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THE OVERSEAS PRIVATE INVESTMENT CORPORATION

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INTRODUCTION

Although the Overseas Private Investment Corporation is a small and relatively new U.S. Government Corporation, since its inception two and one-half years ago its staff and management have worked daily to find practical solutions to many of the problems involved in the settlement of economic disputes in Latin America. Recently, several issues relating to OPIC's role in settling and avoiding investment disputes and in operating in Latin America have been raised in Congressional hearings on OPIC. OPIC officials are hopeful that the experience of the past two and one-half years will, with the assistance of the Congress, make OPIC an even more effective dispute settling and dispute avoiding mechanism in the future and assist in arriving at answers to the many questions facing the United States, U.S. investors, and the countries of Latin America. Before discussing the issues referred to above, a brief description of OPIC and its programs would be helpful.

OPIC BACKGROUND AND PROGRAMS

OPIC's charter was enacted in the Foreign Assistance Act of 1969, and the Corporation began formal operations on January 19, 1971.

Most of the programs which OPIC operates were previously operated by the Office of Private Resources of the Agency for International Development. OPIC's programs include:

— insurance of private U.S. investments in developing countries against the risks of (A) inconvertibility, (B) expropriation, and (C) war, revolution or insurrection;

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— guarantees of U. S. private loans to projects in developing countries against commercial as well as political risks;

— direct dollar loans from the Corporation's capital to assist in financing private projects in developing countries; and

— financing of investment surveys and feasibility studies to develop projects, especially small business and agribusiness opportunities.

Although OPIC's programs are basically the same as those previously operated by A.I.D., the Congress felt that OPIC's corporate structure would produce significant benefits by creating and applying a partnership of U. S. private managerial know-how and official policy decision-making to the business of international development, thereby resulting in greater efficiency in the administration of investment incentives within the confines of U. S. foreign policy. Consistent with these Congressional objectives, OPIC has found that the corporate approach has produced many distinctive features, including:

— *a public-private Board of Directors* which melds private and government viewpoints on the direction of the programs;

— *a balance sheet discipline* which compares income and expenses, and provides the shareholders, the American people, with complete disclosure and accountability;

— *a small sized staff* of high professional competence; and

— *a specialized organization* dealing solely with U. S. investment in the LDC's, capable of providing practical advice to investors and other elements of the U. S. Government.

OPIC'S ROLE IN RESOLVING INVESTMENT DISPUTES

Turning to the issues that have been raised during the OPIC hearings, a question that has been asked repeatedly is whether OPIC plays a role which is beneficial or harmful to U. S. national interests with respect to disputes with foreign governments arising out of OPIC-insured investments.

The theory has been advanced by some that the existence of OPIC insurance causes the U. S. Government to become directly involved in investment disputes to the detriment of the U. S. national interest. How-

ever, an examination of the way investment disputes develop and the manner in which OPIC insurance functions indicates that the role of OPIC's insurance is a beneficial, not a harmful one.

OPIC and its predecessors have paid or settled 13 expropriation claims to date, and in not one instance has OPIC involved the U. S. Government in a dispute with a foreign government. Therefore, the argument that OPIC can lead to such involvement is at best theoretical. Furthermore, in those investment disputes which have affected U. S. relations with foreign governments, either the investment was not insured by OPIC or the amount of OPIC insurance was relatively small and did not affect the bilateral problems arising from the disputes. This demonstrates that the basis for U. S. Government involvement in such disputes is separate from and independent of OPIC insurance. Moreover, there is no reason to expect that OPIC will cause the U. S. Government to be an unwilling party to such disputes in the future. OPIC operates under the foreign policy guidance of the Secretary of State. If OPIC's specific interest were to run counter to the overall U. S. foreign policy interest, the President could and doubtless would exercise his power to require OPIC to subordinate its goals to overall U. S. policies.

Even from a theoretical standpoint, it has been recognized that investment insurance does have a role to play in reducing the likelihood of government-to-government confrontations over investment disputes. For example, in an article last summer in *The American Journal of International Law*, Stanley Metzger, Professor of International Law at Georgetown University, stated:

These programs have the substantial virtue of tending to depoliticize international disputes over approved investments in virtue of the fact that the Investor is paid off under a domestic insurance policy, leaving only money issues between governments Such a system represents a clear gain over having a major international contretemps each time a developing country decides to nationalize one or another sector of its economy. . . .

More significant than the theories about how OPIC might or might not involve the U. S. Government in disputes are the practical conclusions to be drawn from actual experience which show how OPIC has benefited the U. S. Government, the insured investor, and the host government in forestalling and settling disputes.

OPIC's relationship to its insured investments continues over the life of a project, from the planning and construction stages, through start-up of operations and production maturity.

OPIC seeks to minimize risks in the first instance through project selectivity involving negotiations with the investor over the mode and terms of the investment to be insured. By sharing relevant information, OPIC and the investor are better able to make informed decisions concerning the risks involved.

Investors are encouraged to structure their investments in ways which minimize risks, and in certain cases, OPIC suggests that the investor insist that the developing country protect its interests by retaining the assistance of specialized outside consultants.

During the life of a project, the investor is required to provide OPIC with factual information material to the project's operations and OPIC's possible liability, and OPIC's consent is required if the investor changes the form of investment. These and other provisions establish a dynamic relationship between OPIC and the investor which helps both parties foresee future problems and creates a means for their solution.

In the event problems arise, OPIC has a variety of tools available for preventing or resolving disputes. These include the following:

(1) *Settlement Experience.* During its first two and one-half years, 49 claims have been handled by OPIC's claims staff, involving approximately \$440 million in potential liability. Twenty-five claims, amounting to more than \$129 million, have already been settled to the satisfaction of the insured company. This represents almost three times the number of claims paid during the first 22 years of the program. With this experience, OPIC is able to formulate a settlement strategy based on the particular facts of each dispute.

(2) *Keeping the Investor Out Front.* A fundamental part of OPIC's strategy is to keep the investor "out front" in negotiating with the foreign government. This not only reduces the possibility of a government-to-government confrontation, but also makes certain that complex commercial facts about the investment are available. OPIC has found that the requirement in the insurance contract for a one-year waiting period for expropriatory action to become compensable is useful as a "cooling off" period for the investor and the foreign government as well as providing time for the development of facts and the conduct of negotiations.

(3) *Auditing Rights.* In a dispute involving an uninsured investment, the U. S. Government is often called upon to make representations on behalf of a U. S. company without adequate financial information to support the company's claim. In contrast, OPIC's insurance contract gives it the right to audit the financial records and accounts of the investor and foreign enterprise in order to verify the amount of the investor's loss. Such detailed information helps facilitate settlement discussions between the investor and the foreign government, particularly where the dispute is over the value of the investment.

(4) *Restructuring of Investment.* OPIC helps to restructure investments which in their original form have become unacceptable to the host government. In a recent case, for example, the local government objected to a management contract held by the investor who also owned a substantial portion of the equity in the foreign enterprise. A potential conflict was avoided when the investor cancelled the management contract in exchange for the buy-out of its equity interest with a portion of the deferred pay-out guaranteed by OPIC.

(5) *Introduction of a Third Party.* In certain cases, OPIC has introduced an independent third party as a potential purchaser of an investor's interest, as a mediator, or as a fact-finder. ADELA, for example, served as a mediator in a recent case where the relationship between the investor and the foreign government had seriously deteriorated. ADELA's efforts and OPIC's involvement resulted in a cash payment by the government which resolved the dispute.

(6) *Use of OPIC's Good Offices.* OPIC can provide direct assistance in the settlement process by using its good offices and those of the State Department. In a recent case, an investor's local partners were imprisoned and the investor's representative was able to enter the country to meet with local officials, thereby opening the way to compensation negotiations which otherwise would have been stalled.

(7) *Claims Settlement Guaranties.* Perhaps the most interesting and useful tool developed by OPIC for the amelioration of investment disputes is the claims settlement guaranty. Under its statute, OPIC is authorized to settle claims on such terms and conditions as it may determine. Through this authority, OPIC has been able to translate investment disputes into business arrangements which have presented an acceptable solution for both the host government and the U. S. investor. The guaranties work as follows. During the one-year period in which an

expropriatory action must last in order to be compensable, an insured investor must pursue and preserve all remedies in the host country, including negotiations for compensation from the expropriating government. If the investor, with or without OPIC's assistance, is able to work out a compensatory arrangement with the host government, OPIC can, in appropriate cases, back up that arrangement with a guaranty based on its insurance liability. In other words, OPIC changes its insurance liability into a guaranty of the investor-host government compensation agreement, which is triggered if and when the host government fails to make payment. An example of this type of settlement was the nationalization of the property of Bethlehem Steel Corporation in Chile. A.I.D. had insured approximately \$18 million of Bethlehem's investment. In close cooperation with OPIC, Bethlehem negotiated a sale of its properties to the Chilean State Steel agency, for approximately \$22 million, on deferred payment terms extending over a 16-year period. Because OPIC was willing to guarantee the payment of up to \$18 million of the purchase price, Bethlehem was willing to accept the deferred payment terms of the negotiated sale.

Other examples of this or similar uses of the OPIC claims settlement guaranties include the Braden and Parsons & Whittemore settlements in Chile, and the Mina Matilde settlement in Bolivia.

AVOIDING FUTURE DISPUTES

In addition to formulating ways to settle investment disputes, OPIC has also been working to develop means of using its programs to avoid future disputes.

OPIC's project selectivity and monitoring have already been mentioned. In addition, OPIC encourages the multinationalization of large projects, including joint ventures with local or third-country partners and the participation of multinational institutions such as the IFC or private international investment companies like ADELA or PICA.

Also, OPIC has formulated new contracts to insure contractual investments, including production-sharing agreements, construction contracts, and other non-equity investments. Many feel that these and other "new mode" investments may be more resistant to expropriation, particularly where they contribute to the host country's foreign exchange reserves or serve as a substitution for imports.

An example of OPIC's new contractual insurance is the recently approved contract insuring an investment in a geothermal steam facility to generate electrical power in a developing country. The investment by the U. S. firm is actually a long-term technical service contract with no equity in the project. For an initial period under the service contract, the investor's expenditures will exceed fees received from the production and sale of electrical power. OPIC will provide insurance coverage for these deficits. The risks covered include the failure of the host government's power authority to submit disputes to arbitration as called for by the service contract, failure of the power authority to abide by arbitration awards, and inconvertibility of fees received by the investor under the contract.

OPIC also believes that investment disputes can be avoided by multinationalization of the insurance program, and by sharing its risks with other insurers, both public and private.

To this end, OPIC has taken the following steps:

First, a reinsurance arrangement with various syndicates of Lloyds of London and several European insurance companies has been concluded involving the placement for approximately \$410,000,000 of OPIC expropriation liability in some 70 countries. This is the largest amount of expropriation liability ever to be placed in a private reinsurance market, and the first time the U. S. Government has been able to break into the private market.

Second, OPIC has been negotiating with insurance agencies of other developed nations the creation of an Association of Investment Insurers under the auspices of the Berne Union, the existing organization of credit insurers. The Association would provide independent experts for conciliation, informal good offices and investment-appraisal services in expropriation disputes. OPIC is also hopeful that the Association will some day result in reinsurance pooling among member agencies, and has asked Congress for authority to engage in such pooling.

Finally, OPIC has been negotiating with the United States private insurance industry for formation of an insurance syndicate, backed in part by OPIC reinsurance, which would issue expropriation and inconvertibility insurance. This is considered an exciting breakthrough and Congressional approval is being sought for such an arrangement.

OPIC'S PROGRAMS IN LATIN AMERICA

A third issue which has been raised in the OPIC hearings is the question of why there has been a reduction in OPIC's operations in Latin America.

Although there are a number of factors contributing to the decline of insured Latin American projects, including far fewer large extractive investments, perhaps the most important factor has been the adoption by several Latin American countries of the Andean Code, with its severe restrictions on foreign investments and its prohibition of investment agreements providing for subrogation of an investors' interests to a foreign government agency or international arbitration of disputes arising out of private investment.

Regarding the Code's investment restrictions, it may well be that the Andean countries will find that modifications of the Code will be required in order to attract adequate foreign investment. However, in the meantime, the extent of U.S. private investment in the Andean countries will depend in large part on the ability of the investors and the host governments to negotiate mutually satisfactory arrangements within the restrictions. As I have pointed out, OPIC's insurance is sufficiently flexible to permit coverage of the type of contractual and joint venture investments which may be required.

A preliminary barrier which must be overcome, however, is the Code's prohibition of traditional bilateral investment agreements, calling for subrogation and international arbitration. Although OPIC's statute does not require that subrogation rights or international arbitration be spelled out in its agreements with host governments, the State Department has traditionally insisted on such provisions and some 85 countries have agreed to their inclusion in agreements approving the institution of OPIC's programs.

The Latin American attitude evidenced by the Calvo Doctrine and the objection to subrogation appears to represent a desire to avoid confrontations with foreign governments. The position of our State Department insisting upon international arbitration of investment disputes is also based upon a desire to avoid confrontations with foreign governments. Since our objectives are the same, a reasonable solution should be possible.

For the past year OPIC has been working on finding a solution to this very difficult problem in conjunction with the State Department, and

with several of the Andean countries. The Subcommittee on Foreign Economic Policy of the Foreign Affairs Committee of the U. S. House of Representatives also has taken an active interest in this issue, and it is expected that its report on the recent OPIC hearings will recommend that the Executive Branch adopt a flexible approach on this issue. In the meantime, OPIC's management has recommended to its Board of Directors that OPIC utilize other means to protect its interests as insurer of investments in Andean Code countries. Hopefully, all parties concerned — OPIC, the State Department, Congress, investors and the Andean countries — will soon arrive at a solution permitting OPIC to once again assist in the stimulation of investments which are approved by and beneficial to both the United States and the Andean countries.