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UNITED STATES PUBLIC FUND SOURCES FOR INTERNATIONAL INVESTMENT AND TRADE*

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INTRODUCTION

HISTORICALLY, FOR the purpose of advancing their own economies or for furthering their designs on other nations, many countries have offered assistance to merchants and industries within their borders who sought to trade with, or invest in, other nations. Such assistance has ranged from the simple provision of military protection for private trading caravans by ancient Arabia through the subsidies paid to shipbuilders in certain Italian city-states during the Renaissance to the complex programs for trade and development which exist in many of the industrialized nations of the twentieth century. This assistance must be differentiated from programs of direct aid from one nation to another. It is assistance given by a nation to its own private citizens and businesses to enable them to trade with or invest in businesses in foreign nations that will be discussed herein. The purpose of this article is to acquaint American attorneys and businessmen with the assistance of this type provided to American business by the United States Government. In setting forth a guide to, and analysis of the United States programs, careful attention has been paid not only to the nature of the programs but to their mechanics, and to how they may be used by American businesses to expand their horizons and participate profitably in international transactions.

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BACKGROUND OBSERVATIONS

There are numerous programs available in the United States today which provide public funds for international investment and trade. Most of the programs available are uncoordinated and unrelated, except in a few instances. They are designed to encourage private initiative and enterprise in foreign countries. The purpose and objectives of these various programs was best summarized in President Johnson's Foreign Aid Message to the Congress in 1966 wherein he stated, "We will expand our efforts to encourage private initiative and enterprise in developing countries."¹ The Foreign Assistance Act itself spells out the intentions of the United States in regard to the role of free enterprise in foreign countries.

The Congress of the United States recognizes the vital role of free enterprise in achieving rising levels of production and standards of living essential to economic progress and development. Accordingly it is declared to be the policy of the United States . . . to encourage the contribution of United States enterprise toward economic strength of less developed friendly nations, through private trade and investment abroad, private participation in programs carried out under this act . . . and exchange of ideas and technical information.²

Since the Mutual Security of 1948, the United States Government has recognized that the interests of the United States as a nation require the friendship of the nations in the world community. Following World War II, the United States felt an obligation to assist both its former allies and enemies to re-establish and develop their economies to fit the needs of their people. Most of the public programs available after World War II were initially designed to be tools of United States foreign policy. They served essentially military purposes and, only secondarily, economic purposes. Gradually this concept gave way to the concept that the establishment of trade relations and private investments can serve the function of helping the economic growth of the host nation³ as well as bettering the mutual relations of the host nation and the United States.

In the Foreign Assistance Act of 1961, Congress expressed a strong preference for programs of assistance to friendly underdeveloped coun-

¹ Quoted in AGENCY FOR INTERNATIONAL DEVELOPMENT, AID TO BUSINESS (OVERSEAS INVESTMENT) 1 (September, 1966 ed.).

² 22 U.S.C. § 2351(a) (Supp. 1966).

³ "Host nation," as used herein, denotes a nation receiving United States aid or exports or a nation in which an investment of American capital may be or has been made.

tries through private channels rather than through governmental aid. The emphasis was placed by Congress on private investments and private trade with foreign nations rather than on direct government grants or aid. The reasons given were: (1) private sector enterprises are in a better position to supply less-developed countries with needed capital, responsible management, modern business training and also with the establishment of an American presence and an American way; (2) the United States (of political necessity) must rely entirely, if it offers grants to a foreign country, on the local administrations and enterprises to which such grants are given and thus is unable to control the benefits that are intended to flow to the people of these countries; and (3) assistance to private United States enterprises which will establish development projects in those countries is ultimately less expensive to the United States economy, offers a more efficient organizational structure, and eventually returns a profit to the United States. Thus, it was clearly recognized that the United States can accomplish its foreign policy objectives through private channels. The potential drawback is that private American enterprises in host nations may develop to the point where they will control or dominate the local economies and create unrest and dissatisfaction with the United States economic presence, even though it is from the private sector. In addition, governmental aid to a host nation can always be stopped, whereas the private American investment presence is continuous, and may not readily be controllable by the United States Government.

The establishment of private relations between United States and foreign business concerns not only promotes the economies of the host nations, but furthers the establishment, in those nations, of free enterprise and the competitive economic capitalistic system of the United States. It is further believed that if private industry, through trade and investment, is able to assist in the development of foreign nations, this will ultimately relieve the United States Government from certain financial responsibilities in the field of foreign aid.

To encourage and facilitate foreign trade and investment, the United States Government realized that it had to create more favorable trading and investment climate with business partners who do not always enjoy the same political stability as that to which American businessmen are accustomed. Therefore, if certain of the non-commercial risks which have traditionally hampered the free-flow of commerce and investments are removed, the motivation and decision to trade and invest

abroad will be solely based on business considerations with which American businessmen are familiar. In addition to the removal of such non-commercial risks, the United States Government also recognized the necessity to assist American business with direct loans and credits which can also be secured by the presence of a governmental lender.

Notwithstanding the seemingly common denominator of the various public fund programs aimed at encouraging and assisting United States businesses to trade and to invest in foreign nations, there appears to be no coordinated effort among the various agencies handling such programs, nor the legislative acts that created them. This, to a large extent, may be the cause of the limited scope of each individual program if taken separately. The practical effect of this lack of coordination is that the onus is placed on the American attorney to make his client aware of the differences among these varied programs and to counsel his client so that he can make a knowledgeable choice. The failure to do so properly may result in the client choosing a form of assistance which may not be the one best suited to his needs. Proper counseling can even enable the client to take advantage of more than one of the programs, coordinating their impact so as to best fit his needs.

What is of greater concern to the practitioner involved in counseling United States businesses is the fact that, to a large extent, some of these assistance programs are still administered by agencies, such as the Agency for International Development (hereinafter AID), which remain under the authority of the Department of State. Thus, it still appears that to a large measure these programs, which are designed to encourage, stimulate, facilitate and protect United States private business interests abroad, remain a tool of American foreign policy using the private United States interests abroad as a means by which to accomplish political ends. This is believed to subvert the intent of Congress. In its legislative enactments and statements from the 1950 Foreign Assistance Act to this date, Congress repeatedly has stated that the objectives of the programs under the management of AID are not foreign policy objectives. The programs were not intended to be used as a means of bargaining with the host nations, by using the power of private trade and investment to accomplish political and governmental objectives, and to effect foreign policy. Obviously, this destroys the very purpose of encouraging the creation of private ties between nationals of this country and of foreign countries.

If the goal of establishing and promoting the concept of free enterprise in a competitive capitalistic system free from governmental pressure and coercion is the ultimate objective of United States assistance to private business, it is self-defeating to allow the operation and management of such programs to be subjected to day-to-day political pressures and controls whereby long range goals are subverted to satisfy immediate political objectives. As a result of this "political objectives" concept, which has been underlying AID's management of United States public funds available for the protection and stimulation of private foreign trade and investment, Congress has had occasion to admonish the Administration, and particularly AID, for their lack of enthusiastic compliance with the spirit of the Congressional enactments. These admonishments have been made in several Congressional hearings and acts, and have always preceded Congressional increases in the scope and sources available to such programs.⁴ Thus Congress has demonstrated that it is willing to make all necessary means available to the Administration to properly achieve the objectives of the nation, though deploring its begrudging compliance.

Notwithstanding, such Congressional expressions of intent, the agencies responsible for the operation of such programs still have absolute discretionary power in the extension of those programs to the nations of their choice and in the granting of requests or applications by private United States industry. Such discretion, generally based on little or no criteria whatsoever, is justified by the Administration on grounds of foreign policy questions. However, such an excuse would not constitute any grounds for legal justification in the face of express Congressional intent. As a result, the broad discretionary powers of the Administration in the decision to either apply the program to a foreign nation or to grant the application or request of American businesses to qualify under an available program are not subject to any review through either administrative or judicial means. Even the question of compliance or noncompliance of United States business interests with the require-

⁴ 1950 U.S. CODE CONG. SERV. 2448; 1952 U.S. CODE CONG. AND AD. NEWS (hereinafter referred to as U.S.C.C.A.N.) 1958; 1954 U.S.C.C.A.N. 2369; U.S., 84th Cong., 2d Sess., *House Committee on Foreign Affairs, Mutual Security Act of 1956, Hearings* 691-713; 1956 U.S.C.C.A.N. 3210, 3236; 1959 U.S.C.C.A.N. 1849-51. See also Clubb & Vance, *Incentives to Private U.S. Investments Abroad Under the Foreign Assistance Program*, 72 YALE L.J. 489, 502-03 (1963); WHITMAN, *THE UNITED STATES INVESTMENT GUARANTY PROGRAM AND PRIVATE FOREIGN INVESTMENT*, 28-29, 34 (Princeton Studies in International Finance, No. 9 1959).

ments of the agencies remains a matter solely within the discretion of the agencies to determine.⁵

United States public fund sources for international trade and investment can be classified in the following categories:

1. Insurance programs covering foreign exports;
2. Insurance programs guaranteeing the security of foreign investments;
3. Capital loans for investments; and,
4. Other sources and services.

EXPORT INSURANCE PROGRAMS⁶

THE FOREIGN CREDIT INSURANCE ASSOCIATION

The Foreign Credit Insurance Association (FCIA) was established in 1961. It is primarily intended to place United States exporters on an equal footing with foreign competitors who, in the field of international trade, are not exposed to the same risks as United States exporters. This was because several foreign countries have had export insurance coverage which was not available in the United States as it was not deemed within the scope of traditional insurance coverage. The Association is presently composed of seventy-five of the leading insurance companies in this country and the Export-Import Bank. From the inception of its program in 1962 through 1966, FCIA provided coverage for approximately 2.5 billion dollars of export credit under the various forms of its policies. It has paid claims of just over five million dollars. FCIA offers two major types of coverage: Short-Term Policies (180 days or less) and Long-Term Policies (181 days to five years).

1. FCIA Short-Term Policies

Under the Short-Term coverage, two policies are available: the Comprehensive Policy (political and commercial risks) and the Political Risks Policy (political risks only). An exporter can have either one of these policies, but he cannot have both.

⁵ There have been instances in which AID has violated its own criteria on as easily determinable a question as majority U.S. ownership of an applicant. Marcellus Meek, Esq., in a lecture at the Lawyer's Institute of the John Marshall Law School on May 9, 1966, documented such cases including one in which American ownership was 45 percent (or less) which was approved by AID with India as the host nation.

⁶ The authors express their gratitude to The First National Bank of Chicago, International Banking Department, for its assistance in compiling material for this section.

One Short-Term Policy is issued to each exporter, and he is normally required to purchase insurance on his "whole turnover," *i.e.*, all of his short-term export sales, although exceptions can be negotiated. Shipments paid for in advance or under irrevocable letters of credit may be excluded at the exporter's option. The proceeds of an FCIA policy are assignable to those providing financing to the exporter. The exporter is required to notify FCIA that he is assigning the proceeds of his policy to the financing institution which then has a right to payments made by FCIA on a legitimate claim from the exporter. In other words, the financing institution would acquire the same rights as the exporter. FCIA will provide insurance on shipments only if the credit terms offered the foreign buyer are in conformity with those customarily offered in international trade. For example, FCIA can refuse to cover a shipment if the exporter extended 120 day terms when the product was customarily sold on ninety day terms.

Any manufacturer or exporter who is a resident of and is doing business in the United States or its territories, including the Commonwealth of Puerto Rico, may qualify for FCIA insurance. Under Short-Term Policies, eligible products include goods of all types produced or manufactured in the United States to the extent that at least one-half of their value, exclusive of price markup, has been added by labor and material exclusively of United States origin.

In general, FCIA will insure shipments made to buyers in *friendly* foreign countries. Within this group, FCIA rates each country on a scale ranging from *A* to *D*, with an *A* rating being given to those countries where the risks are lowest and a *D* rating being given to those countries where the risks are greatest. Normal coverage and requirements apply to most markets, but FCIA reduces its coverage and/or requires more security, such as a local bank guarantee, in some *D* markets. FCIA issues a Country Limitation Schedule which shows its rating of each country and specifies any special conditions or limitations. This schedule is periodically revised and is not for publication.

In general, to be eligible for coverage, the foreign buyer is required to be a business firm, or a government or semi-public entity, which buys regularly and has established a satisfactory record of paying its commercial obligations. Coverage of private individuals not in business for themselves is not encouraged. The eligibility of a buyer for FCIA coverage depends upon the amount of credit that is to be extended. As explained below, each Short-Term Policy has a Discretionary Limit

which is the maximum amount of credit that can be extended to any one buyer without obtaining special approval from FCIA.

For shipments within the Discretionary Limit, FCIA requires the exporter to obtain at least two credit reports reflecting the buyer's good credit dated within one year prior to the shipment. Credit reports must be obtained from third parties, who must be independent of each other. The exporter's ledger experience may be substituted for one credit report provided it shows a favorable trend and embraces a three year period immediately preceding the shipment.

In order to obtain coverage on credits in excess of the Discretionary Limit, the exporter must qualify the buyer for a Special Buyer Credit Limit, which is a special limit on the amount of credit that may be extended to a particular buyer and still be covered by FCIA insurance. In addition to credit reports and ledger experience, FCIA may, at its option, require financial statements and other evidence of the buyer's credit-worthiness.

An exporter applies for an FCIA Short-Term Policy by filling out a detailed application form and sending it to FCIA, usually through his insurance broker. Based upon its appraisal of the factors contained in the exporter's application, FCIA will quote one of its three premium rate schedules for Short-Term Policies to the exporter. If the exporter decides to accept FCIA's quotation, the policy is issued, on payment of a deposit premium of ten percent of the estimated annual premium.

The coverage on political risks is the same under both the Comprehensive Policy and the Political Risks Policy. In general, FCIA will protect the exporter under its political coverage from transfer risks, official action which prevents the import of a shipment into the buyers' country, war and like disturbances, confiscation of the goods by a governmental authority, official action which prevents the buyer from making payment, or charges not recoverable from the buyer because of a diversion of voyage outside the United States caused by a political action.

Under its commercial credit risks coverage, FCIA will protect the exporter from buyer insolvency or failure of the buyer to pay the insured within six months after due date for products delivered and accepted by the buyer (protracted default). By indorsement to the Comprehensive Policy (at FCIA's option), FCIA will cover some of the loss due to non-acceptance of the goods by the buyer. FCIA will

not pay out on a claim if the loss was due to the fault of the exporter or his agent.

Under its Short-Term Comprehensive Policy, FCIA covers a loss due to commercial risks to the extent of ninety percent of the gross invoice value of the shipment and a loss due to political risks to the extent of ninety-five percent of the gross invoice value. Under its Short-Term Political Risks Policy, FCIA covers a loss due to political risks to the extent of ninety percent of the gross invoice value of the shipment. FCIA modifies its normal coverage in some cases especially in connection with insurance of shipments to certain *D* rated countries.

FCIA requires the exporter to retain the uninsured portion of the credit for his own risk. This portion may be sold on a "with recourse" basis, but FCIA permission is required before the uninsured portion can be sold on a "without recourse" basis. This is the co-insurance feature of the FCIA Program and serves to keep exporters from being too liberal in their extensions of credit.

The Discretionary Limit set on FCIA policies specifies the dollar amount that may be shipped to any buyer without obtaining prior approval from FCIA provided that the exporter has obtained the necessary credit information. Should an exporter desire to ship an amount in excess of the Discretionary Limit to a particular buyer, he must qualify the buyer for a Special Buyer Credit Limit before shipment. Unless otherwise provided, each authorized credit limit, whether Discretionary or Special, applies separately to each buyer on a revolving basis, *i.e.*, as payments are made for earlier shipments, the credit limit becomes valid for further business. Each Comprehensive Policy is also subject to an aggregate limit which is FCIA's maximum liability during the policy period. This aggregate limit is based on a rather liberal estimate of the seller's total risk exposure at any one time.

As mentioned earlier, FCIA has three premium rate schedules for its Short-Term Policies. The premium rate applicable to a particular short-term shipment is based on the exporter's assigned rate schedule, the credit terms allowed, and the FCIA's rating of the country in which the buyer is located. Premiums are stated as rates per one hundred dollars of gross invoice value, and the rates for "political risks only" coverage are about seventy-five percent of the rates for comprehensive coverage. Premiums are paid in the month following the month of shipment.

In order to obtain payment from FCIA, the exporter must file a

Proof of Loss with FCIA within eight months of the due date of the buyer's obligation. This Proof of Loss is considered by FCIA to be the only notice of claim, and it must be accompanied by the draft, bill of lading, invoice, order, and if the claim is for commercial reasons, two credit reports reflecting the buyer's good credit dated within one year prior to the shipment. *FCIA will not entertain a claim made on a shipment made to a buyer already in default, and only claims made on shipments for which the premium was actually paid will be considered.* Payment will be made within a reasonable time after the Proof of Loss on a commercial risk has been submitted and within three months after the Proof of Loss on a political risk claim has been submitted.

By indorsement to its Short-Term Policies, FCIA will provide political risk coverage on consignments to foreign buyers. Normally coverage begins from the date of shipment, defined as the date when the products are shipped en route to the buyer on the order of the exporter or his agent; however, the exporter may elect to insure from the date of the contract of sale (Pre-Shipment Coverage). The exporter pays a small additional premium for this additional coverage.

FCIA also offers, *prior to an actual application for a policy*, a non-cancelable political risk commitment good for ninety days, to enable the exporter within this period of time, to survey and otherwise check out a potential sale. This commitment guarantees that the political risk element of a proposed transaction is acceptable to FCIA, but with the understanding that the credit elements of the sale will be evaluated at the time that an application is submitted.

2. FCIA Medium-Term Policies

This type of coverage is similar in many respects to the Short-Term Policies. Coverage terms of 181 days to five years are available in the same policy forms as above, *i.e.*, The Comprehensive Policy and the Political Risks Policy. Medium-Term Policies are available on a case-by-case basis and a separate policy is issued for each transaction insured. There is no requirement for the exporter to cover all of his medium-term transactions.

Proceeds of Medium-Term Policies are assignable in the same ways as those of the Short-Term Policies. FCIA is also prepared to execute a "Hold Harmless" agreement in favor of a named commercial bank or financial institution which agrees to the purchase of the insured obligation without recourse to the exporter. The Agreement will be issued to

eligible exporters and will in effect guarantee that FCIA will pay the financing institution in the event of a legitimate claim notwithstanding any provision of the policy which would provide the basis for denial of a claim made by the insured exporter. Under this agreement, FCIA agrees to pay interest to the assignee bank at the rate of 4.5 percent per annum on defaulted installments from due date up to a maximum of six months. FCIA also retains the right to recover from the exporter should it be required to pay out to the assignee bank on a claim that would otherwise be denied because of a failure on the part of the exporter with regard to his obligations under the policy.

The Medium-Term Policies are primarily designed to cover income producing capital goods, industrial, communications, transport, and other machinery and equipment, and the like. Certain types of live-stock and surplus agricultural products and other items may qualify provided they are produced or manufactured in the United States and are customarily sold in international trade on payment terms of 181 days to five years. Coverage is available for the value of the United States content in products which include a minor degree of foreign content.

FCIA will provide insurance on export sales which call for medium terms provided that the terms conform to those customarily offered in international trade subject to the buyer's credit-worthiness and FCIA's rating of the country. In addition, FCIA requires the buyer to make a cash payment (normally not less than twenty percent, but lesser percentages will be considered) on or before delivery of goods. FCIA prefers that the remaining balance (or financed portion) be evidenced by a special form of Promissory Note or Notes, in the English language, providing for approximately equal principal installments, monthly, quarterly, or semi-annually, payable in dollars at a bank in the United States, together with interest payable concurrently with the principal. FCIA, however, will consider the use of other forms representing the buyer's obligation, and in the case of government buyers or buyers engaged in seasonal operations, FCIA will consider annual installments.

Eligibility requirements for exporters and buyers are identical to those under the Short-Term Policies. More credit information may be required to support the amount of credit to be granted, due to the longer period of time involved in Medium-Term Policies. The same Country Limitation Schedule applies to both and the political and commercial

risks covered are the same. The loss percentage normally insured is the same for commercial risks, but the loss percent for political risks is reduced to ninety percent, instead of ninety-five percent.⁷ Claim procedures are also identical as are consignment and pre-shipment coverage and the political risk commitment.

Since one Medium-Term Policy is issued for each such transaction insured, a separate application must be filed with FCIA for each medium-term transaction, and credit information on the buyer must be submitted with this application. If the medium-term transaction is approved, FCIA issues to the exporter its Letter of Commitment, with a Special Transaction Indorsement which specifies the conditions of the cover and the applicable premium. The policy is then issued when the premium is paid. There is only one premium rate schedule applicable to medium-term transactions.

Under Medium-Term Policies where the term of credit is three years or more and the first one-half of the installments have been paid, FCIA will, upon application, consider increasing the insurance to one hundred percent by eliminating the co-insurance, provided that the risk is not in a market where a higher co-insurance than ten percent was required when the policy was issued.

Each Medium-Term Policy applies to only one transaction, and thus, each would have a separate policy limit restricted only by the amount of credit that can justifiably be extended to a particular buyer and FCIA's special restrictions on shipments to certain countries.⁸

The premium rate applicable to a particular medium-term shipment is dependent on the length of the credit period and the FCIA's rating of the buyer's country. Premiums are stated as rates per one hundred dollars of financed portion (gross shipment value less cash payment) and are paid in advance, as the shipments are made, for the full term of the insured transaction. Rates for "political risk only" coverage are about seventy-five percent of the rates for comprehensive coverage.

⁷ FCIA may modify its normal coverage in some cases, depending on the risk involved. This is especially true under the Medium-Term Policy with respect to shipments to certain "D" rated countries in which it is felt that the longer term of the policy creates a greater underwriting risk than would be true of a Short-Term Policy running to the same country.

⁸ FCIA covers interest up to a maximum of six percent on the notes evidencing the buyer's obligation on a medium-term transaction. Interest over six percent is not insured.

THE EXPORT-IMPORT BANK GUARANTEE PROGRAM

The Export-Import Bank of the United States (Eximbank) is an independent agency of the United States Government established in 1934 for the purpose of facilitating the financing of United States international trade in conjunction and cooperation with private industry. Though the Bank is primarily concerned with lending, on a long-term basis, it also issues insurance coverage for export and trade.⁹ The insurance and guarantee programs of Eximbank and FCIA are mutually exclusive insofar as the involvement of Eximbank is concerned. Therefore, obtaining insurance coverage under an FCIA program will bar the insured from making application for an Eximbank guarantee covering the same transaction or transactions.¹⁰ The Bank has a capital of one billion dollars (on which it pays dividends) and can borrow up to six million dollars from the United States Treasury on a revolving basis (on which it pays interest).

The Eximbank Guarantee Program operates exclusively in the medium-term field (up to five years except under unusual circumstances). Under this program, Eximbank guarantees foreign buyer notes purchased by commercial banks from American exporters. The value of the Program for the exporter is that he receives non-recourse financing for up to ninety percent of the credit he extends to the foreign buyer in the host nation.

The exporter must be either a corporation organized and existing under the laws of the United States or any state or territory; or an individual or partnership resident in the United States; or a foreign corporation, partnership, or individual doing business in the United States. A certification to this effect must be made by the exporter to the commercial bank financing the transaction. *The bank will in no*

⁹ Eximbank's major program is the lending of U.S. dollars on long terms to cover the costs of U.S. goods and services needed by *foreign* borrowers (either governmental or private) to establish industries, expand existing plants, replace obsolete equipment, modernize transportation and communications, etc. While American businesses are not eligible for participation, it may be possible to receive the benefits of such loans indirectly, either through a foreign subsidiary or a foreign joint venture affiliate. Amendments to the Eximbank legislation passed in August, 1967, limit the amount of loan funds which may be available for purchases of weapons and related military equipment to a percentage of total funds available per annum. The amendments also prohibit loan assistance to countries or entities which trade with North Viet Nam.

¹⁰ It is possible to obtain an Eximbank guarantee either on individual or repetitive sales.

way be held responsible for the truth or accuracy of the exporter's certification regarding eligibility.

To be eligible for the Eximbank coverage, the products must be customarily sold on medium-terms in international trade. The products, including any used equipment, and services being sold must be of United States origin or manufacture. Where the product is not wholly of American origin or manufacture, Eximbank may be asked to grant an exception to this limitation. Such exceptions will be made only under unusual circumstances. Where used equipment is included in an export credit sale, Eximbank requires full information concerning both the equipment and the transaction involved before reaching a decision. In addition, the product, new or used, cannot be destined for military use (as distinguished from police use).

Supplier's credits should have terms which, in the absence of special justification, do not exceed the terms commercially customary in international trade. Eximbank may accept terms which appear long on the foregoing basis if it can be shown that such terms are necessary to meet those offered by foreign competitors with the aid of their governments, *i.e.*, credit insurance. As a general rule, appropriate terms are usually less than the expected life of the items and shorter for small orders than for larger ones of the same item.

In addition, Eximbank requires an importer located in an *A*, *B*, or *C* market to make a minimum cash payment of ten percent of the invoice value before or approximately at the time the goods are delivered, although a cash payment of twenty percent is preferred by Eximbank. The minimum cash payment percentage is increased to twenty percent or more in *D* markets. Lower cash payment percentages will be considered if necessary to meet publicly supported terms of foreign competitors.

The financed portion (invoice value less cash payment) of the transaction shall be evidenced by only one obligation or one series of obligations. All such obligations shall be the negotiable obligations of the purchaser dated not later than thirty days after the date of shipment of the products. These obligations shall be payable in U.S. dollars at a commercial bank in the United States, and shall be printed in the English language. Eximbank has announced that, upon request, it would consider the use of drafts instead of a promissory note provided that a satisfactory instrument is submitted.

On any transaction, the exporter is normally required to retain ten percent of the financed portion for his own account, but this portion may be sold on a "with recourse" basis. The exporter is required to participate in equal amounts of each installment for the full term of the credit. The commercial bank is required to purchase the remaining ninety percent of the financed portion on a "without recourse" basis, paying the exporter cash equal to the bank's participation in the unpaid principal amount of the obligations.

Eximbank will provide its guarantee on shipments to any credit-worthy buyer located in a country in which the political risks are acceptable. Obligations of a public buyer, however, must be unconditionally guaranteed by the Ministry of Finance, by the Central Bank, or, in some cases, by a commercial bank of the buyer nation. Both Eximbank and FCIA follow the same Country Limitation Schedule which was discussed under the FCIA Program above.

Normally, the bank applies for the Eximbank guarantee on behalf of the exporter giving all the details of the proposed transaction. Eximbank has determined that unless it has credit information which casts serious doubt on the wisdom of issuing a guarantee, it will not examine the credit aspects of an application from a commercial bank when the contract price does not exceed \$200,000, but generally will examine these aspects of larger transactions. Eximbank will not issue its guarantee unless:

1. The exporter has received the specified cash payments.
2. There is no default known prior to the date of the Exporter's Certificate (certificate of eligibility) or subsequently.
3. The obligations have been purchased from the exporter in accordance with the relevant provisions.

Eximbank covers only medium-term transactions under its guarantee program, and the risks covered depend upon Eximbank's definition of the "early" and "later" installments of the buyer's obligation. "Early" maturities of the obligations are defined as consisting of the first half of the installments of a one to two and one-half years credit or the first eighteen months of installments of a credit maturing in three years or more. The "later" maturities are the remaining installments. Coverage of political risks applies to all maturities, but coverage of commercial risks is available only on the "later" maturities of

the buyer's obligation. The political and commercial risks covered under Eximbank's guarantee are essentially the same as those covered by the FCIA's insurance policies.

Eximbank covers a loss due to either a political or a commercial risk to the extent of ninety percent of the financed portion of the obligation subject, of course, to the provision that commercial risk coverage does not apply to the "early" maturities.¹¹ Although the interest rate on the buyer's obligation is not subject to limitation, Eximbank's guarantee covers interest to a maximum of six percent per annum. As far as the bank is concerned, Eximbank covers one hundred percent of the portion of the obligations that the bank purchases except for the lack of commercial risk coverage on "early" maturities. Eximbank coverage is modified usually to some extent in connection with transactions involving *D* rated countries.

Eximbank's fees for its guarantee are based on the length of the credit period and the particular country's rating in the Country Limitation Schedule. A fee schedule is sent to the banks, but is not for publication.¹²

Eximbank must be notified within thirty days after any default, and evidence in support of such claim must be submitted within a reasonable time. With respect to the "early" maturities, for a loss due to the inability to convert the buyer's local currency into dollars and transfer the dollars to the United States, Eximbank will make payment within three months after submission of the best evidence reasonably available supporting the claim, at the rate of exchange prevailing on the due date of the obligation or the date of the relevant deposit of local currency, whichever is later. On losses due to other covered political risks, Eximbank will pay the amount of the default or, at Eximbank's option, the entire outstanding balance within three months after submission of the required evidence.

With respect to a default on any of the "later" maturities, Eximbank will pay the balance outstanding promptly after notice of claim to Eximbank and after the bank's rights against the maker, guarantor,

¹¹ On credits with final maturities of three years or more, after the first half of the installments have been paid promptly, Eximbank, upon request on a case-by-case basis, and without payment of additional fee, will consider increasing its guarantee from ninety percent of the financed portion to one hundred percent.

¹² Eximbank does not allow distribution of the fee schedule because there is some danger that amendments to it would not reach all of the holders. An exporter desiring a fee quotation on a transaction should consult his bank.

etc., have been exhausted. This differs from the claim payments of FCIA in that FCIA, under its medium-term comprehensive policy, requires the buyer to be in default for at least six months (protracted default period) before it will pay out on a claim for a loss due to commercial risks. The bank cannot accelerate obligations in the event of default unless Eximbank gives its written consent, but acceleration will be permitted if Eximbank determines that further payments are unlikely. Such determination will be made within thirty days after notice of default.

Eximbank is prepared to issue to exporters a Contracts Guarantee covering selected pre-shipment risks in transactions which are also the subject of Eximbank's guarantees under the bank guarantee program. The risks covered by the Contracts Guarantee are the same as those under the pre-shipment insurance of FCIA. Eximbank is also prepared to issue political risks commitments on a selective basis. These commitments are valid for ninety days and are not subject to cancellation during the period. In effect, this commitment states that the political risks aspects of a particular transaction are acceptable to Eximbank.¹³

Eximbank is also prepared to issue guarantees without the bank first obtaining Eximbank's approval provided that the buyer is located in an *A* or in a selected *B* market. The contract price can be up to a maximum of \$1 million in an *A* market or \$500,000 in a *B* market.¹⁴

¹³ Eximbank also has a new discount program for banks which, while not in the nature of direct aid to the exporter, may confer substantial benefit on the exporter whose local bank feels it is over-committed as to the exporter's foreign paper.

Eximbank opened a discount facility for export debt obligations on September 1, 1966. Under this program commercial banks may borrow from Eximbank for periods up to one year against their portfolio of debt obligations of more than 180 days stemming from exports shipped after March 1, 1966. In addition, to provide an incentive to banks to increase their short term as well as medium term export financing, Eximbank, beginning September 1, 1967, will make loans annually based on the increase over the preceding September 1st in a bank's total export loan portfolio—including short term obligations. Eximbank does not purchase the export obligations; instead, it lends to the commercial bank and gauges the amount, term, rate, and other characteristics of the export debt obligations held in the portfolio of the borrowing bank.

¹⁴ With respect to the definition of "early" and "later" installments, this definition is modified on the guaranties under the Discretionary Authority. The "early" installments are the first half of the installments of the obligation guaranteed, and the remaining installments are the "later" installments. There is no stipulation, as under the normal guarantee program, that the "early" maturities would be limited to the first eighteen months of an obligation with a final maturity of three years or more. Since commercial coverage does not apply to the "early" maturities, the bank would be exposed to more risk on a guarantee obtained under the Discretionary Authority than under the normal procedures if the final maturity of the obligation was over three years.

PROGRAMS GUARANTEEING INVESTMENTS

The main thrust of the United States foreign economic assistance program is administered by the Agency for International Development (AID). The economic assistance provided by AID enables emerging nations to procure goods and services without which development cannot proceed. This effort has a direct and significant impact on the American businessman doing business abroad since it enables him to obtain public source funds to finance his private investments overseas.

Congress' stated purpose in creating the Agency for International Development was "to strengthen friendly foreign countries by encouraging the development of their free economic institutions and productive capabilities, and by minimizing or eliminating barriers to the flow of private investment capital."¹⁵ This is a complete change of policy from the former one in which the underlying objectives and policies were to maintain security and promote foreign policy of the United States through military, economic and technical assistance to friendly countries in order to strengthen mutual security, and individual and collective defense of the free world. This change in policy recognizes the fact that the United States is not engaged in a hot war but rather a cold war which is being waged in the economic theater and not the military theater. Thus, Congress, of necessity, has emphasized an economic policy as the correct and proper means to win the war against Communism.

Various programs come under the aegis of AID. In the main, they consist of aid to the American private investor in the form of investment guaranties, investment surveys, local currency loans (Cooley loans) and dollar loans. This section will examine the available forms of investment guaranties. It should be noted that all of the programs mentioned in this paragraph are in the form of assistance to *investors*, not to *exporters*.¹⁶

BACKGROUND OF THE GUARANTY PROGRAMS

The Specific Risk Guaranty Program of AID and the Informational Guaranty Program of U.S.I.A. are the oldest of the investment

¹⁵ 22 U.S.C. § 2151 (Supp. 1966).

¹⁶ While the investment aids offer no assistance to exporters, they do assist importers as they create industries in the host nations which expand the exports which can be made by those nations to the U.S.

incentive programs of the United States Government, having begun in 1948.¹⁷ Initially, the Programs were limited to the nations which were parties to the Committee for European Economic Coöperation report of September 22, 1947 and their colonies and other European nations¹⁸ which could comply with the intent of the Economic Coöperation Act of 1948, *i.e.*, the rebuilding of the free European economy after the ravages of World War II so as to safeguard democratic institutions and foster European economic cooperation and international trade.¹⁹ These early guaranties only covered risks of convertibility of funds (usually involved with repatriation of profits) and were subject to many significant restrictions: a requirement of substantial beneficial ownership by citizens of the United States (which was determined to be 85 percent); the maximum value of outstanding guaranties could not exceed \$300,000,000 (which figure included the Eximbank appropriation); and, the informational media guaranties were limited to \$15,000,000.²⁰ By way of contrast, in the first quarter of 1967 alone, AID issued Specific Risk Guaranties in Latin America of \$340,893,794 and in all areas of \$439,714,760 to bring the total value of all such guaranties outstanding to more than \$3,500,000,000 out of \$7,000,000,000 authorized.²¹

In its twenty years of existence, the Program has undergone numerous important revisions and expansions. Since this article is descriptive, not explorative, in nature, only some of the most significant changes will be noted here.²² In 1950, a second guaranty was added to protect against losses due to acts of expropriation or confiscation by the host nation.²³ At the same time, mandatory insurance type fees

¹⁷ Act of April 3, 1948, Pub. L. No. 80-472, §§ 101-25, 62 Stat. 137, 144-45. See 1948 U.S. CODE CONG. SERV. 145-64.

¹⁸ Act of April 3, 1948, Pub. L. No. 80-472 § 103, 62 Stat. 137, 138. In 1948 and 1949, the following nations participated in the Program: Austria, Belgium, Denmark, France, Germany (West), Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, and the United Kingdom. Of these, only Greece, Portugal and Turkey and the underdeveloped colonies of the others are eligible under the criteria in effect today.

¹⁹ Act of April 3, 1948, Pub. L. No. 80-472 § 102, 62 Stat. 137, 144.

²⁰ Act of April 3, 1948, Pub. L. No. 80-472 § 111, 62 Stat. 137, 145.

²¹ AID Press Release No. AID-67-85 (May 24, 1967).

²² The authors have under preparation an intensive study of the Specific Risk Guaranty Program which should appear before the end of this year. For those interested in depth in this Program, we refer you to it as soon as it becomes available.

²³ 1950 U.S. CODE CONG. SERV. 2447-48.

were introduced. In 1951, the Program was expanded to cover all nations covered by the Mutual Security Act of 1951²⁴ and, in 1953, participation was expanded to "any country with which the United States had agreed to institute the guaranty program."²⁵ In 1954, the fees were lowered, the convertibility coverage extended and the test of American ownership of the investor cut to a simple majority.²⁶ In 1956, the heretofore conservative Senate acceded in some liberal House revisions in the statements of policy and intent governing the Program so that it more closely resembled a true insurance program. It also de-emphasized the foreign policy aspects by stating that it was immaterial whether the Program created a feeling of gratitude toward the United States so long as it furthered economic development in non-communist host nations.²⁷ The Program was also extended to include guaranties for losses due to war,²⁸ and the Informational Media Guaranties were granted separate funds. In 1959, the military and economic aspects of the entire foreign aid program were separated. More importantly, the policy was expressed that the Guaranty Program is simply "a form of Government insurance against non-business risks" and all but divorced it from specific foreign policy considerations.²⁹ The scope of the Program was drastically changed by limiting future guaranties to nations which are economically underdeveloped.³⁰

In 1961, coincident with the advent of the Kennedy administration, the entire foreign assistance program underwent great revision. The new emphasis on social reform, justice, and social and economic opportunity resulted in the adoption of two new types of guaranties.

²⁴ 65 Stat. 384.

²⁵ Mutual Security Act of 1953, 67 Stat. 158, 161. *See also* 1953 U.S.C.C.A.N. 1931-34.

²⁶ The first and last of these were administrative, rather than legislative, changes probably occasioned by Congress' expressions of dissatisfaction with the restrictive manner of administration employed. *See* 1954 U.S.C.C.A.N. 2369.

²⁷ *See* S. REP. NO. 2273, 84th Cong., 2d Sess. (1956), in 1956 U.S.C.C.A.N. 3204-60, especially 3210, 3236. However, it should be noted that a specific exemption was made for the already communist nation of Yugoslavia, under certain conditions. *Id.* at 3265.

²⁸ *Id.* at 3268.

²⁹ H. R. REP., No. 440, 86th Cong., 1st Sess. (1959), in 1959 U.S.C.C.A.N. 1849-51. To this very day, AID has refused to recognize this clear expression of intent. *See* Appendix B for some of AID's reasons for rejecting proposed investments, some of which are in direct conflict with this intent.

³⁰ *Id.* at 1893.

The first of these was the All-Risk Guaranty which covered losses up to seventy-five percent of value from both political and commercial risks but, which was restricted to "projects clearly related to social improvement in the country concerned."³¹ One of the most important commercial risks covered was loss due to misconduct or fraud on the part of one other than the investor.³² The second guaranty adopted was the All-Risk Guaranty for Housing Projects in Latin America which are in the nature of pilot or demonstration projects. Under this guaranty coverage may go as high as one hundred percent of valuation.³³ The 1961 revisions did not place social change criteria on the Specific Risk Program, but did expand the war risk to include insurrection and revolution. The 1961 Act also created the Agency for International Development to handle, process and coordinate all the guaranty programs presently supervised by it and gave it authority over most of the other assistance to investment programs then in existence.³⁴ Lastly, the 1961 Act provided for a fund of five million dollars to pay half the cost of investment surveys in less-developed nations to determine the feasibility of making private investments therein.³⁵ Virtually all of the subsequent revisions have been minor ones of policy or of expansions of amounts available. It was the 1961 Act which put the Guaranty Programs into their present forms.

Presently under the investment guaranty programs, AID seeks to increase investments of capital by American investors in friendly less-developed nations. The guaranties are forms of insurance against certain political and business risks which had previously deterred American investor interest in most foreign nations. In order to assure that the guaranties spur economic development in the host nations and do not simply enable American investors to unfairly compete by acquiring existing industries, the guaranties are only issued for wholly new investments or for the expansion of pre-existing investments and enterprises.³⁶ The guaranty programs are required by Congress to be

³¹ S. REP. NO. 612, 87th Cong., 1st Sess. (1961), in 1961 U.S.C.C.A.N. 2486.

³² CONF. REP. NO. 1088, 87th Cong., 1st Sess. (1961), in 1961 U.S.C.C.A.N. 2534.

³³ Act of September 4, 1961, Pub. L. No. 87-195, Pt. I, §§ 221, 224, 75 Stat. 429, 432 (now codified at 22 U.S.C. §§ 2181, 2184 (Supp. 1966)).

³⁴ 1961 U.S.C.C.A.N. 2534-35.

³⁵ 1961 U.S.C.C.A.N. 2488-89, 2535.

³⁶ This may not be justified by the legislation. Compare 22 U.S.C. § 2181(a) with § 2183(a)(2) (Supp. 1966).

administered under broad criteria in order to make sure that they have the widest possible application.³⁷ Unfortunately, this has not always been true in practice and the American investor and his attorney should not be misled by the seemingly broad language used by Congress and AID in describing these programs.³⁸

There are four types of investment guaranties available to American investors. The first three are administered by AID and the fourth by the U.S. Information Agency (U.S.I.A.). The four types are:

- (A) Specific political risk guaranties against losses occasioned by (1) inconvertibility of foreign currency, (2) expropriation or confiscation, and (3) war, revolution and insurrection;
- (B) Extended risk guaranties covering up to seventy-five percent losses occasioned by either political or business risks (the so-called "All Risk Guaranty");
- (C) Extended risk guaranties covering up to one hundred percent of losses on certain housing projects, primarily in Latin America; and,
- (D) Specific risk and "All-Risk" guaranties covering investments in informational media.

The first shall be examined in great detail as it is the largest and most used to date; the second in less detail since, due to its more recent origin, many portions of it are somewhat in a state of flux; and the last two in brief fashion because their specificity precludes their being of interest to most potential American investors.

THE SPECIFIC RISK INVESTMENT GUARANTIES

Specific Risk Guaranties are the most popular form of guaranty offered by the United States Government. They cover three types of political risks to which investment capital would not be subject within the United States. They have also been very popular with AID as very few claims for loss have been made under them. Despite the obvious implications of this fact, they still should be sought by American investors because experience shows that the failure to have them has brought about substantial losses to American business in cases where

³⁷ 22 U.S.C. § 2181(a) (Supp. 1966).

³⁸ See note 4 *supra* for some of Congress' expressions of dissatisfaction over the restrictive manner in which AID has applied Congressional intent. Also, compare the broad statements by AID in its AIDS TO BUSINESS pamphlet (*supra* note 1) with its more restrictive statements in its SPECIFIC RISK INVESTMENT GUARANTY HANDBOOK (Rev., Oct. 1966). See Appendix B for illustrations of some of the specific reasons for which AID will refuse a guaranty, many of which are not authorized by the legislation involved. They are similar, in many ways, to the use by the F.C.C. of criteria from other Congressional enactments to apply to applications under its own jurisdiction which was condemned in *F.C.C. v. R.C.A. Communications, Inc.*, 346 U.S. 86 (1953).

supposedly safe host nations have undergone unexpected and disastrous changes in government.³⁹

Investment guaranties can be obtained in any nation with which the United States has agreed to institute the Program by bilateral agreement. Guaranty agreements have been signed with more than seventy-five underdeveloped nations. However, this does not mean that all three types of guaranties are available in each nation.⁴⁰ Guaranties are also available in the underdeveloped overseas dependencies and colonies of five developed European nations.⁴¹ Negotiations are presently in progress with nations not covered at present and with those which have not agreed to all of the Specific Risk Guaranties or to the All-Risk Guaranty. If an investment is to be made in a host nation where only partial coverage is available, the American investor should note his desire for the other coverages and they will apply if made retroactively available. If the signing of a new agreement is imminent in a nation, the investor may obtain an "assurance against prejudice letter" so that the investment can be covered when the guaranties become available.⁴² Prior to the issuance of any guaranty contract, the host nation must approve (for guaranty purposes) the specific project involved.

Investor eligibility is restricted to: (1) citizens of the United States; (2) corporations, partnerships or associations organized under the laws of the United States or of any state or territory thereof and which are substantially beneficially owned by United States citizens; or (3) foreign subsidiaries of one or more eligible United States corporations where not more than five percent of the stock is owned by citizens, corporations, etc., of a foreign nation.⁴³ The phrase "substantially beneficially owned by United States citizens" has been in-

³⁹ The best example is Cuba. In 1957, Cuba signed the required bi-lateral agreement to institute the guaranty against losses due to convertibility and expropriation. Because it was deemed a "safe" country by American investors, no applications were made for this guaranty. The subsequent losses which occurred when Fidel Castro took over in 1959, and expropriated all American investments in 1960, were substantial. No part of the losses were covered by any guaranties despite the fact that large American investments were made in Cuba after the Program went into effect there.

⁴⁰ See Appendix C for countries in which the various guaranties are available.

⁴¹ The Convertibility and Expropriation Guaranties are available for qualified dependencies and colonies of Denmark, France, Netherlands, Norway and the United Kingdom (Convertibility only).

⁴² AID, SPECIFIC RISK INVESTMENT GUARANTY HANDBOOK 4 (Rev. Oct. 1966).

⁴³ 22 U.S.C. § 2183(c) (Supp. 1966). *But see supra* note 5.

terpreted to require that a majority of each class of outstanding stock be either directly or beneficially owned by American citizens.⁴⁴ Even if these tests are met, eligibility may be lost if there is a large indebtedness to foreign creditors or if foreign creditors may be able to exert effective control over the entity. If the would-be investor is a subsidiary of an entity, the parent will be examined to see whether it meets the requisites for eligibility. Joint ventures of two or more eligible investors are permitted provided that a nominee is set up in which (1) the shares held in the nominee's name are for the exclusive use and benefit of the eligible investors, and (2) the shares were acquired with funds of those investors.

Since the purpose of the Program is to increase United States private investment in developing countries, only those investments will be considered eligible which are in the nature of a new undertaking or project. This does not mean, however, that only wholly new enterprises will be considered. Guaranties will be granted for the expansion, modernization or development of an existing enterprise, *e.g.*, construction of a new plant to replace an obsolete one,⁴⁵ infusions of new additional working capital for an expanded business, and acquisition of new machinery. Guaranties may also be issued for the purchase of a non-related pre-existing foreign entity where: (1) the purchase is accompanied by a not insignificant contribution of capital by the purchaser-investor; (2) for the purpose of expanding, developing or modernizing the purchased entity; and, (3) the investor acquires an existing interest therein. In such cases, coverage on existing investments will be limited to an amount equal to the value of the new capital.

AID has adopted what many consider to be too stringent a definition of "new investment." To be "new," for guaranty purposes, application for guaranty coverage must be made prior to the time the investor irrevocably commits himself to the investment. Thus, the investor should bear in mind that the guaranty application should be made prior to finalizing the investment arrangements. In the event the investment falls through, the application can always be withdrawn. However, if it is not made timely, nothing will revive the opportunity to apply for a guaranty.

While almost any type of investment can be covered, AID has es-

⁴⁴ *Supra* note 42, at 5.

⁴⁵ Under certain circumstances, investments by American contractors for work on an eligible investor's enterprise may be granted their own guaranties; assuming that they meet all the other eligibility criteria.

tablished guidelines for eligibility of certain types of investments. Generally an investment must remain in the foreign enterprise for not less than three years. Straight loans, either secured or unsecured, must be for a minimum period of three years. For serial or installment loans, the average maturity of the entire loan must be three years or more.⁴⁶ Thus short-term revolving lines of credit and loans which can be called by the investor during the first three years are not eligible.⁴⁷ However, unless the borrower is a subsidiary of the investor, or otherwise under its control, an option in the borrower to prepay will not render the loan ineligible. Also, acceleration clauses with reasonable default criteria are permissible. Refinancing of existing indebtedness will be eligible only if the loan has an average maturity of at least six years and the existing indebtedness has matured or will mature within one year of the making of the refinancing loan. A loan may be found ineligible if the interest rate is not reasonably related to the legally prevailing rates for comparable loans in the host nation. Where the investor is a surety for the loan of a third party made to the foreign enterprise, a guaranty may be issued by AID to protect the investor's contingent liability provided that the loan secured would be eligible except for the nature of the third party making it.

The *res* of the investment may take many forms. Currency or credits in currency of the United States or of any nation are eligible provided that the foreign currencies or credits are freely convertible into United States dollars, at the time the investment is made.⁴⁸ The reinvestment of retained earnings of the foreign enterprise is eligible if the earnings could have been repatriated to the United States and the earnings are either capitalized or are segregated so as not to be available for distribution as dividends.⁴⁹ New or used materials and

⁴⁶ An exception is made for construction loans under the Housing Guaranty Program regardless of the duration of the loan. This may be particularly helpful when the investor in an enterprise decides to build housing for his labor force, if such housing is covered under the Housing Guaranty Program. See 22 U.S.C. § 2184 (Supp. 1966).

⁴⁷ However, long term credit for capital equipment or commodities may be eligible if the average maturity is not less than three years, the credit extended is equivalent to a loan and the capital will have a significant developmental impact. Protection for this type of transaction will not be granted if similar protection may be obtained from Exim-bank or FCIA.

⁴⁸ Investments in the currency of the host nation which are not readily convertible may be eligible if coupled with some other eligible investment subject to agreement by the host nation to certain assurances of convertibility. See *supra* note 42, at 10.

⁴⁹ This is usually limited to retained earnings accrued out of normal operations within a certain two year period. See *supra* note 42, at 10, 28-29 and 34.

equipment are eligible and will be valued at the reasonable value in the United States plus costs of transport, insurance and installation actually paid by the investor or the agreed value between the investor and the foreign enterprise, whichever is lower.⁵⁰ Generally speaking, tests of valuation acceptable to the United States Internal Revenue Service will be acceptable to AID. Investments may be in the form of services for other than current payment when connected with other eligible investment and even fee agreements can be covered if in conjunction with an investment of not less than five years duration. Similarly, investments may be made in the form of patents, processes or techniques, or licenses for their use with royalty agreements treated the same as fee agreements for services.⁵¹ However, *coverage in the case of patents, processes and techniques is limited to the convertibility guaranty*. While trade names, trademarks and goodwill cannot be covered, their presence as part of an investment will not affect eligibility if they are only a minor portion or are only incidental to the whole transaction.

For the most part, it is hard for an investment in any of the above forms not to comply with the general requirement of furthering the development of the host nation.⁵² Any investment which will increase trade, open a new industry, reduce dependence by the host nation upon imports or even simply increase production or raise the standard of living by providing increased employment at fair wages will meet the requirement. There are however, two major traps which the investor must avoid. First, since the purpose of the Program is to increase private sector participation in the host nation,⁵³ the interest of the host nation in the foreign enterprise must be a noncontrolling minority interest, if any interest is present at all. Second, AID has interpreted certain language in the legislation relating to giving consideration to the balance of payments effect in the United States as precluding procurement of goods and services in foreign developed

⁵⁰ "Reasonable value", as applied to used machinery and equipment, may be the value certified to AID by the investor, if made on a reasonable basis, so long as the valuation does not exceed the fair market value plus costs of transport, insurance and installation.

⁵¹ This is limited to those patents, processes or techniques which represent a body of information and experience that, for the most part, already exists.

⁵² 22 U.S.C. § 2181(a) (Supp. 1966).

⁵³ *Id.*

nations except under certain conditions, many of which are easily met by the small investment but not by a large one (over \$500,000).⁵⁴

Three types of coverage are available under the Specific Risk Program. The premiums for the coverages are set as a percentage of the value insured and vary among the coverages according to the relative risks of loss. All guaranties are limited to twenty years duration and the value insured is limited to the actual dollar value of the investment (as of the date of the investment) plus the actual profit on the investment.⁵⁵ The three risks against which protection may be had are:

- (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 herein, 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, and
- (C) loss due to war, revolution or insurrection: . . .⁵⁶

The Convertibility Guaranty—This guaranty applies only to the blockage of convertibility through all of the legally recognized exchange rates of the host nation. *It offers no protection against the devaluation or inflation of the local currency.*⁵⁷ It is not available where the local currency is not convertible either generally or by special conversion rights (granted by the host nation) at the time of investment, nor will any claim be entertained where loss is due to the effect of an exchange regulation or practice which was in effect at the time of the issuance of the guaranty.⁵⁸ The burden of ascertaining the existence of convertibility is on the investor.

⁵⁴ *Supra* note 42, at 12. See 22 U.S.C. § 2182(g) (Supp. 1966). The legislative history of this provision is sparse and seems to be nothing more than a statement of general concern over the balance of payments problem. See 1963 U.S.C.C.A.N. 420 and 1206. The standards imposed by AID seem to be an unwarranted expansion of the simple legislative statement made.

⁵⁵ 22 U.S.C. § 2181(c) (Supp. 1966). Of course, new investments in an already covered enterprise are eligible for additional guaranties. The twenty year period seems to have been arrived at as a period in which it may be expected that the profits of the investment will have at least paid back its original cost.

⁵⁶ 22 U.S.C. § 2181(b)(1)(A,B,C) (Supp. 1966).

⁵⁷ These restrictions emphasize that this is a political risk guaranty which does not cover business risks. It must be remembered that the guaranties are issued for risks to which domestic investment would not be subject. Since all domestic investment runs this risk, albeit to a lesser extent than foreign ones, it is not deemed a proper risk which the investor should be protected against.

⁵⁸ These exclusions are based on the apparent foreseeability of the effects of such restrictions, regulations or practices of the host nation by the prospective investor.

Convertibility protection is available for both the earnings "actually accrued" on the investment⁵⁹ and the return of the investment so long as the funds were not held more than eighteen months by the investor. The Guaranty's protection arises in three situations. First, it arises when the local currency is not permitted to be converted into United States dollars by the direct operation of any law, decree, regulation or affirmative administrative determination for a period of not less than thirty days.⁶⁰ This is known as "outright blockage." Second, it arises when the host nation fails to approve or deny a properly submitted application for transfer of funds in the normal processing time usually required for such applications at the time of the issuance of the Guaranty, but in no event less than sixty days.⁶¹ This is known as "passive blockage." Third, it arises when the conversion is allowed at a rate of exchange which is less than ninety-nine percent of the rate which would be used to convert the funds under the Guaranty. This is the problem of the discriminatory rate of exchange which must be distinguished from other possible discriminatory measures which may arise under an Expropriation Guaranty.

Losses are payable at ninety-nine percent of the U.S. dollar equivalent of the local currency.⁶² Where there is an effective free market rate of exchange, "dollar equivalent" will be determined on the basis of that rate. If there is no such rate, then the rate used is that which other American investors use to transfer local currency to U.S. dollars for the repatriation of earnings or payments on U.S. dollar debts. If neither of these rates exist, then, as a last resort, the most depreciated rate recognized by the host nation and used in or applicable to not

⁵⁹ Act of Sept. 6, 1965, Pub. L. No. 89-171, § 104(b). See 22 U.S.C. § 2181(c) (Supp. 1966).

⁶⁰ The "negative order doctrine," laid to rest in *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939), is not revived by this phraseology as used by AID in its HANDBOOK, *supra* note 42, at 14. Just the opposite is true where an application for transfer of funds must be made, as a negative response to the application invokes the protection of the Guaranty.

⁶¹ This is a practical recognition of the fact that a prolonged failure to act on the application for transfer of funds has the same effect as outright refusal to grant the application. It is similar to the inclusion of "failure to act" within the definition of "Agency action" adopted in § 2(g) of the Administrative Procedure Act of 1946, 5 U.S.C. § 1002(g) (Supp. 1966).

⁶² "The 1% margin is to allow for fluctuations in the applicable exchange rate and for ordinary expenses, usually borne by investors transferring local currency into United States dollars, such as transfer commissions, mail or cable transfer charges, and transaction stamp taxes." AID HANDBOOK, *supra* note 42, at 15.

less than ten percent of the exchange transactions arising out of importations into the host nation will be used.

The investor must decide upon a maximum amount of coverage and an amount for the current guaranty year. The maximum amount pertains to the whole life of the Guaranty and any unused portion during the life of the Guaranty may be used as the current amount where the investor plans to sell his interest in the foreign enterprise and wishes to repatriate the sums realized on such a sale.

The maximum amount is a top figure for coverage which may not be increased.⁶³ But it can be reduced *permanently* for the next guaranty year if the investor gives notice to AID before the end of the current year. The payment of compensation under a Guaranty will permanently reduce the maximum coverage and, for the current year, reduce the current coverage. The payment of a claim does not affect the current amount which may be selected in any later year except insofar as it reduces the maximum coverage available in a current year should the investor decide to sell.

It is best not to set the current coverage in any year at an amount greater than protection needed during that year as determined by a reasonable estimate of the funds to be converted during that year. The reason for this is that a higher premium rate is charged on the current coverage than on the standby coverage⁶⁴ and a substantial savings in premium can be realized through reasonable estimation procedures which do not overvalue the funds to be protected. The current coverage normally selected for various types of investments are:

- (a) Loans: the total payments of principal and interest which are reasonably expected to be received during the current year.
- (b) Equity: the reasonably anticipated return of capital and the expected dividends to be received during the current year.⁶⁵

⁶³ However, one exception is allowed in the case of the issuance of a Guaranty prior to completion of the investment where the amount to be invested is increased by reason of increased costs or increases in amounts to be invested by other investors.

⁶⁴ "Standby coverage" is the difference between the maximum coverage remaining and the current coverage.

⁶⁵ Care should be taken to avoid the not infrequent situation in which the local management of the foreign enterprise paints too rosy a picture of the upcoming year for the purpose of encouraging the investor to retain his interest or to increase his investment. Careful accounting procedures and market analysis should be used when such a situation is suspected.

- (c) Equity and Loans: the sum of (a) and (b) above.⁶⁶
- (d) Licenses and Services: the amount of royalty payments or service fees anticipated to be received during the current year.

The maximum coverage, like the current coverage, is determined by the investor. However, while current coverage is only limited by the maximum coverage, the maximum coverage is subject to limits set by AID. These limits depend on the type of investment as follows:

- (a) Loans: the principal and interest of the entire loan, stated in United States dollars.⁶⁷
- (b) Equity: the value of the original investment plus an equivalent amount to cover accumulated earnings up to the value of the original investment.
- (c) Loan and Equity: the sum of (a) and (b) above.⁶⁸
- (d) Licenses and Services: the value (in United States dollars) of the royalties and/or fees which can reasonably be anticipated over the life of the agreement.⁶⁹

The cost of the Convertibility Guaranty is one-quarter of one percent ($\frac{1}{4}\%$) of the current coverage and one-tenth of one percent ($\frac{1}{10}\%$) of the standby coverage, if any, both premiums being payable annually. An example will illustrate the computation of the premium: American Co. invests \$50,000 in equity in Development Corp., the foreign enterprise. American Co. obtains the maximum

⁶⁶ This affords the maximum coverage obtainable under this Guaranty. See *supra* note 42, at 16.

⁶⁷ It should be remembered that the maximum guaranty term is twenty years. The practical effect of this would appear to limit coverage to the principal and interest to be received during the first twenty years of any loan for a longer term. Thus, a thirty-year loan with equal annual payments of principal and interest may only be eligible for two-thirds (*i.e.*, twenty year) coverage. However, AID has not clarified this point in its HANDBOOK. See *supra* note 42, at 16. If, on application to AID for a Guaranty, this is stated to be the policy, consideration should be given to reducing the term of the loan to twenty years. In the event this is not practicable and the amount of the investment cannot be reduced, consideration should be given to the possibility of only making a partial loan in the first year and then making a new loan of the balance in the tenth year so that the whole investment can be protected. Another alternative, if the sums are not needed at one time, is to make a series of twenty-year loans in one or five-year installments. In this manner, the whole investment can be made available to the foreign enterprise in the first ten years but the protection will extend over the whole thirty-year period.

⁶⁸ See *supra* note 66. AID may require a smaller maximum if the ratio of loan to equity is greater than five to one.

⁶⁹ The burden is on the investor to establish the reasonableness of his estimate.

coverage of \$100,000, but only requires coverage of \$8,000 in 1968 as that is the highest reasonable amount of earnings expected. The premiums are:

<i>Coverage</i>	<i>Amount</i>	<i>Rate</i>	<i>Premium</i>
Current	\$ 8,000	1/4%	\$20.00
Standby	\$92,000	1/10%	92.00
Maximum	\$100,000		

Premiums for 1968: \$112.00

The current coverage can be adjusted from year to year to reflect changes in anticipated earnings.

The Expropriation Guaranty—This guaranty protects against loss of all or part of the investment due to acts of expropriation or confiscation by the host nation. The legislation defines this concept:

(b) the term "expropriation" includes but is not limited to any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.⁷⁰

While it is true that international law requires, in theory, prompt and adequate compensation by the foreign government for such acts, the actual result is frequently less than this, and such payment is usually inadequate, grossly delayed or both. Thus the Guaranty affords protection against such loss by assuring the investor prompt repayment by the United States Government in U.S. dollars of the whole amount lost.

Due to the significant differences of the effect of actions of the host nations on various forms of capital, the coverage provided also varies according to the form of capital involved. In loan situations, two types of protection are closely supplementary to the Convertibility Guaranty and, depending on the particular action involved, one or the other may apply, but not both. These two actions are when the host nation prevents the investor: (1) from selling the debt instrument or withdrawing the money realized in such a sale, or (2) from receiving or withdrawing payments of principal and/or interest on the loan.⁷¹ In either loan or equity investments, protection is afforded against

⁷⁰ 22 U.S.C. § 2183(b) (Supp. 1966).

⁷¹ If such blockage comes about *solely* through the use of exchange controls, the Convertibility Guaranty applies. Otherwise, the Expropriation Guaranty usually covers the situation.

acts of the host nation which prevent the foreign enterprise from exercising effective control over all or a large portion of its property or from continuing its normal operations. In equity investments, protection is afforded against interference which prevents the investor from exercising his basic rights of ownership. Another equity coverage, similar to that for loans, is protection against preventing the investor from selling the equity or receiving dividends or withdrawing funds received from sale of equity, payment of dividends or liquidation of the enterprise. Similar protection is afforded against interference with the receipt or withdrawal of funds in the nature of royalty or fee payments.

In general, actions of a host nation which result in any of the impairments covered above will be treated as expropriatory action. A taking of property by outright confiscation is covered if it lasts for one year and is for the purpose of nationalizing the property.⁷² A taking need not be direct; it can be by taxation or regulatory laws which have no reasonable relationship to the fiscal regulatory policies of the host nation or those which unreasonably discriminate against the investor specifically or foreigners in general.⁷³ Non-discriminatory acts are not protected against.⁷⁴ Protection is also afforded against interference in the internal affairs of the enterprise, *e.g.*, placing managerial control in a person not chosen by the investor or requiring it to sell its output to a nation at war with the United States. Also covered are breaches of contracts of concession between the enterprise and the host nation.⁷⁵

In line with the legal principle that there can be no recovery by a person for his own culpable acts, no protection is afforded against acts of the host nation for violation of its reasonable laws committed by

⁷² This also includes situations in which the property is turned over to an enterprise native to the host nation, whether or not it is governmentally controlled.

⁷³ The concept involved in the discriminatory situation is similar to that employed by United States courts in determining whether actions of a state improperly discriminate against corporations of a second state engaged in interstate commerce in the first state. While the concept is similar, it is not possible to say what standards would be applied by AID in its determination as no such occasion has yet arisen. Moreover, AID's unbridled discretion in its determinations leaves the investor no assurance of a reasonable application of the basic principle.

⁷⁴ Thus, while there is no protection against a general tax increase, for example, a tax which discriminated against foreign enterprises in the host nations or which was confiscatory in nature, *e.g.*, a one hundred percent tax of profits of foreign enterprises, would be protected against.

⁷⁵ However, this does not extend to contracts for goods, services or other proprietary acts of the host nation, *e.g.* contracts or promises for the supply of gas for fuel.

the enterprise. An excellent example of this type of circumstance would be where an agency similar to the Federal Trade Commission orders the enterprise to divest itself of part of its property under an antitrust law. Another example would be penalties or restrictions imposed by the host nations' equivalent to the Trading With the Enemy Act. No coverage is afforded where the expropriatory action is taken pursuant to a *voluntary* agreement between the host nation and the investor or the enterprise or both.

The Guaranty also contemplates an exhaustion of remedies doctrine. Thus, coverage is not applicable when either the investor or the enterprise fails to try to prevent the expropriatory action including exhausting the judicial or administrative remedies available in the host nation.

Investor eligibility is the same as under the Convertibility Guaranty. However, coverage is extended under the Expropriation Guaranty not only to the investor and the enterprise, but to subsidiaries or affiliates of the enterprise. This extension is operative if: (1) the primary business activity of such subsidiary or affiliate is integrated with the operations of the enterprise, and (2) in the case of an affiliate, the investor owns it and the enterprise or, in the case of the subsidiary, the enterprise controls it and holds a majority interest. This extension becomes operative where the expropriatory action against the subsidiary or affiliate has the effect of destroying the value of the enterprise as a going concern.⁷⁶

The maximum coverages are the same as those for the Convertibility Guaranty for the appropriate forms of investment and are subject to the same conditions as set out above. The current coverage will normally be the unredeemed or unrepatriated portion of the investment including the amounts expected in the current year. Under most circumstances, this will result in a declining coverage with a resultant savings in premium expenditure. In the case of an equity investment, the usual amount of current coverage will be the dollar value of the original investment plus retained earnings less losses and less funds previously repatriated. As with the Convertibility Guaranty, there is a distinct advantage to combining equity and loan investments under one guaranty contract.⁷⁷

⁷⁶ Of course, if all proper requirements are met, there is nothing to prevent the subsidiary or affiliate from being covered by its own Guaranty.

⁷⁷ See *supra* notes 66 and 68.

If expropriatory action occurs and the investor files a claim for loss, he must assign or otherwise transfer to the United States Government all his right, title and interest to the investment or payment involved. This transfer includes all assets, claims relating to them, shares of stock, instruments or documents evidencing loans or payments, etc. The investor, even after such transfer, must continue to exhaust the appropriate remedies and render assistance to the United States Government in its attempts to recover and administer the property involved.⁷⁸

Compensation under the Guaranty varies according to the type of expropriatory action and the nature of the protected investment. In the event of total expropriation of an equity investment, compensation will be the dollar value of the investment plus the investor's pro rata share of retained earnings and realized capital gains less his pro rata share of operating losses, realized capital losses and prior distributions of capital. For a loan investment totally expropriated, compensation is limited to the outstanding principal balance and the accrued unpaid interest.⁷⁹ But, if the foreign enterprise is insolvent and its assets are less than its liabilities, compensation is limited to what would have been realized by the investor in the event the enterprise had been permitted to go into bankruptcy and liquidate and distribute its assets.⁸⁰ Any funds in the form of local currency will be converted, for compensation purposes, in the manner applicable under the Convertibility Guaranty. In no event will compensation ever exceed the current coverage in force on the date the expropriatory action takes effect on the investment.

The premium for the Guaranty per year is one-half of one percent ($\frac{1}{2}\%$) of the current coverage and one-tenth of one percent ($\frac{1}{10}\%$) of the standby coverage. If both the Expropriation Guaranty and the War Risk Guaranty are needed, some savings of premium may occur by combining the two coverages (discussed below).

⁷⁸This includes, but is not limited to, maintenance of court action, producing witnesses and documents in court or diplomatic prosecution of claims, providing local counsel, etc. The expenses resulting from such required cooperation will be reimbursed by the United States Government. The cooperation is in the nature of a condition subsequent without which the claim under the Guaranty may be impaired.

⁷⁹Future interest is not compensated as no right to it would have arisen on the date of the expropriation.

⁸⁰This proviso, *see supra* note 42, at 18, confirms the insurance nature of the Guaranty Program. Compensation is limited to the actual loss, as per standard insurance practice.

The War, Revolution and Insurrection Guaranty—This Guaranty (commonly referred to as the “War Risk Guaranty”) protects an investor’s tangible property investment only,⁸¹ against losses due to war, revolution or insurrection on the part of any hostile force. While there need not be a formal declaration of war, the damage must arise out of the acts of organized armies or organized revolutionary or insurrectionary forces,⁸² or while defending against such acts. Compensation will not be paid where the damage is at least in part due to either the investor’s or the enterprise’s negligent failure to take reasonable measures to prevent the damage.

The current coverage should be set at the amount of compensation which could be received in the event of a total loss of the property. Compensation is governed by formulae set up by AID which determine the amount of the investor’s interest in the property. In the case of an equity investment, compensation is limited to the damage to the property⁸³ multiplied by the following fraction:

Initial investment less return thereon as adjusted for retained earnings, losses, and capital gains and losses realized

Capital plus surplus plus long-term liabilities (including current portion).

In the case of a loan investment, the numerator of the fraction is changed to the sum of the unpaid principal plus the accrued unpaid interest. The compensation actually payable is limited to the lesser of: (1) the amount computed under the above formula, (2) the current coverage in effect on the date of damage, or (3) the statutory limit of the original investment plus earnings and profits actually accrued. Whichever final calculation is the lowest will be further reduced by any amounts paid to the investor as compensation for the loss from other sources or the investor’s share of such amounts paid to the foreign enterprise.⁸⁴

Maximum coverage in the case of an equity investment is limited

⁸¹ Intangible property is not protected, nor are instruments showing security interests in tangible property. For example: plant, machinery, office equipment, and inventory are protected while currency, accounts, deeds, and securities are not.

⁸² Such acts include sabotage.

⁸³ “Damage” is the lesser of (1) the reasonable cost of replacing or repairing the damaged property, or (2) the cost of the damaged property or its original fair market value in the United States, including costs of freight, insurance, etc., less normal depreciation and abnormal deterioration, if any.

⁸⁴ This includes not only insurance but also net proceeds of salvage sales.

to the greatest interest owned by the investor in the property of the enterprise at its depreciated value. While this interest could exceed the value of the original investment, coverage will normally be limited to two hundred percent of that value. In the case of a loan investment, maximum coverage is limited to the principal and interest due. In the case of a combined equity and loan investment, maximum coverage is limited to the sum of the two separate maximum coverages and current coverage is limited to the amount computed under the formula for compensation of an equity investment plus the amount computed under the loan formula.

A claim for loss must be in an amount greater than \$10,000 or one percent of the current coverage in force, whichever is less. If it is possible, within a reasonable time after the date of loss, AID will inspect the property in order to determine the amount of damage. If it is not possible to inspect, it will be presumed that the damage is equal to sixty percent of the covered value, unless the investor can show a greater amount.⁸⁵ In conjunction with the principal that compensation will be reduced by amounts already received from other sources, any unpaid claims, causes of action, etc., which the investor or the enterprise may have (in the nature of compensation), must be assigned to the United States Government. As with the Expropriation Guaranty, the investor must cooperate with AID to any extent required in order to mitigate damage, prevent further damage and assist in evaluating the damage already incurred. But, unlike the Expropriation Guaranty, the investor of equity need not do anything which would affect his interest in any part of the equity other than as to the specific property damaged. However, a loan investor must credit against the unpaid principal and interest the amounts received as compensation under the War Risk Guaranty.

The premiums for the War Risk Guaranty are the same as those for the Expropriation Guaranty. As observed previously, savings may result by combining the two kinds of coverage. This is so because while the premium for each separate coverage is the same, if they are combined, the total premium set by AID is seven-eighths of one percent ($\frac{7}{8}\%$) instead of one percent (1%). The $\frac{7}{8}\%$ premium only applies on the largest current coverage under either Guaranty. Moreover, in such situations, only one standby coverage premium is re-

⁸⁵ The presumed damage is subject to later adjustment if complete information can later be obtained. See *supra* note 42, at 27.

quired.⁸⁶ The combined coverage will usually be advantageous where the two coverages are within 25% of each other or if a substantial standby coverage is required. The following examples illustrate straight rate and combined coverage premium computations.

Example A: The investor invests \$1,000,000 in equity in the foreign enterprise of which 80% is in tangible property coverable by the War Risk Guaranty. The first year premiums are:

<i>Separate Coverages</i>		
Expropriation		
Maximum	\$2,000,000	
Current	1,000,000 at 1/2%	\$5,000
Standby	1,000,000 at 1/10%	1,000
		\$6,000
War Risk		
Maximum	\$1,600,000	
Current	800,000 at 1/2%	\$4,000
Standby	800,000 at 1/10%	900
		\$4,900
<i>Combined Coverage</i>		
Maximum	\$2,000,000	
Current	1,000,000 at 7/8%	\$8,750
Standby	1,000,000 at 1/10%	1,000
		\$9,750

The total for the *Separate Coverages* is \$10,900 while the *Combined Coverage* costs only \$9,750 or a savings in premiums of \$1,150 for the *Combined Coverage*.

Example B: Same as *A* except 50% is in tangible property.

<i>Separate Coverages</i>		
Expropriation		
Maximum	\$2,000,000	
Current	1,000,000 at 1/2%	\$5,000
Standby	1,000,000 at 1/10%	1,000
		\$6,000
War Risk		
Maximum	\$1,000,000	
Current	500,000 at 1/2%	\$2,500
Standby	500,000 at 1/10%	500
		\$3,000

The *Combined Coverage* is the same as in *Example A*. Now the *Combined Coverage* costs \$9,750 while the *Separate Coverages* only cost \$9,000, so a savings of \$750 will be realized using the *Separate Coverages*.

⁸⁶ The reduced rates offered for the combined coverage arise from a practical recogni-

Procedure—In order to obtain any Guaranty, the investor must apply to AID by completing the three copies of its application form⁸⁷ and supporting documents. If there is any change in the information furnished, after the application is submitted but prior to its approval, the applicant must amend the application. A Guaranty may be refused or, if already issued, cancelled for misrepresentation or failure to disclose pertinent information. Prior to filing the application and prior to finalizing the investment, the applicant should obtain an Assurance Against Prejudice Letter (also known as a “waiver letter”) to insure that the investment will be regarded as “new.” After the Letter is issued, the investor may irrevocably commit himself to making the investment without fear that it is no longer a “new” investment. After the issuance of the Letter and prior to the issuance of the Guaranty, the investor must secure the approval of the host nation for the specific investment.⁸⁸ A single application may be used for one, two or all three Guaranties. Rights under a Guaranty Contract are specifically spelled out therein and are standardized, except where unusual circumstances may require modification. Risk of loss liability is not assumed by the United States Government until the issuance of the Guaranty. AID has an absolute and unbridled discretion to issue or refuse Guaranties as it sees fit.⁸⁹ Some of the reasons it uses appear to be clearly unconstitutional but there has never been a court test on this use of discretion. While AID states that disputes arising under the Guaranty Contract are to be submitted to binding arbitration (under American Arbitration Association rules), this is understood as applying only to claims for loss. To date, no such arbitration has had to be conducted.

EXTENDED RISK GUARANTIES

The Extended Risk Guaranty is also known as the All-Risk Guaranty because it covers most normal business risks in addition to the

tion of the small probability that both types of loss will occur simultaneously. While AID states that they are “virtually mutually exclusive,” (*supra* note 42, at 21), it is more realistic to simply observe that one or the other must occur first and that the loss occasioned by the one occurring first removes that part of the investment from the other coverage.

⁸⁷ Form AID 1520-2 (1-65).

⁸⁸ Some of the pitfalls in this area are set out in the HANDBOOK. See *supra* note 42, at 29-30.

⁸⁹ See Appendix B for some of the most frequent reasons for refusal.

political risks covered by the Specific Risk Guaranty Program. The two programs are not mutually exclusive as coverage under the All-Risk Guaranty is limited to seventy-five percent of the value of the investment.⁹⁰ The degree of discretion granted AID in administering this Program is extremely broad and the coverage offered is protection against all risks except "fraud or misconduct for which the investor is responsible."⁹¹ Unlike the Specific Risk Program, this guaranty is not issuable for simple economic development but is issued as guaranties which "emphasize economic development projects furthering social progress and the development of small independent business enterprises."⁹²

The All-Risk Guaranty's lower popularity among American investors is due to many factors, of which the social progress requirement is merely one. Another major factor is the difficulty in obtaining guaranties for equity investments and the restrictions placed on them. The social progress and small business ("share the wealth") criteria are applied more strictly for equity investments than for loan investments. When granted, the Guaranty is usually for a project such as food supply, health improvement or supplying of educational materials. A major drawback is that coverage on equity investments will usually not exceed fifty percent of the value invested. Also, in addition to the usual requirement of investor cooperation in the event of claim (as set out in the discussion of the Expropriation Guaranty), AID will require an investor which had previously been supplying management or managerial assistance to the foreign enterprise, to continue such assistance or management, at a reasonable fee, after claim is made.

In contrast to the strictures placed on equity investments, AID is much more liberal in applying the Guaranty to loan investments. AID recognizes two distinct types of loan investment: (1) a loan by an American corporation to its foreign subsidiary, and (2) a loan by one or more American commercial lending institutions to a foreign enterprise. As will be shown, preference is given to the latter type. In the case of a loan by an American corporation to its subsidiary, the Guar-

⁹⁰ 22 U.S.C. § 2181(b)(2) (Supp. 1966). Specific Risk coverage may be obtained for the uncovered remainder.

⁹¹ 22 U.S.C. § 2181(b)(2) (Supp. 1966).

⁹² *Id.* It is this restriction, primarily, which has made the Program less successful, from the point of view of total volume of American investor participation, than the Specific Risk Program.

anty will cover seventy-five percent of each installment of principal and interest as it matures. Under Specific Risk Guaranties, compensation of losses is made whether or not other avenues of compensation are open (subject, of course, to reduction for amounts actually paid to the investor from other sources). In the case of the All-Risk Guaranty, the investor is required to pursue all his legal remedies against the defaulting borrowing subsidiary prior to receiving any compensation under the Guaranty.

Institutional investors are offered the choice of applying the seventy-five percent coverage over the life of the loan, so they may elect one hundred percent coverage on the last seventy-five percent of the maturities. This privilege is not afforded to other investors. The twenty-five percent which is not covered can frequently be covered in an indirect manner, such as through an indemnity or surety contract with an equity investor in the enterprise whose investment may be guaranteed.

While loans are preferred over equity, there are some severe strictures on loan investments which may make them unattractive to most would-be institutional or corporate investors. Loans are strictly subject to the "Buy American" policy. Thus, first preference will be given to projects which will procure American goods and services in amounts close to the value of the loan, or at least to its guaranteed portion. Guaranties will not be issued if a reasonable alternative guaranty may be obtained elsewhere, if private financing is available on reasonable terms without the Guaranty, or if the project may have an adverse effect on the United States balance of payments problem or otherwise adversely affect the American economy.⁹³ A security for a loan which is convertible at the investor's option to a form of equity (*e.g.*, a convertible debenture) can qualify for the Guaranty, but AID could terminate a Guaranty if the option were exercised. AID also requires that loans meet four general criteria for eligibility.

A loan must:

1. be part of a sound financial plan, in support of an eligible project;
2. be made and repayable in United States dollars;
3. be amortized over a period reasonably related to: (a) the purpose of the loan, (b) the ability of the borrower to repay, and (c) the ability of the country in which the project is located to service the debt (generally the term should not be less than seven years);
4. bear an appropriate rate of interest.⁹⁴

⁹³ AID has not indicated how adverse such an effect might be in order to deny a guaranty. Conceivably, any adverse effect, no matter how slight, may suffice.

⁹⁴ AIDS TO BUSINESS (OVERSEAS INVESTMENT) 20 (Sept. 1966). Criteria 1, 3(c) and 4

Lastly, a loan must be for the establishment, expansion or modernization of productive facilities as opposed, for example, to debt refinancing or retirement, or to purchase of ownership shares.

Guaranties can be issued to projects in those friendly less-developed nations which have agreed with the United States to institute the Program.⁹⁵ Investor eligibility is the same as under the Specific Risk Program. Under the All-Risk Program, there is no requirement that any part of the foreign enterprise be American owned or controlled. AID does require, however, that the enterprise be substantially privately controlled. Thus, more than limited partial ownership by the government of the host nation may render the project ineligible. AID also requires that:

The sponsors of a new enterprise must have a *good reputation* and provide *capable management* and the project must be financially, economically, and technically sound.⁹⁶

Information on application procedures is available from AID on request. Due to the fact that commercial risks as well as political risks are covered, AID will require substantially more information and supporting material for an application for an All-Risk Guaranty than for a Specific Risk Guaranty.⁹⁷

The only coverage available, due to the commercial risk features of the Guaranty, is current coverage. There is no standby coverage as in the case of the Specific Risk Guaranties. The premium ranges up to one and three-quarters percent per annum of the current coverage. An investor may elect to apply for Specific Risk coverage on that portion of his investment not covered by the All-Risk Guaranty.⁹⁸ Such coverage applies strictly to the portion not otherwise covered.

are extremely vague. A prospective investor should take great care to consult with AID in advance of undertaking any part of the project so as to ascertain how these criteria are currently being interpreted. Item 3(c) is the least clear, not seeming to bear any reasonable relation to the project, the loan, or the Guaranty, as it refers to the *country's* ability to service the debt, not to the ability of the enterprise.

⁹⁵ See Appendix C. In addition, specific projects in other nations may, in the sole discretion of AID, be granted coverage.

⁹⁶ *Supra* note 94, at 22 (emphasis added). The vagueness of these standards should put the investor on notice as to the difficulty he may have in meeting these, and other, discretionary criteria. It cannot be overemphasized that AID has complete discretion, without review, of the administration of this Program as well as the Specific Risk Program.

⁹⁷ These extended materials are similar to those required for AID Dollar Loan requests.

⁹⁸ Due to the strict criteria for eligibility for the All-Risk Guaranty, there will usually be no problem in qualifying for Specific Risk Coverage if All-Risk coverage is approved. Yet, there is still no assurance that the granting of one means the automatic granting of the other.

HOUSING LOAN INVESTMENT GUARANTIES

In 1961, Congress expanded the Guaranty Programs to include total coverage of political and commercial risks for loans for housing projects, subject to the restriction that no compensation for loss is to be paid for losses due to the investor's fraud or misconduct.⁹⁹ As with all other Guaranties, the maximum term is twenty years.¹⁰⁰ Due to the fact that primary emphasis in the Foreign Assistance Act of 1961 was placed on the Alliance for Progress, these Guaranties are offered primarily in Latin America.¹⁰¹ Therefore, the following discussion is limited to Latin American investments.

The purpose of the Program is to stimulate the construction of new housing or institutions which encourage or facilitate such construction or private home ownership. It is aimed at providing better housing for middle and lower income families as determined by the standards used for comparable programs of the United States Department of Housing and Urban Development, as adapted to meet conditions in the host nation. The type of loan preferred is one in the nature of long-term mortgage financing.

Unlike the Specific Risk and All-Risk Programs, for which Congress set few criteria, Congress has spelled out the types of eligible projects as follows:

- (1) pilot or demonstration private housing projects in Latin America of types similar to those insured by the Department of Housing and Urban Development and suitable for conditions in Latin America;
- (2) credit institutions in Latin America engaged directly or indirectly in the financing of home mortgages, such as savings and loan institutions and other qualified investment enterprises;
- (3) housing projects in Latin America for lower income families and persons, which projects shall be constructed in accordance with maximum unit costs established by the President for families and persons whose incomes meet the limitations prescribed by the President;
- (4) housing projects in Latin America which will promote the development of institutions important to the success of the Alliance for Progress, such as free labor unions, cooperatives, and other private enterprise programs; or
- (5) housing projects in Latin America 25 per centum or more of the aggregate of

⁹⁹ Act of Sept. 4, 1961, Pub. L. No. 87-195, pt. I, § 222, 75 Stat. 424, 426; 22 U.S.C. § 2181(b)(2) (Supp. 1966).

¹⁰⁰ 22 U.S.C. § 2181(c) (Supp. 1966).

¹⁰¹ Act of Sept. 4, 1961, Pub. L. No. 87-195, pt. I, § 224, 75 Stat. 424, 432; 22 U.S.C. § 2184 (Supp. 1966). The availability of loans for other regions is severely restricted. AID should be consulted prior to even simple planning of such investments outside Latin America to ascertain whether the Program is operative in the nation contemplated.

the mortgage financing for which is made available from sources within Latin America and is not derived from sources outside Latin America, which projects shall, to the maximum extent practicable, have a unit cost of not more than \$6,500.¹⁰²

Projects in the nature of type 2, above, would seem to be limited to loans to such institutions for the purpose of making mortgages under AID's interpretation of the Program as being one which limits eligibility to long-term loans to finance mortgages.¹⁰³

While the Guaranty may cover up to one hundred percent of the principle loaned, individual guaranties are limited to five million dollars. How far AID will be willing to go to view adjacent new construction as a separate project, is not yet clear. Investor eligibility is the same as that under the Specific Risk and All-Risk Programs.¹⁰⁴ If individual mortgage loans are to be made from the principle investment loan, AID usually requires that they be "held and serviced by an experienced administrator or fiduciary, national to the host country."¹⁰⁵ The annual premium for the Guaranty will range between one-half and two percent of the outstanding balance of the investment, computed on a monthly basis. The exact premium on any particular guaranty depends upon the availability and nature of local guaranties and security.

The Housing Guaranty is the only form of guaranty which imposes a profit limitation on the investor. In the fifth year of this Program, Congress imposed a limit related to a similar limit for certain housing investments in the United States. AID prescribes the rate of interest allowable to the investor which shall be not less than one-half percent above nor more than one percent above the "current rate of interest applicable to housing mortgages insured by the Department of Housing and Urban Development."¹⁰⁶

INFORMATIONAL MEDIA GUARANTIES

The legislation authorizing this Program is in a rather confused state. Like the Specific Risk Program, this Program was first author-

¹⁰² 22 U.S.C. § 2184(b) (Supp. 1966). These criteria are amplifications of the Congressional declaration of purpose contained in 22 U.S.C. § 2184(a) (Supp. 1966).

¹⁰³ *Supra* note 94, at 24.

¹⁰⁴ 22 U.S.C. § 2183(c) (Supp. 1966).

¹⁰⁵ *Supra* note 94, at 24.

¹⁰⁶ 22 U.S.C. § 2182(h) (Supp. 1966).

ized by section 111 of the Economic Cooperation Act of 1948.¹⁰⁷ Subsequent amendments placed the authorized coverages in Title 22 of the United States Code in a section which has since been repealed.¹⁰⁸ Currently, the authority to issue Informational Media Guaranties (IMG) is contained in 22 U.S.C. section 1442 (1967), which defines coverage as being in accordance with the repealed section. The situation is further complicated by a 1965 amendment to an Executive Order governing the sub-delegation by the President of functions delegated to him by Congress to various other agencies.¹⁰⁹ The amendment delegates to the Director of the U.S.I.A. the functions conferred on the President by 22 U.S.C. sections 2181-82 "to the extent that these functions relate to informational media guaranties" authorized by 22 U.S.C. section 1442.¹¹⁰ The reader can either follow section 1442 from the start of this chain to its end, and find a circular definition, or can refer to sections 2181-82 and be misled into believing that IMG coverage is identical to the Specific Risk and the All-Risk Programs discussed above. Neither conclusion anywhere near resembles the IMG as it exists in reality. Nor does the reality resemble the legislation, as will be shown.

While the IMG was originally part of the Specific Risk Program, it has not grown in the same way, having been separated from that Program piecemeal from 1952 through 1956. As a result, the only coverage available under an IMG is against the risk of inconvertibility of funds.¹¹¹ The basic legislation states that an IMG is granted to protect "investments in enterprises producing or distributing informational media consistent with the national interests of the United States."¹¹² It further states that an IMG will not be subject to the ordinary time limit on guaranties.¹¹³ Thus, on the face of the legislation, it appears to be an unlimited term guaranty of convertibility for the repatriation of capital investments. However, this is not accurate in the least.

¹⁰⁷ *Supra* note 17.

¹⁰⁸ 22 U.S.C. § 1913(b), repealed by 75 Stat. 460 (1961).

¹⁰⁹ See Exec. Order No. 10,973, 26 Fed. Reg. 10469 (1961), as amended, Exec. Order No. 11,261, 30 Fed. Reg. 15397 (1965).

¹¹⁰ 22 U.S.C.A. § 2381 (1967).

¹¹¹ U.S. 88th Cong., 2d Sess., HOUSE COMM. ON FOREIGN AFFAIRS, STAFF MEMORANDUM ON INTERNATIONAL LENDING AND GUARANTY PROGRAMS, at 73 (Dec. 21, 1964).

¹¹² 22 U.S.C. § 1442(a) (Supp. 1966).

¹¹³ 22 U.S.C. § 1442(c) (Supp. 1966).

The IMG is another example (like parts of the Specific Risk Program) of an instance where a United States agency has completely taken matters into its own hands and clearly frustrated an unambiguous expression of Congressional intent. As presently administered, the IMG is nothing more than a guaranty of convertibility of the proceeds of sales of informational materials exported by American publishers, motion picture producers and recording companies.¹¹⁴ *It is only offered for exports and is not available for investments, the very purpose for which it was expressly authorized by Congress.*¹¹⁵

While there were twenty-one bilateral agreements signed with host nations as of December, 1964, U.S.I.A. was only prepared to issue the IMG in eight countries, having, on its own, suspended or terminated IMG availability in the others.¹¹⁶ Apparently the limited coverage has proved worthwhile for those American exporters who have used it, as U.S.I.A. has paid out almost seventy-five percent of the value of all IMG's issued.¹¹⁷ The premium charged is one percent per annum,¹¹⁸ which is required by statute to be not less than fifty dollars for each IMG or amendment thereto.¹¹⁹

It should also be noted that the IMG is subject to a different foreign policy purpose clause than the other Guaranty Programs.¹²⁰ This clause states that the United States should encourage domestic and foreign private enterprise to participate in and assist economic development, increase international trade, improve technical efficiency, and to take part in reaching similar goals. The clause also lists a number of objectives which seem incompatible with U.S.I.A.'s offering of the IMG to the Communist nations of Poland and Yugoslavia and the absolutist

¹¹⁴ *Supra* note 111, at 72-73.

¹¹⁵ U.S.I.A. has determined that the IMG *only* applies to the materials or to rights or licenses to use them. *Supra* note 111, at 72-73.

¹¹⁶ *Supra* note 111, at 72. The eight countries are: Afghanistan, Guinea, Korea, Pakistan, Poland, Turkey, Viet Nam and Yugoslavia.

¹¹⁷ As of June 30, 1964, contracts amounting to \$100,414,408 had been issued while \$74,303,015 had been paid out in claims. *Supra* note 111, at 72. It should be explained that these payments of claims do not represent total losses to the United States since the Treasury Department is authorized to, and does, sell the local currencies for U.S. dollars, 22 U.S.C. § 1442(d) (Supp. 1966). The actual loss due to exchange during the period was only \$11,522,165, or 11½ percent.

¹¹⁸ *Supra* note 111, at 73.

¹¹⁹ 22 U.S.C. § 1442(e) (Supp. 1966).

¹²⁰ 22 U.S.C. §§ 2351(a)-(b) (Supp. 1966). *See* 22 U.S.C.A. § 1442(a) (Supp. 1966) and Historical Note.

nation of Guinea. These goals include developing the economic strength of less developed *friendly* countries, fostering *private* initiative and *competition*, strengthening free labor unions, and discouraging monopolistic practices.¹²¹ It is ironic that while U.S.I.A. has ignored the clear desire of Congress to use the IMG to guaranty *investment*, not *export*, one portion of the policy clause explicitly urges drawing the attention of American business to, and aiding it in making, investments "in less-developed friendly countries and areas."¹²²

Despite the clearly expressed objectives in all the legislation, the Director of U.S.I.A. wrote a letter on September 28, 1961, to the Chairman of a House subcommittee in which he stated:

But my interest, of course, is chiefly in the ability of IMG to bring important target audiences within the range of American communications media capable of affecting people's thinking in a constructive manner. My feeling here is strongly reinforced by the flood of Communistic publications and films into areas of strategic importance to our country.¹²³

Within the next two years, the IMG was terminated in Burma and the Philippines and suspended in Indonesia, all areas of intense Communist propaganda and guerilla activity.¹²⁴ In line with its highly discretionary policy of only presenting a point of view favorable to the United States,¹²⁵ U.S.I.A. will review all materials either prior to or after export. If the latter, and U.S.I.A. determines that some or all of the materials exported do not meet its policy, it will refuse payment of claims covering those materials.¹²⁶ Thus, an exporter who does not submit his shipments to prior censorship by U.S.I.A. runs a severe risk of being unable to receive payment.

CAPITAL ASSISTANCE PROGRAMS

LOCAL CURRENCY LOANS

Under Section 104(e), Title I of Public Law 480, the Agricultural Trade Development and Assistance Act of 1954, certain of the foreign

¹²¹ 22 U.S.C. § 2351(a) (Supp. 1966), (emphasis added). There is also a portion (22 U.S.C. § 2351(b)(5) (Supp. 1966)) which urges discouraging nationalization and seizure of ownership and control of private investment.

¹²² 22 U.S.C. § 2351(b)(1) (Supp. 1966).

¹²³ *Supra* note 111, at 348.

¹²⁴ *Supra* note 111, at 72.

¹²⁵ *Supra* note 111, at 74, 348, ¶ 2(b).

¹²⁶ *Supra* note 111, at 73.

currencies received by the United States Government in payment for agricultural commodities may be lent to qualified borrowers to develop business and expand trade.¹²⁷ These local currency loans, usually referred to as "Cooley Loans," are named after Congressman Harold D. Cooley, who sponsored the amendment to Public Law 480, and are administered by AID.

Local currencies may be loaned to (1) American firms or their branches, subsidiaries, or affiliates, for business development and trade expansion in the foreign country, or to (2) either American firms or firms of the local country for expanding markets for, and consumption of, United States agricultural products abroad.

As a general rule, any corporation, partnership, association or other legal entity is considered as an American business firm under the Law if it is organized and has its principal place of business within the United States, is controlled by United States citizens, and is either a profit-making organization or an organization engaged in commercial, manufacturing or financial activities of the kind customarily engaged in by profit-making organizations. Majority beneficial ownership of an entity by United States citizens will, in and of itself, be deemed to constitute control of a firm. An individual citizen may also be considered an American business firm.¹²⁸

An applicant for a Cooley loan will be deemed to be an affiliate of an American business if the latter, by virtue of its equity interest in, and other commercial and operating ties to, the business has the power to exercise a significant influence on the policy and the operations of the applicant. Majority ownership of an applicant by an American firm will in and of itself be deemed to evidence such power. However, if the American firm owns less than a majority interest, the other commercial and operating ties between the firm and the applicant will be looked to to determine if such power exists.

Cooley funds are available in some of the countries where the United States has sold agricultural commodities. The funds may be used by the borrower to develop his business and to expand trade by financing such local costs as expansion of plant and equipment, land acquisition, industrial training, and other normal expenses of opera-

¹²⁷ 7 U.S.C. §§ 1691, 1704(d), (g) (Supp. 1966).

¹²⁸ Many of these eligibility requirements are substantially similar to the definition of "eligible investor" for guaranty purposes in 22 U.S.C. § 2183(c) (Supp. 1966). However, the inclusion of firms native to the host nation is an important broadening of the eligible class.

tion. Cooley loans may *not* be made for the manufacture of products which would be exported to the United States in competition with American made products, and they may *not* be made for the production of commodities which would be marketed in competition with American agricultural products. Cooley loans to foreign firms may be made only if they will be used to expand markets for American agricultural products.

Cooley loans usually bear interest at rates comparable to those charged by local development banks,¹²⁹ and maturities are related to the purposes of financing. Loans are repayable in the currency borrowed, without maintenance of value. In some cases, a guaranty of loan repayment may be required.

Since AID has taken over the Cooley Loan Fund from the Export-Import Bank, it has become the most readily available source of private investment capital from the United States Government. The reason for this is that the funds are clearly marked for no purpose other than private investment. The funds are available to firms that are beneficially substantially owned by United States investors. This has been interpreted to mean a company *with as little as twenty-five percent participation by United States investors will qualify on this requirement for the funds.*¹³⁰

It should be noted, however, that these funds are only useful if the investor wishes to participate in business in an area where Cooley Funds are available.¹³¹ AID usually requires, as a condition attached to these loans, that the United States principal of the affiliate to which the loan is made, make a substantial commitment to the particular project. Moreover, while the Cooley Loan Program is a principle point of AID's contact with the American business community, the dollar volume of these loans is small.¹³²

¹²⁹ 7 U.S.C. § 1704(t) (Supp. 1966). This is one of the most appealing features of the Cooley Program.

¹³⁰ This represents a major difference in definition between this Program and the Specific Risk Program. Under the latter, as has been shown above, this identical criterion ("substantially beneficially owned") has usually been interpreted by the identical agency (AID) to require *majority* ownership by United States investors.

¹³¹ For example, in fiscal 1964-65, Cooley Loans were only made to 14 countries.

¹³² From 1962 (when AID took over) through 1965, 162 loans had been authorized totalling \$186,315,521. Of this amount, the greatest portion had been allotted to the Middle East and South Asia (112 loans for \$167,735,206), much smaller amounts to Latin America (28 loans for \$10,363,395) and the Far East (20 loans for \$7,706,720), and virtually none for Africa (2 loans for \$510,000).

Further, from January 1, 1962 to February 18, 1966, AID received 135 loan applications which it turned down. The reasons for the rejections were varied but a few of the most common ones were: (1) inadequate equity participation by the applicant, (2) inadequate capital, and (3) priority of a competing loan application.

Although at first glance it may appear that the United States Government has done much in the area of supplying funds to United States firms wishing to establish business enterprises abroad, this is not exactly the true picture. In reality the administrators of AID have repeatedly responded with little more than lip service and the most limited stimulation of United States investment resources in this area. This strong reluctance to stimulate private foreign investment through the tools at hand is based on several fears. First of all, it is felt that the private investor will conduct himself in such a way as to become unpopular with the local government or people and thus greatly overshadow any economic gains realized. Secondly, private assistance, as these tools are, is feared to be far less effective as a tool of foreign policy than is direct government to government aid. Finally, it is said that the agency personnel prefer to deal with foreign governments than with private investors. Thus, once again, there appears to be a conflict between the expressed wishes of Congress and the reality of administration by the agency entrusted with the Program. This should not, however, dissuade the potential investor. As long as such programs are available, he should attempt to qualify for them as, if he is permitted to participate, they do offer real and important benefits.

DOLLAR LOANS

The Development Loan Fund was created in 1957¹³³ to replace the annual development assistance programs carried out under the Mutual Security Act of 1954.¹³⁴ The stated purpose of the Fund was:

to strengthen friendly countries by encouraging the development of their economies through a competitive free-enterprise system, to minimize or eliminate barriers to the flow of private investment capital and international trade, to facilitate the creation of a climate favorable to the investment of private capital, and to assist, on the basis of self-help and mutual cooperation, the efforts of free peoples to develop their economic resources and to increase their productive capabilities.¹³⁵

¹³³ 71 Stat. 355 (1957).

¹³⁴ 68 Stat. 840 (1954).

¹³⁵ 71 Stat. 604 (1957). The present statement of policy governing the Fund has been greatly expanded and modified. *See* 22 U.S.C. § 2151 (1967).

One of the main reasons for the Fund's new approach for financing foreign investment projects was the entry of the Soviet Union in the foreign aid field. Another causative reason was the difficulties which arose in the administration of development programs and grants through annual appropriations for each respective country. The loan fund technique is designed to give development programs a degree of stability through the assurance that certain funds are, and will be, available as needed in later years. This gives the administration greater independence in the negotiations with applicants for loans.

The Development Loan Fund, as operated today, has its legislative authority in the Foreign Assistance Act of 1961.¹³⁶ In keeping with the confirmed attitude of stressing the importance of private investments as the key element of foreign economic policy (rather than direct governmental involvement), the Act requires that "the President . . . carry out programs of assistance through private channels."¹³⁷

Under this Program, loans are made to private American investors as well as to private foreign enterprises and foreign governments. The legislation imposes six considerations which must be taken into account in determining whether or not to grant any particular loan:

- (1) Is financing available on a reasonable basis for all or part of the project from other free world sources, including sources within the United States?¹³⁸
- (2) The project must be economically and technically sound.¹³⁹
- (3) The project must reasonably contribute "to the development of economic resources or to the increase of productive capacities"¹⁴⁰ "taking into account the current human and material resource requirements"¹⁴¹ of the host nation.
- (4) The project must fit in with the long-term development of the host nation, and show a relationship to similar activities in the host nation and afford an opportunity for private enterprise participation.¹⁴²

¹³⁶ 22 U.S.C. §§ 2161-65 (Supp. 1966).

¹³⁷ 22 U.S.C. § 2351(b)(4) (Supp. 1966).

¹³⁸ 22 U.S.C. § 2161(b)(1) (Supp. 1966). AID interprets this requirement very strictly. It requires that funds be sought from various private United States sources, from the Eximbank, from the World Bank, the International Finance Corporation and, if in Latin America, through the Inter-American Development Bank. These latter three sources are indirect in that they make loans to private development banks which, in turn, make the loan to the investor.

¹³⁹ 22 U.S.C. § 2161(b)(2) (Supp. 1966). This includes a consideration of whether there are reasonable prospects of repayment and whether the repayment will be made in U.S. dollars.

¹⁴⁰ 22 U.S.C. § 2161(b)(3) (Supp. 1966).

¹⁴¹ 22 U.S.C. § 2161(f) (Supp. 1966).

¹⁴² 22 U.S.C. §§ 2161(b)(4), (f) (Supp. 1966).

- (5) The prospective host nation must be one which has programs of its own, including those of a self-help nature, aimed at the "vital, economic, political, and social concerns of its people."¹⁴³
- (6) The project must not have too adverse an effect on the United States economy, especially in the areas of labor surplus and balance of payments.¹⁴⁴

Host nation eligibility is further restricted by the 1966 amendments which state that the host nation must be making progress to respect and recognize various individual rights and freedoms, and improve the climate for private investments, and use the project to help achieve self-sustaining growth.¹⁴⁵

AID gives strong preference for loans to private American investors which will be used to finance the dollar cost of the investments. Practically speaking, this means that virtually all of the dollar loans granted will be for the purchase of goods and materials inside the United States to be used at the project site in the host nation. In line with this policy, AID requires that the investor follow certain "normal commercially acceptable business practices" which will result in achieving low competitive prices for such goods and materials.¹⁴⁶

Loans are made at interest rates of 5½ percent or greater. While loans are usually made repayable to AID directly in U.S. dollars, AID has, on occasion, arranged for loans to be repaid to the host nation in local currency and then have the host nation repay AID in U.S. dollars over a long period (*e.g.*, forty years) at about 2½ per cent interest. This is done where normal repayment may impose a burden on the limited foreign exchange resources of the host nation.

Applications for such loans are made by letter and must be made in great detail. AID requires that the letter show the following:

1. Applicant's full legal name, address, nature (whether corporation, partnership, etc.) and the country in which organized or incorporated.
2. A brief biographical sketch of the principal owners, directors, officers, and managers, including the percentage of U.S. and other ownership. Indicate the extent of management's experience and qualifications.

¹⁴³ 22 U.S.C. § 2161(b)(5) (Supp. 1966). An example of this would be concern by the host nation leading to equitable land distribution in many Latin American nations.

¹⁴⁴ 22 U.S.C. § 2161(b)(6) (Supp. 1966). AID accordingly, does not assist projects which would create undue competition with United States industries or which would, in effect, be "runaway industries" which go to the host nation in order to take advantage of lower labor costs. *See* 22 U.S.C. § 2370(d) (Supp. 1966).

¹⁴⁵ 22 U.S.C. § 2161(b)(7-9), *as amended*, Act of Sept. 19, 1966, Pub. L. No. 89-583 Pt. I, § 102(a), 80 Stat. 796.

¹⁴⁶ *Supra* note 94, at 34.

3. The amount of the loan requested from AID and a statement showing the specific uses to be made of the funds to be borrowed—buildings, machinery, services and equipment, etc.
4. The desired repayment period (in the form of a tentative repayment schedule).
5. If the enterprise is already in operation, submit (a) a current balance sheet and balance sheets for the prior three years, including statements of surplus, (b) a profit and loss statement for the past three years, (c) a statement of sources and uses of funds, and (d) a current cash flow statement, together with similar statements for the past three years. All financial statements should be audited if possible. Otherwise, they should be signed by an officer of the applicant.
6. All applicants must submit pro-forma balance sheets and profit and loss and cash flow statements estimated for future years until operations become fully developed with debt servicing stabilized. Such statements should indicate clearly the assumptions made in the projections and the bases of these assumptions.
7. The names of the applicant's bank(s).
8. The total cost of the proposed project (including all equity investment contemplated) and the amount, sources of, security for, and repayment terms for all proposed borrowing and other financing.
9. Any preliminary engineering, economic, and market studies already made which are pertinent to the proposed loan, including (a) the volume and kind of end products or services which would be produced, (b) the source of the required raw materials, (c) the markets to be supplied, and the competition, if any, (d) the transportation available for raw materials and finished products, and (e) a forecast of production costs.
10. A description of the efforts which have been made to raise the required capital from other free-world sources and the terms, if any, on which such capital is available.¹⁴⁷

OTHER SOURCES AND SERVICES

Another program available is the Investment Survey Program, the purpose of which is to encourage potential investors to investigate specific investment opportunities in friendly less developed countries.¹⁴⁸ AID has the authority to pay up to fifty percent of the approved costs of these investigations.¹⁴⁹ If the prospective investor makes the investment, he bears all the expenses of the survey and retains exclusive rights to the information derived from the study.¹⁵⁰ In order to be eligible to participate in the financing of investment surveys, the project must meet these three standards:

¹⁴⁷ *Supra* note 94, at 35-36.

¹⁴⁸ 22 U.S.C. § 2191(a) (Supp. 1966).

¹⁴⁹ 22 U.S.C. § 2191(a) (Supp. 1966).

¹⁵⁰ 22 U.S.C. § 2191(b) (Supp. 1966). If he does not undertake it, after the required cost payment, the survey becomes the property of AID and there is nothing to stop AID from turning it over to a competitor of the potential investor.

- (1) There must be reasonable prospects that the survey will result in an investment.
- (2) The project to be surveyed must be consistent with the AID objective of developing sound private sector enterprise.
- (3) The contemplated investment must be in tangible form and include a portion (generally in excess of 20 percent of the project's equity).¹⁵¹

The benefits of the investment survey program are twofold: first, AID encourages private investors to look into the possibility of investing in a foreign country, and second, the private investor does not stand to lose his entire investment in the case of an abandoned overseas venture.

For the American businessman who produces armaments and/or other equipment for military use, there is available an insurance and guaranty program for exports of such goods and materiel made to a foreign nation under a contract with the United States Government.¹⁵² This guaranty insures that the exporter will receive the full amount of the contract and also insures that in the event of default by the purchaser the United States Government will take over the contract and make the payments thereunder.

Still another program provides information to small businesses, through AID and the United States Department of Defense, regarding opportunities to supply commodities, defense articles, and services for foreign aid purposes.¹⁵³ The purpose of this program is to enable small businesses to participate, whenever possible, in supplying such items so as to equalize opportunities for small businesses vis-à-vis larger enterprises.

For exporters of surplus agricultural products, there is a guaranty program available (similar to that for military exports and others) offered by the Commodity Credit Corporation.¹⁵⁴ Under the C.C.C. program, the exports which can be covered are surplus agricultural commodities from private stocks as well as similar commodities purchased by the C.C.C. in its domestic parity program which are sold to domestic exporters. Moreover, this program pays part of the ship-

¹⁵¹ *Supra* note 94, at 8. Surveys as to oil, gas, mining, and other mineral extracting potentialities are not eligible.

¹⁵² 22 U.S.C. §§ 2315(b), 2316, 2317(b) (Supp. 1966). This program may soon be abolished by legislation now pending. The Senate has already voted for its abolition. See Averill, *Senate Votes to Abolish Pentagon's Arm's Aid Fund*, Chicago Sun-Times, Wed., Aug. 16, 1967, at 4 cols. 1-3.

¹⁵³ 22 U.S.C. § 2352 (Supp. 1966).

¹⁵⁴ 7 U.S.C. § 1702 (Supp. 1966).

ping costs. Since there is a requirement that commodities under this program be shipped in United States flag vessels, C.C.C. undertakes to pay the difference between the higher costs created by compliance with the requirement and the reasonable prevailing ocean freight charges.

Other fund sources, albeit indirect, are the investment guaranty programs of Japan and Germany.¹⁵⁵ Due to the advanced state of industrial development in both of these nations, the American investor seeking a joint venture partner would do well to consider a partnership with enterprises in these two countries and thus take advantage of two investment guaranty programs.

The Japanese program was instituted in 1956 and offers specific risk guaranties for equity investments and profits in any country regardless of its level of development. The risks insured against are:

- (a) expropriation or nationalization;
- (b) war, revolution, riot, civil war or other civil disturbance;
- (c) action of the host nation interfering with property necessary to the enterprise, *e.g.*, patents, mineral rights;
- (d) losses from disposing of investment equity following a suspension of operations for six months caused by an action in (c) above; and
- (e) inability to repatriate profits for two or more years due to:
 - (1) new exchange restrictions or any exchange restrictions contra to any assurances made at the time of investment,
 - (2) suspension of exchanges due to war, revolution or civil war, and
 - (3) freezing or confiscation of profits.

The guaranty covers seventy-five percent of all loss. Complete coverage costs only about three quarters of one percent per annum of the total amount of equity and expected profit to be insured. It is readily seen that in many respects the coverage is much broader than that provided by the United States Specific Risk Guaranties. Moreover, it costs about 40 percent less than comparable United States coverage for equity investments.¹⁵⁶

The German program was started in 1959. It provides coverage in countries with which Germany has a bilateral agreement, those which agree to institute the program, and those which protect foreign invest-

¹⁵⁵ See discussion of these programs in *INTERNATIONAL FINANCING AND INVESTMENT* (McDaniels, ed. 1964).

¹⁵⁶ As of December, 1961, outstanding guaranties totaled only \$12 million. While exact figures are not presently available, it is understood that the program has greatly expanded since that date. See the discussion of Japan's expanded foreign aid program in *United States Japan Trade*, 3 *BULLETIN OF THE UNITED STATES-JAPAN TRADE COUNCIL* (Feb. 1967).

ments by general law. The guaranty covers the book value of the investment and earnings up to twenty-four percent of book value but not in excess of eight percent thereof per annum. The risks protected against are:

- a) nationalization, confiscation, and their equivalents;
- b) war or armed conflict, revolution, and insurrection;
- c) blocking of payments or moratoria on them; and
- d) impossibility of transfer or conversion.

The usual maximum term is fifteen years, but periods up to twenty years may be allowed by way of exception. Coverage is limited to eighty percent of the total value of the investment and eligible earnings. The premium ranges from three-quarters to one and one-half percent depending upon the length of the guaranty period and various risk factors.¹⁵⁷

Funds are also available through a number of international and regional banks in which the United States is a participating member. Briefly they are:

(1) The International Bank for Reconstruction and Development (World Bank). The World Bank was founded in 1944 to make loans to member nations, their agencies and to private enterprise for the purpose of developing the industries and services needed for economic growth. The loans granted have been on a 20 to 25 year basis, currently at 6% interest, and have primarily been in the areas of electric power, general agricultural and industrial development and transportation. For private enterprises, the guarantee of the member nation is required. Financing for private investors is usually in the form of assistance as to the exchange costs involved in procurement of foreign goods and services.¹⁵⁸ The Bank also encourages private participation in the new loans and sells its own bond issues and portions of existing loans from its portfolio.

(2) The International Finance Corporation is an affiliate of the World Bank founded in 1956 for the same purposes as the Bank but with its activities limited to less-developed member areas. IFC's loans are limited to private investors and are available for local and foreign costs of the projects. They may be used either for fixed assets or working capital or both and are, generally, not as restricted as World Bank loans. However, IFC will not finance (directly) exports or imports. In appropriate cases, IFC will also make direct equity investments and provide technical and monetary assistance to private development finance companies.¹⁵⁹

¹⁵⁷ As of December, 1961, applications had been made for \$93 million of coverage of which \$42 million had been granted by that date.

¹⁵⁸ Through May, 1966, the World Bank had made 457 loans in 79 countries and territories totalling \$9.5 billion. At that time, the Bank's authorized capital stood at \$24 billion.

¹⁵⁹ As of March 31, 1966, IFC's capital of \$99,400,000 has been subscribed by its 81 member countries and it was empowered to borrow up to \$400 million from the World Bank.

(3) The International Development Association, a subsidiary of the World Bank, is to less-developed countries what IFC is to private investors wishing to invest in such countries. It makes long term (usually 50 years) loans to less-developed nations for an annual service charge of 3/4%. IDA permits the borrower to relend the loan funds to private investment projects at terms of repayment and interest which prevail in the recipient nation.¹⁶⁰

(4) The Inter-American Development Bank was started in 1959 to accelerate the pace of economic growth and development in all Latin American nations except Cuba. IDB makes loans to private and public enterprises at 6% interest, usually for 8 to 20 years, under its ordinary Capital Resources Program.¹⁶¹ Such loans are repayable in the currencies in which they were loaned. Under the Fund for Special Operations and the Social Progress Trust Fund, IDB makes loans ranging up to 30 years with interest rates ranging up to 4% for financing the development of low-income housing, transportation, power, irrigation, higher education, and similar activities. Repayment is in the currency loaned and procurement is generally limited to the United States and the borrowing nation and, under certain circumstances, other member countries.

(5) The Asian Development Bank started operations in November, 1966, and has thirty-one member nations including the United States and twelve other non-Asian nations. It is expected to do for its less-developed Asian members what IDB does in Latin America.¹⁶²

An important non-government non-profit American corporation, the International Executive Service Corps, provides management and technical advisors to assist private enterprises in developing countries. IESC arranges for executives to render such assistance without compensation, in most cases, for varying periods of time. The greatest value of the program is the training provided by the experienced executives to the local management of the enterprise. Executives are assigned on the basis of expertise to one or more foreign enterprises either in teams or as individuals. IESC is currently funded, for the most part, through interim financing from AID.

Another program of interest to American exporters is the AID Commodities Procurement Program. Under this Program, AID assists foreign governments, importers and enterprises in procuring commodities, goods and services¹⁶³ in the free world for AID development

¹⁶⁰ Through May, 1966, the total of funds committed by IDA (since November, 1961 when operations commenced) was \$1.26 billion. Total resources available were \$1.7 billion.

¹⁶¹ The subscribed Ordinary Capital as of September, 1966, stood at \$1.77 billion. Procurement anywhere in the free world is permitted.

¹⁶² As of February, 1967, the \$1 billion capital of ADB had been fully subscribed including \$200 million each from the U.S. and Japan. This is the first time since World War II that another nation has matched the U.S. financial contribution to any international organization.

¹⁶³ Commodities not eligible are those which are denied importation into the United

projects in foreign countries. AID makes purchases through negotiation and through bids. AID finances many of the costs of such purchases such as most shipping and packing costs, certain sales commissions, installation costs, personnel training costs, inspection services, and maritime war risk insurance costs. Preference is given to procurement in the United States.¹⁶⁴ Information as to such sales opportunities is available through AID's *Small Business Circular*, AID's Press Releases, and the United States Department of Commerce's weekly magazine *International Commerce* and its *Commerce Business Daily*. In connection with its foreign projects and its domestic studies, AID also frequently contracts for American individuals and organizations to work as experts in its technical assistance programs.

Also important to both investors and exporters are the information programs of AID, the Department of Commerce, and foreign nations. The more important sources of information are:¹⁶⁵

- (1) AID's *Small Business Circular* which advises American small businesses as to opportunities for participation in AID projects and of foreign requests for American manufacturers' catalogues;
- (2) AID's *Directory of Combination Export Managers* which is a list of export firms which can handle exports for smaller American businesses;
- (3) AID Mission libraries in foreign nations which provide detailed source material on the nations in which they are located;
- (4) AID's *Catalog of Investment Information and Opportunities* and its *Index* which give information as to where various types of investments are needed and what project requirements would be;
- (5) AID's *Industry Profiles* which provide plans and estimated costs for small and medium-size plants in specific industries in foreign nations;
- (6) Department of Commerce's *International Commerce* and its *Commerce Business Daily* discussed in the preceding paragraph;
- (7) Department of Commerce's *Overseas Business Reports* which provides background information on specific countries;
- (8) Department of Commerce's *World Trade Directory Reports* which provides commercial and financial information on specific foreign firms and individuals;
- (9) Department of Commerce field offices in the United States which can offer

States by statute, those of which the U.S. is a net importer, and those in the nature of luxury goods which are deemed unsuitable in relation to the goals of the United States foreign aid program.

¹⁶⁴ In the first half of 1965, 93 percent of such procurement amounting to \$616 million was made in the United States. From 1959 through June, 1965, the total value procured amounted to \$6.942 billion of which \$4.464 billion was procured in the U.S. Since 1961, more than 65 percent of the procurement in each year has been within the United States.

¹⁶⁵ See Appendix D for a bibliography of important readings in the entire area.

- assistance to individual American enterprises on foreign transactions and which are located in forty-two major American cities;
- (10) Various investment advisory offices of many developing nations located primarily in New York and Washington;
 - (11) U.S. Department of Labor series on labor law and relations and manpower resources in many foreign nations, for example, *Labor Law and Practice in Ceylon*;
 - (12) Department of Labor's *Labor Digest for Africa* (1967);
 - (13) United States Department of State's series of *Background Notes* for various nations, which provide up-to-date information on the vital statistics, governments, resources, and other facts about many foreign nations; and,
 - (14) Trans World Airlines' *MarketAir Newsletter*, which provides a list of export and import opportunities, international trade fairs, and general foreign business news.

CONCLUSION

There are many programs either funded directly through United States Government agencies or indirectly through United States participation in various national, international and regional bodies which offer substantial financial and informational assistance to the prospective American investor and exporter. Attorneys for such American businesses should make themselves aware of these opportunities so as to render better service to their clients. They may even inform their client of the programs so as to make him aware of expanded opportunities for his enterprise of which he may not have taken advantage.

At the same time, consideration, both as an attorney and as an American citizen, should be given as to how these programs are administered. There is no doubt that private investment should be the object of governmental solicitude and should receive as many incentives as practicable to insure or guarantee a favorable investment and trading climate. However, it must be also understood that such activities by the private sector of the American economy can not, for long, be used by United States agencies to further policy objectives of a given administration and be subjected to the ebb and flow, if not the inconsistent fluctuation, of such governmental policies depending upon the administration in power. It seems that many of those programs primarily directed at the assistance of the American private economic sector in foreign trade and investment carry their own seeds of destruction by their use as tools of foreign policy. The result has been a lack of encouragement and a gradual reduction of foreign under-developed countries' incentive programs to American trade and

investment as they do not wish to attract American investment and trade on those terms. Their fears are primarily based upon the fact that the American private sector is in a position, through governmental assistance, to economically control and dominate the underdeveloped country as well as fulfill United States foreign policy objectives. This has caused the world to view American private investors abroad as a new form of economic imperialism sanctioned by the United States Government.

APPENDIX A* SUMMARY OF FUND SOURCES

United States Agencies

	Export-Import Bank	Agency for International Development (Dollar Loans)	Agency for International Development (Foreign Currency Loans)	Commodity Credit Corporation
Purpose	To promote U.S. exports through dollar loans and assistance to exporters by means of financing, guarantees and insurance.	To promote economic development of less-developed friendly countries.	Business development and trade expansion.	To promote exports of U.S. surplus agricultural commodities.
Loans	Lends dollars only. Terms: for agricultural commodities—up to 12-18 months; for long term capital loans, 5-20 years (interest on these loans generally 6 per cent per annum).	Loans to a country may be for terms up to 40 years, including a 10-year grace period, with interest as low as 1 per cent per annum during the grace period and 2½ per cent per annum thereafter. Loans to private enterprises negotiated on basis of enterprise involved, with minimum interest rate of 6 per cent per annum.	Lends in local currencies at local interest rates, usually 3 to 10 years (15 years in exceptional circumstances). Loans must be acceptable to the foreign country.	Grants credits up to 3 years on applications supported by letters of credit issued, confirmed or advised by U.S. banks.
Guarantees and Insurance	Provides medium term political and credit guarantees to financial institutions in the United States. The institutions must assume the credit risks on the early maturities, which constitute 10 to 50 per cent of the total financing. Cooperates with Foreign Credit Insurance Associations in providing political and credit insurance for exporters.	Specific risk and extended risk guarantees available to private investors.	Not applicable.	No.
Who Can Borrow	United States private enterprises, foreign private enterprises, foreign governments and government agencies.	Governments or government entities of less-developed friendly countries, and certain private enterprises. This includes development banks, agricultural banks, housing banks.	U.S. firms and their affiliates, branches, subsidiaries. For overseas market expansion for U.S. agricultural products, firms of the host country also are eligible.	Export firms in the United States.
Where the Money Must Be Spent	United States.	United States, with few exceptions.	Within the country in which the funds originate.	United States.
Private Participation in Agency Loans	Eximbank encourages commercial banks and other private financial institutions to participate.	None.	None.	Not applicable; see LOANS.
Must Seek Private Capital First	Yes.	Administrator must take into account whether financing is available from other free-world sources on reasonable terms.	No.	See LOANS.
Must Ship Only in United States Vessels	Yes, unless waived by Maritime Administration. No restriction where assistance is by guarantee or insurance.	Not less than 50 per cent in U.S. vessels, more if desired; AID will pay freight only on cargo shipped in U.S. vessels.	Not applicable.	No.

* Chart from Bankers Trust Company booklet: *Washington Agencies that Help to Finance Foreign Trade.*

APPENDIX A (continued)

International Agencies

	World Bank	International Development Association	International Finance Corporation	International Monetary Fund	Inter-American Development Bank
Purpose	To finance projects helping to build the foundations of economic growth in less developed countries.	Same as World Bank.	To finance only private enterprises contributing to economic development of less developed member countries.	To promote stability of international exchange, and expansion and growth of world trade.	Principally to accelerate the economic development of its Latin American member nations; also finances social development projects.
Loans	Lends dollars and other currencies. Terms: 5 to 35 years, depending on project. Current standard rate: 6 per cent per annum. Government guarantees required except on loans to IFC.	Terms may be varied. To date loans have been for 50 years without interest, with repayment in a convertible currency, after a 10-year grace period. There is a service charge of 1/4 per cent per annum on the outstanding balance.	Invests in or lends to any enterprise that makes a useful contribution to the economic development of a member country. Does not invest in undertakings that are government-owned or government-operated. Can now invest in capital stock.	Credits take the form of foreign exchange transactions (currencies of other member nations advanced in exchange for local currencies) which are to be repaid in a period of 3 to 5 years. Rates are 2 to 5 per cent per annum, plus a service fee.	Lends in currencies of all member nations. Ordinary loans require repayment in the currency lent, but Special Fund loans may permit repayment in the borrowing nation's own currency. Social Progress Trust Fund Loans generally are repayable in local currency.
Guarantees and Insurance	Has authority to guarantee loans in whole or in part, but does not do so.	Same as World Bank.	Can underwrite the subscription of capital issues.	Not applicable.	Has authority to guarantee loans but has not yet done so.
Who Can Borrow	Governments of member nations, including territories and political subdivisions; public international or regional organizations.	Same as World Bank.	Private companies in member countries.	Governments of member nations.	Public or private entities in member countries.
Where the Money Must Be Spent	Member countries and Switzerland; normally other than the one in which project is located.	Same as World Bank.	Member countries and Switzerland.	No limitations.	Ordinary capital: worldwide procurement; Special Fund and Social Progress Trust Funds: in U.S. or recipient country.
Private Participation in Agency Loans	Commercial banks and other financial institutions welcomed.	No.	Welcomes financial participation by financial institutions or industrial partners in member countries.	No direct participation, but agreements between Fund and member nations serve to encourage private sources to lend to those countries.	Encouraged.
Must Seek Private Capital First	Yes.	Yes, and also World Bank.	Yes.	No.	Yes, and other public capital.
Must Ship Only in United States Vessels	No.	No.	No.	Not applicable.	Ordinary capital: no. Special Fund and Social Progress Trust Funds: yes, unless waived by Maritime Administration.

APPENDIX B*

**CHECKLIST OF REASONS RENDERING INVESTMENTS
INELIGIBLE FOR SPECIFIC RISK INVESTMENT GUARANTIES**

This is a list of the principal reasons for which an application for specific risk investment guaranties, or the pertinent part of such application, may be rejected. It is not controlling, and it is not definitive, but it is offered as a useful checklist and guide.

A. Identity of The Investor

1. *Citizenship and Ownership*—The Investor does not meet the requirement of United States citizenship as established in the statute, and also if a corporation, partnership, or association, the additional statutory requirement of substantial beneficial ownership by United States citizens.

2. *Reputation*—The Investor or his associates are of such bad reputation that the U.S. would be significantly injured in its relations with the host country if it were associated with the project.

3. *Member of or Delegate to Congress or Resident Commissioner*—The Investor is a member of or delegate to Congress or is a resident commissioner, provided that this prohibition shall not apply to guaranty contracts entered into with a corporation for its general benefit (required by statute).

B. Identity of The Host Country and Approved by It

4. *Eligible Country or Area*—The country or area in which the investment is to be located is not a "less developed friendly country or area" as required by the statute, or is not a country or area with which or concerning which the U.S. has entered into the required bilateral agreement instituting the program in that country or area, or is a country where U.S. policy objectives prohibit issuance of guaranties.

5. *Foreign Government Approval*—The host government has not approved the project in which the investment is to be made for investment guaranty purposes, or the foreign government approval that is received is inadequate.

C. Nature of Project in Which Investment is to be Made

6. *Agricultural Commodities*—The investment is for a project of increasing the production or processing of food, feeds, and other agricultural commodities (including meats) for the purpose of export, if the food, feed, or other agricultural commodity is of a type in surplus in the U.S.

7. *Arms Production*—The investment is for the construction or operation of a munitions or armaments factory.

* This is Appendix F of AID, *Handbook*, *supra* note 42, at pp. 52-54.

APPENDIX B (continued)

8. *Real Estate*—The investment is for the establishment or operation of a business engaged in purchasing and selling real estate (as contrasted with development of real estate).

9. *Hotel with Gambling*—The investment is for the construction or operation of a hotel containing a gambling operation.

10. *Alcoholic Beverages*—The investment is for the establishment or operation of a business engaged in producing alcoholic beverages.

11. *Government-Owned and Controlled Entity*—The investment is in an enterprise owned and controlled by the host foreign government without any significant participation by private enterprise.

12. *Speculation*—The principal purpose of the investment is speculation in commodities or other items.

13. *Entertainment*—The investment is for facilities devoted to entertainment such as sports stadiums, amusement parks, country clubs, golf courses.

14. *Runaway Industries*—The so-called “runaway industry” (i.e., when a going concern within the United States is closed down and re-established in a foreign country, all the time retaining and producing for essentially the same markets in the United States) may not be eligible for guaranty coverage. While guaranties may be issued for investments in foreign enterprises that plan to export their products to the United States, an investment in a runaway industry that is devoted almost entirely to production for export to the United States will not normally be eligible unless there are counter-balancing advantages.

D. Nature of the Investment

15. *Date of Investment*—The investment is not new in that it has been made in the enterprise, or at least irrevocably committed to the enterprise, prior to the date of application.

16. *Purchase of Existing Shares*—The investment adds nothing to development of the host country in that it consists of the purchase of outstanding equity shares of the enterprise from the former owner. However, such acquisition costs may be guaranteed to the extent that the purchase of such shares is matched by new investment in the enterprise.

17. *Refinancing Debt*—The investment consists of refinancing of existing debts of the enterprise. Under established guidelines, exceptions are made to the extent that debts that are mature or will mature within one year are refinanced by loans with an average maturity of six years or more; or debts which will mature within three years are refinanced by loans with an average maturity of 10 years or more.

18. *Duration of Loans or Credit*—The transaction is a sale, or is a credit or loan with an average maturity of less than three years, rather than an investment as that term is commonly understood.

19. *Supplier's Credit*—The investment is solely a short-term supplier's credit.

APPENDIX B (*continued*)

20. *Debt of Foreign Government* — The investment consists of goods and services for which the investor receives an obligation of a foreign government to pay money, e.g., a foreign government bond.

21. *Inconvertible Local Currency*—The funds to be invested consist of inconvertible local currency.

22. *Interest Rate on Loan*—The investment consists of a loan at what is determined to be a usurious rate of interest applying the norms and standards for the country involved.

23. *Trademark, Tradename, Goodwill*—The investment consists solely of a license for the use of a trade name, a trade mark, or good will.

24. *Source of Funds*—The U.S. Investor is only a conduit for putting non-U.S. capital into the project with benefit of A.I.D. guaranties, lacking either true risk of loss, or substantial assets, or both.

E. Effect on Economy of Host Foreign Country

25. *Development of LDC*—The investment is in a project which does not satisfy the statutory test of furthering the development of the economic resources and productive capacities of the Less Developed Country or area in which the project is located.

26. *Restrictive Trade Agreements*—The foreign government has conferred upon the project in which the investment is being made a monopoly or some other privilege which unreasonably restricts trade for a long period of time without overbalancing advantages from the viewpoint of the country's economic and social development.

27. *Foreign Exchange Considerations*—The operator of the project in which the investment is made must not impose a strain upon the foreign exchange reserves of the foreign country without overbalancing advantages to the country involved.

F. Effect on Economy of United States

28. *U.S. Balance of Payments*—The investment is to be used for procurement of goods and services outside the United States in other developed countries and does not accord with current guidelines.

APPENDIX C*

Countries Where Investment Guaranties Are Available

Convertibility	Expropriation	War, Revolution & Insurrection	Extended Risk
Afghanistan	Afghanistan	Afghanistan *	—
Argentina	Argentina ¹	Argentina ¹	Argentina ¹
Bolivia	Bolivia	Bolivia	Bolivia
Brazil	Brazil	Brazil	Brazil
British Honduras	British Honduras	British Honduras	British Honduras
Central African Republic	Central African Republic	Central African Republic	Central African Republic
Ceylon	Ceylon	Ceylon	Ceylon
Chad	Chad	Chad	Chad
Chile	Chile	Chile	Chile
China, Republic of	China, Republic of	China, Republic of	China, Republic of
Colombia	Colombia	Colombia	Colombia
Congo (Brazzaville) ²	Congo (Brazzaville) ²	Congo (Brazzaville) ²	Congo (Brazzaville) ²
Congo (Kinshasa)	Congo (Kinshasa)	Congo (Kinshasa)	Congo (Kinshasa)
Costa Rica	Costa Rica	Costa Rica ¹	Costa Rica ¹
Cyprus	Cyprus	Cyprus	Cyprus
Dahomey	Dahomey	Dahomey	Dahomey
Dominican Republic	Dominican Republic	Dominican Republic	Dominican Republic
Ecuador	Ecuador	Ecuador	Ecuador
El Salvador	El Salvador	—	—
Ethiopia	Ethiopia	—	—
Gabon	Gabon	Gabon	Gabon
Ghana	Ghana	—	—
Greece	Greece	Greece	Greece
Guatemala ²	Guatemala ²	—	—
Guinea	Guinea	Guinea	Guinea
Guyana	Guyana	Guyana	Guyana
Haiti	Haiti	—	—
Honduras	Honduras	Honduras	Honduras
India	India	India	India
Iran	Iran	—	—
Israel	Israel	Israel	Israel
Ivory Coast	Ivory Coast	Ivory Coast	Ivory Coast
Jamaica	Jamaica	Jamaica	Jamaica
Jordan	Jordan	Jordan	Jordan
Kenya	Kenya	Kenya	Kenya
Korea	Korea	Korea	Korea
Laos	Laos	Laos	Laos
Liberia	Liberia	Liberia	Liberia
Malagasy	Malagasy	Malagasy	Malagasy
Malaysia	Malaysia	Malaysia	Malaysia
Mali	Mali	Mali	Mali
Mauritania	Mauritania	Mauritania	Mauritania
Morocco	Morocco	Morocco	Morocco
Nepal	Nepal	Nepal	Nepal
Nicaragua	Nicaragua	Nicaragua ¹	Nicaragua ¹
Niger	Niger	Niger	Niger
Nigeria	Nigeria	—	—
Pakistan	Pakistan	—	—
Panama	Panama	Panama *	—
Paraguay	Paraguay	Paraguay	Paraguay
Peru	—	—	—
Philippines	Philippines	Philippines	Philippines
Portugal	Portugal	—	—
Rwanda ¹	Rwanda ¹	Rwanda ¹	Rwanda ¹
Senegal	Senegal	Senegal	Senegal
Sierra Leone	Sierra Leone	Sierra Leone	Sierra Leone
Singapore	Singapore	Singapore	Singapore
Somali Republic	Somali Republic	Somali Republic	Somali Republic

* This is Exhibit II from AID, *Aids to Business*, *supra* note 1, at 41-42.

APPENDIX C (*Continued*)

Convertibility	Expropriation	War, Revolution & Insurrection	Extended Risk
Spain ²	Spain ³	—	—
Sudan	Sudan	Sudan	Sudan
Tanzania	Tanzania	Tanzania	Tanzania
Thailand	Thailand	Thailand	Thailand
Togo	Togo	Togo	Togo
Trinidad-Tobago	Trinidad-Tobago	Trinidad-Tobago	Trinidad-Tobago
Tunisia	Tunisia	Tunisia	Tunisia
Turkey	Turkey	Turkey	Turkey
Uganda	Uganda	Uganda	Uganda
Upper Volta	Upper Volta	Upper Volta	Upper Volta
U.A.R. (Egypt)	U.A.R. (Egypt)	U.A.R. (Egypt)	U.A.R. (Egypt)
Uruguay ¹	Uruguay ¹	—	—
Vietnam	Vietnam	Vietnam	Vietnam
Venezuela	Venezuela	Venezuela	Venezuela
Yugoslavia ²	Yugoslavia ²	—	—
Zambia	Zambia	Zambia	Zambia

¹ Although applications will be accepted, guaranties cannot be processed until agreement is ratified by country's legislative body and in force.

² Restricted availability.

³ Not presently available.

* Includes only guaranties against loss due to damage from war.

APPENDIX D

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