared the possible burden of at least some successful claims for recovery against the government.

6. Conclusions

Although the insurance plan proposed in this article derives in part from precedents in the United States and the Federal Republic of Germany, it would break some new ground. Its practical virtues outweigh possible objections that are, to a large degree, based upon trade restrictions intended to protect domestic manufacturers with little concern for the interest of U.S. exporters.

The insurance program would assure a measure of fairness to U.S. exporters whose activities pose problems for foreign policy. This form of insurance would harmonize conflicts between current policies and laws. While the United States often appears eager to encourage trade with East European countries as a way of easing political tension and of establishing normal relations among nations, it has enacted laws and regulations that limit trade with those

countries when it harms the U.S. economy or when foreign policy dictates that trade be used as an economic weapon. Unfortunately, the aperiodic use of that weapon is likely to damage the business interests of U.S. exporters. The proposed insurance would spread the risk of such injury rather than allowing it to be concentrated upon the few firms that are involved in trade with the East. It would also enable those firms to protect their interests through participation in an insurance fund.

A number of issues remain to be explored before a final model of this insurance scheme can be proposed. The parties eligible, the transactions to be insured, the calculation of premiums, the amount to be recovered, and the extent to which insurance provisions should bar Fifth Amendment claims are questions that require additional discussion. Nevertheless, adoption of an insurance plan will provide incentive to U.S. exporters and allow them to compete more effectively against foreign exporters who benefit from more expansive programs of government assistance.

Notes

[1] See, generally, Walsh, *Countertrade: Not Just for East-West Any More*, 17 J. World Trade L. 3 (Jan.-Feb. 1983); McVey, *Countertrade and Barter: Alternative Trade Financing by Third World Nations*, 6 Int'l Trade L.J. 197 (Spring-Summer 1981); Potter, *East-West Countertrade: Economic Injury and Dependence under U.S. Trade Law*, 13 Law & Pol'y Int'l Bus. 413 (1981).

[2] See Walsh, *supra* note 1, at 3; McVey, *supra* note 1, at 197. See also, e.g., Lowenstein, U.S. Firms Move to "Countertrading", Wall St. J., Nov. 4, 1981, at 31, col. 2.

[3] See Potter, *supra* note 1, at 416; McVey, *supra* note 1, at 197; Ianni, *The International Treatment of State Trading*, 16 J. World Trade L. 480 (1982); Vernon, *The Fragile Foundations of East-West Trade*, 57 Foreign Aff. 1035, 1040-44 (1971).

[4] See, e.g., McVey *supra* note 1, at 199; Middleton, *China May Trade Minerals for Arms*, N.Y. Times, Dec. 27, 1981, §1, at 9, col. 1. For a general discussion of the PRC's recent evolution as a trading power, see Ianni, *supra* note 3, at 492-94.

[5] See, generally, Walsh, *supra* note 1, at 3-11. See also, e.g., McVey, *supra* note 1, at 199; 2 U.S. Firms to Employ Barter System in Sales of Scrap Metal to Mexico, Am. Metal Market, Sept. 13, 1982, at 1.

[6] See, e.g., Potter, *supra* note 1, at 417-19, 463-64.

[7] Undersecretary of Commerce, Lionel Olmer, has estimated that 25% of world trade is now subject to countertrade; it is a phenomenon "difficult, if not impossible, to legislate against". Hershey, *A Perilous Time for World Trade*, N.Y. Times, Aug. 1, 1982, at C9, col. 1.

[8] See section 3.2, *infra*. Export-Import Bank insurance is not available with respect to shipments to the U.S.S.R. and other Eastern European countries with which countertrade is most likely, unless the President determines that the insurance is in the national interest.

[9] In fact, McDonnell Douglas Corp. sold DC-9 passenger jets to Yugoslavia. In return, McDonnell Douglas purchased hams, tools, and other products from Yugoslavia in a counterpurchase. See, Leo Welt, *Countertrade Gains Popularity as International Trade Tool*, 3 Bus. Am. 12, 14 (July 14, 1980).

[10] See, e.g., Morgan and Pincus, *Northrup Finds a Way to Offset Customers' Cash Shortage*, Wash. Post, July 6, 1982, at A1, Col. 3. To finance its aircraft sales, Northrup agreed to find markets in third countries for Turkish wine and other products.

The countertraded merchandise need not be imported into the United States. It may be, and often is, marketed in third countries, in which case U.S. import restraints do not apply. However, U.S. exporters of goods competing with the countertraded goods may complain under, e.g., §§301 and 302 of the Trade Act of 1974 (as amended 1979), 19 U.S.C. §2411, that their third country export markets are adversely affected by such a deal.

[11] In 1973, Occidental signed a multibillion dollar contract with the Soviet Union. Ammonia imports from the USSR under this arrangement began in 1978. *See, generally, Potter, supra* note 1, at 438.

[12] Anhydrous Ammonia from the USSR, TA-406-5, USITC Pub. 1006 (1979); TA-406-6, USITC Pub. 1051 (1980). Both of these cases were brought under section 406 of the Trade Act of 1974, 19 U.S.C. §2436 (1976 and Supp. III 1979). Section 406 empowers the U.S. International Trade Commission (the "ITC") to determine whether imports from "Communist countries" are market disruptive to a domestic industry, creating "a significant cause of material injury, or threat thereof, to such domestic industry", 19 U.S.C. §2436(e)(2), and, if so, to recommend to the President that he impose limitations on the imports.

[13] In the proceeding initiated by the United Auto Workers and the Ford Motor Company to obtain import restrictions on Japanese automobiles under the "escape clause", §201 of the Trade Act of 1974, 19 U.S.C. §2251, the trade association of dealers of Japanese automobiles made this argument in resisting the relief requested by the petitioners. *See, e.g., Testimony of Robert McElwaine, President, American International Automobile Dealers Association, in USITC, In re Certain Motor Vehicles, USITC Investigation TA201-44, Transcript of Hearing at 991 (Oct. 10, 1980).*

[14] The Council for Mutual Economic Aid (the "CMEA") was established in 1949 and includes Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Rumania, Yugoslavia, and the U.S.S.R.

[15] Order Temporarily Denying Export Privileges (Dresser (France) S.A.), 47 Fed. Reg. 38170 (Aug. 30, 1982). *See also Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982) (Order denying preliminary injunction).

[16] *See Penner, Uncle Sam, Insurance Agent*, N.Y. Times, Jan. 4, 1981, §3, at 2, col. 3. A recent report of the General Accounting Office (the "GAO") indicates that in 1980 U.S. Government guaranteed loans accounted for nearly 10% of the \$348 billion advanced by all lenders in the U.S. credit markets. GAO, Federal Credit Policy on Guaranteed Loans Should be Clarified and Enforced, GAO/RCED 83-22, at 1 (Nov. 4, 1982) (hereinafter "GAO Report"). The GAO Report mentions that in 1982 some 65 separate federal insurance programs were in existence, GAO Report at 3.

[17] U.S. programs insure financial institutions lending money to private homeowners, citizens who build ships, produce energy, open shops in urban areas where riots or unrest may occur, raise crops, suffer floods, and go to college. *See Penner, supra* note 16.

A study of the Overseas Private Investment Corporation (the "OPIC"), prepared for the Senate Committee on Foreign Affairs, noted that "[t]he U.S. Government offers dozens of programs through which private citizens can either insure against some type of loss or receive Federal credit aids for projects deemed worthy of assistance. OPIC represents only a very small portion of the dollar volume of these programs". Staff of the Foreign Affairs Division, Congressional Research Service, Library of Congress, prepared for the House Committee on Foreign Affairs, 93d Cong. 1st Sess., *The Overseas Private Investment Corporation: A Critical Analysis* 37 (Comm. Print 1973) (hereinafter "Report on OPIC"). The report listed as examples the Export-Import Bank, the federal riot reinsurance program, the federal crime insurance program, the Merchant Marine war insurance program, the Federal Aviation war risk insurance program, the Federal Housing Administration, and the Veterans Administration guaranty program. *Id.*

[18] As one writer has observed, these insurance programs may drain resources away from one another and, thus, ultimately cancel one another's effectiveness. It is possible, for example, that

they drain resources from applications not benefiting from such an artificial stimulus and, thus, may contribute to an inefficient allocation of our resources. See Penner, *supra* note 16.

[19] OPIC was established by amendment to the Foreign Assistance Act, 22 U.S.C. §2191 (as amended 1969). See, generally, Report on OPIC, *supra* note 17.

[20] See *New Business for OPIC*, N.Y. Times, Oct. 24, 1982, §3, at 20, col. 3.

[21] 22 U.S.C. §2197(a).

[22] See Note, *The 1981 OPIC Amendments and Reagan's "Newer Directions" in Third World Development Policy*, 14 *Law & Pol'y Int'l Bus.* 181, 183-84 (1982).

[23] See Penner, *supra* note 16, quoting GAO Report and discussion of OMB Circular A-70.

[24] If such costs were determinable, there would be less need for governmental participation; the private sector could provide the coverage unless the costs were commercially prohibitive.

[25] See §4.02(b) of OPIC, General Terms and Conditions of an Insurance Contract for Investment Insurance Under §234(a) of the Foreign Assistance Act of 1961, as Amended (Form 234KGT-S-73 (Revised)).

[26] The notion of most-favoured-nation treatment is a foundation of the General Agreement of Tariffs and Trade (the "GATT"). GATT, Article I, October 30, 1947, 61 Stat. Part 5: T.I.A.S. No. 1700; 55-61 U.N.T.S. At this time 88 countries belong to the GATT.

[27] 12 U.S.C. §635(b) (2) (1977). In the past, the President has decided in favor of Ex-Im insurance for exports to Poland, Romania, Yugoslavia, and the PRC. At present, Poland and Romania are excluded from Ex-Im coverage, in part because of the economic difficulties of those countries.

[28] See Form FCIA-100, 2a, 9-71; W. Streng, Government Supported Export Credit A9-A11 (1980) (detailed description of Ex-Im guarantees).

[29] An example of a revocation of this sort is the American action with respect to shipments for the Siberian pipeline. There is no record of claims being filed under this coverage with respect to U.S. Government actions.

[30] 7 U.S.C. §1736j (Supp. V 1981).

[31] S. Rep. No. 97-126, 97th Cong., 1st Sess., 1265 (hereinafter "Senate Report"), reprinted in 1981 U.S. Code Cong. & Ad. News 1965, 2090.

[32] Senate Report, *supra* note 31, at 126, reprinted in 1981 U.S. Code Cong. & Ad. News at 2091.

[33] In the case of particularly fungible, mass-produced goods such as agricultural commodities, it might be more impracticable to insure individual export sales than it would be in the case of more easily differentiated manufactured items or services. However, a selective embargo affects the domestic price and the unaffected export market prices of steel pipe or drilling services as readily as it does grain or poultry.

[34] Zinkeisen, *Das Fehlen einer Entschädigungsregelung im Aussenwirtschaftsgesetz* 55 (1968).

[35] See *Aussenwirtschaftsgesetz vom 28 April 1961*, §§7(1) (1), (3) (BGBI. I 481).

[36] Bundesgerichtshof 33/68, 55 Bundesgerichtshof, Gr. Sen. Z. 261 (1971).

[37] Bundesgerichtshof 127/64, 1966 *Neue Juristische Wochenschrift* 877 (1966).

[38] Zinkeisen, *supra* note 34, at 58.

[39] The corporations, both based in Hamburg, are Hermes Kreditversicherungs AG and Treuarbeit AG Wirtschaftsprüfungsgesellschaft und Steuerberatungsgesellschaft.

[40] The notion that export promotion merits priority attention from Congress is supported by the Conference Report, H.R. Rep. 97-924, 97th Cong., 2d Sess. 22 (1982), on the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§4001-4011), concluding that "the necessity of export expansion has never been more obvious".

[41] In a sense this argument interprets the situation as the opposite of the view taken by the Senate Agriculture Committee. That Committee suggested that obliging the government to pay farmers who are adversely affected by embargoes would be likely to restrain the political arm of the government from imposing the embargo. See Senate Report, *supra* note 31.

[42] The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT (relating to subsidies and countervailing measures) was approved for the United States in the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, §2c-5 (codified at 19 U.S.C. §2503c-5).

[43] Final Affirmative Countervailing Duty Determination, 47 Fed. Reg. 39304, 39305 (1982).

[44] Countervailing Duty Determination, 2 I.T.R.D. 5161, 5165 (1980).

[45] See, e.g., *Turney v. U.S.*, 115 F. Supp. 457 (Ct. Cl. 1953) (Philippine export embargo which was imposed at U.S. insistence on goods purchased for export from the Philippines deemed a compensable taking). *But cf.*, *Anglo-American Trading Corp. v. U.S.*, 75 F. Supp. 260 (Ct. Cl. 1948) (New Zealand export embargo imposed at the request of the United States was not a taking).

For a recent discussion of the right to recover seized property, under 50 U.S.C. App. 5(b) (1976) (authority granted the President under Trading with the Enemy Act), see *Alcan Sales v. U.S.* 4 I.T.R.D. 1097 (CAFC 1982) (under authority of Trading with the Enemy Act, the President imposed a 10% duty surcharge; court held that surcharge was not recoverable since taken as a regulatory measure).

[46] See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636, 653 (1981) (Brennan, J., dissenting).

[47] See *United States v. Causby*, 328 U.S. 256 (1946). This theory is analogous to the "special sacrifice" (*Sonderopfer*) provision of eminent domain in the Federal Republic of Germany. Under that provision, a person or a narrowly limited class of persons may assert a claim for compensation from the government if sovereign actions have exacted a "special sacrifice" for the public benefit. See *Bundesgerichtshof 33/68. supra* note 36 and accompanying text (cancellation of licences issued to the only two exporters of a special commodity on grounds of foreign policy may constitute a situation in which the principle of "special sacrifice" applies).

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