The Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Developmental Role of Investment Insurance*

STEVEN FRANKLIN† AND GERALD T. WEST‡

SUMMARY

* This article relies substantially on research done by the authors and other staff members of the Overseas Private Investment Corporation (OPIC) in connection with the Executive Branch review of OPIC, which is discussed herein. However, the views are those of the authors and not of OPIC. Friends and colleagues of the authors contributed conceptually to various portions of the article, for which appreciation is given. The authors wish to acknowledge particularly the contributions of Professor Franklin Root of the Wharton School, and Rutherford Poats. Mr. Poats, who guided OPIC through its most difficult hours of legislative decision, encouraged and supported the authors' efforts. Any errors are, of course, the sole responsibility of the authors. Mr. Poats resigned as OPIC's Acting President in October, 1978, to join the White House Staff.

† B.A. 1965, University of Oklahoma; LL.B. 1968, University of Texas. Mr. Franklin has served as Legislative Counsel and Director of Congressional Relations of OPIC since 1975.

‡ B.A. 1966, Le Moyne College, Syracuse, N.Y.; M.A. 1969, and Ph.D. 1973, University of Pennsylvania. Dr. West is Senior Staff Assistant to OPIC's Vice President of Insurance. Since 1976 he has been an instructor in a series of Wharton-sponsored executive seminars on the Risk Management of Overseas Investments and Operations.

INTRODUCTION

On April 24, 1978, President Carter signed legislation[1] to extend and modify the operating authorities of the Overseas Private Investment Corporation [hereinafter referred to as OPIC], the self-sustaining corporate agency of the United States that issues political risk insurance for private United States investments in eighty friendly developing countries. Enactment of this legislation [hereinafter referred to as 1978 OPIC Amendments] ended over a year of exhaustive deliberation by the Executive Branch and Congress regarding the basic purpose and future of OPIC. It reflected a shift in the mood of Congress on important trade and investment issues and a reaffirmation of United States policy to encourage productive private United States investment in developing countries.

Although it has been consistent policy of the United States since World War II to promote the flow of private United States investment to less-developed countries [hereinafter referred to as LDC's],[2] there has been a lively debate in recent years over the developmental benefits of investments by United States firms, especially multinational corporations [hereinafter referred to as MNC's], and, correspondingly, over the contribution of OPIC in facilitating investment that is compatible with United States economic developmental objectives.[3] This article examines the developmental role of OPIC in the late 1970's in light of the 1978 OPIC Amendments and discusses the principal implications of this new legislation.

I. ECONOMIC AND POLITICAL BACKGROUND OF THE 1978 OPIC AMENDMENTS

For the last three decades, the basic development question among LDC's has been: "Where are we to find the massive infusion of capital needed to develop our resources and build a productive economy?" By

1. Overseas Private Investment Corporation Amendments Act of 1978, Pub. L. No. 95-268, 92 Stat. 213 (1978), *amending* 22 U.S.C. § 2191 *et seq.* (1964 & Supp. 1978) [hereinafter cited to U.S.C. sections].

2. DEVELOPMENT ISSUES, U.S. ACTIONS AFFECTING THE DEVELOPMENT OF LOW-INCOME COUNTRIES 69 (2d Ann. Rpt. to Cong. on Development Coordination, 1976). For a discussion of the early history of the program, see M. VON NEUMANN WHITMAN, THE UNITED STATES INVESTMENT GUARANTY PROGRAM AND PRIVATE FOREIGN INVESTMENT (1959).

3. S. REP. NO. 95-505, 95th Cong., 1st Sess. 5 (1977) [hereinafter cited as the 1977 SENATE REPORT].

large the answer—both sought by the LDC's and given by the developed countries—has been direct public assistance in one form or another. Bilateral and multilateral assistance has made impressive contributions to the development process in many countries.[4] It is becoming increasingly clear, however, particularly in light of increased capital flow needs of LDC's resulting from oil price increases and relative international economic stagnation, that direct aid from the developed countries has not been sufficient and that it is increasingly unlikely to be sufficient in the future.[5] Moreover, developed countries are not likely to increase their assistance levels significantly.[6]

This trend has not gone unnoticed.[7] With the same vigor they once reserved for the pursuit of foreign aid, most LDC's now are actively pressing for improvements in the terms of trade with developed countries so as to increase their export earnings. For example, the World Bank has argued that unless the developing countries can be assured of continuing markets for their exports and expanded access to international capital on terms they can afford, the number of people in absolute poverty cannot be expected to decrease.[8] Few expect, however, that improved export earnings will contribute more than marginally to meeting the capital needs of the developing world.[9] There is growing recognition that while increased capital flows from public sources are vital, private sources must increasingly be tapped.[10]

An increasing number of LDC's either are vigorously courting foreign investment or cautiously moderating policies that have prohibited or severely restricted foreign investment. C. Fred Bergsten, Assistant Secretary of Treasury for International Affairs, has described this shift in attitude as follows:

> [T]he rhetoric of developing countries in recent years has been somewhat hostile to private investment. However, the actual behavior has been more moderate. The intense need for capital, technology, and managerial skills has encouraged a pragmatic approach . . . . The growing ability of developing countries to harness multinational corporations to their national development

4. *See OPIC Authorization: Hearings on S. 1771 Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 141 (1977) (statement of Henry Kissinger) [hereinafter cited as 1977 *Senate Hearings*].

5. *Id.*

6. Speech of Robert S. McNamara, President, World Bank, to World Bank Board of Governors (September 25, 1978), in which he noted that assistance from Development Assistance Committee (DAC) countries had declined from 0.52% of gross national product in 1960 to 0.31% in 1977.

7. *See* 1977 *Senate Hearings*, *supra* note 4, at 140 (statement of Henry Kissinger).

8. WORLD BANK DEVELOPMENT REPORT 11, 23 (1978); WORLD BANK ANNUAL REPORT 15 (1978).

9. WORLD BANK DEVELOPMENT REPORT 18, 24 (1978).

10. *Id. See also* DEVELOPMENT ISSUES, *supra* note 2, at 83, and 1977 *Senate Hearings*, *supra* note 4, at 20 (statement of Rutherford Poats) and 141 (statement of Henry Kissinger).

> objectives has reduced hostility toward the firms, and indeed, has led many developing countries to actually induce private firms to come in . . . .[11]

LDC investment incentive programs testify to the fact that direct private foreign investment is being sought as one of the more readily available sources of capital for developing countries.[12] Moreover, the emerging structure of LDC investment incentives and regulations indicates an increasing awareness that foreign private investment tends to be more effective than government-to-government assistance in providing access to industrial technology, manpower training, managerial expertise and connections with a global marketing network.[13] Often these benefits are as crucial to the development process in an LDC as is capital itself.

Given the principle that it is both rational and efficient to harness private sector funds and energies to realize public policy goals, it is not surprising that for thirty years United States policymakers have sought to encourage the flow of certain kinds of United States private investment to selected countries, especially to those countries that are the recipients of United States foreign assistance. One of the more important means of facilitating these private investment flows has continued to be investment insurance.

The United States Government's use of political risk investment insurance to encourage private United States investment in foreign countries dates from the 1948 Marshall Plan[14] when limited investment guarantees were offered to encourage private United States companies to invest in war-torn Europe. By the late 1950's the program had been reoriented to its present purpose of promoting United States private investment in friendly LDC's, and the scope of the insurance coverage had been expanded to include the major LDC political risks that concern business managers and lawyers, *i.e.*, transfer risks, expropriation risks, and war risks.[15] Other major industrial countries also began to offer similar incentives to their na-

11. 1977 *Senate Hearings*, *supra* note 4, at 7 (statement of C. Fred Bergsten).

12. *Id.* at 8.

13. *Supra* note 9.

14. H.R. REP. No. 95-670, 95th Cong., 1st Sess. 3 [hereinafter cited as 1977 H.R. REP.], *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1090, 1091. *See also*, M. VON NEUMANN WHITMAN, *supra* note 2, at 20.

15. 1977 H.R. Rep., *supra* note 14, at 3; M. VON NEUMANN WHITMAN, *supra* note 2, at 20. *See also* Y. AHARONI, THE FOREIGN INVESTMENT DECISION PROCESS 93 (1966). Based in part on an extensive survey of businessmen, Mr. Aharoni concluded that the major risks of concern to businessmen considering an LDC investment are (a) political: war, expropriation, revolution, general instability; (b) economic: inflation, devaluation, inconvertibility of currency; and (c) nuisance: lack of adequate basic services, government intervention. Today, investors also give particular attention to risks related to expropriation such as cancellation of contracts or concessional arrangements, imposed divestiture or "domestication," and radical tax increases. Moreover, investors increasingly are aware that a number of lesser political risks can adversely influence the certainty of economic projections since they may threaten the security or profitability of the investment without resulting in an extraordinary act such as expropriation.

tionals to encourage investments in LDC's.[16] During the 1960's, Congress authorized additional investment incentives such as project financing and pre-investment survey grants to further stimulate United States investor interest in the developing world.[17] These programs were transferred to OPIC when it was organized.[18]

The demand for political risk insurance rose sharply during the 1960's. The Agency for International Development [hereinafter referred to as AID], which then administered the program, was ill-equipped to handle the volume of applications.[19] A presidential advisory committee in 1968 concluded that a corporate agency with a mixed public-private board of directors would provide an efficient and effective balance of managerial flexibility and public policy control.[20] Growing investor complaints about bureaucratic inertia encouraged the prompt formation of OPIC in 1969 as an independent government corporation to manage the various investment incentive programs. Most large MNC's supported the concept of OPIC and many played a direct role in enacting its legislative charter.[21] OPIC was initially given a five-year charter.

Shortly after its organization, OPIC became deeply embroiled in a world-wide controversy over the economic and political activities of MNC's. Ironically, as an integral part of the foreign assistance program, the investment insurance program had been shielded to a substantial degree from the larger discussion of foreign policy issues. As a new and independent agency which could be labeled a boon to big business, OPIC presented a much higher profile at the very time when political storm clouds were gathering over MNC activities.

OPIC was drawn directly into this controversy in 1971 when the Allende Government took power in Chile and promptly commenced the expropriation of several AID-insured United States investments.[22] This resulted in

16. *See* OECD, INVESTMENT IN DEVELOPING COUNTRIES (3d ed. 1975).

17. OPIC's finance activities, which include commercial guaranties of medium- and long-term loans, direct lending, feasibility study financing and related services, are not discussed in this article. For information on these programs see OPIC, INVESTMENT FINANCING HANDBOOK (1977); U.S. DEP'T OF COM., OFFICIAL U.S. AND INTERNATIONAL FINANCIAL INSTITUTIONS (1977); *Extension and Revision of OPIC Programs, Hearings Before Subcomm. on Int'l Econ. Pol. & Trade of the House Comm. on Int'l Rel.*, 95th Cong., 1st Sess. 405 (monograph by S. Franklin) [hereinafter cited as 1977 *House Hearings*]; and 1977 *Senate Hearings*, *supra* note 4, at 119 (statement of H. Freeman).

18. Foreign Assistance Act of 1961, § 234(b), (c), (d), *as amended* 22 U.S.C. § 2191(b), (c), (d) (Supp. 1978).

19. *See* Hornbostel, *Investment Guaranties: Bureaucracy Clogs the Flow*, 4 COLUM. J. WORLD BUS. 37 (1969).

20. THE INTERNATIONAL PRIVATE INVESTMENT ADVISORY COUNCIL, THE CASE FOR A U.S. OVERSEAS PRIVATE ENTERPRISE DEVELOPMENT CORPORATION: A PROPOSAL (1968). *See also* Griffin, *Transfer of OPIC's Investment Insurance to Private Insurers: Praspects and Proposals*, 8 L. & POL'Y IN INT'L BUS. 631, 634 (1976).

21. *Id. See also* 115 CONG. REC. 38,699 (1969) (statement of Sen. Javits).

22. Griffin, *supra* note 20, at 637. *See also* Gilbert, *Expropriations and the Overseas Private Investment Corporation*, 9 L. & POL'Y INT'L BUS. 515 (1977).

claims against OPIC in excess of $360 million, including those of the Anaconda Company for $154 million and of ITT for $95 million.[23] It appeared that, if all the claims proved valid, OPIC would not have the immediate reserves necessary to cover and would have to seek appropriations from Congress to pay the claims.[24]

In 1973, when the Subcommittee on Multinational Corporations of the Senate Foreign Relations Committee [hereinafter referred to as MNC Subcommittee] began hearings on a bill to extend OPIC's operating authorities, the negative political effects of OPIC's pending Chile claims had been compounded by disclosures of political actions by ITT in Chile.[25] Moreover, the United States Ambassador to Jamaica in 1970 testified before the MNC Subcommittee that the large OPIC insurance exposure on bauxite investments in Jamaica had led him to imply to a candidate for Prime Minister that the United States might intervene in the Jamaican elections if the industry's nationalization became a campaign issue.[26]

These developments resulted in a complete Congressional reassessment of the need for OPIC and a hard-fought Congressional battle that OPIC barely survived. The debate centered essentially on two questions: (1) the extent to which OPIC contributed to the development assistance objectives of the United States; and (2) OPIC's financial condition and whether OPIC's insurance of United States investors increased the likelihood of conflicts between the United States and host countries.

Members of the Senate Foreign Relations Committee [hereinafter referred to as SFRC] divided sharply on these questions. Relying on conclusions of the MNC Subcommittee, the majority argued that at best OPIC contributed only marginally to United States development objectives and that its insurance exposure increased the likelihood of government-to-government confrontation.[27] Rather than kill the program, however, the majority voted to report a bill extending OPIC's authority but providing for a transfer of OPIC's insurance program to the private sector over a five-year period and establishing inflexible interim goals regarding the percentage of private insurance participation OPIC must achieve by certain dates.[28] OPIC was to cease issuing insurance if it did not meet these interim goals.

A minority of the SFRC vigorously disputed the majority's conclu-

23. Gilbert, *supra* note 22, at 539.
24. *Id.* at 516.
25. *Id.* at 539.
26. Griffin, *supra* note 22. *See also* U.S. FOREIGN RELATIONS AND MULTINATIONAL CORPORATIONS: WHAT'S THE CONNECTION? 37 (1978) (Comp. Gen. Rep. to Cong. B-172255) [hereinafter cited as GAO REPORT ON MNC's] *and* S. Rubin, *The Multinational Enterprise and the 'Home' State*, in GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS 62 (G. Ball ed. 1975) [hereinafter cited as GLOBAL COMPANIES].
27. S. REP. No. 93-676, 93d Cong., 2d Sess. 41 (1973), *reprinted in* [1974] U.S. CODE & AD. NEWS 4517.
28. *Id.* at 37.

sions.[29] It argued that OPIC's insurance program bolstered the competitive position of the United States while complementing official United States development assistance programs, that OPIC had mitigated rather than caused inter-governmental political conflict over the expropriation of United States investments, and that it could meet its financial obligations without resort to appropriations. The minority further argued that the "sudden death" provisions of the majority bill would cripple or destroy the program.[30] A floor fight followed, and on a crucial floor amendment to modify the mandatory guidelines, the SFRC minority position carried by two votes.[31] A compromise bill thus passed the Senate.

In the House of Representatives, the report of the Committee on Foreign Affairs generally followed the minority position in the SFRC.[32] By a comfortable margin, the House agreed to the basic Senate compromise providing for the continuation of OPIC through 1977 under the condition that it would endeavor to transfer its insurance underwriting to the private sector by 1981.

Between 1974 and 1976, OPIC was able to settle its Chilean claims by using its own financial resources.[33] With these settlements, concern over OPIC's financial condition subsided. By the end of 1976, however, it was evident that OPIC would not be able to transfer the insurance program to the private sector on the schedule set forth in the 1974 amendments, and that continued efforts to do so would undermine OPIC effectiveness.[34] Moreover, United States investment in LDC's appeared to be declining during a period of increasing need for and interest in such investment and of growing United States national interest in the diversification of critical raw materials.[35] These developments led to an extensive examination early in the Carter Administration of OPIC's functions and policies; this review culminated in recommendations by the Cabinet-level Economic

29. *Id.* at 55.
30. *Id.* at 67.
31. 120 CONG. REC. 4255 (1974).
32. H. R. REP. No. 93-1026, 93d Cong., 2d Sess. (1974).
33. *See* 1977 H.R. REP., *supra* note 14, at 6, and 1977 *Senate Hearings*, *supra* note 4, at 26 (statement of Rutherford Poats).
34. The Executive Branch review, studies by the American Bar Association and the General Accounting Office, and the private insurance industry all agreed that the 1974 "privatization" mandate would not work. *See* 1977 H.R. REP., *supra* note 14, at 15; 1977 S. REP., *supra* note 4, at 13, 26. The SFRC further concluded that "lifting the requirement for privatization by a date certain will free OPIC manpower and resources for more innovative efforts in project identification and development." *Id.* at 25. *See also* 1977 *House Hearings*, *supra* note 17, at 37 (statement of Rutherford Poats), 104 (statement of C. Fred Bergsten), 161 (statement of Joseph Griffin, spokesman for the American Bar Association), 195 (statement of Leroy Simon, senior vice-president, Prudential Insurance Company), 247 (statement of J. Kenneth Fasick, GAO spokesman), 241 (statement of Marshall T. Mays, former President of OPIC who testified that it was too early to abandon the privatization experiment) *and* Griffin, *supra* note 20, at 630, 657, which reprints the transcript of an April 21, 1976 discussion, "New Developments in Insuring Overseas Investments Against Political Risks," sponsored in Washington, D.C. by the American Bar Association Subcommittee on Insuring Overseas Investment.
35. *See* 1977 *Senate Hearings*, *supra* note 4, at 20 (statement of Rutherford Poats).

Policy Group.[36] The principal conclusion of this review was that OPIC does significantly contribute to the implementation of United States foreign economic development policies and should be continued.[37] The Carter Administration also concluded that with certain new program directives, OPIC could play an even more important role in the future. These directives included: (1) further focusing OPIC's efforts on the lower income developing countries; (2) focusing on improved coverage for projects in energy and raw material resource development; and (3) relieving OPIC of the requirement to transfer its insurance underwriting to the private sector.[38]

These conclusions generally were endorsed by the SFRC and the House International Relations Committee [hereinafter referred to as HIRC].[39] The Administration bill easily passed the Senate by a vote of 69 to 12,[40] but a floor fight developed in the House of Representatives as a result of AFL-CIO lobbying against the bill. The unions argued that OPIC aided and abetted the export of U.S. jobs.[41] Opponents also argued that OPIC insurance goes primarily to large MNC's which do not need investment insurance. After intensive lobbying and three days of floor debate, the bill finally passed by a vote of 191 to 165.[42]

II. THE CONTINUING DEVELOPMENTAL ROLE OF INVESTMENT INSURANCE

The classic rationale for investment insurance can be put simply: if, for a public purpose, the United States Government wishes to encourage selected United States private investment in countries when the perceived

36. *Id.* at 12 (statement of C. Fred Bergsten), 20 (statement of Rutherford Poats).
37. *Id.* at 15.
38. *Id.* at 12.
39. *See* 1977 S. REP., *supra* note 3 and 1977 H. R. REP., *supra* note 14.
40. 123 CONG. REC. S17,688-S17,699 (daily ed. Oct. 25, 1977).
41. *See* 36 CONG. Q. WKLY REP. 561 (March 4, 1978). Lobbying for and against the bill was extensive. The principal supporters were the U.S. Chamber of Commerce, National Association of Manufacturers, Emergency Committee for American Trade, Associated General Contractors of America, the American Agribusiness Associates, the League of Women Voters, the American Bar Association, and the Association of American Chambers of Commerce in Latin America. The principle opponents were the AFL-CIO and constituent unions, and the Americans for Democratic Action. The most poignant effort was a deathbed letter from Senator Hubert H. Humphrey to all Members of the House in which he stated, in part:

> I have devoted much of my life to assuring and expanding job opportunities for all Americans. . . . You may be sure I would not support a program that causes the loss of American jobs. . . .
>
> It is a rare occasion that I differ with my friends in the AFL-CIO. However, in this case I believe their concerns are mistaken. On balance, OPIC's operations are in our national interest; they produce additional jobs and result in few, if any, job losses; they help provide new sources of needed raw materials; and they are helpful to the developing countries—all at no cost to the taxpayer . . . .

124 CONG. REC. S4929 (daily ed. Apr. 6, 1978). A letter in support of the bill also was sent to various Texas Congressmen by the members of the Council of the International Law Section, State Bar of Texas.

42. 124 CONG. REC. H1438-H1454 (daily ed. Feb. 23, 1978).

political risks are judged to be prohibitive, then the United States Government needs to offer an effective program that would mitigate the effects of such risks.[43] We would contend that this classic rationale for investment insurance remains as valid in the late 1970's as it was in the late 1940's. Reasonably priced, comprehensive insurance against the major political risks has proven to be a low-cost public policy that over the years has successfully encouraged an increased flow of private investment to selected countries.[44]

The dynamic international milieu of the 1970's, of course, has influenced the nature of the developmental benefits engendered by private investment. Furthermore, it has raised some issues about the role of investment insurance to a prominence not previously attained. While each of these issues will be discussed later at some length, it is useful to state them briefly at this point:

1. Is the corporate investment decision-making process influenced any longer by the incentive effect of insurance?
2. Have the expanding size and international experience of United States firms and the collateral development of a variety of risk management techniques rendered investment insurance unnecessary?
3. Does investment insurance continue to have a beneficial effect on the cost of the investment to the developing country?
4. Finally, given OPIC's eight-year record of settling investment disputes and claims, are there any discernable developmental benefits of this mode of dealing with confrontations between United States corporations and the governments of LDC's?

A. *The Impact of Investment Insurance on the Corporate Foreign Investment Decision-Making Process*

Research on the foreign, direct-investment, decision-making process of private corporations is still in its infancy.[45] Moreover, because a myriad of factors affects the final decision, it is by definition difficult to isolate the impact of any single factor such as investment insurance on that decision. Compounding this difficulty is the fact that the international business community is not a monolith; it is composed of thousands of unique firms in hundreds of different kinds of businesses. Nevertheless, there is a solid body of direct and indirect evidence, logical argument, and expert testi-

43. *See* 1977 *House Hearings*, *supra* note 17, at 15 (statement of Rutherford Poats), 99 (statement of C. Fred Bergsten) and 222 (statement of Prof. Stephen J. Kobrin, Sloan School of Management, Massachusetts Institute of Technology).
44. *Id.*
45. *See* AHARONI, *supra* note 15; Y. AHARONI, MARKETS, PLANNING AND DEVELOPMENT: THE PRIVATE AND PUBLIC SECTORS IN ECONOMIC DEVELOPMENT (1977); D. HAENDEL, G. T. WEST & R. MEADOW, OVERSEAS INVESTMENT AND POLITICAL RISK (1975); GAO REPORT ON MNC's, *supra* note 24, at 9; and Stevens, *The Determinants of Investment*, in ECONOMIC ANALYSIS AND THE MULTINATIONAL ENTERPRISE (J. Dunning ed. 1974).

mony supporting the position that OPIC investment insurance continues to have an important positive effect on the foreign investment decision-making process within corporations.

To examine the influence of OPIC's insurance on this process requires a brief discussion of how investors evaluate investment opportunities and reach investment decisions. Since the decision to invest or not is merely the final step in a series of decisions about the investment opportunity, the influence of political risk insurance needs to be treated in the context of this whole process.

Regardless of the size or nature of his business, a businessman considering an investment in an LDC cannot help but notice that there are some different economic and political factors that must be considered—factors that he does not usually consider when evaluating a United States investment.[46] These include weaknesses in the LDC's infrastructure, notably in transportation, communications and other public services; the limited size of local markets; the thin layer of managerial, professional and technical personnel that often necessitates extensive training; and higher levels of uncertainty and risk occasioned by the possibility of rapid inflation and devaluation, political instability, changing attitudes towards foreign investment, pervasive discretionary business regulation, and expropriation.[47]

Nearly all potential investors undertake some kind of examination of the political factors that may affect the profitability and security of the investment while they are examining the financial aspects of the LDC investment opportunity.[48] The most frequently followed course entails some preliminary library research on economic, political, and legal matters followed by investigative tours of the country, consultation with various experts and governmental agencies, and an "analysis" of relevant political factors that may affect the projected profitability of the proposed investment.[49] The purpose of conducting such an analysis is to provide the investor with a sound basis for deciding whether to avoid the political risk altogether (not to invest), to bear what is deemed to be an acceptable risk, or to bear a portion of the risk and transfer another portion through insurance or some other risk management technique.

While the purpose of conducting such an analysis is nearly identical among businessmen, the ways and means of conducting such analyses vary widely. It is ironic that while a businessman's judgment about political risks will often have multiple effects on his decision to invest in an LDC, relatively few corporations have developed or implemented a systematic

46. *Id. See also* Kobrin, *Political Risk: A Review and Reconsideration*, J. INT'L BUS. STUDIES (Forthcoming 1979).
47. *Supra* note 45.
48. *Id. See also*, Rummel & Heenan, *How Multinationals Analyze Political Risk*, 56 HARV. BUS. REV. 67 (1978).
49. *Supra* note 45.

approach to the analysis of these factors.[50] Indeed, subjective approaches continue to dominate political risk assessment. Some disastrous investments which have been made could have been avoided with a better analysis of the political risk. In far more instances, however, businessmen have missed excellent investment opportunities because they have over-reacted to the lack of certainty and have received poor evaluations and assessments of political factors. This is particularly true in the case of smaller companies and among businessmen with little or no international experience.[51]

The approaches businessmen take in assessing and responding to the political risk associated with a proposed investment can be typologized broadly into four groups: (1) hit or miss, (2) premium for risk, (3) range of estimates, and (4) risk analysis.[52] While each of these approaches is rarely used to the exclusion of all others, it is useful to treat them as if they were analytically discrete and to note the influence of OPIC investment insurance on each.

1. Hit or Miss

The approval or disapproval of an investment on the basis of a few considerations, while ignoring all other factors, is the basic characteristic of this approach. Certain investments and even countries are often rejected (or selected) by irrelevant or irrational criteria, hence the term "hit or miss." In spite of its many obvious drawbacks, this approach does have some slight utility as a means to screen out projects that are completely unsuitable.

Often even a cursory assessment of political uncertainties and risks in a country may preclude further economic analysis of a project, regardless of the availability of insurance or other risk management techniques.[53] The most common case is when open revolution, subversion, or external aggression causes potential investors to ignore any proposed investment for the short term. For example, the protracted political conflict in the Middle East has posed a continuing obstacle to the promotion of investment in Israel, Jordan, Syria and Egypt, countries which otherwise provide some attractive investment opportunities. In such circumstances, the contents of a morning newspaper may have a very direct impact on corporate decisions. Obviously, investment insurance will not overcome single-handedly an investor's lack of interest in countries that do not present a basically hospitable investment climate at least for the short term.

When short-term political conditions are acceptable attention naturally shifts to medium and long-term political risks. In this time frame, even the

50. *Id.*
51. *Id.*
52. *Id.*
53. *See* Rummel & Heenan, *supra* note 48, at 68.

potential availability of investment insurance is often important. The mere possibility that such insurance can be purchased indicates that a country understands the foreign investor's natural desire for security. A potential investor is aware that countries which are signatories with the United States Government to bilateral investment agreements[54] that allow the OPIC insurance program to operate provide, *ceteris paribus*, a tolerable legal environment for a foreign investment. Hence, the existence of such an agreement, emphasizing the mutual interests and responsibilities of the signatories, can be reassuring to an investor who tends toward a "hit or miss" approach to political risk assessment.

The initiation, reinstitution, cancellation or restriction of OPIC programs in a country can also have important repercussions for such an investor. For example, the signing of bilateral agreements to institute the OPIC program has been considered an important symbol with respect to a number of countries.[55] It will not, of course, guarantee favorable interest.

In brief, the availability of OPIC insurance—whether or not it is purchased—can make what might be an unthinkable investment a possible investment. This is especially the case when it is the risk of expropriation that is of greatest concern. In such instances, especially for small investors, investment insurance can be a *sine qua non*.

2. Premium for Risk

A premium-for-risk approach tends to select or reject a proposed investment on the basis of whether or not the projected and adjusted rate of return meets some specified *a priori* threshold. Firms attempt to judgmentally "discount" a project (or a country) for various political risk factors; this essentially allows a firm to treat political risk as one contingency cost among the many that affect a project's expected rate of return.

54. All OPIC bilateral agreements may be found in DEP'T OF STATE, UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS. Basic elements of these agreements are (a) mutual consultation on the programs and approval of insured or guaranteed investments (b) international arbitration in the event of disputes between the United States and the host country regarding the programs and (c) confirmation of the right of subrogation with respect to insured or financed investments.

55. *See* discussion of OPIC's ground breaking role, section II.B. *infra*. Examples in which signing of a bilateral agreement was considered a diplomatic gesture were Yugoslavia, Egypt, Syria and Portugal. A June 23, 1976 letter from Senator Edward M. Kennedy to OPIC regarding the bilateral agreement with Portugal also discloses the domestic political consequences of such an agreement. It states, in part, as follows: "Since the change in government in Portugal on April 25, 1974, many members of the Senate have been deeply interested in the progress of the Portuguese democractic experiment, and have supported U.S. economic assistance to that country. I understand that OPIC is now giving consideration to a program of investment guarantees for Portugal to facilitate U.S. investments there. I would like to express my strong support for this possible initiative. I believe that it would aid immeasurably in helping to stimulate renewed foreign investment in Portugal, and thus help that close friend and ally of the United States to solve its staggering economic problems. In this way, we could give further tangible support to the democratic experiment in Portugal, and help bring that country back into the mainstream of European political and economic life. This would also be of great benefit to our own country."

Dr. Franklin Root, Associate Professor of International Business at the Wharton School of Business, has described this common approach very succinctly:

> In evaluating prospective foreign investment projects, U.S. managers make use of a "hurdle rate" which is the minimum return they consider acceptable to them. For investments in the United States and in many other industrial countries, the hurdle rate represents the opportunity cost of capital to the investment firm. But to take account of political risks in the developing countries, it is customary for U.S. managers to add a "risk premium" to their usual hurdle rate or—what amounts to the same thing—to require a fast payback of their investment. The risk-adjusted hurdle rates used by U.S. companies to evaluate investment projects in LDC's are commonly very high, on the order of 30 percent or more, or, alternatively, their required payback period is three years or less. The availability of political risk insurance allows U.S. investors to reduce their hurdle rates (or lengthen their payback periods) on projects in LDC's.[56]

The value of OPIC insurance to a businessman relying on this type of approach can be very concretely demonstrated. For example, in bidding on construction contracts offered by LDC governments, some United States contractors will attempt to treat political risk as a contingent cost.[57] As a result of this estimated cost, a contractor may decide not even to bid on the project. In other cases, the uninsured contractor customarily will include in the bid price an estimate—often up to twenty percent of his investment under the contract—to cover these contingent risks. The purchase of political risk insurance usually permits such a contractor to reduce that contingent amount to below five percent, thereby making his bid more competitive.

Similar methods of estimating political risk factors are evident in other sectors. Research done for OPIC indicates that mining companies differentiate substantially among the rates of return expected on new mining in different countries.[58] These companies generally believe a reasonably acceptable return on investment is approximately fifteen percent per annum on mining projects in the United States, 22.5% in "stable" overseas countries, and at least thirty-five percent in "unstable" overseas countries—if the investment is even considered. With OPIC insurance, these companies apparently will consider an anticipated rate of return in an unstable country closer to that of stable overseas countries or, in unique cases, to that of investing in United States mineral exploration.

56. 1977 *House Hearings*, *supra* note 17, at 235.

57. Data based on interviews with George E. Stockton, Asst. Dir., Assoc. Gen. Contractors of America, and Clark E. Batchelder, former OPIC insurance officer for construction contracting and presently a consultant on the construction industry to the Export-Import Bank of the United States.

58. 1977 *House Hearings*, *supra* note 17, at 401.

In the nomenclature of this approach, the purchase of OPIC insurance can make the difference between a proposed investment passing or not passing the corporate hurdle rate since it acts directly to lower that hurdle rate.

3. Range of Estimates

This approach is a basic extension of the premium-for-risk approach. After identifying those crucial political factors that could affect the profitability of an investment, estimates of their variation at different times in the future are made in order to determine how sensitive the firm's cash flow—or net profit—would be to such variations. The investor examines how sensitive the cash flow is to changes in each of the crucial political factors, and experiments to see how different combinations of these estimates affect the cash flow. Then a likely range for the resulting cash flows under various circumstances is developed.

The costs and benefits of procuring OPIC investment insurance can be directly factored into such a range of estimated cash flows, serving to make certain LDC investments more attractive than would otherwise be the case.

4. Risk Analyses

A more sophisticated approach to making a foreign, direct-investment decision is the risk analysis approach. This involves the estimation of the probability of various political events occurring and of their probabilistic impact on the profitability of the proposed investment. In the last few years, a small number of consulting firms and a growing number of large multinationals such as Exxon, Chase Manhattan, Shell and Dow have been using sophisticated methods for estimating the probabilities of the occurrence of adverse political acts and of their effects on corporate rates of return.[59] These probability estimates are utilized to discount anticipated cash flows, to allow for comparisons between potential projects, and to consider alternate uses of funds.[60]

It should be noted that the value of OPIC investment insurance is nowhere more clearly laid out for an investor than where a risk analysis approach is taken to evaluate an investment opportunity.[61] A strong logical argument can be made that if investment insurance is purchased subsequent to such a risk analysis, then it was deemed to be essential.

Under any of these four approaches to assessing and responding to political risk, it is difficult to generalize about the "weight" potential investors give to the availability of OPIC insurance, either in aggregate terms or with respect to individual projects. In congressional testimony, a spokesman for the General Accounting Office [hereinafter referred to as GAO] testified that a GAO study of OPIC indicated that probably two-thirds of the OPIC-insured investments would not have been made without the insurance, including those investments in the more developed of the LDC's.[62] This estimate was supported in congressional hearings by company witnesses,[63] international business scholars,[64] and statements of OPIC-users submitted for the record.[65]

59. *See* HAENDEL, WEST & MEADOW, *supra* note 45, at 6, 60.

60. *See* Rummel & Heenan, *supra* note 48, at 70.

61. *See* 1977 *House Hearings*, *supra* note 17, at 434 (model of risk analysis using this technique and adjusting for value of OPIC insurance).

On the individual firm basis, it should be evident from the foregoing analysis of the ways in which businessmen assess political risk that, depending on the host country, the industry, the particular corporation and so forth, the significance of OPIC insurance will vary from essential—a *sine qua non* to further consideration of the investment—to substantial or only marginal. Such a conclusion is supported further by a 1971 survey conducted by *Business International* of the major firms operating overseas in which 45.8% of the respondents believed that insurance is "necessary," 47.6% believed it is "desirable," and 5.9% said it was "not important."[66]

In aggregate terms, AID issued $3.97 billion of insurance from 1961 through 1970 and OPIC had issued $2.97 billion through the end of fiscal year 1977, with total outstanding coverage at that time being $5.77 billion, representing over one thousand investments by over four-hundred and fifty investors in seventy-nine countries.[67]

Based on responses to a 1977 market survey of United States companies

62. 1977 *Senate Hearings*, *supra* note 4, at 114 (statement of J. Kenneth Fasick, GAO spokesman).

63. *See* 1977 *House Hearings*, *supra* note 17, at 175-93. One witness, Donald W. Hoagland, counsel for the Filon Exploration Corp., described the importance of OPIC insurance in securing partners for petroleum exploration in Jordan under a production sharing agreement as follows:

> Filon tried to find drilling partners and found a large number of them unwilling to commit to the prospect of the political risks. We have furnished OPIC with some correspondence that we have which quite explicitly states that as the problem these companies were having in proceeding to examine this prospect. There were other problems, too, but many companies treated the political risk as an absolute barrier to further discussion of the technical and financial aspects of the proposal. Although Filon had spent $1.2 million of its own funds in exploring this project by the fall of 1976, it was not prepared to go any farther [*sic*] without partners. . . . In the fall of 1976, OPIC . . . expressed a greater interest in mineral exploration projects and after a preliminary industry meeting responded positively to Filon's interest and agreed to try to work out a contract, subject to its board's approval. Well, our contract was negotiated, drafted, authorized, and signed by January of 1977. The availability of the insurance contract changed the attitude of Filon as well as many of the companies which had refused to look at the project. At least a dozen took a new look at it. It was clear to us that reasonable political risk insurance was necessary for any of these companies to commit to the project. In addition, the Kingdom of Jordan saw the execution of this contract as a sufficient indication of progress on our part to become more receptive to the needed revisions in the production sharing agreement. . . .

Id. at 181.

64. *Id.* at 222-29.

65. *Id.* at 119.

66. S. REP. No. 93-676, *supra* note 27, at 56.

67. Data supplied by OPIC. *See* 1977 *House Hearings*, *supra* note 17, at 17, 411. *See also* OPIC ANNUAL REPORT 12 (1977).

having overseas investment potential.[68] OPIC further estimates that from 1965 through 1978, AID and OPIC annually insured—or OPIC is likely to insure—investments amounting to between thirty-five and fifty percent of all investment projects by these companies in all LDC's. The following table sets forth this data:

	1965-70	1971-72	1973-74	1975-76	1977-78
Total Number of Projects Invested in LDC's	748	393	436	515	300
Of the Total Number of Projects in LDC's, Number of Projects for which Respondents Did Seek (or are seeking) AID/OPIC Insurance Coverage	357	138	180	230	154
Percent Seeking AID/OPIC Insurance	47.7%	35.1%	41.3%	44.7%	51.3%

Based on data presently available, it is impossible to determine the portion of the total dollar amount of investment eligible for OPIC insurance that actually has been covered, either in whole or part.[69] This is because statistics concerning private, direct United States investment in LDC's, including those of the Organization for Economic Co-operation and Development [hereinafter referred to as OECD], and the Commerce Department are neither comprehensive nor collected in a suitable form.[70] Thus, estimates of the percentage of dollar volume of investment that was eligible for insurance and was actually insured may vary in a given year from seventeen to ninety-four percent.[71]

B. *The "Ground-Breaking" Role of Investment Insurance*

Even accurate aggregate statistics would not reveal the "ground-breaking" developmental role OPIC has played in particular countries in the past and hopes to play in others in the future. Two countries that OPIC cites as examples of this "ground breaking" role are Korea and Indonesia.[72] While many factors have been important in promoting foreign investment in Korea, the boom of United States investment in Korea can also be directly related to the 1960 signing of the bilateral agreement which

68. Data based on a 1977 marketing survey by the University City Science Center for the Overseas Private Investment Insurance Group.
69. *See* 1977 *House Hearings*, *supra* note 17, at 86,411.
70. *Id.*
71. *Id.*
72. *Hearings on Multinational Corporations and U.S. Foreign Policy Before the Subcomm. on Multinational Corps. of the Senate For. Rel. Comm.*, 94th Cong., 1st Sess., Part 3 at 443 (1973).

established the investment insurance program. Korean and OPIC statistics indicate that fifty-two percent of all eligible investment projects from 1962 through 1972 were assisted by OPIC. This represented eighty-nine percent of the total dollar amount of eligible investment. Indeed, virtually no major investment occurred in Korea during this period without OPIC insurance.[73]

Non-petroleum United States investment in Indonesia presents a similar case.[74] The great majority of such investment began to occur after the signing of the bilateral agreement in 1967. OPIC and Indonesian statistics indicate that from 1967 through 1973, OPIC insured sixty-three percent of the total number of eligible projects with a proposed capitalization of $362 million, which represents eighty-six percent of the total amount of eligible investments. Perhaps more significantly, AID, and subsequently OPIC, undertook a major ground-breaking role both in insuring and financing a $10 million INDOSAT satellite project in 1968, and later, in 1970, a $200 million Freeport copper project.[75]

In the next decade OPIC hopes to play a similar ground-breaking role with respect to some African countries. OPIC's total impact on other countries such as Afghanistan and Rwanda, where OPIC was successful in helping pioneering new ventures enter a country with virtually no United States presence, may be equally significant although the total amount of investment will be considerably smaller.[76]

C. *The Impact of Insurance on the Cost of the Investment*

The developmental benefits yielded from a reduction in the cost of the investment as a result of investment insurance can be distinguished from the benefits stemming from OPIC's influence on the corporate decision-making process and from OPIC's ground-breaking role. The purchase of OPIC insurance tends to encourage longer term planning on the part of the investor and, *certeris paribus*, delivers more benefits at a lower cost to the host country than would be the case in its absence. Moreover, the direct developmental benefits of the OPIC-insured investment are also often accompanied by other beneficial social and economic side effects.

1. Impact on Expected Cash Flow

As already noted, investors have a minimal return that must be met

73. *Id.*
74. *Id.* at 444.
75. Interview with Harry L. Freeman, Director of the AID Insurance Program from 1967 to 1970 and OPIC Vice President for Finance 1974-75. Mr. Freeman asserts that the INDOSAT project was a critical element in United States Government efforts to stimulate United States investor interest in Indonesia late in the 1960's. It demonstrated United States commitment both in providing insurance and in guaranteeing a portion of the debt financing for the project.
76. *See* 1977 *House Hearings*, *supra* note 17, at 26,51 (statement of Rutherford Poats), and 410 (monograph by S. Franklin).

before making an investment. This may be expressed in terms of an anticipated "payback"—the time required to recapture this investment—or as "return on investment"—the earning power of the full life of the investment. Although there is substantial variance among businessmen as to the desirable payback on any given investment, an anticipated payback beyond three to five years is usually considered unattractive in the context of LDC's because the risks are perceived to be so high.[77] This means that businessmen usually expect greater short-term cash flows on LDC investments than on those in the United States or in other developed countries. Thus, when comparing alternative investments, businessmen will tend to reject an LDC investment with a lower initial cash flow in favor of other investment opportunities in developed countries or, to the extent possible, a similar LDC investment which has a higher initial cash flow, even though the longer term returns on such an investment may be significantly lower than on the LDC investment with lower initial cash flows.[78] Alternatively, if the investor is constrained to make the investment for reasons other than profitability, the desire for higher initial cash flows will affect his bargaining position with the host government concerning investment incentives and the project's financial structure.

Since OPIC offers insurance coverage for a term of up to twenty years,[79] the use of insurance reduces the perceived need for an investor to seek a rapid recapture of his investment costs. This can yield a variety of benefits both to the investor and to the host country. For example, some projects such as agricultural production may have a start-up time in excess of five years, particularly in LDC's where infrastructure weaknesses usually extend start-up times beyond those anticipated in the United States. In these cases, the investor's willingness to accept a long-term payback will be critical to the investment decision.

Insured investors, who usually feel more secure, also tend to be more willing to consider LDC investments with a lower aggregate cash flow or return on investment. Two examples noted previously are in the construction industry and the mining industry. In the former, the investor benefits from the insurance by submitting a more competitive bid and the host country benefits by receiving the United States technology at a lower price. In the latter, the investor's willingness to accept a lower rate of return has obvious economic benefits both for the investor and the host country. It permits consideration of less profitable mining ventures and also provides the investor with greater flexibility in negotiating the terms of concession or production sharing agreements. This, in turn, reduces the likelihood of subsequent allegations of "excessive profits," of forced renegotiation of the concession, or of threats of expropriation.

77. 1977 *House Hearings*, *supra* note 17, at 234 (statement of Professor Root).
78. *See* 1977 *House Hearings*, *supra* note 17, at 434 (risk analysis model).
79. OPIC, INVESTMENT INSURANCE HANDBOOK 8 (1978).

2. Incentive to Reinvest Earnings

For the investor, the purchase of OPIC insurance not only removes a significant measure of risk associated with an investment in an LDC, but it also removes a quantum of uncertainty, fear, anxiety and suspicion. The investor who has OPIC insurance can act more self confidently in his dealings with various host country political groups, he can afford to have a longer time perspective, and he is less likely to act precipitously or panic when the host country experiences political or economic difficulties. He is less likely to act out of fear and/or greed and withdraw earnings as rapidly as they are generated.

When insurance is issued, OPIC usually offers a total insurance commitment of current coverage on ninety percent of the investment plus a commitment for additional coverage of up to one hundred eighty percent of the initial investment for reinvested retained earnings.[80] Together with the twenty year insurance term, this practice provides an incentive to reinvest earnings. The additional coverage is available to the investor at the time the initial investment is made rather than on the subsequent reinvestment date. Thus the investor is assured of political risk coverage on additional capital expenditures from internal operations that may be necessitated at a future time. Of course, additional insurance on reinvested retained earnings above that amount may also be available depending upon OPIC's underwriting policies in effect at that time.

3. Encouraging Equity in Appropriate Cases

OPIC insurance also provides a financial benefit both for the investor and the host country since it encourages equity investments in appropriate cases. Because equity investments are perceived to pose and often do pose greater expropriation risks as well as the prospect of greater economic returns, it is with respect to such investments that OPIC insurance often is more attractive. At the same time, it must be remembered that host countries vigorously encourage equity in many cases. In practice, equity investments are not considered fixed foreign exchange obligations of the country as are debt investments. Moreover, although the long-term cost to the host country on equity investments usually is larger than on debt investments, debt requires payment both of principal and interest in a fairly short time. Equity usually remains in the country for a longer period of time; it involves the continuing inflow of investor's technology and management skills; and equity earnings, which are payable only if the foreign enterprise is successful enough to accumulate earned surplus, are often reinvested in whole or part. Thus, although the long-term cost in foreign exchange may be greater than with respect to debt investments, there are distinct short- and medium-term advantages of equity over fixed debt obligation, and the

80. *Id.*

long-term cost of an equity investment can be offset by the benefits the host country receives from the longer term participation of the United States investor.

4. Other Beneficial Developmental Effects

Businessmen who take a longer term view of their investment in a country are more prone to engage in other activities that benefit the host country, notably the voluntary improvement of labor conditions, better fringe benefits, more on-the-job training, production and profitsharing, and so forth. Moreover, the investor's ability and willingness to plan for a long-term economic relationship in the country permits it to develop future markets during the initial term of its investment.

This long-term thinking may also contribute to the creation of some beneficial social relationships that tend to counter nationalistic apprehensions and promote understanding and cooperation between the host country and the United States. For example, Richard Gordon Myers, Executive Vice-President of Seaboard Allied Milling, has stated that construction of an OPIC-assisted flour mill in Sierra Leone not only improved the local working conditions but also furthered people-to-people relations between the United States and Sierra Leone.[81] Of course, part of the motivation for good corporate citizenship and community involvement is profit or security of the investment. Part of it also is simply human nature and the modification of perspectives engendered by long-term thinking about the investment.

For the LDC, the value of an OPIC-insured investment thus extends beyond the direct developmental effects of the particular project itself. The demonstration effect engendered by the presence of an OPIC-insured investment is symbolic of: (1) The LDC's new or continued desire to attract foreign private investment, (2) the host country's willingness to allow for the transfer of some of the perceived political risk to attract the investment, and (3) the LDC's willingness to contribute to the building of a more mutually beneficial relationship between it and the international investment community.

D. *Impact of OPIC Insurance on Investment Disputes*

Although not specified in OPIC's legislative charter, the nature of OPIC's operations has required it to develop expertise in investment dispute settlement.[82] Moreover, in its 1977 review of OPIC, the Executive

81. 1977 *House Hearings*, *supra* note 17, at 178.

82. *See* 1977 H. R. REP., *supra* note 14, at 6. The sixty-one claims paid or guaranteed since the beginning of the political risk insurance program have totaled $336.5 million. Because of recoveries, the total net cash payment on claims was $108 million as of June 1977, and OPIC anticipates that by 1988 it will actually receive a net gain on its claims due to interest payments on settled claims which it has paid. OPIC has denied eight expropriation claims totaling $249.54 million and two incovertibility claims equaling $102,000. *Id.* at 6-7.

Branch concluded that this expertise has distinct developmental benefits.[83] In Senate testimony, Rutherford Poats described this as follows:

> OPIC has three developmental roles to play. One is to increase the flow of private U.S. investment to developing countries . . . Second, the OPIC insurance improves the form and character of the investment . . . And third, the OPIC insurance, by virtue of its capacity to deal with and head off disputes that may arise between the investor and the host country tends to increase the possibilities of avoiding international confrontation over investment relations between U.S. corporations and developing country governments.[84]

This position, which was supported by the GAO study[85] and the HIRC and SFRC committee reports,[86] sets aside the majority SFRC position in 1973 that OPIC's insurance increases the likelihood of government-to-government confrontation.

In practice, OPIC's efforts to reduce the probability of confrontation over an insured investment begins with its standard criteria for eligibility and its initial project review both to screen out undesirable or ineligible projects and to assist investors, when appropriate, in structuring the investment. As a prerequisite to obtaining insurance, OPIC requires each investor to make several representations and factual disclosures relevant to OPIC's interest in the project such as arrangements with the host country government, applicable host country investment incentives or regulations, and the host country developmental benefits and United States economic effects.[87] OPIC also obtains the views of the relevant United States embassy concerning the project.

OPIC carefully analyzes this information and actually rejects about one application for insurance for every six that it approves, the principal reasons being adverse United States effects, ineligible projects, or adverse developmental benefits.[88] Moreover, based on its review of a project, OPIC also may decide to recommend or require modifications to improve potential United States or host country effects, or to reduce potential future host country-investor confrontation. Finally, OPIC will consider risk reduction techniques in setting the premium on each insurance contract.[89]

It should be evident that OPIC's leverage to require project modifica-

83. 1977 *Senate Hearings*, *supra* note 4, at 22 (statement of Rutherford Poats).

84. *Id.* at 154.

85. *See* THE INVESTMENT INSURANCE PROGRAM MANAGED BY THE OVERSEAS PRIVATE INVESTMENT CORPORATION 37 (1977) (Comp. Gen. Rep. to Cong. B-172340).

86. *See* 1977 S. REP., *supra* note 3, at 20, and 1977 H. R. REP., *supra* note 14, at 8.

87. OPIC, INVESTMENT INSURANCE HANDBOOK 16 (1978), OPIC FORM. NO. 52, Application for Political Risk Insurance (1975), OPIC POLICY GUIDELINE, Development Criteria and Implementation BDR(71)42 (June 14, 1971).

88. *See* 1977 *House Hearings*, *supra* note 14, at 123 (insert for the record on project selectivity).

89. *See* OPIC POLICY GUIDELINE, Insurance Premium Rating Structure: Revisions, BDR(77)37 (Nov. 17, 1977).

tions is directly proportional to the weight that an investor gives to the availability of insurance on the investment decision. In any case, OPIC acts as a clearing house for the exchange of ideas among investors as to risk reduction techniques because OPIC participates in a variety of projects and can suggest to one investor, without disclosing business confidences, a technique used by another.

There is nothing unique about most of the risk reduction techniques OPIC encourages.[90] They include, among others: (1) encouraging host governments without local expertise in a given industry to seek assistance of specialized outside consultants to protect its interests in granting concessions, investment activities, and so forth, which tends to bolster host country perception that the basic deal is fair;[91] (2) multilateralizing the project through joint ventures with third country investors and obtaining investment insurance or guaranties from the third party's home government, syndicating the financing among multilateral institutions such as the World Bank, regional development banks, third country commercial banks and private international investment companies;[92] (3) seeking joint venture partners in the host country;[93] and (4) negotiating special investment arrangements with the host country, that, for example, allocate rights between the investor and the host country to foreign exchange earnings, provide contractual dispute resolution techniques (arbitration, fact-finding, and conciliation arrangements), or establish non-equity forms of investment such as a production sharing agreements (which may avoid future nationalistic resentment to the investor because of equity ownership in host country natural resources).[94] In addition, the bilateral agreements under which OPIC programs operate all require express host government approval of insurance on the project, which confirms rights of OPIC as subrogee and provides for international arbitration between the United States and the host country regarding disputes between the two countries over the insured project.[95]

The primary purpose of these techniques is to stablize the investment arrangements, providing greater certainty to the project and reducing the potential of future pressure on the host country to expropriate. OPIC also has established an "insurance monitoring system" that includes country monitoring, project monitoring and incipient claims monitoring.[96] The

90. *See* Salzman, *How to Reduce and Manage the Political Risks of Investment in Less Developed Countries*, in GLOBAL COMPANIES, *supra* note 26, at 85. *See also* Bradley, *Managing Against Expropriation*, 55 HARV. BUS. REV. 75 (1977); and CURRENT LEGAL ASPECTS OF DOING BUSINESS IN BLACK AFRICA, chs. 2 & 4 (1975).

91. Salzman, *supra* note 90, at 97.

92. *Id.* at 99.

93. *Id.*

94. *Id.* at 100. *See also* 1977 *House Hearings*, *supra* note 17, at 30 (statement of Rutherford Poats) and 85 (statement of Hon. Robert A. Smith, OPIC, former Ambassador to the Ivory Coast, regarding new forms of investment in extractive industies).

95. *See* note 54, *supra*.

96. 1977 *House Hearings*, *supra* note 17, at 424.

purpose is to detect early warning signs of potential problems, providing OPIC and the insured investor extra time to possibly head off a dispute before publicity and posturing has led to hardened positions.

This "early warning system" is strengthened by standard insurance contract requirements that the investor notify OPIC of actions that materially may affect the project and obtain OPIC's advance consent to material changes in the project (OPIC cannot withhold such consent without good reason).[97] Moreover, OPIC has access to a variety of sources of information concerning a dispute, including all United States Government sources, as well the right to examine the books of the investor and the foreign enterprise.[98]

OPIC maintains that most of the potential or actual insurance claims cases have ended amicably without much publicity, including numerous examples

> of OPIC and the insured working quietly together to limit the scope of host government initiated renegotiations, of coverage amendments arranged to permit an insured to restructure its investment without loss of coverage, and of settlements or understandings worked out between OPIC and the insured in advance of any actual expropriation or claim filing so that the insured could negotiate more effectively with the host government.[99]

In some cases, however, the investor-host country negotiations attracted a great deal of public interest even though attention was not focused on the OPIC insurance aspect. A notable example is the 1974-75 renegotiation of bauxite mining arrangements between the Jamaican Government and United States aluminum companies, during which OPIC worked closely with the companies having insured investments to assure continued coverage on the modified arrangements.

Although OPIC will not hesitate, when appropriate, to play a direct role in negotiations, it clearly prefers that the investor stay "out front."[100] This evidences a belief that the insured company generally will have both the self-interest and know-how to do the best job.[101] In addition, OPIC's taking a back seat position may reduce the risk that direct confrontation between government agencies will politicize the dispute. It also puts OPIC in a better position to encourage mediation or other dispute resolution techniques.

Thus in most of OPIC's expropriation claims cases, the investor carried

97. C. Hunt, *Valuation Experience of Government Insurance Investment Operations*, in THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 64, 81 (R. Lillich. ed. 1975). *See also* Gilbert, *supra* note 22, at 518.

98. Hunt, *supra* note 97, at 74.

99. Speech of Cecil Hunt, OPIC General Counsel, OPIC's Claim History (Jan. 1978) (OPIC Mineral and Energy Seminar, copies of text available from OPIC).

100. *Id.* at 6. *See also* Gilbert, *supra* note 22, at 520.

101. Hunt, *supra* note 99, at 6.

out the negotiations with the host country.[102] In some cases OPIC encouraged the participation of a third party to provide new impetus to negotiations that had bogged down due to mistrust or hostility that had developed between the original parties.[103] Finally, it sometimes has been necessary for OPIC to play a direct role.[104] In such cases, and indeed in all negotiations in which OPIC has participated, it appears that a critical element has been that OPIC has assumed—and foreign governments have perceived it to assume—a technical as opposed to a political perspective with respect to the negotiations.[105] OPIC believes this approach tends to avoid inflaming nationalist emotions and shifts the negotiations into the hands of legal and financial technicians.[106]

Whether in the background or as an active participant in negotiations, OPIC has significant leverage in expropriation cases both with the investor and the host country. For example, OPIC insurance does not insure against all acts a government may take with respect to the project. Moreover, OPIC requires the investor to retain at least ten percent of the risk on the portion of investment that OPIC insures, and upon payment of an expropriation claim the investor must in effect abandon the project by assigning all of its insured interest to OPIC. The standard insurance contract also requires the investor to take all reasonable steps, including negotiation and adjudicatory proceeding, to prevent or postpone potentially expropriatory action, and sets a waiting period of one year before an alleged expropriatory act is compensable under the insurance. This helps facilitate a "cooling off" period between the investor and the host country during which facts can be gathered and positions reviewed.[107] This period also provides OPIC the opportunity to encourage a settlement that may provide either adequate compensation or a suitable modification of arrangements that would permit the investor and the host country to pursue mutually desirable future relations. Finally, if necessary, OPIC can resort to its rights against the host government under the bilateral agreement.

The most significant leverage OPIC has in these cases, however, is its ability to use its "claims guaranty authority" to help make installment compensation by a financially weak government acceptable to the United States investor.[108] The reason is that an expropriating government often will agree to pay satisfactory compensation if a portion of the payments can be deferred. The United States investor usually will not accept such installment settlement notes because of the heavy discount that the market

102. Gilbert, *supra* note 22, at 518-20.
103. *Id.* at 522-23.
104. *Id.* at 528, 543.
105. *Id.* at 544. *See also* 1977 *House Hearings*, *supra* note 17, at 19, 31 (statement of Rutherford Poats).
106. *Id.*
107. *See* Hunt, *supra* note 99, at 9; Gilbert, *supra* note 22, at 518.
108. Hunt, *supra* note 99, at 78. *See also* 1977 *House Hearings*, *supra* note 17, at 19 (statement of Rutherford Poats).

would place on their value. An OPIC guaranty can resolve this issue and, in theory, help bring the case into—or at least closer to—compliance with United States views of international law on compensation standards.[109]

In summary, OPIC's approach to potential or actual claims matters is to establish a flexible, working relationship between the insured and OPIC permitting the consideration of alternate forms of resolving disputes. This allows the investor to investigate any form of settlement with the host government or a new arrangement with the host government for continuing operations. By close consultation with OPIC, the investor can pursue these avenues without prejudice to its insurance rights. If all else fails, insurance provides reasonably prompt payment on most of the loss.

The developmental impact of this approach is two-fold. First, when nationalization is inevitable, the ability to avoid inflaming, potentially damaging political issues associated with the dispute can pay an important dividend in terms of the relations between the United States and the host country, the host country's international image, and the prospects for attracting other private foreign investment that the host country government may still desire. Second, whenever the investor and the host country can agree to mutually satisfactory arrangements that permit the host country to achieve revised national goals with respect to the project, but also provide sound prospects for the investor to continue its participation in the project, the host country continues to receive the benefits of the United States investor's participation in the country's economic development.

III. FUTURE DIRECTIONS FOR THE OPIC PROGRAM

The 1978 OPIC Amendments did not seek to change the basic developmental role of OPIC. Rather, these amendments contained program modifications designed to sharpen the focus of OPIC's programs. In three areas—modification of the statutory provisions regarding private participation in the programs, further focusing the program in lower income countries, and increased emphasis on certain industrial sectors—the impetus for these changes came from the Executive Branch. In a fourth, which was a series of statutory prerequisites to and restrictions on the availability of OPIC insurance, the impetus came from Congress.

A. Transfer of Insurance Program

The 1978 OPIC Amendments abandoned the requirement that OPIC seek to transfer its insurance program to the private sector.[110] OPIC still may seek reinsurance from the private insurance companies for risk management and other purposes.

109. Hunt, *supra* note 99, at 7-8.
110. 22 U.S.C. § 2191 (1964 & Supp. 1978), *as amended by* Pub. L. No. 95-268, 92 Stat. 213 (1978). *See also* H. R. CONF. REP. No. 95-1043 on H.R. 9179, 95th Cong., 1st Sess. 9 [hereinafter cited as H.R. CONF. REP.], *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1118, 1121.

B. Greater Emphasis on Lower Income LDC's

The 1978 OPIC Amendments require OPIC to give preferential consideration to potential projects in countries with a per capita income of $520 or less in 1975 dollars and to restrict its assistance with respect to potential projects in upper income LDC's having a per capita income of $1,000 or more in 1975 dollars.[111] This enacted into law a 1977 OPIC policy directive that restricted the availability of OPIC insurance in upper income LDC's to special cases such as: (1) projects for the exploration and development of non-fuel minerals or for exploration and development of oil and gas in LDC's that are not members of the Organization of Petroleum Exporting Countries; (2) projects sponsored by or significantly involving cooperatives or smaller United States companies; and (3) unusual projects approved by the Board of Directors such as those having exceptionally developmental effects or serving some other important United States policy consideration.[112] The conference report on the 1978 OPIC Amendments added, moreover, that it was the understanding of the conferees that OPIC's Board of Directors would retain flexibility in administering this policy but must keep the SFRC and HIRC informed of significant changes.[113]

This provision was a direct result of the Executive Branch review of OPIC's operations, which concluded that upper income countries such as Brazil had become so effective in attracting foreign investment that incentives such as OPIC insurance were not essential. The main thrust of this new policy came from Assistant Secretary Bergsten, who argued that the United States investment patterns in higher income LDC's such as Mexico and Brazil had been roughly comparable from 1966 to 1975 to United States investment patterns in developed countries, whereas very little investment went to the poorer LDC's during that decade. Hence, the need for the incentives was much higher for the latter group of countries.[114]

The principal dissent to this position came from a spokesman for the American Bar Association who argued that the focus on lower income countries should remain a matter of emphasis rather than a restriction, particularly since per capita income is an arbitrary criterion of develop-

111. H.R. CONF. REP., *id.* at 8.

112. OPIC POLICY GUIDELINE, Country Eligibility for OPIC Programs, BDR(77)26 (Sept. 20, 1977) *as amended by* BDR(78)2 (Jan. 31, 1978).

113. H.R. CONF. REP., *supra* note 110, at 8.

114. 1977 *House Hearings*, *supra* note 17, at 99 (statement of C. F. Bergsten). It should be noted that much of this new policy thrust came from research done by Secretary Bergsten at the Brookings Institute. *See* C. F. BERGSTEN, T. HORST & T. H. MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS (1978). Portions of the book were distributed for comment long in advance of the book's publication so its basic thesis was well known among international policy experts in Washington, D.C. in advance of the Executive Branch and Congressional review of OPIC. *See* 1977 *House Hearings*, *supra* note 17, at 116 (dialogue between Congressman Charles Whalen and Secretary Bergsten). The impact of Secretary Bergsten on the Executive Branch review of OPIC should be evident.

ment.[115] Indeed, he argued, some wealthy LDC's such as Saudi Arabia "still have developmental needs that are best met by private investment."[116]

Congressional concern about the continuing concentration of OPIC insurance in a few countries—notably Brazil—was certainly a factor in congressional approval of the change.[117] In fact, the HIRC committee report placed greater weight on the potential that this policy might modify the historical tendency toward country concentration of exposure than on its value as a means of rerouting the flow of investment to the poorer countries.[118]

C. Emphasis on Natural Resource Development[119]

The Executive Branch decision to intensify OPIC's efforts to promote United States investment in LDC energy and non-fuel mineral projects was in direct response to the economic impact of oil price increases.[120] In fact, prior to 1977, OPIC had not insured petroleum investments because

115. 1977 *House Hearings*, *supra* note 17, at 169 (statement of Joseph P. Griffin).

116. *Id.*

117. 1977 *House Report*, *supra* note 14, at 11.

118. *Id.*

119. In the midst of the House debate on the 1978 OPIC Amendments, OPIC and the Department of Agriculture announced a joint program to increase the demand for feed grains and other United States farm commodities in LDC's. The purpose of the program is to seek an orderly increase in the supply of lower priced meats, poultry and processed grains for the expanding markets in LDC's as well as a steady growth in LDC purchases of United States farm commodities and breeder stock. Essentially, OPIC would assist United States agribusiness companies and cooperatives in establishing grain milling, livestock feeding, and storage and distribution projects, using its investment identification, insurance and financing authorities. The Commodity Credit Corporation (hereinafter CCC) would provide commercial export credits for the United States farm commodity exports to these projects. Although this program was developed after the Executive Branch review of OPIC, its announcement was received well by agricultural interest groups and interested Congressmen. *See* 124 CONG. REC. E 662 (daily ed. Feb. 15, 1978) (statement of Congressman John Cavanaugh, "OPIC and U.S. Agriculture") and 124 CONG. REC. H1453 (daily ed. Feb. 23, 1978) (statement of Congressman Bill Alexander). Support from agricultural interest groups, at a time of extensive agricultural lobbying on other legislative issues, clearly contributed to final passage of the 1978 OPIC Amendments. Interest group pressure also contributed to enactment of the Agricultural Trade Act of 1978, Pub.L. No. 95-501, 92 Stat. 1685 (1978), which the President signed into law on October 21, 1978. This statute provides the Department of Agriculture with both new and improved export promotion tools, including appointment of an Under Secretary of Agriculture for International Affairs and Commodity Programs; authority to offer intermediate (tenor of up to ten years) export credits in certain cases such as the export of breeder animals, the financing of improved import and handling facilities, and to meet foreign credit competition; authority to offer short-term (tenor of up to three years) CCC export credits to the People's Republic of China; designation of Agricultural Counselors in certain United States diplomatic missions; and establishment of between six and twenty-five overseas agricultural trade offices to provide a variety of services to private United States agricultural trade promotion groups. *See* H. REP. No. 95-1355 on S. 3447, 95th Cong., 2d Sess.(1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5426.

120. 1977 H. R. REP., *supra* note 14, at 34, 47 (statement of Rutherford Poats). *See also Extension of OPIC, Hearings on H.R. 9179 Before the House Comm. on Int'l Rel.*, 95th Cong., 2d Sess. 1 (special hearing on OPIC's role in promotion of new exploration for minerals) (1977-78) [hereinafter cited as 1977 *House Hearings*, Part II].

of the large amounts of money involved in most projects. Development of smaller reserves in poor and energy-deficient LDC's became commercially feasible only after the increased oil prices. In congressional testimony, moreover, scholars, company representatives and Executive Branch witnesses asserted that there has been a shift in LDC attitudes toward the role of foreign investment in natural resource development.[121] Finally, two GAO studies of United States dependence on foreign sources of critical raw materials had noted the potential role for OPIC in diversifying United States mineral supplies.[122]

Since OPIC already had the authority both to insure mineral exploration investments and to guaranty loans to such projects, the Executive Branch did not seek significant statutory amendments to implement this new policy. It did assert, however, that elimination of the 1974 amendments requiring the transfer of insurance underwriting to the private sector would ease pressure on OPIC to reduce its exposure with respect to riskier investments such as mining or oil and gas exploration.[123] There is substantial evidence supporting this position. For example, although over one-fourth of the total amount of outstanding expropriation insurance issued by OPIC or AID and over two-thirds of the total amount of OPIC's insurance claims settlements pertain to mining investments, OPIC insured only two major mining investments between March 1971, when OPIC adopted strict risk management guidelines on large and/or sensitive industries, and early 1977, when OPIC announced a new program to encourage more mineral investment in LDC's.[124] The HIRC and SFRC committee reports endorsed these conclusions, but encouraged OPIC to pursue this new policy cautiously. The 1978 OPIC Amendments also gave OPIC additional authority to provide small amounts of direct financial assistance to mineral exploration projects other than for oil and gas.[125]

D. *Additional Statutory Prerequisites and Restrictions Applicable to OPIC Insurance*

In order to explain the broad implications of the changes in the insurance program wrought by the 1978 OPIC Amendments, it is necessary first to review briefly the congressional debate concerning OPIC's relationship to large MNC's. It should not be surprising that the use of OPIC insurance is roughly congruent with the overseas investment patterns of United States companies. Since approximately ninety to ninety-five percent of all overseas investment is made by the largest three- to four-hundred United

121. 1977 *House Hearings*, *supra* note 17, Part II at 1.
122. *Id.* at 23.
123. 1977 *House Hearings*, *supra* note 17, at 105 (statement of Secretary Bergsten).
124. Speech of Marshall T. Mays, OPIC President, "Mineral Exploration and Production in Developing Countries: New Dimensions in OPIC's Assistance," presented to the ABA National Institute on World Mineral Resources Development, Trade, Outlook (Apr. 14, 1977).
125. *See* H.R. CONF. REP., *supra* note 110, at 9.

States companies, it follows that these corporations are the main users of OPIC insurance.[126] From 1974 through 1976, seventy-one percent of the investment projects OPIC insured and eighty-nine percent of the dollar volume of OPIC insurance was issued to companies and banks equal in size to the "*Fortune* 500."[127] Hence, OPIC insurance of investments by such companies is not disproportionate to the profile of United States foreign private direct investment.

In both the 1973-74 and 1977-78 congressional debates, opponents of OPIC often centered their attack on the activities of MNC's and, secondarily, on OPIC's insurance of selected investments by such companies. The nature and impact of these "guilt by association" attacks were quite different in 1973-74 and 1977-78, as were the statutory results of such attacks. As noted above, the central issues in the 1973-74 debate were potential adverse effects on the United States Treasury and United States diplomatic relations with LDC's. A showdown in the Senate was averted by a compromise—the "privatization" provisions. In the 1977-78 debate, the central issue was a declining United States trade position that was receiving wide-spread publicity late in 1977 due to the closing of large steel and electronic plants and to rising protectionist pressure from both organized labor and some United States industries. These developments buttressed basic political-economic opposition to OPIC by advocates of the "global reach" view of MNC's—that they stifle competition, cartelize world markets, export United States jobs, undermine official United States fiscal and economic measures, and accentuate rather than reduce inequalities in LDC's.[128] Some human rights advocates and the AFL-CIO argued that the real beneficiaries of OPIC's insurance were not the United States working man or the poor majority in LDC's but a few giant MNC's and the local elites in countries ruled by authoritarian regimes, which these corporations supported to maintain attractive political stability and labor discipline.

In its review of OPIC's programs, the Executive Branch had rejected this "global reach" condemnation of MNC's in favor of a balanced view that MNC's can and frequently do contribute to American diplomatic and eco-

126. 1977 *House Hearings*, *supra* note 17, at 389 (insert for the record).
127. *Id.*
128. *See* 1977 *House Hearings*, *supra* note 17, at 143, 353, 373 (statements in opposition to OPIC); 1977 *House Hearings*, Part II, *supra* note 120, at 59 (statement by the AFL-CIO) and 85 (response by OPIC). The global reach interpretation of MNC's was not developed effectively until after passage of OPIC's 1974 authorizing legislation. *See* R. J. BARNET & R. E. MULLER, GLOBAL REACH (1974); Muller, *A Qualifying and Dissenting View of the Multinational Corporation*, in GLOBAL COMPANIES, *supra* note 26, at 21; *Hearings on Multinational Corporations and Foreign Policy Before the Subcomm. on Multinational Corps. of the Senate For. Rel. Comm.*, 94th Cong., 1st Sess., part 12 at 59 (1975). The study has been criticized as being neither an academic, economic or political study of MNC's but an advocacy book supported by a careful selection of facts. *Id.* at 103 (insert in the record by Senator Hugh Scott). *See also* BERGSTEN, HORST & MORAN, *supra* note 114, at 333.

nomic interests.[129] Furthermore, Executive Branch spokesmen sought to avoid having OPIC's extension turn on the outcome of a general debate over MNC's and the theoretical effects on the United States economy of foreign direct investment. Thus, in testifying on the issue of the job exports, Rutherford Poats argued:

> the issue before the House is not the broad strategy or theory of international economic development. OPIC is the issue, and OPIC does not rely on general theories contending U.S. private investment is either good or bad for the U.S. economy . . . . The program is highly selective. It seeks in every way possible to guard against the very charge that has been leveled against us by the AFL-CIO . . . .[130]

The HIRC and the SFRC also sought to separate consideration of OPIC legislation from broader issues pertaining to MNC's. Thus, the SFRC declined to reopen the 1973-74 debate within the committee, sidestepping the previous views both of the majority and the minority positions in favor of the following:

> Despite the swirl of controversy around multinational corporations (MNC's) in recent years, some trends are becoming visible. One is a more discriminating look at MNC's in both developed and developing countries. There is a tendency to judge them on a more individual basis, with the recognition that some forms and types of investment may be more beneficial to host countries than others. . . . The Committee believes that in carrying out its developmental mandate, OPIC should make a major effort to sharpen its criteria for selecting projects with maximum developmental impact.[131]

The thrust of the HIRC committee report is similar.

Both the HIRC and SFRC were satisfied with OPIC's ability to screen out projects having potentially adverse United States effects, but were not satisfied with OPIC's statistical data on the development effects of approved projects. In particular, both committee reports concluded that OPIC's data concerning foreign exchange earnings, host country revenue, and employment gains did not explain satisfactorily the relationship between the effects of OPIC-assisted private investment and the "New Directions" development strategy adopted by Congress in 1973, which had shifted the emphasis in United States bilateral economic assistance from capital intensive development projects to programs designed to provide assistance directly to the poorer majority in food production, health and

129. *See* 1977 *House Hearings*, *supra* note 17, at 429 (speech by Hon. Richard N. Cooper, Under Secretary of State for Economic Affairs). *See also* Cooper, *North-South Dialogue: Need for Perspective*, and Bergsten, *North-South Interdependence: Government and Business Initiatives*, in TOP MANAGEMENT REPORT ON: GOVERMENT—BUSINESS COOPERATION IN MEETING THE NORTH-SOUTH CHALLENGE (1978). For a further statement of Secretary Bergsten's view of the "global reach" interpretation see BERGSTEN, HORST & MORAN, *supra* note 114, at 333.

130. 1977 *House Hearings*, Part II, *supra* note 120, at 86, 91.

131. 1977 S. REP., *supra* note 3, at 8.

family planning, and education.[132] Both committee reports acknowledged that private investment should not be expected to produce the same effects as the "New Directions" programs, but added that Congress had not provided OPIC with adequate guidelines for screening out projects that would not be "compatible" with the "New Directions".[133]

Both the HIRC and SFRC thus recommended statutory guidelines of factors that OPIC must take into consideration in evaluating projects. The conference committee adopted the more general Senate version, providing that OPIC "be guided by the economic and social development impact and benefits of such a project and the ways in which such project compliments, or is compatible with, other development assistance programs or projects of the United States or other donors . . . ."[134] Both committee reports also provided several pages of more detailed criteria and required new reports to Congress setting forth the developmental effects of OPIC's operations. As the SFRC committee report notes, these provisions "will require OPIC to move beyond an aggregate statistical approach and consider such issues as appropriate skills and technology transfer, benefits to the poor majority, especially the rural poor, production of goods and services of primary benefit to the poor majority, effects on food supply and production, local content in the end product, and other social and development benefits less easily quantifiable."[135] Both committees did recognize, however, that supplying the data and conducting the analysis to conform to these guidelines would constitute an additional prerequisite to the use of OPIC insurance and urged that the additional administrative burden should fall on OPIC rather than OPIC-insured investors.[136]

Despite efforts of the Executive Branch and the SFRC and HIRC, the House floor debate promptly flared into a debate over United States trade and development policy, the effect of foreign investment, the social responsibilities of MNC's and the need for the United States protectionism. Since the battle was fought in major part along these lines, one might argue that final passage of the bill had implications broader than a basic reaffirmation of support for the OPIC program. The difficulty of doing so, of course, is that the vote was close and that supporters and opponents of the program did not divide along customary interest group lines.

Nevertheless, some general inferences can be drawn from the floor debates and certain provisions of the 1978 OPIC Amendments. First, it is evident that despite great discomfort over the United States trade problems, Congress resisted intense pressure for rash protectionism in favor of a limited modification of the traditional United States policy favoring freedom of international trade and investment. Thus, although

132. *Id.*, at 8, 24. *See also* 1977 H. R. REP., *supra* note 14, at 10.

133. *Id. See also* H. R. CONF. REP., *supra* note 110, at 7.

134. Foreign Assistance Act of 1961 § 231(1), 22 U.S.C. § 2191(1).

135. 1977 S. REP., *supra* note 3, at 24-25.

136. *See* 1977 H. R. REP., *supra* note 14, at 27.

Congress clearly rejected the basic AFL-CIO attack on OPIC, it did tighten restrictions in OPIC's statute that prevent the agency from assisting "runaway" industries or investments that would cause a significant reduction in United States employment.[137] Congress also adopted some protectionist amendments that: (1) prohibit OPIC from supporting substantial new investments in copper mining scheduled to commence prior to January 1, 1981 or, if scheduled to commence thereafter, would cause injury to the primary United States copper industry,[138] and (2) prohibit OPIC from supporting any project to establish or expand the production or processing of palm oil, sugar, or citrus for export to the United States.[139] Other protectionist amendments failed.

Second, the 1978 OPIC Amendments underscore the increasing willingness of Congress to constrain off-shore, private sector activities to accomplish a foreign policy objective. Prior to taking up the 1978 OPIC Amendments, the 95th Congress already had passed the Export Administration Act amendments[140] which prohibit United States corporations from complying with foreign boycott requirements, and the Foreign Corrupt Practice Act of 1977 [hereinafter referred to as FCPA][141] which imposes criminal penalties under United States laws for corrupt payments to foreign government officials. The FCPA sanctions were extended under the 1978 OPIC Amendments so that OPIC is required to deny claims under insurance contracts written after the date of enactment of the 1978 OPIC Amendments for losses resulting from an act for which the investor or his agent has been convicted under the FCPA.[142] OPIC also was required to adopt regulations for suspension from eligibility for OPIC's services of an investor convicted under the FCPA for actions related to an OPIC-supported project.[143]

As a further demonstration of the willingness to tie private sector activities to foreign policy goals, a House floor amendment that was accepted in the conference committee required the termination of OPIC's programs with respect to any nation whose government follows a consistent pattern of gross violations of human rights, except for projects directly benefiting the needy people of the country or for national security reasons.[144] In this context, both the Executive Branch and congressional leadership appeared to be willing to accept a distinction between the public policy implications of encouraging private investment in LDC's for development reasons and simply encouraging United States exports. Thus, the Executive Branch and congressional leadership reluctantly accepted this floor amendment to

137. 22 U.S.C. § 2191(k),(l). H. R. CONF. REP., *supra* note 110, at 9.
138. 22 U.S.C. § 2197(j). H. R. CONF. REP., *supra* note 110, at 9.
139. 22 U.S.C. § 2197(k). H. R. CONF. REP., *supra* note 110, at 11.
140. Pub. L. No. 95-52, 91 Stat. 235 (1977).
141. Pub. L. No. 95-213, 91 Stat. 1494 (1977).
142. 22 U.S.C. § 2197(l). H. R. CONF. REP., *supra* note 110, at 10.
143. *Id.*
144. 22 U.S.C. § 2199(l). H. R. CONF. REP., *supra* note 110, at 11.

the OPIC bill, but subsequently fought successfully to defeat a virtually identical floor amendment that was proposed to authorize legislation for the Export-Import Bank of the United States [hereinafter referred to as Eximbank].

A third and perhaps the most significant aspect of the 1978 OPIC Amendments was a firm congressional statement that OPIC seek to stimulate much greater interest among medium and smaller sized United States companies in appropriate investment opportunities in LDC's. This new policy direction coincided with extensive nation-wide efforts undertaken jointly by the Department of Commerce, the Small Business Administration [hereinafter referred to as SBA], Eximbank and OPIC to help make international markets much more accessible to United States small business.

Since its inception, OPIC has given special consideration to small business projects.[145] The Executive Branch supported continuation of this policy but argued that OPIC, by virtue of its very nature, would provide the bulk of this insurance for investment by larger companies because these companies have both the resources and the surplus management talent to undertake a diversification of their overseas operations and the motivation in terms of their total marketing programs to do so.[146] Opponents of the OPIC program argued these statements manifested OPIC's bias in favor of giant MNC's and proposed severe limitations on the extent to which OPIC could insure investments by larger companies.[147] The Executive Branch and OPIC's congressional supporters vigorously opposed these proposals, arguing that this would not help United States small business, would drastically reduce OPIC's developmental usefulness and would handicap United States companies in competition with European and Japanese investors.[148]

It was thus as much in the context of "big business versus small business" as in the context of "protectionism" that the House floor debate reached its peak. In the heat of the debate, a floor amendment passed by a vote of 285 to 111 that would require OPIC to provide fifty percent of its services to SBA-sized small business.[149] This amendment effectively would have killed the insurance program. The conferees agreed to rewrite the amendment rather than to delete it, seeking to preserve the general House intent that OPIC make a major effort to encourage smaller companies to undertake appropriate LDC investments but recognizing that OPIC

145. *See* 1977 *House Hearings*, *supra* note 17, at 29 (statement of Rutherford Poats).
146. 1977 *Senate Hearings*, *supra* note 4, at 157 (statement of Rutherford Poats).
147. 123 CONG. REC. H12,111 (daily ed. Nov. 3, 1977) (debate on amendment by Congressman Clarence Long).
148. *Id.*
149. *Id.* at H12,118. After the November 3 vote on the 'Long Amendment,' the House leadership decided to delay the final vote on the bill to bolster basic support for the program. The floor debate thus involved three days, November 2 and 3 and February 23. Lobbying was extensive between November 3 and February 23.

must continue to look to large MNC's as the most substantial source for LDC investment. Executive Branch representatives worked with the conferees in rewriting this amendment and supported its passage. Opponents of the program would not accept a compromise, however, and fought this approach both in the conference committee and again on the House floor, arguing that the House should reject the conference report. The report was adopted by a comfortable margin.[150]

The 1978 OPIC Amendments thus (1) restrict OPIC's direct lending to United States small businesses,[151] (2) urge OPIC to increase the number of projects sponsored by or significantly involving United States small businessess to thirty percent of the total number of insurance projects, or those involving the issuance of an OPIC financial guaranty,[152] and (3) direct OPIC to use up to fifty percent of its net annual income—after making allocations to reserves—for special small business development projects.[153] Significantly, the conference committee recognized that small business within the context of foreign investment is much larger than small business in the context of domestic investment and specified that for the purpose of these provisions, the definition of small business is a company that is below the "*Fortune* 1000."[154] By July 1978, OPIC had developed a program to implement the new mandate, which included lower insurance fees, expanded assistance in identifying and investigating investment opportunities, and OPIC's assumption of some of the extra costs to smaller companies of setting up an overseas operation.[155]

CONCLUSION

Enactment of the 1978 OPIC Amendments must be viewed as a reaffirmation of belief in the developmental role to be played by private direct investment in the LDC's as a supplement to direct foreign assistance and in the incentive effect of investment insurance in facilitating such investment. Modifications and restrictions in OPIC's basic authority contained in this Act to some extent reflect domestic political concerns and residual doubts about the proper relationship between the United States government and the overseas operations of large United States corporations. The fact that the 1978 OPIC Amendments can be viewed in such different lights is indicative of OPIC's unique role of interfacing between United

150. The vote on the conference report was 216 to 185, 124 CONG. REC. H2744 (daily ed. Apr. 11, 1978).

151. 22 U.S.C. § 2194(c). H. R. CONF. REP., *supra* note 110 at 8-9.

152. 22 U.S.C. § 2191(e)(2). H. R. CONF. REP., *supra* note 110, at 9.

153. 22 U.S.C. § 2200. H. R. CONF. REP., *supra* note 110, at 8-9.

154. H. R. CONF. REP., *supra* note 110, at 9. *See also* 1977 H. R. REP., *supra* note 14, at 21; 1977 *House Hearings*, *supra* note 17, at 294 (discussion of small business amendment offered by Congressman Charles Whalen, which resulted in the definition of small business adopted by the conferees).

155. OPIC POLICY GUIDELINE, Preferences for Small Investors and Cooperatives, BDR (78)12 (July 11, 1978).

States investors, LDC's, and policy-making bodies of the United States Government. Congressional and Executive Branch desires to direct and restrict OPIC's operations have been tempered by exhaustive deliberation and debate on OPIC's programs and policy. In the end, Congress recognized that a developmental program such as OPIC cannot be successful without a considerable amount of autonomy and flexibility.