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VOLUME ONE

Edited by

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INTRODUCTION: POLITICAL RISK

The Rise of Foreign Direct Investment

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

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

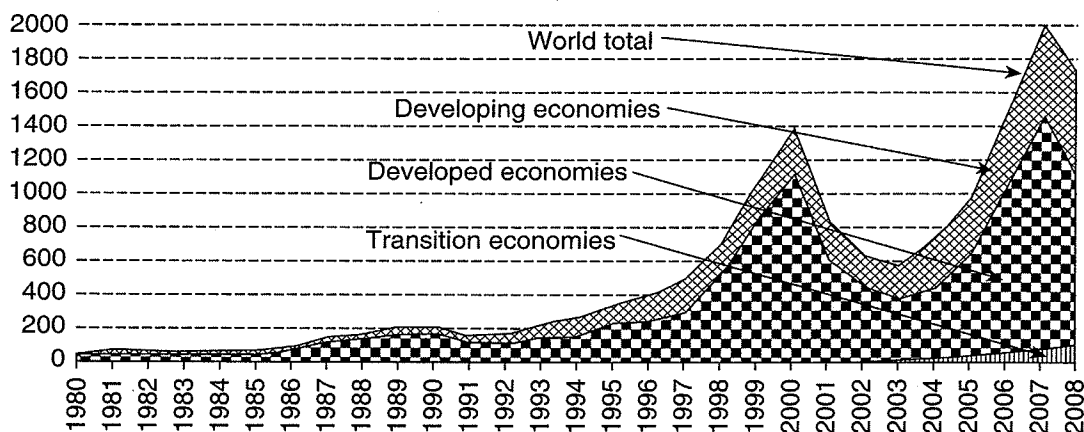


Figure 1 FDI inflows, global and by group of economies, 1980–2008 (Billions of US dollars)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

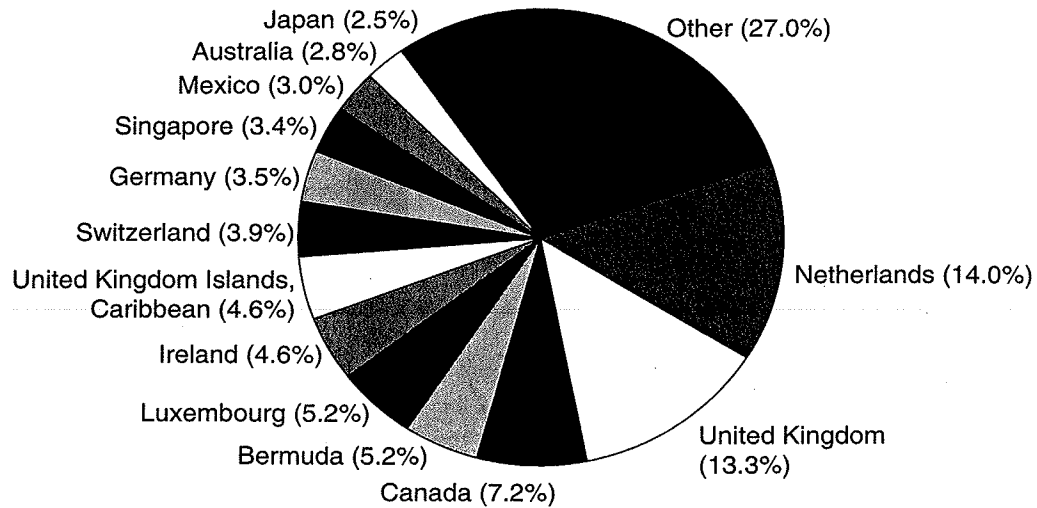


Figure 2 US Outward direct investment position, by country of foreign affiliate, year end 2008

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

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

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

Source: Bureau of Economic Analysis data.

The International Investment Regime

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

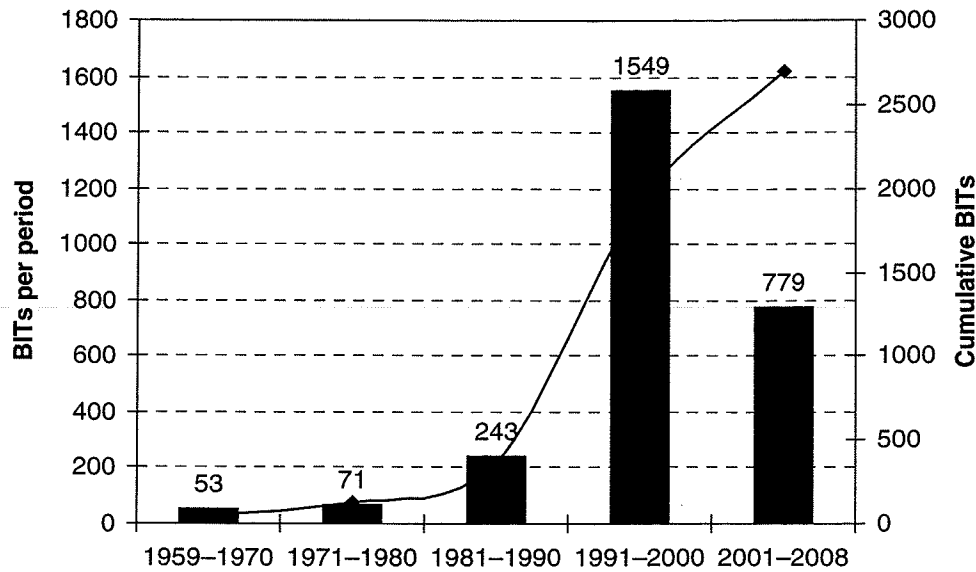


Figure 3 Growth of BITs from 1959–2008, by period and cumulative

Source: UNCTAD, <<http://www.unctad.org/iia>>.

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

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

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

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

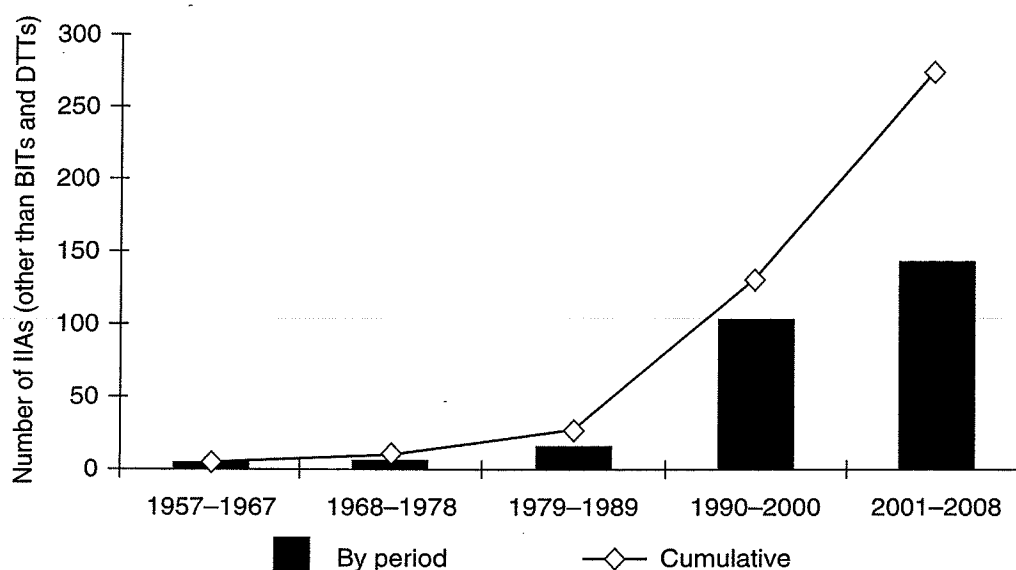


Figure 4 Number of IIAs other than BITs and double taxation treaties concluded, cumulative and per period, end of 2008

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

As a result, and even in the absence of a multilateral investment treaty,¹⁰ a relatively strong international investment regime has emerged. It is enforced, moreover, through an investor-state dispute settlement mechanism that is increasingly used by firms to protect what they see to be their rights: there were at least 317 known treaty-based international investor-state disputes by the end of 2008,¹¹ with 30 percent of them brought by investors during 2006–2008 (figure 5). The US had been involved, as of 16 August 2009, in 16 disputes, all of them arising under NAFTA Chapter 11.¹²

FTA (2006), available at: <http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html>. The US-Columbia FTA, the US-Republic of Korea FTA, and the US-PanamaFTA have investment chapters, but are still awaiting approval by Congress (<http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html>, <http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html> and <http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html>).

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

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

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

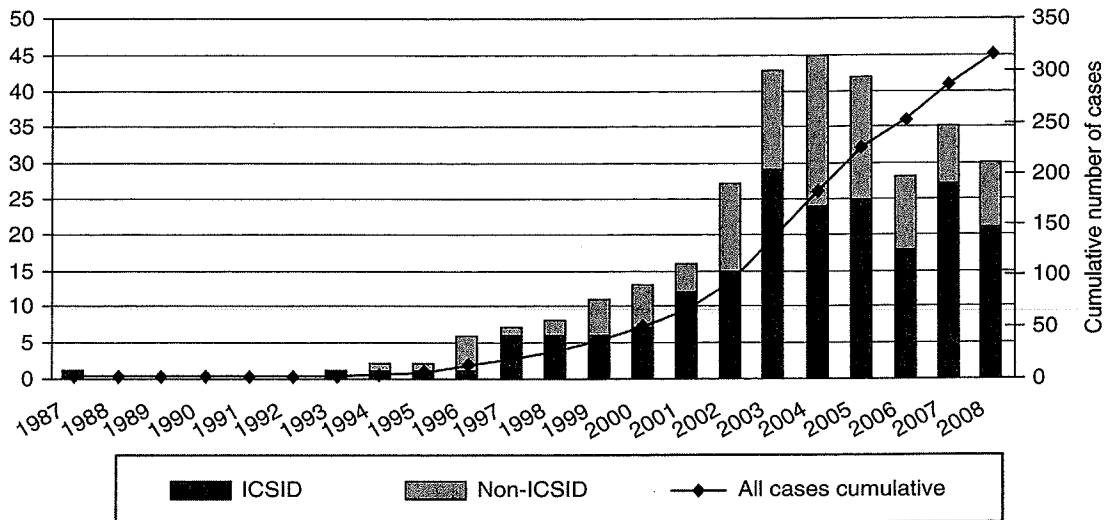


Figure 5 Known investment treaty arbitrations, cumulative and newly instituted cases, 1989–2009

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

Political Risk

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

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

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

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

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

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

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

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

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

OPIC Investment Insurance Coverage

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

¹⁵ See 22 USC Section 2191 et seq.

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

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

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

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

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

OPIC's *expropriation* coverage remains highly relevant in current global economic conditions. This coverage protects against relatively straightforward direct expropriations, as well as 'unlawful government acts (or a series of acts) that deprive the investor of its fundamental rights in a project'.²¹ OPIC expropriation determinations have addressed such diverse issues as the forced sale of a mine in Chile to the Chilean government²² and court decisions concerning regulatory restrictions on lending in an Islamic host state.²³ OPIC's determinations provide insight into pragmatic assessments of expropriation focused on an investor's 'fundamental rights' in a project, which developed over time as institutional experience with such claims grew.

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

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

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

²¹ OPIC Handbook, at p. 18 (2008).

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

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

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

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

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

²⁷ OPIC Handbook, at p. 19 (2008).

economies in Latin America,²⁸ Africa,²⁹ the Middle East³⁰ and Asia,³¹ this coverage is likely to grow further in importance and may prove important for attracting US foreign investment to recently war-torn economies.

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

Influence of Current Investment Insurance Decisions

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

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

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

³⁰ See eg ‘Terrorist Attack Highlights Risks Of Yemen’s Oil Industry’, Oil Voice, 7 Jan 2010.

³¹ See eg Aftab Borka, ‘Al Qaeda suspected of Pakistan’s Marriott bombing’, Reuters, 21 September 2008.

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

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

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

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

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

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

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

³⁶ *Generation Ukraine v Ukraine*, at 19.22–19.24.

³⁷ *Generation Ukraine v Ukraine*, at 19.22–19.24.

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Vietnam Inconvertibility Claims

Cases covered

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

Overview

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

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

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

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

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

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

Suggested additional reading

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

Vietnam Expropriation Claims

Cases covered

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

Overview

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

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

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

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

Suggested additional reading

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

Chile Expropriation Claims

Cases covered

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

Overview

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

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

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

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

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

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

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

Suggested additional reading

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

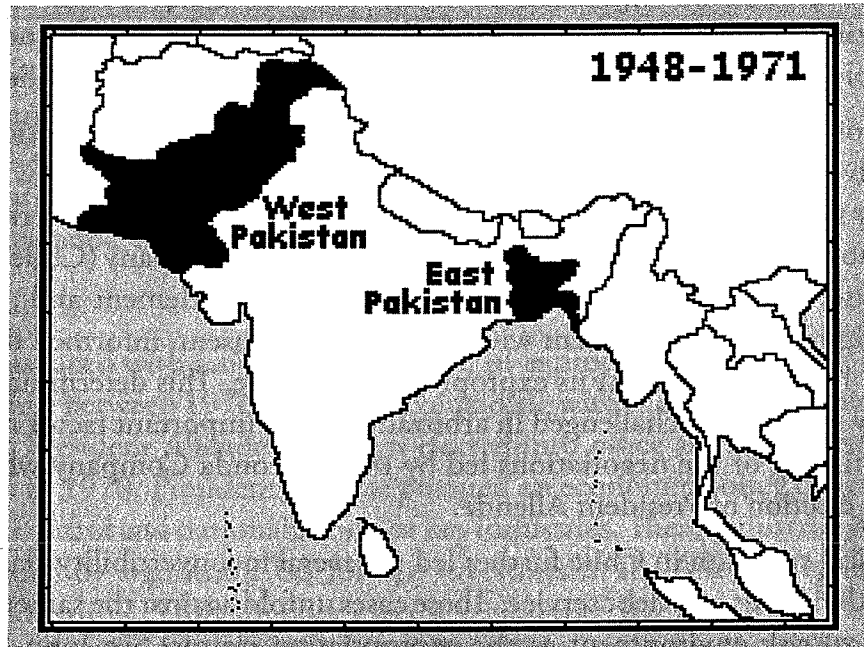
Indo-Pakistan War Claims

Cases covered

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

Overview

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



Historical Map of Pakistan

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

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

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

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

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

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

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

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

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

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

Suggested additional reading

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

Argentina Inconvertibility Claims (1971)

Cases covered

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

Overview

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

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

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

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

Nicaragua Claims

Cases covered

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

Overview

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

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

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

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

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

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

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

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

Suggested additional reading

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

Zaire Inconvertibility Claims

Cases covered

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

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

Overview

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

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

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

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

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

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

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

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

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

Suggested additional reading

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

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

Ghana Inconvertibility Claims

Cases covered

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

Overview

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

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

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

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

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

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

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

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

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

Suggested additional reading

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

Claims Arising out of the Iranian Revolution

Cases covered

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

Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

Suggested additional reading

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

Sudan Inconvertibility Claims (1980s)

Cases covered

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

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

Overview

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

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

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

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

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

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

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

OPIC claims relating to the Sudan were filed by two companies, Union Carbide Corporation and Equator Bank Limited. Union Carbide Sudan Limited was organized on 9 April 1974 to manufacture and sell dry cell batteries and to import and resell such batteries not produced locally. Equity investments were provided by Union Carbide Corporation ('UCC') and three private Sudanese investors. UCC executed an insurance contract with OPIC on 30 June 1975. Equator Bank Limited acted for a syndicate of lenders. The syndicate issued a loans in the aggregate amount of \$9,500,000 to Sudan-Ren Chemicals and Fertilizer Limited ('Sudan-Ren') on 20 June 1978. The loans were insured by OPIC on 15 December 1966. The loans were unconditionally guaranteed by the Government of Sudan, meaning that upon failure of payment by Sudan-Ren the lenders could demand dollar payment of the unpaid amount.

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

Suggested additional reading

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

El Salvador Inconvertibility Claims

Cases covered

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

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

Overview

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

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

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

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

Suggested additional reading

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

Philippines Inconvertibility and Political Violence Claims

Cases covered

- Armco-Marsteel Alloy Corp (Philippines: 1984(I))
- Armco-Marsteel Alloy Corp (Philippines: 1984(II))
- Armco Steel Corp (Philippines: 1984(I))
- Armco Steel Corp (Philippines: 1984(II))
- Armco Steel Corp (Philippines: 1984(III))
- General Foods Corp (Philippines: 1984)
- Kimberly-Clark Corp (Philippines: 1984(I))
- Kimberly-Clark Corp (Philippines: 1984(II))
- Philippine Geothermal, Inc (Philippines: 1984)
- Universal Foods Export Corp (Philippines: 1984)
- Armco-Marsteel Alloy Corp (Philippines: 1985(I))
- Armco-Marsteel Alloy Corp (Philippines: 1985(II))
- General Foods Corp (Philippines: 1985(I))
- General Foods Corp (Philippines: 1985(II))
- JP Morgan Overseas Capital Corp (Philippines: 1985)
- Kimberly-Clark Corp (Philippines: 1985(I))
- Kimberly-Clark Corp (Philippines: 1985(II))
- Kimberly-Clark Corp (Philippines: 1985(III))
- Kimberly-Clark Corp (Philippines: 1985(IV))
- Kimberly-Clark Corp (Philippines: 1986)
- Kimberly-Clark Corp (Philippines: 1986(I))
- Kimberly-Clark Corp (Philippines: 1986(II))
- Kimberly-Clark Corp (Philippines: 1986(III))
- Kimberly-Clark Corp (Philippines: 1986(IV))
- Kimberly-Clark Corp (Philippines: 1986(V))

Overview

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

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

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

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

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

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

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

Suggested additional reading

- James K. Boyce, *The Philippines: The Political Economy of Growth and Impoverishment in the Marcos Era* (Honolulu: University of Hawaii Press, 1993)
- Benedict J. Kerkvliet and Resil B. Mojares, *From Marcos to Aquino: Local Perspectives on Political Transition in the Philippines* (Honolulu: University of Hawaii Press, 1992)
- Misagh Parsa, *States, Ideologies, and Social Revolutions: A Comparative Analysis of Iran, Nicaragua, and the Philippines* (Cambridge: CUP, 2000)

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