Volume II, Issue 2

November 2006

political risk insurance newsletter

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Aircraft Non-Repossession Insurance

By Robert T. Wray

Manufacturers of aircraft have been eager to meet the growing demand for passenger and cargo airlift capacity and have encouraged (and, in some cases, assisted) lessors and lenders to expand their horizons to make finance available in developing countries and for weaker and start-up airlines. In many of these circumstances, the aircraft operators cannot provide stand-alone credit ratings strong enough to attract financing. As a consequence, most such transactions are based upon the value of the aircraft and the ability of lessors or lenders to repossess it if the payments are interrupted. These asset-based facilities require assurance that, in an event of default, the aircraft will be returned promptly with its maintenance records in shape for the issuance of a new Certificate of Airworthiness by the relevant aviation authority, which is a basic requirement for re-leasing or resale to a new operator.

The risk that return of the aircraft to the lessor or to the lender/mortgagor is not possible or that the legal system in the host country is not effective in ensuring the return of the aircraft in a reasonable time frame may well be a fatal deterrent to the proposed and otherwise attractive transaction. In some countries, the host government may itself intervene to prevent the return of the aircraft or simply fail to act, and such failure makes return of the aircraft impossible.

The PRI industry has a product to cover these risks. Aircraft Non-Repossession Insurance has proven to be a significant and profitable niche market. In the last several years, approximately 75 to 100 policies providing coverage in excess of $1 billion have been in force. Premiums range from 0.10% p.a. to in excess of 3% p.a. Information about claims is sketchy and informal; however, the claims history seems to be a good story from the underwriters' perspective, with the possible exception of recent problems in Brazil related to the timely return of Varig aircraft following extended insolvency proceedings. There have been other recent failures to repossess aircraft such as Philippine Airlines and Air Nauru, but these were not covered by insurance.

Major brokers include Willis, which has the largest share of the market, along with Marsh, Chubb and HSBC. Most policies are manuscripted to some extent, but the basic terms generally include the following:

- **Description of the Aircraft** – Including detailed maintenance records
- **Agreed Value**
- **Designation of the Transaction Documents** – Lease, loan/mortgage, etc.
- **Covered Perils** - Action or inaction of the host country

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Interview with John Salinger

John Salinger is President of AIG Global Trade & Political Risk Insurance Co., a wholly owned subsidiary of American International Group. AIG Global is a long-standing and leading private sector underwriter of political risk and export credit insurance. Mr. Salinger is one of the PRI industry's most experienced and knowledgeable figures. He currently serves as Chairman of the Short Term Export Credit Committee of the Berne Union and on the OPIC Advisory Committee.

Looking out a few years, do you see any major trends or changes in store for the PRI and Trade Credit marketplace?

We're in the risk business, and major trends will be driven by the risk environment. Any clear-eyed assessment indicates more negative developments than positive ones. Of most concern is the loss of faith in the "Washington Consensus" that promised development in emerging markets through privatization and fewer restrictions on the movement of capital. However, with a move to the political left in some countries it's not difficult to imagine events of "re-nationalization" in the future. At the same time there is an enormous amount of liquidity in the world that, over the past several years, has created significant downward pressure on risk spreads and premiums. In late May, emerging mar-

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Aircraft Non-Repossession Insurance (cont'd)

(Continued from page 1)

government (including its judiciary) which amounts to expropriation, deprivation of use or failure to allow repossession or deregistration from the host country's aviation registry in accordance with the relevant transaction agreements. Generally, these coverages also include inability to remit the proceeds of a sale of the aircraft in hard currencies. Policies also cover third party blockades or quarantines and U.N. sanctions which prevent export of the aircraft.

- **Waiting Period -** 180 to 360 days
- **Core Exclusions -** Loss arising from war/political violence; damage during the waiting period; failure of the insured to comply with local law.
- **Warranties/Covenants -** Due and valid execution of binding and enforceable transaction documents; compliance with local law; cooperation with the underwriter in matters affecting the claim; etc.
- **Subrogation**
- **Confidentiality**

> "...[T]he Cape Town Convention may provide enough comfort about the prospect of reliable enforcement of repossession rights that PRI might even be unnecessary or, in any event, available at lower premiums."

In a number of countries, the demand for aircraft vastly exceeds the pace of modernization of the local legal systems and the development of a commercial culture compatible with international norms. The risks of non-repossession for transactions in these countries can be covered or substantially mitigated by Aircraft Non-Repossession cover, and it is therefore likely that the demand for this special PRI product will continue to grow.

Cape Town Convention

The Cape Town Convention on International Interests in Mobile Equipment (the "Cape Town Convention") and its accompanying "Protocol on Matters Specific to Aircraft Equipment" (the "Aircraft Protocol"), now both in force, are the product of years of work under the auspices of several international bodies. The purpose of the Cape Town Convention is to make the creation and enforcement of security interests in mobile equipment, particularly aircraft, more transparent and effective on a global basis. The basic innovations include an open global electronic registry for perfecting international interests in aircraft, coupled with the signatory's option of elections and declarations in the Aircraft Protocol to bring about uniform standards and practices for the enforcement of security interests in local courts.

In some countries that might otherwise require PRI, the host government's adoption and ratification of the Cape Town Convention may provide enough comfort about the prospect of reliable enforcement of repossession rights that PRI might even be unnecessary or, in any event, available at a lower premium. As of this moment, however, it is unclear whether the Cape Town Convention will attract broad-based adoption around the globe. ■

Cape Town Convention

Country	Date of Entry into Force (dd/mm/yyyy)
Afghanistan	01.11.2006
Angola	01.08.2006
Ethiopia	01.03.2006
Ireland	01.03.2006
Kenya	*01.02.2007*
Malaysia	01.03.2006
Mongolia	*01.02.2007*
Nigeria	01.03.2006
Oman	01.03.2006
Pakistan	01.03.2006
Panama	01.03.2006
Senegal	01.05.2006
United States of America	01.03.2006

People and Organizations

■ **Marsh**: Maura Garych has returned to the Hartford office as Senior Vice President in Marsh's US Political Risk Practice. Scott Bevege is joining the practice as an Assistant Vice President in the San Francisco office.

■ **Exporters International Group**: Paul McGonagle, formerly Head of International Credit at Bank One in Chicago, has been named President and Chief Executive Officer of this group captive credit and political risk insurer. Exporters also announced that it entered into an arrangement for the production of political risk insurance with IOA, which will use the services of Alex Lotocki to review, structure and price business submitted to exporters for binding approval.

■ **Zurich** recently implemented a new regional organization. Managers and underwriters in each region will be responsible for both PRI and TCI lines of business.

Managing Director	Daniel Riordan
Chief Operating Officer	Edward Coppola
Chief Underwriting Officer	Michael Bond
Regional Manager - UK	Sian Aspinall
Regional Manager - the Americas	Anne Marie Thurber
Regional Manager - Asia & Pacific	Frederic Louat
(Acting) Regional Manager - Continental Europe	Michael Bond
Manager for Business Development	Sean Cassidy

Interview with John Salinger (cont'd.)

(Continued from page 1)

ket spreads in the capital market began to go back up. It's too soon to tell if this is a blip on the radar screen or the beginning of a trend. The insurance markets, trained to look backward at actuarial trends, have historically lagged behind rate trends in the capital markets. However, in this risk environment, trends of lower rates and broader cover cannot continue indefinitely. A correction is in our future.

> "... in this risk environment, trends of lower rates and broader cover cannot continue indefinitely. A correction is in our future."

What scope do you see for new or significantly modified PRI products – or have the limits of innovation been reached?

I have listened to presentations that characterized traditional CEN language as "archaic." A new approach may lie with providing a backstop to Bilateral Investment Treaties ("BITs"). There are now over a thousand BITs in existence and that was not the case when the CEN market developed. "BIT coverage" would include outright expropriation and would replace the "series of acts" language with coverage insuring the foreign investor receives "fair and equitable" treatment by the host government based on the provisions of the relevant BIT. A loss resulting from an outright physical taking could be paid immediately. A finding of unfair treatment would only be finally paid after default on an arbitral finding. This approach has several advantages. "Fair and equitable" treatment of the foreign investment is at least as broad as the existing coverage and an indemnifiable loss will be much easier to prove. After the loss is paid the underwriter becomes subrogated to an award that has international standing. The principal disadvantage is that the arbitration process may take two or three years. This shortcoming could be remedied with advance payments to insureds.

Non-honoring coverage looms very large in many PRI portfolios relative to traditional CEN, CI and PV exposures. Is this a healthy development, or just a necessary response to demand?

We learned in the 1980's that, while countries don't necessarily "go broke," they are not always capable of paying their debts. More recently we've seen countries, some of whom could pay their debts, negotiate repayment at a steep discount.

The nature of the agreement subject to non-honoring coverage is also relevant. It is generally riskier to insure performance risk that may become subject to commercial disputes, than unconditional payment risk. It is even riskier, unhealthily so, to insure contracts, such as Power Purchase Agreements, that are likely to be subjected to renegotiation pressures prior to their expiry.

Finally, underwriters need to be mindful of the law and jurisdiction of agreements they're insuring. There are some, but not many, emerging markets that will give foreign interests a level playing field using local courts and local law.

Pricing discipline is always a challenge. Is it significantly more or less difficult in the PRI industry than in property and casualty lines?

We're a market like any other. Each participant has to decide whether the rate is sufficient to cover the risk and the underwriter's expenses. It is more of a challenge in PRI because we cannot rely on actuarial analysis to give us a reliable break-even point. AIG has always taken the view that risk selection, including an analysis of the value of subrogation rights, is more important than price. This is even more critical in a low rate environment.

In a competitive insurance market, "standards" discipline may also be difficult to maintain. Are there any important PRI terms and conditions that you think are in danger of being eroded?

Our market is not only competitive, it's filled with a lot of creative people. Whether a new approach is an attack on a "standard," or just a new, creative way to lose money is something time will tell.

Are you satisfied with the level and effectiveness of cooperation between public and private sector insurers these days? What changes, if any, would you like to see?

I can honestly report that the old split between public and private sector insurers is breaking down and the catalyst has been the Berne Union. There are two trends at work. First, the Berne Union has opened its doors to private sector insurers that meet its standards. AIG led the way when we were admitted in 1999, after three years of negotiations. Second, many European underwriters are becoming more of a commercial insurer and less of a government underwriter. Since joining the Berne Union, AIG has worked on transactions with 11 other members. We have even placed facultative reinsurance with several wholly owned government underwriters. This would have been unimaginable ten years ago, but is now seen as a win-win situation.

I think the next frontier will be the development of direct relationships between the Berne Union and the governments of emerging markets that are the beneficiaries of the members' activities.

AIG has deep roots in the Far East. Do you see any significant differences in the way investors and lenders there view and use PRI, compared to Western investors?

AIG has deep roots in Asia but we are newcomers there in the world of trade credit and political risk insurance. Our Asian HQ is in Hong Kong but we now have satellite offices in Tokyo and China, where we have only recently obtained licenses. We think our business in Asia will grow over the next decade.

> "... the old split between public and private sector insurers is breaking down and the catalyst has been the Berne Union."

AIG has invested in PRI joint ventures overseas. How have these worked out? Is the model a good one?

We have two of them. They have proven to be excellent sources of underwriting intelligence and, in one case, a successful risk management tool that resolved a contractual dispute before it became a loss.

What impact do you see Basel II having on the PRI marketplace?

I think some have tried to use Basel II as an opportunity to turn insurance into financial guarantees. That isn't going to happen. Reinsurers will withdraw all capacity and, in New York, financial guarantees cannot legally be issued by multi-line insurers. I think the bankers have come to understand that. However, Basel II will force us to re-examine all the clauses in our policies with an eye to helping banks manage policy conditionality, not eliminate it. ■

PRI Claims Process Roundtable

The PRI claims process often receives attention only when losses threaten or occur. By being knowledgeable and prepared to deal with these situations policyholders can avoid delayed compensation, unnecessary effort and expense, or worse, impairment of an otherwise valid claim. Our roundtable of PRI claims managers addresses key questions about the claims process. In our next edition we will present the views of PRI brokers and buyers.

Q. Making a PRI claim can seem an arduous and legalistic process, even when the facts seem pretty clear. Why does it have to be that way?

Richard Walsh, Claims Director and Counsel of Zurich Emerging Markets Solutions, answers: No matter how favorably disposed insurers may be to policyholders' claims, they owe a fiduciary responsibility to reinsurers, obligating them to investigate all claims matters thoroughly. Documentation would be needed to demonstrate to a third party that a covered event had occurred. A policyholder will have a better perspective and understanding of the process if he puts himself in the insurer's shoes and considers what would be needed to demonstrate coverage to a third party.

> "No matter how favorably disposed insurers may be to policyholders' claims, they owe a fiduciary responsibility to reinsurers, obligating them to investigate all claims matters thoroughly." *- Richard Walsh (Zurich)*

Q. Are reinsurers, treaty or facultative, ever consulted by insurers during the claims management process, or are they merely informed?

Walsh: Reinsurers will typically expect periodic reports of the status of any claim but not expect to be involved in the ultimate decision-making process. Nonetheless, reinsurers will typically make it a point to audit any claim file resulting in a loss payment.

Q. PRI policies typically call for policyholders to seek to minimize loss and to obtain the underwriter's consent to any loss settlement agreement. To what extent must the policyholder take guidance from the insurer in managing the loss situation?

Jack Collier, General Counsel of Sovereign Risk Insurance Ltd., responds: The extent to which a policyholder will perceive the need to take input from the insurer will depend on the severity of the loss and whether the insured will call on the policy at all. The less severe the loss, the less likely the insured will do more than provide the minimum notices under the policies to keep it in force and work out the problem himself.

In such a case—where there is a small loss where coverage is not likely to be triggered—the insurer will have little interest in consulting with the insured, beyond being kept apprised of the insured's efforts to mitigate or avoid the loss.

When a loss is likely to be catastrophic, whether it is covered or not, the insured will send all required notices to insurers and will, out of fear of inadvertently prejudicing insurers' rights, start to seek input from the insurers on every substantive point of a workout or mitigation situation.

Insurers are circumspect about jumping on the bandwagon if the loss is not clearly political in nature. If the loss may be commercial and not relevant to its policy, the insurer will look on with interest, but will do so at arm's length so as to avoid the implication that he considers the event to be covered under his policy, thus giving him consultation rights.

If the loss is clearly political in nature and likely to be covered, the postures change a bit and the insured demands that the insurer consent to a course of action to mitigate loss or waive his right to deny a claim on the basis that the insured took such action without his consent. Note that this is during the "Due Diligence" period before a loss has actually been established under the policy. If, at this time, it is the insurer who is insisting on being involved in the mitigation strategy, then he bears the risk and cost of pursuing the strategy pushed by him.

Of course, it is impossible to say what will be required in every situation, but guidelines would dictate that the insurer cannot "stonewall" when asked for input. He may have to get an agreement from the insured that he is not liable merely for consulting, but his goal cannot be to set up a claim to fail by saying that the insured did not do all it could have to avoid or mitigate a loss when the insurer refused to get involved. Likewise, the insured must not disregard the insurer's input and take action that exacerbates the loss unless the insurer has consented to that course of action.

In summary, consultation must be undertaken with a view to protecting each party's rights under the policy, but with a real purpose of mitigating losses.

> "[The insurer's] goal cannot be to set up a claim to fail by saying that the insured did not do all it could have to avoid or mitigate a loss when the insurer refused to get involved."
> *- Jack Collier (Sovereign)*

Q. Public agencies are credited with the ability to deter some PRI losses. What can private market insurers do to help avoid or minimize a loss? How well does this work in practice?

Collier: Private sector insurers do not generally engage Host Governments in loss mitigation or avoidance activities. However, two recent examples are worth highlighting.

In the Argentina crisis, many insureds were facing catastrophic losses due to exchange controls enacted by the Argentine Central Bank in the face of the 3 to 1 devaluation of the peso relative to the dollar. At the height of the crisis in Argentina, the Argentine Central Bank decreed that borrowers who owed debts to lenders insured by a member of the Berne Union did not require prior approval of the Central Bank to convert and transfer funds to make payments of principal or interest on the insured loans. Several private insurers who were members of the Berne Union were able to make it possible for a number of their clients to effect conversion and transfer of regularly scheduled principal and interest repayments out of Argentina, thereby avoiding losses and enabling their bank clients to keep these private market-insured loans performing and current.

In a more recent situation in Venezuela, with the Chavez regime's imposition of the CADIVI controls for foreign remittances, private markets insurers have been

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establishing a presence in Venezuela and working with borrowers whose loans are insured in the private market to manage the CADIVI process in the most efficient way possible. This assistance enabled many borrowers to get debt service out of Venezuela when it would otherwise be blocked, leading to Currency Inconvertibility claims.

> "The most common problem we see is that full details of the claim are not provided when a claim is first submitted." *- Tom Ripp (AIG)*

Q. What are the most common problems policyholders have in pursuing PRI claims, and how can they be avoided?

Two PRI claims managers of long experience, Tom Ripp, Senior Vice President in AIU Claims Management, and Robert O'Sullivan, Associate General Counsel for Insurance Claims of the Overseas Private Investment Corporation (OPIC), respond:

Ripp: The most common problem we see is that full details of the claim are not provided when a claim is first submitted. When the claim involves some type of adverse host government action, detailed information explaining the circumstances leading up to a claim and/or information on the taking or alleged dispute is vital. This is important to establish that an insured event has occurred and to understand any actions or allegations made by the foreign government entity. Details showing the calculation of the loss are also crucial. It is often difficult to understand the basis of the amount claimed. Information showing exactly how the loss is calculated will often help expedite the claim process.

Another way to expedite the processing of a claim is to keep the insurer abreast of meetings and discussions that the insured has with the foreign entity when a serious problem develops. This will help speed the processing of a claim if one is submitted. Also, if the insured is in a position to involve the carrier in discussions, it can expedite the claim process and help the carrier process the claim quicker.

Common Responsibilities of Policyholders in PRI Claims Situations:

- Loss minimization
- Timely notice of loss potential and submission of claim
- Burden of proof
- Cooperation in claims investigation
- Securing insurer's consent to loss settlement
- Assignment of interest and subrogation to insurer

O'Sullivan: An investor making its first PRI claim faces a situation that is very different from the usual insurance claim process. PRI claims and claim determinations are custom-crafted, not standardized. They are factually complicated, require a firm grasp of the terms of the insurance contract, and many of the compensation provisions of the insurance contract rely upon technical accounting concepts. The insured itself must do what standard forms, checklists, charts, reference manuals, and computer programs accomplish with respect to the consumer insurance claims with which we are familiar. Too many insured investors just insist that complex issues are simple and try to bluff their way through or drop out of touch and then complain of delay.

On the positive side, the PRI claims process is more flexible and personally interactive than mass-market consumer claims processes. Working together with the insurer to identify and resolve the issues is a surer path to getting paid in the right amount than attempting to avoid the issues, or leaving it to the insurer alone to sort them out.

PRI contracts are negotiated agreements, not boilerplate form contracts. The contract terms are the means by which the insurer manages risk, and they represent an agreed allocation of risk. It is unrealistic to think that an insurer will ignore material contract terms or renegotiate them in a claim situation. The starting point has to be a review of the contract terms to outline the issues that will have to be dealt with in pursuing the claim.

The claim process is interactive and flexible. The insured can take the initiative to make the process work, even from the initial stages. If the insured's review of the contract identifies problem areas, the insured can discuss them with the insurer. Credibility and clear communication are important. If the insured is dissatisfied with the process, it should try to change it. If exchanges of correspondence have led nowhere, try a meeting or teleconference. If the process is stalled, the insured should ask what the outstanding issues or questions are. It should not then be offended to receive a list of issues or questions, fail to think them through and respond to them, and, above all, should do not drop out of touch for months on end with a claim pending.

> "Too many insured investors just insist that complex issues are simple and try to bluff their way through or drop out of touch and then complain of delay." *- Robert O'Sullivan (OPIC)*

The quality of the initial application for compensation is the most important factor in determining how quickly and smoothly the claim process moves. There is no particular form required. OPIC provides guidelines and model certificates based on its standard contracts, but a particular claim has to focus on the specific contract on which it is based. The general areas at issue are whether the event that caused the loss is within the scope of coverage, what compensation is payable, and whether the insured complied with its duties under the contract.

Q. In the end, what if the policyholder isn't satisfied with the insurer's claim determination?

O'Sullivan: PRI contracts typically contain arbitration clauses. An insured who is dissatisfied with the insurer's decision should first try to discuss it with the insurer and get the insurer to reconsider it, short of the formal dispute resolution procedure. OPIC has a standard practice of reaching detailed determinations on claims, which become public, and sending any proposed adverse determination to the insured for comment before denying a claim. Other insurers may be open to reconsideration, even without such formal procedures.

If the insured remains dissatisfied and wishes to invoke the formal process, there is no reason to delay. Arbitration clauses often shorten the otherwise applicable statute of limitations, arbitration is easy and relatively easy to initiate, filing avoids a time bar on a claim against the insurer and does not preclude further negotiations. ■

Investors and the Energy Charter Treaty

By Craig S. Bamberger

In this Newsletter's second edition we discussed PRI coverage for international arbitration outcomes. We invited Craig S. Bamberger to discuss the Energy Charter Treaty, one important foundation for bringing investment disputes to arbitration. Mr. Bamberger is a legal consultant in the Washington, DC area. In 1992-1994, while serving as General Counsel of the International Energy Agency in Paris, he chaired the legal advisory committee to the conference in which the Energy Charter Treaty was negotiated.

The Energy Charter Treaty (ECT) is little known in the US, but since opening for signature in December 1994 it has gone into force in 46 States of Europe and Asia. It affords investors in energy-related assets legal protections against host countries that are comparable to the protections sometimes available under bilateral investment treaties. What makes the ECT's legal protections especially valuable is its provision for compulsory arbitration at the option of the foreign investor for an alleged breach of the Treaty's investment provisions. Awards rendered pursuant to the Treaty's provisions could be the basis for CEN or Arbitral Award Default coverage.

This feature has proved increasingly popular among investor litigants. At least 14 investor-State arbitrations are publicly known to have been initiated under the ECT at the International Centre for Settlement of Investment Disputes (ICSID) or the Arbitration Institute of the Stockholm Chamber of Commerce, or under the rules of the United Nations Commission on International Trade Law (UNCITRAL); one cannot be certain of the actual number, in the absence of any general requirement for public disclosure. All but one of the 14 known arbitrations have been against formerly Communist countries (the exception being an arbitration against Turkey). Two of the 14 have culminated in decisions, in which monetary awards were rendered against Kyrgyzstan and Latvia, respectively.

> "What makes the ECT's legal protections especially valuable is its provision for compulsory arbitration at the option of the foreign investor for an alleged breach of the treaty's investment provisions."

Russia signed the ECT and has continued to participate actively in the business of the conference in which the ECT contracting parties meet and in its secretariat, but has refused to ratify the Treaty. Nonetheless, as a signatory which was not among those few signatories who opted out of "provisional application" of the Treaty, Russia is bound to apply the ECT "provisionally", "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Accordingly, shareholders of the Russian oil company Yukos have initiated arbitration under the UNCITRAL rules against the Russian Government over the alleged expropriation of the assets of that company, asking some $33 billion in damages.

Since the US and Canada have elected not to sign the ECT, US and Canadian investors only can avail themselves of the Treaty's protections through entities organized in ECT contracting parties. Any US or Canadian investor contemplating this needs to be aware of ECT Article 17(1), which allows a host government to deny the Treaty's investment protections to an entity owned or controlled by citizens or nationals of a State that is not an ECT contracting party, if the entity has no substantial business activities in the State in which it is organized. In a jurisdictional ruling, an ICSID panel in an arbitration against Bulgaria held that a host country may not exercise its Article 17(1) right retrospectively, to existing investments, for the reason that such exercise would breach existing investors' legitimate expectation that they would enjoy the investment protections of the ECT, and deny to potential investors any certainty when planning investments that they would come under or fall outside of the Treaty's umbrella of protection. In opposition to this view, it has been argued by commentators that Article 17(1) itself puts investors on notice of the need to seek assurances from the host State, and that, in contrast with situations where foreigners are invited by tender to invest in large or strategic projects, a host state may not be aware of the establishment of a new investment in its territory, or the nationality of the investor or of those who own or control the investor. More doubtless remains to be said about the application of Article 17(1).

> "Russia signed the ECT and has continued to participate actively in the business of the conference in which ECT contracting parties meet and in its secretariat, but it has refused to ratify the treaty."

Thus far (with one possible exception about which public information is lacking), it appears that all known ECT investor-State arbitrations have been initiated in the names of the foreign investors, rather than in the name of a domestic entity in the host country in which the foreign investors hold interests. The latter approach may have particular advantages for investors in cases where a fragmentation of ownership creates a potential for multiple and possibly divergent claims over the same underlying factual circumstances. Some attorneys privately have expressed uncertainty whether the ECT permits that approach. The States participating in the conference in which the ECT was negotiated, however, clearly voiced their collective intention to allow investor-State arbitrations to be brought in the name of a domestic entity in which the foreign investors hold interests. It may be necessary for investors wishing to pursue that approach to be prepared to introduce evidence of the negotiating countries' intention. ■

Loss & Recovery Journal

■ **Gaza**: A 140 MW power plant in Gaza was destroyed by Israeli air strikes. The plant is insured by OPIC against political violence to a limit of $48 million.

■ **Colombia**: Zurich reports that it has paid $17.8 million under PRI coverage that insured an equity investment in the power sector. The loss resulted from guerilla attacks on power lines that connected a power facility to the grid in Cartegena.

MARKET PROFILE:

The Overseas Private Investment Corporation (OPIC) is the primary U.S. government agency focused on supporting and encouraging private sector investment in the developing world. OPIC helps U.S. businesses invest overseas by insuring eligible investment against a broad range of political risks, providing loans and loan guarantees, and financing private equity investment funds. Because OPIC charges market-based fees for its products, it operates on a self-sustaining basis at no net cost to U.S. taxpayers.

Coverages and Products

Coverages provided are currency inconvertibility, expropriation and political violence (assets and business income coverage). OPIC offers specialized coverages for institutional loans; capital markets transactions; capital and operating leases; bid, performance, advance payment and other guaranties; and mining and oil and gas concessions.

Small businesses receiving loans from OPIC's Small Business Center can utilize OPIC's insurance "wrap" (a political risk insurance rider), which provides political risk insurance at a reduced rate.

Capacity

OPIC can insure up to $250 million per project for up to 20 years, and up to $300 million for projects in the oil and gas sector with offshore, hard currency revenues.

Eligible Investors and Projects

OPIC Insurance is available to:

- U.S. citizens;
- corporations, partnerships or other associations created under the laws of the United States, its states or territories, and more than 50 percent owned by U.S. citizens;
- foreign corporations that are more than 95 percent owned by investors eligible under the above criteria; and
- other foreign entities that are 100 percent U.S.-owned.

OPIC can offer insurance for investments in new ventures, expansions of existing enterprises, privatizations and acquisitions with positive developmental benefits. All projects must meet OPIC's policy requirements which include country eligibility, worker rights, human rights, environmental protection and enhancement, U.S. effects and additionality to the U.S. private political risk insurance market.

Claims Experience

As of September 30, 2005, OPIC had made 280 insurance claim settlements totaling $964.7 million since 1971. These settlements have been structured either as cash settlements to investors ($608.7 million) or as OPIC guaranties of host government obligations or other similar arrangements ($356 million). OPIC claims information is available on its website (www.opic.gov) and by contacting Susan Fribush, Claims Assistant, by telephone at 202-336-8437, by email at sfrib@opic.gov, or by facsimile at 202-408-0297.

Company Comment

OPIC offers unparalleled experience in the political risk insurance market as well as the financial backing of the full faith and credit of the U.S. government. OPIC provides innovative solutions based on investors' individual needs.

OPIC also provides advocacy services on behalf of clients experiencing difficulties overseas that could result in insurance claims. Through these services, OPIC can sometimes deter a potential claim by early engagement with government officials or in helping a client resolve issues that could have a negative impact on the success of the investor's project.

OPIC has ongoing programs of cooperation such as coinsurance and reinsurance with the U.S. private political risk industry. Under its Private Insurer Co-operation program, for coverage above $5 million, OPIC only offers insurance to investors who, after having investigated the possibility of obtaining insurance from private political risk insurers, decide to pursue OPIC insurance because private insurance is not available on terms sufficient to make the investment viable for the investor, or because of specific benefits OPIC participation will bring to the investment.

Key People

Edie Quintrell, *Vice President for Insurance*
Ruth Ann Nicastri, *Director for Latin America and the Technical Operations Group*
Jim Williams, *Director for the Middle East and Africa*
Richard Abizaid, *Director for Eurasia*
Juan Carlos Rivera-Montes, *Manager of the Small Business Center*

Contact Information

OPIC's website: www.opic.gov Main number: (202) 336-8400

■

ADB Combines PRG and B-loan for Afghan Project

The Asian Development Bank (ADB) has issued a loan of up to US$40 million and a B-loan and Political Risk Guarantee (PRG) of up to $15 million to Afghanistan's leading cellular network, Roshan. The transaction will help accelerate the expansion of mobile telecommunications services in Afghanistan and builds on the success of Roshan's first-phase expansion in 2004, which was also partly financed by an ADB private sector loan of $35 million.

Afghanistan continues to suffer from a critical lack of communications infrastructure, and cellular phones are seen as the only viable method of providing country-wide communications services. Roshan has significantly exceeded subscriber and traffic growth targets since 2004 and the company had to accelerate its capital expenditure program to meet strong demand. The loans and guarantee will enable Roshan to provide near country-wide coverage on an accelerated basis, additional network redundancy, and a network upgrade.

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The primary sponsor of the Project is the Aga Khan Fund for Economic Development. Co-sponsors include a subsidiary of Cable & Wireless, and a US-based telecommunications company.

ADB's participation helped catalyze additional financing for the second tranche of financing. Proparco, ADB's financing partner for the Phase I financing, and DEG also participated in the Phase II financing. The financing package included loans from Standard Bank and the National Bank of Pakistan - the first international commercial bank financing in the country in some three decades.

"The commercial banks were willing to enter into this financing because of the existence of the PRG and B loan ADB issued to protect them from perceived Afghan country risk. The PRG was structured to cover only the last years of commercial bank exposure, which enabled them to provide longer tenors that would otherwise not have been possible", noted Daniel Wagner, Senior Guarantees and Syndications Specialist in ADB's Office of Cofinancing operations in Manila. By combining the B-loan with a PRG, ADB made it possible for the lenders to achieve two objectives: obtain a withholding tax exemption (from the B-loan) and an indemnity (from the PRG). The PRG included Expropriation (which included license cancellation) and Political Violence coverages (the lenders did not require Currency Inconvertibility/Non-Transfer coverage). Approximately half of the project cost will be covered by additional equity and cash flow from Roshan's operations. ADB's loan was made without a government guarantee and carries a 6-year term, including a grace period of 2 years.

The balance of funding will be met through loans from various lenders, including Standard Bank Plc, the French Societe de Promotion et de Participation Pour La Cooperation Economique (Proparco), and the German Investment and Development Company. ■

about this newsletter

This is the fourth edition of the robert wray PLLC **political risk insurance newsletter**. Our intention is to provide a forum for the exchange of information and opinions relating to topics that will be of interest to political risk insurers, buyers, brokers, attorneys and others. We invite contributions and suggestions from professionals in the field.

We also encourage readers to submit information about notable transactions, personnel changes and other important developments in the political risk insurance sector.

If you would like to receive future editions of the PRI Newsletter electronically, or if you have friends or colleagues who would be interested in joining our distribution list, please e-mail us at *info@robertwraypllc.com*. This and previous editions of the newsletter are available at *www.robertwraypllc.com*

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about robert wray PLLC

robert wray PLLC is a specialized law firm focused on analyzing complex issues and providing innovative solutions in the areas of political risk insurance, project finance, transportation infrastructure, privatization and aircraft finance. The firm's political risk insurance practice, led by Robert T. Wray and Felton (Mac) Johnston, offers comprehensive advice related to the mitigation of risks and selection and acquisition of political risk insurance associated with international investments.

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