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## Legal and Practical Protection of U.S. Foreign Investment

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## Legal and Practical Protection of U.S. Foreign Investment

*W. Geoffrey Anderson\**

What is the Overseas Private Investment Corporation (“OPIC”)? Our detractors will tell you that it is the ATM machine for the Fortune 500. My lawyers will tell you that it is the home of the twenty brightest legal minds in America—every chance you give them.

Ken Hansen talked eloquently about the private sector and the public sector. Since the public sector is what I consider important, that is what I will be discussing. As I go through my presentation, it is important to remember that Iraq is the background motif I am discussing. All of the programs that we participate in, and all the things we read about occurring in Iraq, were difficult to get established in Iraq. We are very pleased that we are now there and open for business.

What does OPIC do? We provide long-term financing, political risk insurance, and investment funds. The statute that we operate under is a narrow statute. As a result, every time we want to do something, the lawyers must sit around and re-read the statute. We are not an export credit agency. We represent American business interests. Our plan is to mobilize American capital and American knowledge, take it to a transition economy, and do good things for the world. There will then be world peace and we will all floss. That is what we are supposed to do. We are unique: we pay attention to the business in country A.

I will talk a little bit about the backing of the U.S. government and return to that theme at the end. I want to point out some of the benefits that OPIC has over the private market, as well as some of its limitations. First, the full faith and credit of the government is an enormously valuable tool. More than one client has told me: “the full faith and credit provision is the only reason I am paying you your fee, now go out there and advocate for me.”

A note about OPIC priorities. OPIC is a self-sustaining agency of the Executive Branch. We are also the only federal agency that makes a profit every year. Last year we profited \$120 million dollars and the amount continues to rise. But as an arm of the Executive Branch, we must respond to what the President and his administration want to do. Small business is huge with President Bush, therefore it is gigantic with OPIC. Not surprisingly, Russia and front line states such as Afghanistan and Iraq, are also immensely significant for the administration and, therefore, for us. Regarding those countries, we are paying attention to housing, infrastructure, and technology to maximize opportunities.

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What benefits do we provide in finance—meaning investment guarantees or direct loans? We have money, and capital can be scarce. We have unique terms and conditions. We offer flexible programs. We also have the Small Business Center, which I will discuss later. And of course, we are the best corporate citizen around.

Next I will discuss eligibility. The potential investor must meet eligibility requirements in our different product lines. The requirements can be difficult to meet. “American investor” is the catch phrase and that is what we live by. In assessing eligibility, we must always analyze the potential company to make sure the shareholding and equity lines up with the statute. This type of analysis is required since we are subject to close congressional oversight. It is impossible to tell congressional staff that we did not do the due diligence necessary and we were surprised by an ineligible investor’s application.

Once an investor is eligible, we offer a variety of terms on loans. For example, our present cap in one transaction is \$250 million. We do not have a minimum investment size. Leverage is moving sixty to forty. Market rates are good and there is limited recourse.

One thing that is of particular interest is the Small Business Center. Our application process, which could take up to a year, and any unnecessary delay can really dishearten an investor who is anxious to get his or her operation going. With the institution of the Small Business Center we promised to cut the time down to sixty days from the time that you submit your registration. Reducing the time period generated a tidal wave of effort on our part, particularly in the legal department since there is no legal difference in the due diligence in documentation required between a small business deal and \$250 million deal. They are the same. Accordingly, we have had real growing pains. I am happy to say we have succeeded in cutting it down to sixty days. We are doing it, but the pipeline is increasing, as you would expect. Continuing this pace will continue to be difficult.

We have some interesting programs to offer. For instance, OPIC is in now in the terrorism insurance business, with the inception of the Political Risk Insurance (“PRI”) program. What does PRI do? It protects you. It has terms that cover inconvertibility, expropriation, and political violence. In fact, we are the only offeror of weapons of mass destruction (“WMD”) coverage, and we are capitalizing on it. But again, there are eligibility problems to watch out for. One such requirement is that if you are a foreign corporation, you must be ninety-five percent owned by U.S. citizens, corporations, or partnerships.

Terms of these loans are up to twenty years, which is very good. This program also has a \$250 million dollar cap. The terms of the PRI include a ten-year tenure, which is very desirable to investors. When they feel the risk, they want the protection now. We also have a new program where we add the PRI coverage to regular coverage and call it a “wrap.”

As I said, we are now able to process loans in sixty days and we are quite proud of that achievement. If you have less than \$35 million in annual

consolidated revenues or \$27 million in personal net worth, you qualify. We joined with the Small Business Administration, for which I wrote and executed the Memorandum of Understanding. As part of this agreement, OPIC is able to use the Small Business Administration's regional centers, which have made the process much easier. Any person can walk into one of the centers, file an application, and get walked through the process. The options are explained to them, and the amount of need determined. Next, credit-worthiness is evaluated. When the potential investor gets to the first, second or third desk, and the Small Business Center staff see the size of the organization, or the fact that the investor is from an American company, then they ask the investor if they know about OPIC. By the time the potential investors get shipped over to us, we are ready for them and have at least a credit-worthiness profile. As a result, this process cuts down on the amount of time we put into helping each investor. The working relationship between the Small Business Center and OPIC has been a very good fit and we are happy with it.

Before I shift over and talk about the Dabhol Power Project, I want to mention a little story about an event six months ago. OPIC just went through its reauthorization process, which requires us to go Congress, tell our story, learn whether they like our story or not, and then they reauthorize us. In this case, the reauthorization was for four years. At one point during the hearings, an individual questioned Dr. Peter Watson, our President, and made points in the manner of an attorney delivering a prepared cross-examination. The individual brought up Afghanistan in his line of questioning. In a voice dripping with sarcasm he asked, "Dr. Watson, isn't it true that your first project in Afghanistan, where everything that's been razed and the Taliban has been run out, was to build a four-star hotel?" He answered, "Yes." "And it isn't a hotel—I'm sorry, was that a four-star or five-star hotel Dr. Watson?" "Oh, I think it was five. But it might have been four." "And so the highest and best this mighty, nimble, wonderful organization of yours can do is to build a hotel?" "Well, it was the right thing to do."

At that point the committee chairman from the opposing party could not take it any longer. He hops up and said, in the form of a colloquy, "Bill, didn't you and I just travel to Afghanistan two weeks ago?" Bill said, "Yes, we did Mr. Chairman." The Chairman continued, "And Bill, while we were there where did we stay at night?" Bill answered, "Mr. Chairman we stayed in an outbuilding, kind of like a barn." The Chairman next asked, "Bill, what did they give to you and I each night?" "Uh, shotguns." "And Bill, what else did they give us every night?" "Side arms." "Thank you. Dr. Watson, I want to thank you because before any potential investment goes anywhere, you have to have a safe hotel to stay in." It really made a fine point of OPIC's contribution to filling the need for security and stability.

The Dabhol Power Company is a 2.2 thousand megawatt facility in Western India in the State of Maharashtra. Before I make my two legal points today, I will give you a brief description of this project. On the debt side of this monster

project, we have Citi, Bank of America, ABN AMRO, and a consortium of twenty-six lesser banks led by Bank of America. On the equity side, it is primarily an Enron project since Enron owns sixty-five percent of this project. General Electric (“GE”) and Bechtel own ten percent each and the reservoir of fifteen percent belongs to the Maharashtra State Electricity Board. For many reasons, most of them bad economic assumptions, OPIC was all over the map on this project. We were a debtor and loaned money to the project through investment guarantees. We sold political risk insurance to Bank of America. We are also on the equity side, having sold \$200 million dollars in political risk insurance to the sponsors. I cannot tell you how often I hear from those guys, “Geoff you are so conflicted out—what are you doing?” The answer is that the opposite is actually the truth. We step up and wear the hat of the U.S. government. This is what OPIC does best. We sort things out and we get things done.

The short story is that the power was too expensive to produce. The government of Maharashtra stopped paying one day and the plant closed down. That is the way it has been ever since. The plant was almost fully completed when it shut down, which is important to know. After it shut down, a period of time went by and everyone started suing everyone else. Interested parties filed for arbitration in every venue around the world. The suits were mostly against Indians because Indians were on the side of the State of Maharashtra, the Indian government, and therefore lurking behind the State’s actions. The State of Maharashtra provided the counter guarantee to the loans, which is why people started suing the Indians who backed the government. The Indians then went to their “independent judiciary” and obtained impermissible injunctions against every legal action. Thus, everything is brought to a complete halt. The rule of law that we talk about, which is so essential to a transition economy, is what we want to put in place in Iraq. Instead, we look to the biggest democracy on the planet, India, to see how quickly and effectively the rule of law is supplanted by fiat, if you will.

When the arbitrations were brought to a halt, the parties filed for more arbitration. Also, the companies filed investor claims (BIT claims) against the Government of India directly. They also filed insurance claims against OPIC.

This brings me to my first point, which relates to arbitration. The arbitration process was very difficult for this reason: GE and Bechtel said, “My asset was taken away by the Government of India. Because it was expropriation, OPIC must pay under our insurance plan.” In response, OPIC took a very technical legal defense. We got the finest law firm in the entire world to help us and we took a technical defense. We argued that the operative language in the contract should prevail. As paraphrased, the language in the contract said, notwithstanding any other language in the contract, OPIC shall not pay until a court enters a judgment of expropriation. GE and Bechtel had to try to enforce the contract somewhere and have it denied. Also, they had to keep trying to enforce the contract for six months and fail. GE and Bechtel failed to satisfy

these requirements and they acknowledged the failure. They said, “We did not do any of that. We were expropriated.” OPIC took what I think is the legally correct position—the technical defense that this is what you signed up for. Our position was that the building was “on fire” when GE and Bechtel asked for fire insurance, which it was. GE and Bechtel did not agree with this characterization, and had a completely different understanding of the arrangement. The evidence brought in at the arbitration proceeding was used to determine who said what to whom.

We then went to the UNCITRAL rules of arbitration. This allowed me to pick an arbitrator who is supposed to be in my pocket. Also, the other side picks their arbitrator, who is supposed to be in their pocket. A third arbitrator is then selected, so there can be a two to one ruling and everyone is happy. Mistakenly, I thought it was going to be two-to-one in OPIC’s favor. Instead, it was three-to-nothing for GE and Bechtel. Three-to-nothing on its face is tough. I had to write a taxpayer check for \$63 million dollars, then another for \$28 million to Bank of America. We are already up to over \$90 million. But the good news is, and I would like to think that it was my arbitrator on the panel, included in the award was some of the toughest language in an award that I have ever seen. It said the Government of India, through its subordinate political entities, totally expropriated every shred of the assets. They denied everything to GE, Bechtel, and others. The arbitration decision establishes a prima facie case for me to take directly to the Government of India in a claim against the government through our bilateral treaty. I am sorry I lost, but I am pleased to have the weapon I now have in the claim against the Government of India.

The next and last legal point I want to make concerns the full faith and credit of the U.S. government. My clients tell me that the reason they bring transactions to OPIC is because of our advocacy position as representatives of the U.S. government. When we sit down at the table, we speak for the government and people listen. I earned all my frequent flier miles traveling to India to provide the advocacy our clients seek. I go to New Delhi, sit down and have tea. Indians love tea. Every time you ask them a tough question, time for another round of tea. You can stay there and tea yourself to death.

I always ask myself what we can do to make this problem better for our clients. First of all, I think it is necessary to pursue the claim against the Government of India as hard as I possibly can. That is the lever I must push because this suit will bring the pressure to bear on all the subordinate entities. Second, I think I should to reduce the number of equity holders. For instance, what good is Enron in this project? Not a great deal, except for the comedic value. When you say “Enron” to one of the Indians, they visibly flinch. Then you follow it with a “Rebecca Mark” and they flinch again. Why is this? You see, there was a \$14 million “training fund” which Enron took to India for training on various things associated with the F-9 turbines. No one can tell you where the \$14 million went, and I do not know.

I think we should eliminate Enron from the group, and OPIC is in the process of doing that. We should probably get rid of some of the offshore debt as well

because we have too much debt. The visual picture now is like the “OK Corral,” where there is so much anger and distrust among the players that it is as if everyone is backed up to some part of the corral. The guns are drawn and everyone is waiting to fire. Reducing the number of players would help resolve this problem, which is what we are trying to do.

The next thing to do is restructure the debt. Restructure the whole deal, which will make everyone happy, and let India absorb as much of the pain as possible. Most of the project is in India, and its debt is \$1.5 billion. The offshore debt is about half a billion dollars. Thus, they ought to take most of the pain and I am encouraging them to do that. It may be that they want an all-India solution anyway. They say that is not what they want, but their actions speak otherwise.

My goal is to get the project restarted. Restructure the project, settle all the claims, both with OPIC and against everybody else. I leave for India the second week of March. OPIC has taken the position that the asset will be sold. I do not know whether it is going to be an equity share sale, an asset sale, a foreclosure, or hybrid. But we are going to run the bids, we are going to make the selection and we will take on all the potential liability.