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Overseas Private Investment Corporation: Current Authority and Programs

Charles F. Lipman

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by Charles F. Lipman*

I. Introduction

Overseas Private Investment Corporation (OPIC) was created in 1969 by an amendment[1] to the Foreign Assistance Act of 1961 (FAA).[2] This amendment established OPIC as an autonomous agency of the United States "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas . . . ."[3] OPIC's authority under the FAA was significantly amended in 1974[4] and in 1978.[5]

OPIC promotes economic development by insuring investments made by United States investors in developing country projects against the "political risks" of currency inconvertibility, expropriation, and war, revolution and insurrection.[6] It also finances projects sponsored by U.S. business in the developing countries by loan guaranties,[7] direct loans of OPIC's own funds,[8] and by financing surveys of investment opportunities.[9] This article discusses OPIC insurance and finance programs available under current legislation and policy to assist projects of U.S. investors in the developing countries.

II. Legislative Background

OPIC programs originated in the Marshall Plan to assist in the re-

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* Assistant General Counsel for Finance, Overseas Private Investment Corporation. A.B. 1957, Stanford University; LL.B. 1961, Stanford Law School. The author wishes to acknowledge his appreciation for the assistance of members of OPIC's staff who have commented on this article; any errors are, of course, the sole responsibility of the author.

1 Foreign Assistance Act of 1969, Pub. L. No. 91-175, sec. 105, 83 Stat. 807 (codified as amended at 22 U.S.C. §§ 2191-2200a (1976 & Supp. II 1978)).

2 Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at scattered sections of 22 U.S.C.).

3 Pub. L. No. 91-175, sec. 105, § 231, 83 Stat. 809 (codified at 22 U.S.C. § 2191 (1976)).

4 OPIC Amendments Act of 1974, Pub. L. No. 93-390, 88 Stat. 763 (codified as amended at 22 U.S.C. §§ 2191, 2194, 2195, 2197, 2199, 2200, 2200a (Supp. II 1978)).

5 OPIC Amendments Act of 1978, Pub. L. No. 95-268, 92 Stat. 213 (codified at 22 U.S.C. §§ 2191, 2194, 2195, 2197, 2199, 2200, 2200a (Supp. II 1978)).

6 22 U.S.C. § 2194(a)(1) (1976).

7 *Id.* § 2194(b) (Supp. II 1978).

8 *Id.* § 2194(c) (Supp. II 1978).

9 *Id.* § 2194(d) (Supp. II 1978).

construction of Europe after World War II. Under the Economic Cooperation Act of 1948,[10] the Economic Cooperation Administration was authorized to guarantee the convertibility into U.S. dollars of foreign currencies received from private projects.[11] In 1950 it was authorized to guarantee against expropriation risks.[12] The Mutual Security Act of 1954[13] transferred these programs to the International Cooperation Administration (ICA),[14] and under the Mutual Security Act of 1956 guaranties against war risks were authorized.[15]

The Mutual Security Act of 1957[16] created the Development Loan Fund (DLF)[17] with authority to guarantee loans against all risks, commercial as well as political, and to "guarantee" equity and loans against political risks.[18] In 1959 the guaranty program was limited to the underdeveloped countries.[19]

The United States foreign assistance programs were consolidated and expanded with the adoption of the Foreign Assistance Act in 1961[20] which authorized the President to create the Agency for International Development (AID)[21] and, among other things, transferred to it the ICA and DLF guaranty authorities.[22] This act added revolution and insurrection coverage to the war coverage,[23] added all-risk guaranties of equity to the DLF all-risk loan guaranty authority,[24] authorized housing guaranties,[25] and authorized assistance in the surveying of investment opportunities.[26]

In 1969 Congress amended the FAA to create OPIC as an autonomous United States agency. The guaranty programs of AID (except for housing guaranties) were transferred to it, and an investment encouragement program modifying the AID investment survey program, as well as

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[10] Pub. L. No. 80-472, 62 Stat. 137 (1948) (repealed 1954).

[11] *Id.* § 111(b)(3), 62 Stat. 144-45.

[12] Economic Cooperation Act of 1950, Pub. L. No. 81-535, § 103, 64 Stat. 198 (repealed 1954).

[13] Mutual Security Act of 1954, Pub. L. No. 83-665, 68 Stat. 847.

[14] Executive Order 10610, §§ 101-103, May 9, 1955 effective June 30, 1955.

[15] Mutual Security Act of 1956, Pub. L. No. 84-726, 70 Stat. 555 (repealed 1961).

[16] Mutual Security Act of 1957, Pub. L. No. 85-141, 71 Stat. 335 (repealed in part 1961, remaining sections codified as amended at scattered sections of 22 U.S.C.).

[17] *Id.* § 6, 71 Stat. 357 (amending title II of the Mutual Security Act of 1954, ch. 937, 68 Stat. 832) (repealed 1961).

[18] *Id.*

[19] Mutual Security Act of 1959, Pub. L. No. 86-108, § 205(m), 73 Stat. 246 (amending § 413 of the Mutual Security Act of 1954) (repealed 1961).

[20] Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at scattered sections of 22 U.S.C.).

[21] *See* Exec. Order No. 10,973, § 102 (1961), *reprinted in* 22 U.S.C. § 2381 (1976).

[22] Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2381 (1976)).

[23] *Id.* § 221, 75 Stat. 429 (codified as amended at 22 U.S.C. § 2194 (1976)).

[24] *Id.* § 223, 75 Stat. 431 (codified as amended at 22 U.S.C. § 2194 (1976)).

[25] *Id.* § 224, 75 Stat. 432 (codified as amended at 22 U.S.C. §§ 2181-2182 (1976)).

[26] *Id.* § 231, 75 Stat. 432 (codified as amended at 22 U.S.C. § 2194 (1976)).

a direct loan program, were added.[27] The AID specific-risk and extended-risk guaranty programs became the OPIC insurance and guaranty programs, respectively.

On April 10, 1979, President Carter presented to the Congress Reorganization Plan No. 2 of 1979 for the organization of the United States International Development Cooperation Agency (IDCA). This agency was to be managed by a director responsible for setting overall development assistance policy and for coordinating international development activities supported by the United States.[28] IDCA was established October 1, 1979 and contains AID, OPIC and a new agency to be organized known as the Institute for Scientific and Technological Cooperation.[29] Although OPIC is an affiliate of IDCA, OPIC's Board of Directors, chaired by the Director of IDCA, will continue to set OPIC policy.[30]

III. OPIC General Legislation and Policies

A. Basic Purposes

OPIC's creation and basic purposes are set forth in FAA section 231,[31] as follows:

> To mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States, there is hereby created the Overseas Private Investment Corporation . . ., which shall be an agency of the United States under the policy guidance of the Secretary of State.

OPIC is directed to conduct financing, insurance, and reinsurance operations on a self-sustaining basis, taking into account in its financing operations the economic and financial soundness of projects.[32] To date OPIC operations have been self-sustaining in the aggregate and without cost to the taxpayer.[33] OPIC is further directed to utilize private credit and investment institutions and OPIC's guaranty authority as the principal means of mobilizing private investment funds.[34] It must also conduct its

[27] Foreign Assistance Act of 1969, Pub. L. No. 91-175, sec. 105, 83 Stat. 807 (codified as amended at 22 U.S.C. §§ 2191-2200a (1976 & Supp. II 1978)).

[28] Reorganization Plan No. 2 detailed President Carter's desire to create the International Development Cooperation Agency (IDCA) and for its director to assume all the functions and authority vested in the Agency for International Development (AID) and its Administrator. Reorg. Plan No. 2 of 1979, 44 Fed. Reg. 41,165 (1979). This plan specifically transferred to the Director of IDCA the Administrator of AID's position as the Chairman of the Board of OPIC. *Id.* § 6(a)(1). With Executive Order 12,163 of 1979 President Carter declared effective the aforementioned portion of Reorganization Plan No. 2. Exec. Order No. 12,163 § 1-101, 44 Fed. Reg. 56,673 (1979).

[29] Exec. Order No. 12,163, §§ 1-101, 401, 44 Fed. Reg. 56,673 (1979).

[30] *Id.* § 1-101 (declaring effective § 6 of Reorg. Plan No. 2 of 1979, 44 Fed. Reg. 41,165); *see* 22 U.S.C. § 2193(b) (1976).

[31] 22 U.S.C. § 2191 (1976).

[32] *Id.* § 2191(a).

[33] [1971-1979] OPIC ANN. REPS. OPIC's net income for the year ending Sept. 30, 1980 was $64.6 million. Memorandum for the Board of Directors, Financial statements for the Twelve Months ending September 30, 1980 (Nov. 6, 1980) (copy on file in the office of the *North Carolina Journal of International Law and Commercial Regulation*).

[34] 22 U.S.C. § 2191(b) (1976).

insurance operations with due regard to risk management. This includes efforts to share its insurance and reinsurance risks,[35] to consider the extent to which developing country governments are receptive to private enterprise,[36] to foster private initiative and competition and to discourage monopolistic practices.

B. Preference for Small U.S. Business and Least Developed Countries

In the 1978 legislation[37] Congress directed OPIC to focus its attention on the least developed countries and on the smaller U.S. businesses,[38] although OPIC operations are not limited to such countries or to such U.S. businesses. OPIC is directed to give preferential consideration to projects in developing countries that have annual per capita incomes of $520 or less (in 1975 dollars) and to restrict its activities for projects in developing countries that have annual per capita incomes of $1,000 or more (in 1975 dollars); this last restriction is subject to certain exceptions, however.[39] The new loan program added by the Foreign Assistance Act of 1969 is limited to projects that are sponsored by or significantly involve U.S. small business or cooperatives.[40] In the context of OPIC programs, U.S. "small business" means businesses below the "Fortune 1000" list of industrial companies and non-industrial businesses with stockholders' equity less than $37 million.[41] OPIC is also directed to give preferential consideration to U.S. small business to the maximum degree possible in its insurance, reinsurance and guaranty activities, and to increase the proportion of projects sponsored by small U.S. business to at least 30% of all projects insured, reinsured or guaranteed by OPIC.[42] To assist in promoting these objectives, OPIC is directed to devote up to 50% of its annual net income (after suitable allocations to reserves) to assist small business and cooperatives under programs authorized by the

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[35] *Id.* § 2191(d).

[36] *Id.* § 2191(f) (Supp. II 1978).

[37] OPIC Amendments Act of 1978, Pub. L. No. 95-268, 92 Stat. 213 (codified at 22 U.S.C. §§ 2191, 2194, 2195, 2197, 2199, 2200, 2200(a) (Supp. II 1978)).

[38] 22 U.S.C. § 2191 (Supp. II 1978).

[39] *Id.* § 2191(2). By resolutions of its Board of Directors [hereinafter cited as BDR], the OPIC Board resolved by BDR(77)26 (Sept. 20, 1977), *as amended* by BDR(79)13 (May 1, 1979) and by BDR(80)19-22 (May 13, 1980), to limit OPIC programs to countries in which the annual per capita incomes (in 1975 dollars) do not exceed $1,000, except for:

A. energy and mineral exploration or development projects in non-OPEC countries;
B. projects sponsored by U.S. small business or cooperatives;
C. reinsurance of private underwriters when approved by the Board;
D. insurance of letters of credit posted by contractors or exporters as guaranties of their bid, performance, advance payment or similar obligations;
E. projects promising significant net U.S. trade benefits; and other projects determined by the Board to involve an "extraordinarily significant development benefit." BDR(79)13 at 2 (May 1, 1979).

[40] 22 U.S.C. § 2194(c) (Supp. II 1978).

[41] H.R. CONF. REP. NO. 1043, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 646, 648-49; S. REP. NO. 95-505, 95th Cong., 2d Sess. 25; Memorandum of OPIC President, Updating of Standards Used in Defining Small Businesses (June 17, 1980).

[42] 22 U.S.C. § 2191(e) (Supp. II 1978).

FAA.[43]

C. *Protection of the U.S. Economy*

Congress also sought under the FAA to promote the U.S. economy generally and in some cases to protect specific U.S. industries. Thus, OPIC is required, to the greatest degree possible and in a manner consistent with its goals, to further the balance of payments and employment objectives of the United States.[44] It must decline to assist investment in projects if OPIC determines such investment is likely to cause the investor significantly to reduce its U.S. employment in order to replace its U.S. production with production from foreign sources to serve the same market,[45] or is likely to cause a significant reduction in U.S. employment generally.[46] OPIC is also forbidden to assist new or significantly expanded copper projects if production is planned to begin before January 1, 1981 or thereafter if such assistance would injure the primary U.S. copper industry.[47] It must also refuse to assist projects to establish or expand the production or processing of palm oil, sugar or citrus crops for export[48] to the United States.[49] In addition to these statutory limitations, OPIC policy prevents assistance to projects for the production of munitions or alcoholic beverages or projects that support gambling facilities.[50]

D. *Management*

OPIC was created in corporate form to assure that its operations would be conducted in a businesslike manner consistent with its overall objectives.[51] OPIC is managed by a Board of Directors of thirteen persons appointed by the President of the United States, seven of whom are from outside the government and must be confirmed by the United States Senate. Of these seven, one must be experienced in small business, one in organized labor, and one in cooperatives. Of the six government directors, the President of OPIC, the Director of IDCA (Chairman of OPIC's Board of Directors) and the United States Trade Representative of the new Office of the United States Trade Representative (Vice Chairman of OPIC's Board of Directors) serve *ex officio*, and the remaining three are appointed by and serve at the pleasure of the President.[52] Nor-

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43 *Id.* § 2200.

44 *Id.* § 2191(h).

45 *Id.* § 2191(k)(1).

46 *Id.* § 2191(l).

47 *Id.* § 2199(j).

48 *Id.* § 2199(k).

49 H.R. CONF. REP. NO. 1043, 95th Cong., 2d Sess. 11, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 646, 651.

50 OVERSEAS PRIVATE INVESTMENT CORPORATION, FINANCE HANDBOOK 6 (May 1980) [hereinafter cited as FINANCE HANDBOOK].

51 H.R. REP. NO. 611, 91st Cong., 1st Sess. 28 (1969).

52 *See* 22 U.S.C. § 2193 (1976); Exec. Order No. 12,163, 44 Fed. Reg. 56,673 at 56,674

mally these three are representatives from the Departments of State, Treasury and Commerce whose presence on OPIC's Board promotes coordination of OPIC operations with other related branches of the U.S. Government.

OPIC operations, led by its President and Executive Vice President, are divided into departments headed by Vice Presidents for Insurance, Finance, General Counsel, Development, Public and Congressional Affairs, Treasurer, and Personnel and Administration. OPIC has a staff of about 130 persons based in Washington, D.C.

IV. OPIC Insurance Programs

A. General Criteria

The major function of OPIC is the operation of insurance programs insuring long-term investment of eligible investors in developing country projects against the political risks of inconvertibility of foreign currencies, expropriation, and war, revolution and insurrection.[53] It should be noted that OPIC insures *investment* in projects, not project company assets or operations themselves, although the existence of covered political risks is usually measured by the effect of host country acts on such assets or operations. As described below, OPIC applies several criteria in issuing investment insurance, including consideration of the nature of the investment, eligibility of the investor, eligibility of the country, foreign government project approval, OPIC evaluation of the project, extent of coverage, and premiums.

1. Time of Investment

Because OPIC is directed "to mobilize and facilitate the participation of United States private capital"[54] OPIC insures only new investment in new projects or in expansions of existing projects. OPIC may also insure investment made to purchase outstanding ownership interests in project companies to the extent that the investors also make new investments in these companies. The investor must request a "Registration Letter" from OPIC in order to establish that its investment has not already been made or irrevocably committed. Registration Letters are issued by OPIC on the basis of preliminary information submitted by the investor but do not constitute "insurance binders" committing OPIC eventually to issue investment insurance. After issuance of the Registration Letter, the investor must submit a formal, detailed application for

(1979). Section 4 of Reorganization Plan No. 3 of 1979, Reorganization of Functions Relating to International Trade, provides that the Trade Representative shall be Vice Chairman of OPIC's Board of Directors and that a 13th member of OPIC's Board of Directors shall be appointed by the President of the United States from outside the U.S. government. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273-74 (1979). Section 4 of Reorganization Plan No. 3 became effective January 2, 1980. Exec. Order No. 12,188, 45 Fed. Reg. 989, § 1-107 (1980).

53 22 U.S.C. § 2194(a)(1) (1976).

54 *Id.* § 2191.

insurance.[55]

2. *Form of Investment*

Although normally investment is in the form of cash, the FAA permits an insurable investment to take several forms of equity or debt.

> [T]he term 'investment' includes any contribution of funds, commodities, services, patents, processes, or techniques, in the form of (1) a loan or loans to an approved project, (2) the purchase of a share of ownership in any such project, (3) participation in royalties, earnings, or profits of any such project, and (4) the furnishing of commodities or services pursuant to a lease or other contract . . . .[56]

3. *Eligible Investor*

OPIC investment insurance and guaranties may be issued only to "eligible investors," which are defined as follows:

> the term 'eligible investor' means: (1) United States citizens; (2) corporations, partnerships, or other associations including nonprofit associations, created under the laws of the United States or any State or territory thereof and substantially beneficially owned by United States citizens; and (3) foreign corporations, partnerships, or other associations wholly owned by one or more such United States citizens, corporations, partnerships, or other associations: *Provided, however*, That the eligibility of such foreign corporation shall be determined without regard to any shares, in aggregate less than 5 per centum of the total issued and subscribed share capital, held by other than the United States owners: *Provided further*, That in the case of any loan investment a final determination of eligibility may be made at the time the insurance or guaranty is issued; in all other cases, the investor must be eligible at the time a claim arises as well as at the time the insurance or guaranty is issued . . . .[57]

OPIC considers a corporate investor to be "substantially beneficially owned" by U.S. citizens if more than 50% of each class of its outstanding stock is beneficially owned by U.S. citizens, and will trace back through known intermediary owners to the ultimate beneficial owner.[58] Stock of publicly-owned corporations held by nominees with U.S. addresses is deemed to be owned by U.S. citizens unless the investor has contrary knowlege.[59] It should be noted that the FAA limits only the ownership of the investor, not the ownership of the enterprise into which the insured or guaranteed investment is made.[60]

4. *Eligible Countries*

OPIC follows the policies of international development banks in de-

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[55] OVERSEAS PRIVATE INVESTMENT CORPORATION, INVESTMENT INSURANCE HANDBOOK 18-20 (Aug. 1980) [hereinafter cited as INSURANCE HANDBOOK].

[56] 22 U.S.C. § 2198(a) (1976).

[57] *Id.* § 2198(c).

[58] INSURANCE HANDBOOK, *supra* note 55, at 3-5.

[59] *Id.* at 5.

[60] 22 U.S.C. § 2198(c) (1976).

termining whether a country meets the test of being "less developed."[61] Generally, countries permitted to borrow from the International Development Association of the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Caribbean Development Bank, the Asian Development Bank and the African Development Bank are considered by OPIC to be "less developed" for the operation of OPIC programs.[62] OPIC programs are available in over ninety developing countries and dependent areas.[63] Because country eligibility changes from time to time based on legal and policy considerations, OPIC should be consulted to determine the eligibility of particular countries at any specific time.[64]

5. *Foreign Government Approval*

The FAA requires that OPIC insurance, guaranties and reinsurance be made only of investment in countries whose governments have agreed with the United States to enter into such a program.[65] OPIC must also determine that suitable arrangements exist in such countries to protect the interests of the United States acquired by reason of these programs.[66] OPIC attempts to satisfy these requirements by bilateral agreements between the United States and such host countries which, among other things, require host country government approval of OPIC insurance and guaranty projects before OPIC insurance or guaranties are issued. The investor is required to contact the host country to obtain this foreign government approval which is then returned to OPIC via the U.S. Embassy in such country.[67] In this way, OPIC ascertains that the investor has made its project known to the host country and that the host country is willing to receive it with knowledge of OPIC's role as insurer or guarantor.

6. *Project Evaluation*

OPIC's application for insurance requests detailed information about the investment in question including factors that bear on OPIC policies. The names and ownership of the investor and project company, the nature of the proposed investment and the requested amount of OPIC insurance must be supplied. The application also requests infor-

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61 BDR (73)33 (Dec. 17, 1973) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

62 *Id.*

63 OVERSEAS PRIVATE INVESTMENT CORPORATION, Country and Area List (Aug. 1980).

64 Inquiries regarding OPIC's insurance program should be addressed to:

Applications Officer
Overseas Private Investment Corporation
Washington, D.C. 20527
(202) 632-1820

65 22 U.S.C. § 2197(a) (1976).

66 *Id.* § 2197(b).

67 *See* INSURANCE HANDBOOK, *supra* note 55, at 5, 20.

mation on the economic and social effect of the project on the host country and on the United States, on U.S. balance of payments and employment, and on the environment.[68] OPIC's experience has been that most projects qualify for insurance based on this application.

In accordance with its mandate to conduct its insurance operations with due regard to risk management,[69] OPIC may suggest methods of reducing political risks. These include structuring investment plans to include more debt than equity, "multinationalizing" projects through joint ventures with host country investors, joint financings with multinational organizations, and loans from other countries. Further, OPIC limits its risk by providing differing premium rates and insurance limits on investment in so-called "large or sensitive" foreign projects[70] and by rationing its insurance to avoid heavy concentrations in certain countries or industries.[71] The insured investor is also required to assume at least 10% of the risk of loss of the investment except to the extent not permitted by state law or with respect to financial institutions making loans to unrelated parties.[72]

7. *Extent of Coverage*

OPIC insurance, guaranty or reinsurance coverage is limited to a duration of twenty years for equity investment[73] and to an amount equal to the original investment made in the project company plus earnings thereon, with adjustments permitted to the dollar value of project assets to reflect replacement cost.[74] Pursuant to the 10% co-insurance requirement referred to in the preceding paragraph, OPIC normally will insure 90% of an original equity investment plus 90% of dividends to be earned thereon, and will insure 90% of a loan plus 90% of interest to accrue thereon,[75] up to 270% of the original loan or equity investments.

The investor may elect to carry one or more of the coverages for inconvertibility, expropriation, and war, revolution and insurrection, and must elect a "Maximum Insured Amount" for each coverage which may never thereafter be increased. The Maximum Insured Amount for each risk is broken down into the "Current Insured Amount" (the insurance in force during each contract year) and the "Standby Amount" (the unused OPIC commitment to insure). The investor elects each amount annually and such amounts continue unchanged (except for any OPIC insurance payment during the year) until the next contract anniversary

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68 *Id.* at 17-18; FINANCE HANDBOOK, *supra* note 50, at 8.

69 22 U.S.C. § 2191(d) (1976).

70 BDR (71)18 (March 8, 1971) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

71 BDR (76)18 (Aug. 3, 1976); BDR (73)23 (Sept. 10, 1973) (copies on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

72 22 U.S.C. § 2197(f) (Supp. II 1978).

73 *Id.* § 2197(e) (1976).

74 *Id.* § 2197(f) (Supp. II 1978).

75 INSURANCE HANDBOOK, *supra* note 55, at 6.

date. The "Current Insured Amount" must at least equal the investment at risk for expropriation and for war, revolution and insurrection coverages.[76]

8. *Premiums*

OPIC is required to charge premiums for its insurance, guaranty and reinsurance coverages.[77] For insurance these premiums vary with the category of project involved: manufacturing and services, natural resources, oil and gas, institutional loans, and contractors' and exporters' guaranties.[78] The premiums listed in footnote 78 are the base rates nor-

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[76] *Id.* at 9.

[77] 22 U.S.C. § 2197(d) (1976).

[78] INSURANCE HANDBOOK, *supra* note 55, at 10-12. The HANDBOOK specifies the following premium rate structure:

Manufacturing/Services Projects

Coverage	Current (%)	Standby (%)
Inconvertibility	.30	.25
Expropriation	.60	.25
War, Rev., Insurr.	.60	.25

Institutional Loans

Coverage	Current (%)	Unused Commitment (%)
Inconvertibility	.25	.20
Expropriation	.30	.20
War, Rev., Insurr.	.60	.20
Inconv., Exp. (combined)	.50	.30
Inconv., Exp., WRI (combined)	.90	.50

Natural Resource Projects (other than oil and gas)

Coverage	Current (%)	Standby (%)
Inconvertibility	.30	.25
Expropriation	.90	.25
War, Rev., Insurr.	.60	.25

Contractors' and Exporters' Guaranty Coverage

Coverage	Current (%)	Standby (%)
Bid, Performance and Advance Payment Guaranties	.60	.25

Oil and Gas Projects

Coverage	Exploration (%)	Development/Production (%)
Inconvertibility	0.1	0.3
Expropriation	0.4	1.5
War, Revolution, Insurrection ("WRI")	0.6	0.6
Interference with Operations ("IWO")	0.4	0.4
Primary Standby (per coverage*)	0.075	0.25
Secondary Standby (per coverage**)	0.0075	0.0075

* for Primary Standby premiums, WRI and IWO are treated as one coverage.
** Secondary Standby is intended to cover amounts needed only after discovery of oil or gas in commercial quantities.

Id. at 10-12.

mally applied. These may be increased or decreased by 33% depending on OPIC's assessment of the project.[79] The Standard Insurance Contract (defined *infra*) permits OPIC to increase the foregoing premiums by up to 50% through the tenth year of coverage and by up to 100% thereafter.[80]

9. *Insurance Contracts*

OPIC has developed a number of insurance contracts to accommodate various types of investment and projects. These contracts consist of general terms and conditions of standard provisions and special terms and conditions to fit the particular investor, investment and project. The principal contract OPIC uses to insure equity and non-institutional loans is form 234 KGT 12-70 (revised) General Terms and Conditions and Special Terms and Conditions (herein cited as the "Standard Insurance Contract"). Because the Standard Insurance Contract is in general use today for most investments, sometimes modified by addenda for special transactions, it will be used to describe OPIC insurance terms.

B. *Inconvertibility Insurance*

OPIC's inconvertibility insurance provides that the investor will be able to convert local currency received with respect to the insured investment into U.S. dollars under host country rules applied on the date of the OPIC insurance contract.

1. *Authority*

FAA section 234(a)(1)(A)[81] authorizes OPIC to insure in whole or in part against:

> inability to convert into United States dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof . . . .

It should be noted that this authority does not permit OPIC to insure against devaluation of currencies or to insure conversion of funds received otherwise than as earnings or profits on or repayment of the insured investment or as compensation for the sale or disposition of the insured investment. Therefore, OPIC does not insure the convertibility of a project company's funds needed, for example, to procure equipment abroad or to service uninsured foreign debt.

2. *Transfer Blockage*

Under the Standard Insurance Contract OPIC agrees, upon appli-

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[79] *Id.* at 12.
[80] *Id.*
[81] 22 U.S.C. § 2194(a)(1)(A) (1976).

cation from the insured investor, to transfer into U.S. dollars local currency received with respect to an insured investment and held by the investor for not more than eighteen months and which the investor, after taking reasonable steps, has been unable to transfer for one of three reasons: inability to transfer (1) for thirty days because of a host country law regulating currency transfers, (2) for sixty days because of the failure of appropriate agencies of the host country to act after application for such currency transfer, or (3) for thirty days during which time the investor can obtain currency transfer only at an exchange rate less than 99% of the rate currently in effect.

3. OPIC Currency Transfer

An important condition to OPIC currency transfer is that such local currency could have been exchanged for U.S. dollars in comparable circumstances on the date the OPIC insurance contract was issued. OPIC insures only against the worsening of currency convertibility conditions.

The exchange rate at which OPIC will transfer such local currency is the rate in effect thirty or sixty days prior to the date of the investor's application to OPIC, depending on the relevant blockage period referred to above. OPIC will transfer such local currency to U.S. dollars upon delivery to OPIC, in cash or by draft subject to collection, of the local currency the investor was unable to transfer.

Pursuant to the bilateral agreements between the United States and host countries referred to above, the U.S. government may use foreign currencies received by OPIC to pay U.S. Embassy and other expenses in those host countries. Upon such payments, the U.S. Treasury credits OPIC's account with an equivalent amount of dollars, permitting OPIC to recoup its payments to insured investors.

C. Expropriation Insurance

1. Authority

FAA section 234(a)(1)(B)[82] authorizes OPIC to insure, upon such terms and conditions as OPIC may determine, against the "loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government . . . ." FAA section 238(b)[83] defines expropriation to include: "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, 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 . . . ." Pursuant to this authority, OPIC has developed comprehensive expropriation coverage of a broad range of actions taken by host coun-

[82] *Id.* § 2194(a)(1)(B).
[83] *Id.* § 2198(b).

tries, with or without compensation, that have specific effects on the project company or investor and that are not subject to certain exceptions.

2. Expropriatory Action

"Expropriatory Action" is defined by the Standard Insurance Contract as action taken, authorized, ratified or condoned by the government of the project country that lasts for one year and prevents the investor: (1) from receiving payment due under securities acquired for the insured investment, (2) from exercising fundamental rights with respect to the project company as a shareholder or a creditor, (3) from disposing of securities obtained for the insured investment, (4) from using in the host country or repatriating proceeds of the investment within eighteen months after receipt in the host country ("blocked currency receipts"), or (5) that prevents the project company from exercising control over or disposing of a substantial portion of its property or from operating the project.

Such action, however, is not deemed to constitute compensable Expropriatory Action if it results from: (1) any revenue or regulatory law not expressly for expropriation which is not arbitrary and which does not violate accepted principles of international law; (2) the failure of the investor or project company reasonably to contest such action; (3) agreements voluntarily made by the investor or project company; (4) provocation by the investor or project company; (5) insolvency proceedings against the project company unless the host government blocks available measures to restrain such proceedings; (6) bona fide exchange control actions of the host country; (7) action of the host country as a shareholder or official of the project company permitted by applicable law; or (8) a breach by the host country of an agreement to invest equity in the project company.

3. Compensation Conditions

Two conditions to OPIC compensation are intended to assure that the Expropriatory Action is fundamental to the interests of the insured investor. First, the Expropriatory Action must last at least one year. During this period the Standard Insurance Contract requires the investor to take all reasonable measures to pursue and preserve all administrative and judicial remedies and to preserve the assets of the project company. OPIC itself may become involved in negotiations and other measures to encourage the host government to cease action that may become expropriatory.

Second, the insured investor must transfer to OPIC all of its interest in the project company upon payment by OPIC. Except with respect to blocked currency receipts, the investor is required to assign to OPIC all of its interest in the securities representing the insured investment and all assets and causes of action with respect thereto. With such exception,

OPIC does not furnish partial expropriation coverage; therefore, an investor must weigh the advantage to it of OPIC's insurance payment for expropriation against the retention of its interest in the project company which it might continue profitably.

4. *Amount of Compensation*

Except for blocked currency receipts, the amount of compensation payable by OPIC is the lesser of the Current Insured Amount in effect for expropriation coverage and the "Net Investment" attributable thereto. Net Investment is defined for equity investment as the amount invested plus or minus earnings or losses thereon and less return of invested capital. For loans, it is defined as the outstanding principal plus accrued and unpaid interest thereon. Such OPIC compensation is reduced by the amount of any property received by the investor from others (the project company or host country) with respect to the insured investment. It is also limited with respect to debt investment to the amount the investor could have received by liquidation of the project company in bankruptcy on the date of expropriation. Compensation for blocked currency receipts is the U.S. dollar value of such receipts.

D. *War, Revolution and Insurrection Insurance*

The FAA authorizes OPIC to insure investment in whole or in part against "loss due to war, revolution, or insurrection."[84] In implementation of this authority, under the Standard Insurance Contract OPIC compensates an investor for its "Ratable Share" of "Damage" caused by war, revolution or insurrection to property of the project company.

1. *Damage*

Damage in this context means physical injury to tangible property or its disappearance or seizure and retention directly caused by war, whether or not declared, or by revolution or insurrection. This includes action taken by the investor or by the project company to defend against existing or expected hostile acts. The coverage does not compensate for civil strife of a lesser degree than revolution or insurrection although it does cover acts of sabotage by organized revolutionary forces.[85]

2. *Investor's Ratable Share*

The investor's Ratable Share of such damaged property is deemed to be the percent that (1) the sum of the project company's debt to or guaranteed by the insured investor plus equity invested by the insured investor bears to (2) the sum of such project company debt plus the total book value of project company equity. The value of such damaged prop-

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[84] *Id.* § 2194(a)(1)(C).

[85] INSURANCE HANDBOOK, *supra* note 55, at 8-9, 14-15.

erty is deemed to be its cost to the project company (not exceeding fair market value in the United States) plus freight, insurance, import duties, installation and other related costs.

3. *Amount of Compensation*

OPIC undertakes to pay the investor the lesser of its Ratable Share of the Damage (after deducting any compensation received by the insured investor from any other source for such Damage), the Current Insured Amount for war coverage, and the Net Investment (discussed above), provided that such compensation exceeds the lesser of $10,000 or 1% of the Current Insured Amount for war coverage on the date of Damage. The insured investor agrees to credit such OPIC compensation for debt investment to outstanding principal of indebtedness insured by OPIC and to assign to OPIC any claims, causes of action, or rights which the investor may have for compensation from other sources for such Damage.

The amount of OPIC compensation is further limited to the lesser of the reasonable cost of repairing or replacing the damaged property within a reasonable time and the amount by which such Damage reduced the fair market value of such damaged property in the project country.

If conditions in the host country make it hazardous to investigate the amount of Damage, OPIC will compensate the insured investor 60% of the value of the damaged property. Such compensation is subject to adjustment for five years on the basis of further information.

E. *OPIC Insurance for Specific Transactions*

OPIC has developed several insurance policies to fit certain specific transactions and industries.

1. *Institutional Loans*

By a special insurance policy, OPIC insures loans of financial institutions that are made to unrelated project companies against the same political risks as described above which cause default in scheduled payments of such loans for three months, or for one month in the case of subsequent defaults. Such defaults may be in repaying a loan as originally scheduled, as accelerated for default by the project company or as rescheduled with OPIC approval. The insured institutional lender is not required to assume at least 10% of the loss as required for other investors,[86] and therefore 100% of institutional loans and interest thereon are normally covered.

Subsequent defaults for eighteen months after the first compensable default are deemed to be caused by the same political risk unless OPIC

[86] 22 U.S.C. § 2197(f) (Supp. II 1978).

proves otherwise. After the project company resumes scheduled payments for eighteen consecutive months, the burden of proof shifts back to the insured lender to prove that subsequent defaults were caused by a political risk covered by OPIC insurance. Where the same insured lender has made insured and uninsured loans to the same project company, payments received by the lender are pro-rated between such loans for OPIC insurance purposes.

The Standard Insurance Contract is used to insure loans made by lenders affiliated with project companies but limits OPIC compensation to 90% or less of the loss. OPIC also insures guaranties made by eligible investors of third-party loans, whether or not such third party is itself eligible for OPIC insurance.

2. *Branch Bank and Other Branch Operations*

OPIC branch bank insurance provides coverage for transactions typical in branch banking operations covering the initial branch capital contributed by the home office and credit and overdraft facilities between the home office and the branch. OPIC insurance is also available to cover investment by home offices of industrial firms in their branches in developing countries. The home office and branch are required to keep records as if the branch were a separate corporation in order to calculate the investment in the branch and return of investment and earnings thereon.

3. *Contractors and Exporters*

OPIC insures obligations under bid, performance, advance-payment, payment, and retained-percentage guaranties posted by U.S. construction, service or export contractors in favor of host country project owners. OPIC insures that such guaranties, normally in the form of on-demand letters of credit, will not be drawn unless justified by non-performance of the contractor. OPIC compensates the insured contractor up to 90% of the amount drawn if the host government fails to pay a judicial or arbitral award resolving such performance issue in favor of the contractor. OPIC compensation is also provided if such proceedings are blocked by the host government or result in a corrupt or unsupported award to the host country.[87]

4. *Mineral Projects*

OPIC insures investment in mineral projects pursuant to the political risk coverages discussed above for up to 90% of the investment plus earnings thereon depending on OPIC's assessment of the project risk. During the exploration phase all three coverages are available for investment attributable to intangible costs and tangible assets. Losses resulting

[87] INSURANCE HANDBOOK, *supra* note 55, at 12-13.

from the breach by the host country of specific contracts may also be covered, the premium for which is specially established. OPIC insurance may also cover payments for maintenance expenses resulting from a closing of operations for at least six months caused by war, revolution or insurrrection.[88]

5. *Oil and Gas Projects*

OPIC covers up to 90% of the insured investor's net unrecovered costs in oil and gas projects (the sum of the tangible property and, after discovery of oil or gas in commercial quantities, operating costs, including a 6% allowance for overhead, less the value of recoveries attributable to costs plus return of the original investment), not to exceed the investor's interest in proven reserves of oil or gas. Prior to discovery of oil or gas in commercial quantities, intangible costs of drilling "dry holes" are not covered. Coverage is issued for twelve years, which OPIC may elect to extend for another eight years.[89] Inconvertibility of currency coverage is provided as discussed above.

Compensation for war, revolution and insurrection damage is generally the cost of repair or replacement of equipment or the reduction of its fair market value. OPIC also insures against interference with operations caused by war, revolution or insurrection that makes such operations unreasonably hazardous for a period of six months or more. Compensation for such interference is 90% of the net unrecovered cost of the investor, which must be returned to OPIC without interest if the investor is able to resume operations within five years.[90]

Expropriation coverage includes the breach by the host government of production sharing or concession agreements which last six months or more with certain results. This includes breach of the investor's rights to take the oil or gas or to be compensated for it. Expropriation coverage also includes compensation for confiscated tangible property and bank accounts based on the value of such property.[91]

F. *Outstanding Insurance and Claims*

As of June 30, 1980, outstanding OPIC insurance aggregated $2,720,297,980 of inconvertibility coverage; $3,160,994,744 of expropriation coverage; and $2,772,029,548 of war, revolution and insurrection coverage.[92]

As of June 15, 1980 OPIC (and its predecessor AID) had settled 102 insurance claims for more than $366.6 million through cash payments or

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88 *Id.* at 13.
89 *Id.* at 14.
90 *Id.* at 15.
91 *Id.* at 15-17.
92 OVERSEAS PRIVATE INVESTMENT CORPORATION, STATUS OF INVESTMENT INSURANCE CONTRACTS, REP. NO. I, at 172 (June 30, 1980).

guaranties. OPIC had paid $128.8 million in cash; an additional $84.9 million in cash paid to insured investors was obtained from third parties in exchange for host country obligations guaranteed by OPIC. Of the remaining $152.9 million, $144.9 million was represented by host country obligations held by insured investors and guaranteed by OPIC. OPIC also indemnified an insured investor against potential loss of up to $8 million.[93]

Eighteen claims have been denied under the insurance programs (ten by OPIC), five of which were submitted to arbitration by insured investors. Of the total $128.8 million of OPIC cash settlements, OPIC has recovered $59.5 million plus interest from host countries and from the disposal of assets acquired in subrogation to the rights of insured investors.[94]

V. OPIC Finance Programs

OPIC operates finance programs in which it guarantees loans and equity investments made by eligible U.S. investors,[95] lends directly its own funds,[96] and finances the investigation of investment opportunities.[97] Although this financing is provided in U.S. dollars, OPIC also has authority to lend foreign currencies that are owned by the United States, that are determined by the Secretary of the Treasury to exceed normal U.S. Government requirements, and that are allocated to OPIC by the Office of Management and Budget.[98] OPIC can also lend foreign currencies generated under U.S. agricultural sales programs and allocated to OPIC.[99] OPIC finance programs are subject to the same OPIC-wide principles and restrictions referred to above.[100] In addition, OPIC is not permitted to make direct loans or to finance feasibility studies for the extraction of oil or gas and is limited in financing projects for the extraction of non-fuel minerals by direct loans to $4 million per year[101] and by feasibility studies to $200,000 per year.[102]

A. Financing Criteria

Because OPIC is directed to conduct its financing operations on a self-sustaining basis, with consideration of the economic and financial soundness of projects,[103] OPIC financing is furnished on commercial

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93 OVERSEAS PRIVATE INVESTMENT CORPORATION, "Insurance Claims Experienced to Date: OPIC and Its Predecessor Agency," Press Release No. RJ/503, at 1 (June 1980).

94 *Id.*

95 22 U.S.C. § 2194(b) (Supp. II 1978).

96 *Id.* § 2194(c).

97 *Id.* § 2194(d).

98 *Id.* § 2194(c).

99 7 U.S.C. § 1704(e) (1976).

100 *See* text accompanying notes 54-72, 77 *supra.*

101 22 U.S.C. § 2194(c) (Supp. II 1978).

102 *Id.* § 2194(d).

103 *Id.* § 2191(a) (1976).

terms rather than the concessional terms ordinarily associated with government-to-government aid programs. OPIC has developed several principles which apply to all of its financing whether by way of direct loans, guaranteed loans or local currency loans.

1. *Successful Sponsor with Financial Interest*

OPIC generally requires that the project be sponsored by a U.S. party which has a successful operating history in the project industry and which will take a meaningful share of the risk. This includes investment of at least 25% of the project company's equity, which the sponsor is required to retain for the term of the OPIC financing. Because OPIC normally engages in "project financing" in which OPIC repayment is based wholly on the financial resources, cash flow and assets of the project company itself without resort to sponsor or host government guaranties, the project sponsor is required to submit an application for OPIC financing to establish that the project will be economically, technically and financially sound.

2. *Financial Structure*

Appropriate debt to equity ratios must be established to promote a conservative financial posture of project companies and to avoid the risk of high debt leverage ratios. Although this may vary with the industry and specific project, OPIC has found a 60% debt to 40% equity structure to be satisfactory for project companies. OPIC financing likewise will vary with the industry and project but usually is limited to between 35% and 45% of the total funding of new project companies, and up to 70% for expansions of existing companies.

The maturity schedule of OPIC financing is based on the ability of a project company to service its debt and to make a reasonable return to its owners, and usually is for a longer period than financing available from U.S. or host country sources. OPIC financing normally matures in approximately equal semi-annual installments over approximately twelve years including a suitable grace period for repayment of principal. This permits the project company an adequate period to complete construction and to begin commercial operations.

3. *Industries*

Except for the limitations applying to OPIC programs generally,[104] there are no limits on the industries OPIC may finance. It should be noted that the oil, gas and mineral restrictions applying to direct loans and investment encouragement assistance[105] do not apply to OPIC guaranteed loans. OPIC finances projects in a wide range of industries in-

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[104] *See* notes 44-50 and accompanying text *supra*.
[105] *See* 22 U.S.C. § 2194(c)-(d) (Supp. II 1978).

cluding manufacturing, processing, mineral extraction, forestry, fishing, agribusiness, utilities, hotels, and service enterprises.

4. Project Ownership

Although OPIC direct loans must be made to firms privately owned or of mixed public and private ownership, OPIC guaranteed loans have no such statutory requirement.[106] These loans are, however, generally subject to the 25% U.S. sponsor ownership policy discussed above. Although OPIC financing is generally made to projects at least 50% privately owned, OPIC may finance projects in which government has voting control if management will be in private hands through management contracts.

5. Project Completion Agreement

Because project costs occasionally exceed the amount of planned financing, project sponsors are normally required to enter into a project completion arrangement requiring them to invest cost-overrun funds either in the form of equity or debt subordinated to debt furnished by OPIC. This assures that the project will be finished, will meet certain completion production tests, and will begin operations with sufficient working capital.

6. Collateral Security

OPIC financing is usually secured by mortgages of project company real property, liens on movable property and occasionally by the proceeds of contracts under which production of the project company is sold. Occasionally security in off-shore bank accounts or trusts can be used to avoid the high cost of host country mortgages, the host country taxes and fees which are often based on the amount being secured. For those projects in which the project company's assets and expected receipts are not adequate, OPIC may require security from the project sponsors.

7. Loan Documentation

OPIC prepares the loan agreements for loans made or guaranteed by it and other important related documents, such as the OPIC guaranty agreement and the project completion agreement referred to above. Such loan agreements contain the normal provisions of long-term loans for foreign "project financing" type operations. Because OPIC normally finances new companies in developing countries relying solely on a project's assets and cash generation for repayment of OPIC financing, OPIC

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106 *Id.* § 2194(b)-(c); *Report of the Committee on Foreign Affairs on H.R. 14580*, 91st Cong., 1st Sess. 23 (Nov. 6, 1969); BDR (71)39 (June 14, 1971) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

must carefully review and approve all aspects of the project company's present and proposed business.

Conditions for loan disbursement normally include the following documents which OPIC must approve: proof that sufficient equity has been invested; other loan agreements; construction and procurement documents for project facilities and equipment; various collateral security documents to secure repayment of OPIC's loan; contracts for management of the project company; supply agreements for acquisition of raw materials; marketing agreements for sale of the project company's goods and services; articles of association and by-laws of the project company; documents establishing that the project company has acquired sufficient land, utilities, and commercial insurance; desirable host government project approvals; and legal opinions from host country counsel to OPIC, and to the project company and U.S. counsel to the sponsor stating that all desirable contracts and government approvals have been duly issued and are in effect. Other loan terms require the project company to carry out the project, to maintain its rights and properties, to submit certain financial statements to OPIC, and to observe limitations on its indebtedness, encumbrances, and dividend payments.

B. Guaranties

1. Authority

OPIC's guaranty authority is set forth in FAA section 234(b)[107] which authorizes OPIC:

> To issue to eligible investors guaranties of loans and other investments made by such investors assuring against loss due to such risks and upon such terms and conditions as [OPIC] may determine: *Provided, however*, That such guaranties on other than loan investments shall not exceed 75 per centum of such investment: *Provided further*, That except for loan investments for credit unions made by eligible credit unions or credit union associations, the aggregate amount of investment (exclusive of interest and earnings) so guaranteed with respect to any project shall not exceed, at the time of issuance of any such guaranty, 75 per centum of the total investment committed to any such project as determined by [OPIC], which determination shall be conclusive for purposes of [OPIC's] authority to issue any such guaranty . . . .

OPIC is directed to use its guaranty authority as its principal means to mobilize the funds of private credit and investment institutions,[108] and is authorized to guarantee up to $750 million in the aggregate.[109] The FAA contains several provisions designed to assure that guaranteed lenders will be paid pursuant to OPIC's guaranty.

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[107] 22 U.S.C. § 2194(b) (Supp. II 1978).
[108] *Id.* § 2191(b) (1976).
[109] *Id.* § 2195(a)(2) (Supp. II 1978).

2. *Character of OPIC-Guaranteed Obligations*

OPIC guaranties constitute obligations of the United States and are backed by its full faith and credit[110] as confirmed by the Attorney General of the United States.[111] OPIC guaranty obligations are also backed by a cash reserve which must at least equal 25% of guaranties outstanding or committed under the FAA and predecessor authority when each OPIC guaranty is committed.[112] This cash reserve is a separate fund available to meet OPIC guaranty obligations[113] and may not be used for other purposes. As of June 30, 1980, the OPIC guaranty reserve totaled $113,523,915 to secure payment of guaranties outstanding or committed aggregating $168.4 million,[114] which was $71.4 million in excess of the required minimum 25% reserve and provided capacity for expected expansion of guaranty operations. Congress has authorized the appropriation of whatever further funds may be necessary to replenish the guaranty reserve to permit OPIC to pay guaranty claims.[115] Each guaranty executed by an authorized officer of OPIC is conclusively presumed to be issued in compliance with the FAA.[116] Pursuant to this authority OPIC guaranties outstanding or committed, as of June 23, 1980, aggregated $168.4 million including $87,370 of guaranteed participations in OPIC direct loans.[117]

3. *Guaranty Coverage*

The lender guaranteed by OPIC must be an eligible investor as defined above with respect to OPIC insurance.[118] OPIC may not guarantee more than 75% of total investment committed to a project,[119] but such total may include other loans and equity. OPIC's guaranty covers 100% of the obligation to which it relates, including loan principal, interest and taxes thereon that the project company agrees to pay. It is a guaranty of payment, not merely of collection, under which the guaranteed lender need not exhaust remedies against a defaulting borrower prior to receiving payment from OPIC.

4. *Qualification under Other Laws*

OPIC-guaranteed obligations generally qualify as "legal" investments under various state and federal laws. For example, OPIC has

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110 *Id.* § 2197(c) (1976).
111 Opinion of the Attorney General of the United States, 42 Op. Atty. Gen. 455 (1972).
112 22 U.S.C. § 2195(a)(2) (Supp. II 1978).
113 *Id.* § 2195(c)-(d) (1976).
114 OVERSEAS PRIVATE INVESTMENT CORPORATION, STATUS OF AUTHORITIES, REP. NO. C.I.A. (June 30, 1980).
115 22 U.S.C. § 2195(f) (1976).
116 *Id.* § 2197(j).
117 OVERSEAS PRIVATE INVESTMENT CORPORATION, *supra* note 114.
118 22 U.S.C. § 2198(c) (1976); *see* text accompanying note 57 *supra*.
119 22 U.S.C. § 2194(b) (Supp. II 1978).

been advised that OPIC-guaranteed obligations qualify: for "reserve investment" by New York insurers under section 81(1) of the New York Insurance Law;[120] for lawful investment by New York savings banks under section 235(1) of the New York Banking Law;[121] for exemption from the 10% lending limits on national banks set forth in 12 U.S.C. section 84;[122] as "exempt securities" under section 3(a)(2) of the Securities Act of 1933,[123] under section 3(a)12 of the Securities Exchange Act of 1934,[124] and under section 304(a)(4) of the Trust Indenture Act of 1939;[125] and as legal investments for Federal Home Loan Banks and federal savings and loan associations.[126]

5. Terms of OPIC-Guaranteed Loans

OPIC generally uses guaranteed loans for financings up to $50 million. Interest rates on such loans are comparable to other U.S. government guaranteed obligations of similar maturities and are subject to OPIC approval. Over time, interest rates on OPIC-guaranteed loans have varied from 7⅞% to 10¾% per annum. In addition, OPIC charges guaranty fees on the outstanding loan principal ranging from 1¾% to 2½% per annum; this amount varies with OPIC's assessment of the commercial and political risks of the project. Together with the guaranteed lender, OPIC charges commitment and cancellation fees for its guaranty commitment. It requires the borrowing company to pay any taxes assessed against OPIC and to reimburse OPIC's out-of-pocket costs for such matters as the fees and expenses of outside business and host-country legal counsel, and communications and similar costs incurred with respect to the guaranteed financing.

C. Direct Loans

1. Authority

OPIC direct loans are authorized by FAA section 234(c)[127] which

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[120] Section 81(1) N.Y. INS. LAW (McKinney 1966). Letter from the State of New York Insurance Department to OPIC (Nov. 11, 1971) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

[121] Section 235(1) N.Y. BANKING LAW (McKinney 1971). Letter from the State of New York Banking Department to OPIC (Nov. 3, 1971) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

[122] (1976). Letter from the Administrator of National Banks, Office of the Comptroller of Currency, to OPIC (June 6, 1972) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

[123] 15 U.S.C. § 77c(a)(2) (1976); *see* "No action" letters, note 125 *infra*.

[124] 15 U.S.C. § 78c(a)(12) (1976); *see* "No action" letters, note 125 *infra*.

[125] 15 U.S.C. § 77ddd(a)(4) (1976); "No action" letters from the Securities and Exchange Commission to OPIC (Dec. 21, 1972, Aug. 23, 1971) (copies on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*).

[126] Letter from the Federal Home Loan Bank Board to OPIC (March 11, 1975) (copy on file in the office of the *North Carolina Journal of International Law & Commercial Regulation*); *see* 12 C.F.R. § 545.9(b) (1979).

[127] 22 U.S.C. § 2194(c) (Supp. II 1978).

authorizes OPIC:

> To make loans in United States dollars repayable in dollars or loans in foreign currencies (including . . . such foreign currencies which the Secretary of the Treasury may determine to be excess to the normal requirements of the United States and the Director of the Bureau of the Budget may allocate) to firms privately owned or of mixed private and public ownership upon such terms and conditions as [OPIC] may determine. [OPIC] may not purchase or invest in any stock in any other corporation, except that it may (1) accept as evidence of indebtedness debt securities convertible to stock, but such debt securities shall not be converted to stock while held by [OPIC] . . . . Loans may be made under this subsection only for projects that are sponsored by or significantly involve United States small business or cooperatives . . . .[128]

2. *Direct Loan Sources, Uses, and Terms*

OPIC direct loans are made from its Direct Investment Fund, for which Congress has appropriated $40 million[129] and to which OPIC has contributed $10 million of its earnings.[130] As noted above, OPIC direct loans are restricted to projects sponsored by or significantly involving U.S. small business or cooperatives.[131] These direct loans usually range from $100,000 to $4 million. OPIC direct loans have often been used to fill "gaps" in financings where loan funds are needed in amounts too small to interest insurance companies but for maturity periods too long to interest commercial banks.

Interest rates on OPIC direct loans reflect the trend of interest rates generally, including U.S. government borrowings, and vary with OPIC's assessment of the project risk. However, OPIC does not require such financial practices affecting the cost of money as the maintenance of compensating balances. Over time, interest rates on OPIC direct loans have varied from 8½% to 12% per annum.

In accordance with international lending norms, OPIC charges commitment and cancellation fees for its direct loans and requires the borrowing company to pay any taxes assessed against OPIC and to reimburse OPIC's costs for the fees of outside legal counsel and similar expenses with respect to its direct loans. However, OPIC may absorb some of such costs depending on the amount of its direct loans and the size of the U.S. sponsor. As of June 30, 1980 OPIC outstanding or committed direct loans aggregated $26,325,509, net of participations of $87,370 sold to U.S. banks.[132]

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[128] *Id.*
[129] *See* 22 U.S.C. §§ 2192, 2195(b) (1976).
[130] *See* [1979] OPIC ANN. REP. 55. *See also* 22 U.S.C. § 2196(c) (1976).
[131] 22 U.S.C. § 2194(c) (Supp. II 1978); *see* text accompanying note 128 *supra*.
[132] *See* OVERSEAS PRIVATE INVESTMENT CORPORATION, *supra* note 114.

3. Convertible Loans

Although FAA section 234(c)[133] does not permit OPIC to invest in stock of other companies, OPIC may make direct loans convertible into stock, although OPIC itself is not permitted to convert such loans. OPIC, however, may share in the profitability of project companies by selling convertible debentures representing such loans to third parties for the value of the underlying stock.[134]

Such convertible loans improve the financial strength of project companies because they normally are subordinated to and bear lower interest rates than senior debt and are not secured by project company assets. Sale of these convertible debentures to residents of host countries also permits OPIC to contribute to the broadening of ownership of project companies and to the development of host country capital markets.

4. Revolving Fund

OPIC is directed to broaden private participation and revolve its funds through selling its direct investments to private investors,[135] and for this purpose is permitted to sell participations in such loans.[136] Pursuant to this authority OPIC occasionally has sold participations in its direct loan portfolio to U.S. banks, the proceeds of which are returned to the Direct Investment Fund. These participations have been sold with recourse to OPIC under its FAA section 234(b)[137] guaranty authority because relevant portions of the direct loan portfolio do not yet attract private lenders based solely on the financial strength of the project companies involved.

D. Local Currency Loans

As mentioned above, OPIC is authorized to make loans in local currencies.[138] Sources of local currency, however, are reduced for loans of this kind, and in the last several years have been limited to Pakistani rupees.

E. Investment Encouragement

OPIC finances surveys of investment opportunities through its investment encouragement program under which OPIC is authorized: "[t]o initiate and support through financial participation, incentive grant, or otherwise, and on such terms and conditions as [OPIC] may determine, the identification, assessment, surveying and promotion of private investment opportunities, utilizing wherever feasible and effec-

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133 22 U.S.C. § 2194(c) (Supp. II 1978).
134 *Id.*
135 *Id.* § 2191(c) (1976).
136 *Id.* § 2199(d) (Supp. II 1978).
137 *Id.* § 2194(b) (Supp. II 1978).
138 *See* notes 98-99 and accompanying text *supra*.

tive the facilities of private organizations or private investors."[139] OPIC, however, may not finance feasibility surveys of mineral-fuel operations nor spend more than $200,000 per fiscal year to finance feasibility surveys of non-fuel mineral operations.[140] All U.S. businesses are eligible for OPIC feasibility survey assistance; however, this program is available to firms which do not qualify as U.S. small business only in host countries whose per capita annual incomes are less than $520 (in 1975 dollars).[141]

OPIC has used this broad statutory authority to make grants and loans for feasibility studies of new projects, sometimes through the stage of pilot plant operations. This assistance is generally provided by letter agreements under which a potential investor agrees to investigate a particular opportunity pursuant to agreed plans and budget. OPIC agrees to reimburse such potential investor a certain percentage of its budgeted costs if the investigation does not result in an attractive opportunity for it.

Normally, OPIC will participate in such surveys if it appears likely that their successful completion would result in projects that could be assisted by OPIC finance and insurance services. In fiscal year 1980 OPIC committed $199,241 to assist eight project feasibility surveys which were conducted by U.S. small business firms.[142]

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[139] 22 U.S.C. § 2194(d) (Supp. II 1978).

[140] *Id.* § 2194(d)(1)-(2).

[141] FINANCE HANDBOOK, *supra* note 50, at 13-14.

[142] Memorandum from Mr. Jean G. Crouzet, Vice President, Finance Department of OPIC, Finance Department Operations, Fiscal Year 1980; Preliminary Results (Oct. 7, 1980) (copy on file in the office of the *North Carolina Journal of International Law and Commercial Regulation*).