NEW YORK LAW SCHOOL JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 15 NUMBER 1 1994

REDUCING POLITICAL RISK IN DEVELOPING COUNTRIES: BILATERAL INVESTMENT TREATIES, STABILIZATION CLAUSES, AND MIGA & OPIC INVESTMENT INSURANCE

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I. INTRODUCTION

The emergence of relatively free-market economic policies in the developing nations of the world has created immense opportunities for Western investors. However, along with these opportunities comes substantial risk. In addition to ordinary business risk, which is faced by every businessman or investor whether investing at home or abroad, investors in developing countries face political risk that is much greater than that experienced when investing in liberal Western democracies.

Political risk is the risk that the laws of a country will unexpectedly change to the investor's detriment after the investor has invested capital in the country, thereby reducing the value of the individual's investment. Put simply, political risk is the risk of government intervention.[1] Examples of political risk are the risks that a government will raise import or export duties, increase taxes, impose further regulations, or nationalize or expropriate the assets of the investor.

Political risk may be a minor concern to a business person investing in a stable liberal democracy with an independent judiciary and a track record of protecting property rights; however, a foreign investor investing in an unstable regime or a regime hostile to property rights has no such assurances and thus faces greater political risk. For example, a Belgian national investing in oil and gas properties in the United States can be reasonably confident that, in the unlikely event that the government were to nationalize his property, it would have to account for this action before a neutral U.S. court that would not allow such an action to be taken arbitrarily and would award just compensation.[2] The investor's options in the face of such intervention may be very limited, especially if the country

1. One type of political risk that is not often recognized as such is the very ability of legislatures to enact legislation, to change the rules from day to day. As pointed out by the late Italian legal theorist Bruno Leoni in his *Freedom and the Law*, even if a given statute is written clearly, "we are *never certain* that tomorrow we shall still have the rules we have today." BRUNO LEONI, FREEDOM AND THE LAW 75 (3d ed. 1991) (emphasis in original). For a detailed discussion of these issues, see Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J.L. & PUB. POL'Y 661 (1988); Leonard P. Liggio & Tom G. Palmer, *Freedom and the Law: A Comment on Professor Aranson's Article*, 11 HARV. J.L. & PUB. POL'Y 713 (1988); and N. Stephan Kinsella, *The Irrationalism of the Civil Law* (forthcoming).

2. It should be noted, however, that many governmental actions in the U.S. which are in fact takings of property rights, such as zoning regulations and taxes, are not always considered to be takings by U.S. courts. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

does not have an independent judiciary to serve as a check on its legislature.

The investor can take some comfort, however, in the recently signed bilateral investment treaties between the U.S. and several developing countries. These treaties contain promises by these countries guaranteeing certain standards of treatment of U.S. investors and investments.

In addition, an investor with enough clout may be able to negotiate directly with a host state to receive "internationalized" contractual assurances containing "stabilization clauses" and international arbitration clauses. These clauses provide that the law in place when the investor initially invests will continue to apply to the investor and that disputes between the investor and the government will be settled in a neutral forum.

An investor can also purchase political risk insurance. This insurance typically provides coverage against risks such as currency inconvertibility, expropriation, and war and is available from a number of sources, including nationally-sponsored insurance agencies, private insurers, and the World Bank's Multilateral Investment Guarantee Agency ("MIGA").

Each of these ways of controlling political risk is discussed in turn in this Article.[3]

II. BILATERAL INVESTMENT TREATIES

Political risk may be substantially reduced if a treaty to protect private investment is in place between the foreign state and the investor's home state. Treaties aimed specifically at protecting private foreign direct investment are called bilateral investment treaties ("BITs"). BITs set forth standards for treatment of foreign investors in areas such as expropriation of property, repatriation of funds, and settlement of disputes.

While investors can, and should, use other methods to reduce political risks—such as concession agreements[4] and government-sponsored

3. Much of the material presented in this Article appeared previously in Paul E. Comeaux & N. Stephan Kinsella, *Reducing the Political Risk of Investing in Russia and Other C.I.S. Republics: International Arbitration and Stabilization Clauses*, RUSSIAN OIL & GAS GUIDE, Apr. 1993, at 21; N. Stephan Kinsella & Paul E. Comeaux, *United States Bilateral Investment Treaties with Russia and Other C.I.S. Republics*, RUSSIAN OIL & GAS GUIDE, July 1993, at 23; Paul E. Comeaux & N. Stephan Kinsella, *Political Risk and Petroleum Investment in Russia*, CURRENTS 48 (Summer 1993); Paul E. Comeaux & N. Stephan Kinsella, *Insuring Investments in Russia and Other C.I.S. Republics: OPIC and MIGA*, 2, RUSSIAN OIL & GAS GUIDE, October 1993.

4. *See infra* Part III.

insurance programs[5]—the presence of a treaty provides a strong incentive for a host state to honor its obligations under international law and its agreements with the investor. When a host state violates the rights guaranteed to the investor by the treaty, that state has not only violated norms of customary international law (such as the requirement to expropriate only for a public purpose, in a nondiscriminatory fashion, and upon the payment of prompt, adequate, and effective compensation[6]), but has also breached a treaty with the investor's home state.

While European countries have been successfully negotiating BITs since the late 1950s,[7] the United States did not begin to do so until the early 1980s.[8] In 1982, the United States announced the formulation of a model BIT, which was updated in 1983, 1984, and again in 1987. The model BIT is used as a starting point in all BIT negotiations conducted by the United States.[9]

It is likely that BITs will soon be in place between the United States and several developing countries, including many of the C.I.S. republics. As part of its on-going program of negotiating BITs with its trading partners, especially less developed countries, the United States has signed BITs with the Russian Federation and several other states. The U.S.-Russia BIT received the advice and consent[10] of the U.S. Senate and requires similar domestic approval from the Russian government before it enters into force.[11]

5. *See infra* Part IV.

6. *See* M. N. SHAW, INTERNATIONAL LAW 516-21 (1991).

7. "West Germany and Pakistan signed the first BIT in 1959." Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990).

8. Previously, issues of private foreign investment were addressed collaterally in treaties known as Friendship, Commerce, and Navigation Treaties ("FCNs"). Although the first FCN was negotiated with France by Benjamin Franklin, Arthur Lee, and Silas Deane shortly after the signing of the Declaration of Independence, BITs were the first treaties focused solely on these issues. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203-13 (1988). For further discussion of FCNs, see *id.* at 204. *See also* Valerie H. Ruttenberg, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA. J. INT'L BUS. L. 121 (1987).

9. Vandevelde, *supra* note 8, at 210-11.

10. The treaty power is granted to the President, by and with the advice and consent of the Senate, providing two-thirds of the Senators present concur. U.S. CONST. art. II, § 2, cl. 2.

11. Telephone Interview between Paul E. Comeaux and the Office of Treaty Information, United States Department of State (Nov. 30, 1994).

This section discusses the major provisions of the U.S.-Russia BIT, as an example of a typical U.S. BIT, and examines how these provisions will affect investors.[12]

A. *The U.S.-Russia BIT*

The BIT between America and Russia (the "U.S.-Russia BIT") was signed in Washington, D.C. on June 17, 1992.[13] It is the first BIT with a C.I.S. Republic to be submitted for Senate consideration[14] and has since been approved by the United States Senate.[15] Although the U.S.-Russia BIT imposes obligations on both Russia and the United States with respect to foreign investment, we focus here on Russia's obligations to American investors under the BIT.

The issues addressed by the U.S.-Russia BIT include: the standard of treatment of U.S. investment by Russia; the legality of and remedies for expropriation of U.S. investments; the transfer of currency into and out of Russia; certain provisions for the settlement of investment disputes; the duration of the U.S.-Russia BIT; and the status of the U.S.-Russia BIT in the event that the Russian Federation splits apart.

1. Treatment of Investment

Article II concerns the standard of treatment which Russia must provide to U.S. investors and their investments.[16] These standards fall into two broad categories: relative treatment, which means that Russia must treat U.S. investment as well as it treats investment from any other

12. For further discussion of BITs, see KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992), and Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993). *See also* Salacuse, *supra* note 7; Vandevelde, *supra* note 8; Michael R. Reading, Note, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 DUKE L.J. 679 (1992); Eileen D. Denza & Shelagh B. Brooks, *International Protection of Investment Treaties*, 36 INT'L & COMP. L.Q. 909 (1987); T. Modybo Ocran, *Bilateral Investment Protection Treaties: A Comparative Study*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 401 (1987); Ruttenberg, *supra* note 8.

13. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, June 17, 1992, U.S.-the Russian Federation, S. TREATY DOC. NO. 102-33, 102d Cong., 2d Sess. [hereinafter U.S.-Russia BIT].

14. Letter of Submittal from Secretary of State Lawrence S. Eagleburger to President George Bush (July 21, 1992) (included with the U.S.-Russia BIT).

15. *Id.*

16. U.S.-Russia BIT, *supra* note 13, art. II, S. TREATY DOC. NO. 102-33 at 6-9.

country; and absolute treatment, which states that Russia must treat U.S. investment fairly and equitably, and in accordance with international law, regardless of how it treats non-U.S. investment.

• *Relative Standards.* Paragraph 1 of Article II provides for "relative" standards of treatment, by requiring Russia to treat U.S. investment "on a nondiscriminatory basis" with non-U.S. investment, subject to exceptions in certain sectors of the economy which are listed in an Annex to the BIT.[17]

These relative standards are sometimes known as "national treatment" and "most-favored-nation" ("MFN") treatment. National treatment generally requires the host state to treat the foreign investment no less favorably than the investment of its own nationals; MFN treatment requires the host state to treat the investment no less favorably than it treats the investment of any third country's investors.[18] Paragraph 4(a) of the Protocol to the U.S.-Russia BIT specifically refers to the requirement to accord national treatment with respect to the entry of investments.[19]

The exceptions listed in the Annex generally relate to matters such as land, power production, state loans, banking, and mass media.[20] One significant sector in which Russia reserves the right to make exceptions is "*ownership of land and use of subsoil and natural resources.*"[21]

Attached to the U.S.-Russia BIT is a letter between the U.S. and Russia containing an understanding of the BIT shared by both countries. The letter states that

> [b]ased on the Law of the Russian Federation on Subsoil and legislation relating to natural resources, the Russian Federation

17. *Id.*

18. Vandevelde, *supra* note 8, at 202.

19. U.S.-Russia BIT, *supra* note 13, Protocol, S. TREATY DOC. NO. 102-33 at 23.

20. *Id.*

21. It is noteworthy that in the U.S.-Russian treaty the United States has accepted, for a period of five years, the requirement of a special investment permission by the Russian Government for "large-scale investments that exceed the threshold amount set forth in the Russian Federation Law on Foreign Investments of July 4, 1991." It should be recalled that Article 16 of the Law requires that "enterprises into which foreign investors contributed in excess of the total of 100 million Rubles" be subject to an approval process by the Russian Government.

Heribert Golsong, *Introductory Note* to *Russian Federation-United States: Treaty Concerning the Encouragement and Reciprocal Protection of Investment*, 31 I.L.M. 794 (1992).

> has reserved the right to make or maintain exceptions to national treatment for the use of subsoil and natural resources. The aforementioned Law on Subsoil in principle accords national treatment to foreign investment concerning the use of subsoil . . . . [T]he Russian Federation intends to continue to accord national treatment to investments of nationals and companies of the United States with respect to the use of subsoil and natural resources.
>
> Such understanding "constitutes an integral part of the Treaty." Therefore, even though Russia reserves the right to make exceptions to national treatment for the use of the subsoil and natural resources, it appears to be attempting to promise, . . . without making an absolutely binding commitment, that it will not deny national treatment to U.S. companies and nationals investing in natural resources in Russia.[22]

The permitted exceptions apply only to the provisions of Paragraph 1, which concerns national treatment, and Russia has promised in the Annex to the U.S.-Russia BIT to keep future exceptions to a minimum. Further, "[a]ny future exception by [Russia or the U.S.] shall not apply to investment existing in that sector or matter at the time the exception becomes effective."[23]

• *Absolute Standards.* Paragraph 2 of Article II provides for "absolute" standards of treatment. Russia must provide the investment with fair and equitable treatment, full protection and security, and treatment not inconsistent with the norms and principles of international law.[24] Russia may not impair by arbitrary or discriminatory measures the management, operation or other use of investments.

Finally, Russia must observe any concessions it enters into with U.S. nationals or companies.[25] Because the BIT is not yet in force and could

22. Kinsella & Comeaux, *supra* note 3, at 24.

23. *Id.*

24. Certain requirements in the treaty are redundant with already-existing requirements of international law. Although the treaty binds Russia to the requirements of international law, by its nature international law binds Russia even when there is no BIT in place. *See* Shaw, *supra* note 6, at 516-521.

25. Paragraph 2(c) refers to "obligations [Russia] may have entered into with regard to investments . . . ." This type of agreement is known as a concession. *See id.* at art. I, ¶ (f) (defining "investment agreement" as "an agreement between a Party (or its agencies or instrumentalities) and a national or company of the other Party concerning an investment"). Although it is useful to have this obligation embodied in a treaty, this

terminate in the future even after it does come into force (discussed below), and because of Russia's power to make exceptions with respect to natural resources, an investor would be wise to consider the use of a concession to protect his investment, as discussed in Part III, below.

• *Other protections.* Other provisions of Article II guarantee the right of U.S. investors to bring U.S. nationals to Russia to establish and operate the investment (Paragraph 3) and to hire top managerial personnel of their choice, regardless of nationality (Paragraph 4). Russia is barred from imposing on the investor requirements to export goods produced, or to purchase goods and services locally, or other similar requirements (Paragraph 5). Russia is to provide effective means of asserting claims and enforcing rights related to investments and investment agreements (Paragraph 6) and must publish all laws or regulations affecting investments (Paragraph 7).

2. Expropriation

Provisions protecting an individual's investment from the consequences of an expropriation or nationalization are of particular importance—especially in an unstable regime such as Russia, which also has a history of hostility towards private property rights.

Article III of the U.S.-Russia BIT limits Russia's right to expropriate U.S. investments in Russia and provides for compensation when expropriation does occur.[26] The Article provides that investments shall not be expropriated, directly or indirectly, unless performed: (1) for a public purpose; (2) in a nondiscriminatory manner; (3) upon payment of prompt, adequate, and effective compensation; and (4) in accordance with due process of law and the "absolute" standards of treatment discussed above.

Realistically, although Russia would be technically in breach of a treaty obligation, as well as customary international law, if it were to take property in a discriminatory manner or not for a public purpose, merely finding Russia to have violated international law will be of little economic benefit to an injured investor, who may well have lost millions, or even billions, of dollars' worth of assets and other rights.

Therefore, one of the most important guarantees an investor can have is a guarantee of compensation if an expropriation occurs. Practically speaking, it is impossible to prevent a nation from expropriating assets it

provision is somewhat redundant, since Russia need not be a party to a treaty to be obligated under a concession agreement. *Id.* at 516, and *infra* part III.

26. U. S.-Russia BIT, *supra* note 13, art. III, S. TREATY DOC. NO. 102-33 at 9-10.

is determined to confiscate because other states would not be willing to prevent the expropriation by force. This is especially true in the context of the modern movement towards "permanent sovereignty over natural resources," in which many states (typically, third-world, developing economies) have declared that a state always retains the right to expropriate certain assets, such as natural resources, if the "public interest" demands it—even if the state has promised not to do so, e.g. in a concession agreement or in a BIT.[27]

It is, however, more acceptable under current international law and practice for a state to bind itself to pay compensation in the event that it does nationalize or expropriate an investor's property. Based upon an obligation to compensate, the courts of other nations, in certain circumstances, are willing to enforce a damages award, against the assets of the offending state which are located within the court's jurisdiction.[28] It is seen as less of an infringement on the sovereignty of the confiscating state to simply enforce a commitment to pay compensation than to declare that the confiscating state may not perform expropriating acts within its own sovereign territory.[29]

27. For further discussion of the concept of "permanent sovereignty over natural resources," see G.W. Haight, *The New International Legal Order and the Charter of Rights and Duties of States*, 9 INT'L LAW. 591 (1975); Andres Rozenthal, *The Charter of Economic Rights and Duties of States and the New International Legal Order*, 16 VA. J. INT'L L. 306 (1976); Charles N. Brower and John B. Tepe, *The Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 295 (1975); F. V. García-Amador, *The Proposed New International Economic Order; A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. OF THE AM. 1 (1980); Shaw, *supra* note 6, at 521-23.

28. For information concerning enforcement of arbitral awards, see Ian F. G. Baxter, *International Business Disputes*, 39 INT'L & COMP. L.Q. 288 (1990); Leo J. Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, 8 J. INT'L ARB. 81, 111 *passim* (1991); Peter M. McGowan, *Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution Under the Foreign Sovereign Immunities Act of 1976*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 409, 417-19 (1984); *Notes: Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75 (1982); Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784 (1981); and J. Stewart McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 NW. J. INT'L L. & BUS. 58 (1982).

29. It is not realistic to expect an award of specific performance, or of restitution, to either be awarded or enforced against a sovereign state. Although the tribunal in Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, Award on the Merits of January 19, 1977, 53 I.L.R. 389 (1979), 17 I.L.M. 1 (1978), awarded restitution, such an award will not, in practice, be enforceable against the offending state, nor will an award of damages be enforceable against property within the territory of the

Thus the provision of Article III requiring "payment of prompt, adequate and effective compensation" is one of the most potentially useful to an investor. Such a requirement is likely to be one of the most effective in terms of protecting the value of the investment because other nations are more willing to enforce a damages award based on this obligation and because Russia would be less willing to expropriate in the first place if it would have to pay for the property it confiscates.

Of further benefit to the investor is the adoption of the "prompt, adequate and effective compensation" standard and the further requirement that compensation should be the "fair market value of the expropriated investment immediately before the expropriatory action was taken or became known . . . ."[30] This compensation standard is the "Hull Formula," which is promoted by the United States but is not universally accepted as customary international law. This standard better protects the investor by insisting that the aggressor nation pay the true economic value of the investment which is taken, rather than "appropriate" compensation—an inadequate standard which is often favored by less developed countries.[31]

This provision also requires that compensation be paid without delay, include interest from the date of the expropriation, be fully realizable, and be freely transferable at a market rate of exchange.[32] Additionally, the

state. "The problems . . . of enforcing such restitution awards against a recalcitrant state may be imagined." SHAW, *supra* note 6, at 521-24. *See also* A. Z. El Chiati, *Protection of Investment in the Context of Petroleum Agreements*, 4 RECUEIL DES COURS D'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] (Collected Courses of the Hague Academy of International Law) 9, 158 *et seq.* (1987). "The futility of claiming a *restitutio in integrum* has become so apparent that some litigants do not even bother to claim it." *Id.* at 161.

30. U.S.-Russia BIT, *supra* note 13, art. III., S. TREATY DOC. NO. 102-33 at 10.

31. The international law principle of requiring "appropriate compensation" in such cases was codified in U.N. General Assembly Resolution no. 1803 (XVII) of 14 December, 1962, on Permanent Sovereignty over Natural Resources, Article 4. Government of Kuwait v. American Independent Oil Company (Aminoil), 21 I.L.M. 976, 1032 (1982), 66 I.L.R. 518 (1984). *See also Texaco*, 53 I.L.R. at 403-04; *id.* at 489 (citing the standard "appropriate compensation" with approval as a rule of customary law).

32. Since at the time of signature of the BIT there was no single market rate of exchange in Russia, the U.S.-Russia BIT carries with it a side letter stating that in the absence of a unified rate of exchange in the Russian Federation at the time of ratification, the provision in question has to be renegotiated at the request of the United States. The same applies to a market rate for all other transfers, referred to in Article IV (2) of the Russian BIT.

Article prohibits indirect, as well as direct, expropriation. This provision helps to ensure that Russia may not avoid the prohibition against expropriation by indirectly or gradually imposing regulations[33] that have the same economic effect as a direct expropriation.

Other provisions in Article III concern the right of an investor complaining of an expropriation to review of the complaint by the appropriate judicial or administrative authorities in Russia and the right of an investor to be accorded nondiscriminatory treatment by Russia as regards restitution, compensation or other measures following losses due to war or revolution in Russia.

3. Currency Transfers

Although highly burdensome exchange control regulations may constitute an expropriation, exchange control regulations which do not rise to this level can still be very costly to investors.[34] Article IV of the U.S.-Russia BIT addresses this concern by providing for free transfer of currency into and out of the Host State.[35] The treaty states that each country shall allow "all transfers related to an investment to be made freely and without delay into and out of its territory." Investors are allowed to convert currency "into the freely convertible currency of their choice."

The treaty gives examples of what is meant by "transfers related to an investment." Such transfers fall into two broad categories. First, a transfer may occur in the normal course of the investor's business. Examples include returns and proceeds from the sale or liquidation of all or part of an investment. Second, a transfer may occur as a payment from Russia to the investor as compensation for a transgression. If Russia compensates the investor for a violation of an agreement between them, Russia may not pay the money and then refuse to allow the money to be expatriated.

Article IV does, however, list several qualifications. Russia is allowed to require reports of currency transfers by the investor and to impose withholding taxes on expatriated currency. Finally, Russia is

Golsong, *supra* note 21, at 795.

33. Gradually increasing regulations which amount to a taking are sometimes known as "creeping expropriation."

34. Vandevelde, *supra* note 8, at 244.

35. U. S.-Russia BIT, *supra* note 13, art. IV, S. TREATY DOC. NO. 102-33 at 11-12.

allowed to pass laws protecting the rights of creditors, which may interfere with an investor's right to freely transfer currency.

4. Arbitration and Settlement of Investment Disputes

Article VI of the U.S.-Russia BIT concerns the settlement of disputes between the investor and the Host State.[36] This Article covers "investment disputes," which are defined as disputes arising over: (a) an investment agreement between the investor and the host state; (b) the authority given to the investor by the Host State; or (c) a breach of the U.S.-Russia BIT itself.

If any such dispute arises, the U.S.-Russia BIT mandates that the parties first attempt to negotiate the dispute between themselves, with or without the help of third-party, non-binding mediation. This rule overrides contractual provisions between the investor and the Host State to the contrary. Thus, even if the investor and the Host State are parties to a concession which provides that, upon violation of the concession, either party may immediately invoke binding arbitration, the U.S.-Russia BIT mandates that the parties must nevertheless first attempt to settle their differences by negotiation. An investor that negotiates to resolve an investment dispute in accordance with this provision of the U.S.-Russia BIT should keep records of such negotiations to prevent later claims by the Host State that no such negotiations were undertaken.

If the investment dispute cannot be resolved by negotiation between the parties, the parties are then allowed to settle their dispute "in accordance with previously agreed, applicable dispute-settlement procedures."[37] This provision contemplates and allows dispute settlement provisions, such as international arbitration provisions, in agreements between a Host State and an investor.[38] The U.S.-Russia BIT states that these dispute-settlement procedures are enforceable in accordance with "the terms of the agreement, relevant provisions of domestic law, and applicable international agreements regarding enforcement of arbitral awards."[39]

36. Such disputes are differentiated from disputes between the U.S. and Russia themselves, which are governed by Articles V and VII. *Id.* arts. V, VI, VII at 12-16.

37. *Id.* art. VI at 13.

38. *See infra* part III.

39. This provision may be interpreted to mean that dispute settlement provisions can be invalidated by domestic law. This interpretation would allow the Host State to invalidate an international arbitration provision that it had previously agreed to in a concession by legislating against it. The investor can best protect itself from this

Finally, Article VI provides a mechanism by which the investor may insist upon arbitration of an investment dispute before an international arbitral body, even if the parties did not provide for this type of dispute resolution in their contract or concession. This provision allows arbitration of an investment dispute before one of the following arbitral bodies: the International Center for Investment Disputes (the "ICSID"),[40] if the Russian Federation has become a party to the treaty which authorized ICSID; the Additional Facility of ICSID (the "Additional Facility");[41] the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"); or any other institutional arbitration facility which is agreed upon by the parties to the dispute.

In the U.S.-Russia BIT itself, Russia gives its consent to arbitration before the ICSID, the Additional Facility, or under the UNCITRAL Rules. The investor has the option to consent at any time after six months from the date that the investment dispute arose. *Once the investor consents,* then either Russia or the investor may bring an action before the particular arbitration body to which the investor has given its consent.

This provision is relevant in situations either where the dispute settlement provisions in a contract between Russia and an investor do not cover a particular investment dispute or where there are no investment dispute provisions between Russia and the investor. The investor may nevertheless invoke international arbitration by consenting to it under this provision. However, it would be prudent for an investor to negotiate settlement dispute mechanisms in its agreements with Russia rather than relying upon this provision. Such dispute provisions can be tailored to the particular needs of the investor and can include such safeguards as a stabilization clause.[42]

contingency by including a stabilization clause in any contract negotiated with a state. For further discussion of stabilization clauses, *see infra* Part III.

40. The ICSID is an international arbitral institution with both a standing secretariat and rules for arbitration between states and nationals of other states. It was formed by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which was signed in Washington D.C. in March of 1965. Currently, over 100 countries are parties to the ICSID Convention. As of this writing, Russia has signed but not ratified the convention. *See generally The Convention on the Settlement of Investment Disputes,* 136 R.C.A.D.I. 330 (1972).

41. The ICSID Additional Facility is a part of the ICSID and is designed to handle arbitration between States which are not a part of the ICSID convention and nationals of other States.

42. For further discussion of stabilization clauses, see *infra* Part III.

5. Termination of the U.S.-Russia BIT

Article XIII provides that the BIT enters into force thirty days after it has been ratified by both the U.S. and Russia and remains in force for at least ten years.[43] Of particular importance to investors with already-existing investments in Russia, this Article also provides that the BIT "shall apply to investments existing at the time of entry into force as well as to investments made thereafter."[44] This provision helps reduce any incentive an investor might have to wait until the BIT is in force before investing, and also, as a bonus, protects current investments on an equal footing with post-BIT investments.

After the initial ten-year period, either Russia or the U.S. may, by giving at least one year's written notice, terminate the BIT. Thereafter, any prospective investor would be aware that the BIT was no longer in force and could decide not to invest in Russia if the risk was felt to be too high. For investors who had already invested in Russia, the Article provides that the provisions of the BIT continue to be effective for a period of ten years from the date of termination of the treaty. Therefore, any investor relying upon the protections afforded by the U.S.-Russia BIT should be aware that Russia could, at any time after the initial ten-year period, announce termination of the BIT, giving the investor benefits under the BIT for only eleven more years (one year's notice to terminate plus ten years after termination).

To the extent that investors require protection lasting longer than this, other options, such as investment insurance programs or concession agreements negotiated directly with the government that contain a longer term than that of the BIT, should be considered.

6. Dissolution of the Russian Republic

Given recent unrest and instability in Russia, investors may understandably be concerned that republics or parts of Russia could separate from Russia to form one or more independent states. For example, three of the most restless of the republics are Chechnya, Tatarstan, and the oil-rich Bashkortostan; it is not inconceivable that these republics could break away from Russia entirely.[45]

43. U. S.-Russia BIT, *supra* note 13, art. xiii, S. TREATY DOC. No. 102-33 at 19-20.

44. *Id.* at 19.

45. *See Russia in Turmoil: A Country of Countries*, ECONOMIST, Mar. 27, 1993, at 19, 21.

If Russia or another developing country that a signatory to a BIT were to fragment, the provisions of any BIT would, under international law, probably still bind the successor states.[46] This prediction is reinforced by Article XII which provides that "[t]his Treaty shall apply to the political subdivisions of the Parties."[47]

B. BITs with Other States

BITs have also been signed between the U.S. and the following countries: Armenia, Bangladesh, Cameroon, Egypt, Grenada, Kazakhstan, Kyrgyzstan, Morocco, Panama, Senegal, Turkey, Zaire, Argentina, the Czech and Slovak Federal Republic, the Congo, Haiti, Romania, Sri Lanka, and Tunisia.[48] Many of these BITs are very similar to the U.S.-Russia BIT discussed above.

It is expected that the U.S. will continue to negotiate and enter into BITs with other developing countries.[49] Additionally, "[t]here is a broad expectation that the [U.S.-Russia BIT and the BIT between the U.K. and Russia] will serve as models for comparable treaties with other major commercial countries."[50]

46. *See* Shaw, *supra* note 6, at 606-11, discussing standards of international law, as manifested in the 1978 Vienna Convention on the Succession of States in Respect of Treaties.

47. U. S.-Russia BIT, *supra* note 13, art. xii, S. TREATY DOC. No. 102-33 at 19.

48. Golsong, *supra* note 21, at 796.

49. "BIT negotiations are underway with several of the other newly independent states of the former Soviet Union." Letter of Submittal of U.S.-Russia BIT to the President of the United States, July 21, 1992, by Lawrence S. Eagleburger, included with the U.S.-Russia BIT. "It is expected that the number of BITs will increase significantly in the near future in view of on-going negotiations." Golsong, *supra* note 21, at 796. *See also* Public Law 102-511—FREEDOM FOR RUSSIA AND EMERGING EURASIAN DEMOCRACIES AND OPEN MARKET SUPPORT ACT OF 1992, *reprinted in* PRACTISING LAW INSTITUTE, THE IMPLICATIONS OF ECONOMIC AND LEGAL REFORMS ON DOING A DEAL IN RUSSIA AND UKRAINE 393 (1993), in which the Congress finds that

> the success of the United States assistance for the independent states of the former Soviet Union depends on . . . reciprocal commitments by the governments of the independent states to work toward the creation of democratic institutions and an environment hospitable to foreign investment based upon the rule of law, including negotiation of bilateral and multilateral agreements on open trade and investment . . . .

50. Russell H. Pollack, et al., FOREIGN INVESTMENT IN RUSSIA: THE PERSPECTIVE OF THE RUSSIAN GOVERNMENT AND PROBLEMS FACED BY WESTERN INVESTORS, *reprinted in* THE IMPLICATIONS OF ECONOMIC AND LEGAL REFORMS ON DOING A DEAL IN RUSSIA AND UKRAINE 507, 516 (1993).

III. STABILIZATION AND INTERNATIONAL ARBITRATION CLAUSES

After an individual has made a foreign investment, the political regime may become unstable, thus rendering the investment of time and capital worthless. As discussed in the introduction above, the investor's options may be very limited, especially if the country does not have an independent judiciary to serve as a check on its powers of legislation. Furthermore, in most circumstances, the investor has no standing under international law to appeal this type of matter to an international tribunal. International law traditionally considers such matters purely within the jurisdiction and discretion of the country involved.[51]

Investors with greater bargaining power—those with large amounts of capital and expertise which are needed by the government to develop its economy and exploit its resources—can often reduce these uncertainties by asking the host state to grant specific assurances and promises which can be enforced under international law.[52] The state might provide assurance, for example, that it will agree to settle disputes in a neutral forum (not in the state's own courts), and a promise that the state will not later pass internal legislation which may alter detrimentally the rights of the investor.

This section of this Article focuses on two important assurances for which a prudent investor in any developing country should ask for before committing his resources. This discussion of the relevant international law principles centers around asking for these assurances in a specific type of investor-state contract called a concession agreement, because much of the significant international law to date concerning agreements between a private investor and a host state focuses on concession agreements.

51. Recent trends in international law indicate that this principle may not apply if human rights violations against the investor are involved. Such matters are beyond the scope of this Article. *See generally* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994) and a book review of Higgins's book, N. Stephan Kinsella, REASON PAPERS NO. 20 (Fall 1995, forthcoming); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 3 R.C.A.D.I. 259, 355 *et seq.* (1982) [hereinafter Higgins, *The Taking of Property by the State*].

52. For a discussion of four basic arrangements between host countries and multinational oil companies, see Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 Tex. Int'l L.J. 13, 35 (1989). The authors also state that "[i]t is important to note, however, that some existing agreements have borrowed clauses and concepts from two or more types of arrangements. Thus, precise categorization of a particular country's arrangements is not always possible." *Id.* at 35-36.

The international law principles discussed here concerning concession agreements are, however, equally applicable to other investor-state contracts which also contain these assurances.[53] Therefore, whenever an investor negotiates an agreement directly with a state or state agency, whether the agreement is called a concession, license, or joint venture, the investor should attempt to negotiate the clauses discussed here.

A. The Nature of Concessions

A concession is one type of contract between a state and a national of another state. It differs from a standard contract in that one of the parties to it is a sovereign state, which can make the relationship subject to international law.[54] This difference has important ramifications for the investor.

The most important consequence is that the concession agreement is given international status. If the concession includes the clauses discussed in this Article, then the state may not unilaterally change its terms without consequence in international law, despite the fact that the obligations must be performed in the territory of that country.[55]

This limit is of vital importance to the investor who wishes to invest in a country that might be tempted to change its laws in order to expropriate the investor's profits and assets. For example, if a well-drafted concession contract states that the investing oil company has a right to choose which shipping fleet to use to transport the produced oil, then the country may not later impose unilaterally on the company a requirement that only government-favored tankers can export oil.[56]

Two provisions are often inserted in concession agreements in order to invoke these principles and to prevent the state from unilaterally changing the terms of the concession. First, an international arbitration clause provides that any disputes arising in relation to the concession shall be settled before an international tribunal. This clause ensures the investor of a neutral forum to protect its rights in the concession, including its

53. *Id.*

54. *See, e.g.*, Saudi Arabia v. Arabian American Oil Company (Aramco), 27 I.L.R. 117 (1963).

55. Laws which affect the investor only incidentally or which are of general importance to the country as a whole, such as health and safety regulations, are generally upheld by international tribunals on the theory that their necessity justifies such a taking. For a further discussion of this topic, see Higgins, *The Taking of Property by the State*, *supra* note 51, and Bouchez, *supra* note 28, at 87.

56. 27 I.L.R. at 227-28.

rights under the stabilization clause.[57] Second, a stabilization clause, which states that the law in force in the country at the time the concession takes effect is the law that will apply to supplement the terms of the contract, is often included. A stabilization clause prevents the state from imposing new laws on the investor that would change the terms of the concession or affect detrimentally the rights guaranteed thereunder.

The following discussion focuses on the structure and validity of international stabilization clauses and arbitration clauses in international contracts.[58]

B. *INTERNATIONAL ARBITRATION CLAUSES*

Certain types of disputes seem to recur in international oil and gas concessions. For example, the state will often raise the investor's taxes dramatically after promising not to do so or will nationalize the investor's property without providing adequate compensation. A prudent investor will negotiate an arbitration clause into the concession agreement so that, if a dispute cannot be resolved by negotiation, these and other problems can be settled in a neutral forum. The investor should insist that the contract contain an international arbitration clause that stipulates international arbitration as the method used to settle any disputes arising in connection with the contract. The presence of an arbitration clause serves a dual function. First, it defines the scope of an arbitration, and

57. In addition, international law is often chosen as one of the laws to be applied by the arbitrator, as a further guarantee of neutrality. *See generally* David J. Branson & Richard E. Wallace, Jr., *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39 (1986); Chiati, *supra* note 29, at 121; Bouchez, *supra* note 28, at 100.

58. There are many other considerations that must be taken into account when negotiating agreements with states, which are beyond the scope of this Article. *See generally* Detlev F. Vagts, *Dispute-Resolution Mechanisms in International Business*, 3 R.C.A.D.I. 9 (1987) and the bibliography contained therein; Chiati, *supra* note 29 and the bibliography contained therein; ERNEST E. SMITH & JOHN S. DZIENKOWSKI, INTERNATIONAL PETROLEUM TRANSACTIONS INSTITUTE (November 20, 1992, Houston, Texas, sponsored by The University of Texas School of Law, a version of which was also recently published as SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS (1993), available from the Rocky Mountain Mineral Law Foundation); GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (1982); RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS (1992); A.F. LOWENFELD, INTERNATIONAL PRIVATE INVESTMENT (2d ed. 1982); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (1986); Note, *Unilateral Action by Oil Producing Countries: Possible Contractual Remedies of Foreign Petroleum Companies*, 9 FORDHAM INT'L L.J. 63 (1985-1986).

procedures and details by which the arbitration shall be conducted. Second, and perhaps more importantly, it is important to establish the jurisdiction of an arbitrator to hear the matter.

1. Structure

A typical ad hoc international arbitration clause provides detailed provisions, including: the scope of the clause; the method by which a party can invoke arbitration; the method for choosing the arbitrators; the applicable procedural and substantive laws; the procedure if one party refuses to participate; the method by which the arbitrators render a decision; and the time period within which the parties must comply with the results of the arbitration.[59] In addition, the clause usually states that the decision of the arbitrators is binding. To illustrate, a portion of the international arbitration clause found in the concession agreement that was the subject of the *BP v. Libyan Arab Republic* arbitration is set forth below. The first paragraph of the arbitration clause establishes the consent of the parties to arbitration, the scope of any arbitration, and the method for choosing an arbitrator and reads as follows:

> If at any time during or after the currency of this Concession any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance hereof, or anything herein contained or in connection herewith, or the rights and liabilities of either of such parties hereunder and if such parties should fail to settle such difference or dispute by agreement, the same shall, failing any agreement to settle it any other way, be referred to two Arbitrators, one of whom shall be appointed by each such party, and an Umpire who shall be appointed by the Arbitrators immediately after they are themselves appointed.
>
> In the event of the Arbitrators failing to agree upon an Umpire within 60 days from the date of the appointment of the second Arbitrator, either of such parties may request the President or, if the President is a national of Libya or of the Country where the Company was incorporated, the Vice-

59. *See, e.g.*, BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic, 53 I.L.R. 291, 302 (1979).

President, of the International Court of Justice to appoint the Umpire.[60]

The remainder of the arbitration clause concerns the matters referred to in the paragraph immediately above.

As an alternative to ad hoc arbitration, which sets out the procedures and administrative details of a possible arbitration in full detail, parties can choose to have their arbitration managed by an international arbitration system. The ICSID is one of several organizations that provide a detailed arbitration system, a list of experienced arbitrators, and administrative amenities.[61]

2. Validity and Effect

An international arbitration clause, in addition to defining the scope, procedure, and administrative details of an arbitration, also grants authority to an arbitrator to claim jurisdiction over a dispute. This authority is important, as often a state will object to the jurisdiction of the arbitrator and will refuse to recognize the validity of the proceedings. Establishing a firm basis in international law for the validity of the tribunal's authority will assist the investor in later efforts to enforce any award.

International case law confirms that an arbitrator has jurisdiction to decide whether he has authority to hear a matter presented to him.[62] One of the factors which is often cited in the arbitrator's "jurisdiction to decide jurisdiction" is the express consent of the parties. This consent is found in the arbitration clause. As an example, the arbitration clause in the *Texaco* concession contains the following phrase: "The Arbitrators . . . shall determine the applicability of this Clause and the procedure to be

60. *Id.* at 302.

61. *See* Vagts, *supra* note 58 (discussing international arbitration mechanisms, including a comparison of *ad hoc* and institutionalized arbitration). *See also* Bouchez, *supra* note 28, at 93 *passim*; William W. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783 (1984).

62. *See* Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. 111, 20 I.L.R. 567 (1953); Concerning the Arbitral Award Made by The King of Spain on December 23, 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 30 I.L.R. 457 (1966).

followed in the Arbitration."[63] The arbitrator in the *Texaco* case cited this phrase as one of the justifications for assuming jurisdiction.[64]

If the arbitrator decides that he has jurisdiction, then jurisdiction cannot be revoked unilaterally by the state. International law dictates that a government bound by an arbitration clause cannot free itself of this obligation by unilateral action, such as by changing its internal law or by unilaterally rescinding the contract.[65] "It is well-established in case law that the unilateral cancellation of a contract can have no effect on the arbitration clause which continues to be operative . . . ."[66] An arbitration clause is severable from the remainder of the concession and thus cannot be nationalized by the state even where the state nationalizes other rights contemplated by the concession agreement.

C. *STABILIZATION CLAUSES*

A stabilization clause states that the law in force in the state at a given date—typically, the time the concession takes effect—is the law that will apply to supplement the terms of the contract, regardless of future legislation, decrees, or regulations issued by the government.[67] Its purpose is to "preclude the application to an agreement of any subsequent legislative (statutory) or administrative (regulatory) act issued by the government . . . that modifies the legal situation of the investor."[68] In other words, by agreeing to a stabilization clause, a state alienates its right to unilaterally change the regime and rights relied upon by, and promised to, the investor.

63. Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic, 53 I.L.R. 389, 403-04 (1979).

64. *Id.*

65. Jiménez de Aréchega, *L'Arbitrage Entre les Etats et les Sociétés Privées Etrangères*, *in* MÉLANGES EN L'HONNEUR DE GILBERT GIDEL 367, 375 (1961) *cited in Texaco*, 53 I.L.R. at 410.

66. Losinger, 1936 P.C.I.J. (Ser. C) No. 78, at 105, *cited in* Texaco, 53 I.L.R. at 408.

67. Principles of international law may also apply. The state's municipal law, as it stands on a given date, is often chosen as the law to govern certain local matters. *See generally* Chiati, *supra* note 29.

68. *Id.* at 115. For examples of various stabilization clauses, see *id.* at 115-21.

1. Structure

The concession contract between the parties in *Liamco v. Libya* provides a good example of a stabilization clause and states:

> (1) The Government of Libya, the Commission and the appropriate provincial authorities will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties.
>
> (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the Agreement of Amendment by which this paragraph [sic] (2) was incorporated into this Concession Agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.[69]

The first paragraph makes clear that mutual consent of the parties is needed to alter the contractual rights secured by the concession. The second paragraph establishes that the municipal law by which the concession is to be interpreted is fixed as of a certain date, so that no later government legislation or action can unilaterally infringe upon the company's contractual rights.

The key element of the stabilization clause is the removal of the government's right to unilaterally alter the investor's rights by changing its municipal law; this element is made more explicit by the requirement that the investor's consent is necessary before any such change in law will affect the investor.[70]

69. Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, Award of 12 April 1977, 62 I.L.R. 140, 170 (1980); 20 I.L.M. 1 (1981).

70. The first paragraph, in requiring mutual consent to change the concession contract, is sometimes referred to as an "intangibility clause" to distinguish it from a stabilization clause, which freezes the law as of a certain date. *See, e.g.*, Bouchez, *supra* note 28, at 86. Most such clauses, however, combine both complementary aspects. Chiati, *supra* note 29, at 115-16. Therefore, the term "stabilization clause" in this article will refer to both intangibility and stabilization provisions, as set out in the two paragraphs of the *LIAMCO* stabilization clause.

2. Validity and Effect

International law upholds both the validity of stabilization clauses and the right of a sovereign nation to bind itself through the use of such clauses.[71] The tribunal in *Texaco v. Libyan Arab Republic*[72] stated that "[n]othing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irretractable rights . . . ."[73] The tribunal in *Texaco* held that, "in entering into concession contracts with the plaintiffs, the Libyan State did not *alienate* but *exercised* its sovereignty."[74] Some nations protest, however, that it is an infringement on their sovereignty for a tribunal to rule that they may not legislate in a way that would violate the terms of a concession agreement.

A stabilization clause is valid in principle under international law, although arbitrators differ as to the consequences of the violation of such a clause.[75] Generally, arbitrators will not order specific performance of a concession agreement, even if it contains a stabilization clause, out of respect for state sovereignty and an inability to enforce such an award (the remedy in *Texaco*, discussed below, is an exception to this rule). Instead, a state's violation of a stabilization clause is more likely to affect the amount of damages awarded or on the certainty that damages will be awarded.[76]

71. *See, e.g.*, Chiati, *supra* note 29, at 161 (stating that "[s]tabilization clauses, validly entered into, are valid and binding").

72. Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic, 53 I.L.R. at 474, (quoting Saudi Arabia v. Arabian American Oil Company, Award of August 23, 1958, (Aramco), 27 I.L.R. 117, 168).

73. *Id.*

74. *Id.* at 482 (emphasis added). *See also* Bouchez, *supra* note 28, at 86 (discussing a similar holding by the Permanent Court of International Justice, in the Wimbledon Case, 1928 P.C.I.J. (ser. A) No. 1, at 25).

75. As stated in *LIAMCO*, international law is unclear on the question of damages. *LIAMCO*, 62 I.L.R. at 160 *et seq. See also* Shaw, *supra* note 6, at 521.

76. *See* Chiati, *supra* note 29, at 165 (stating that "the extent of the indemnity due to the investor . . . may vary from compensation for the value of the property taken to the financial equivalent of restitution and may even include, at least theoretically, punitive damages") (footnote omitted). *See also* SHAW, *supra* note 6, at 523-24. For a critique of this position, see ROSALYN HIGGINS, *supra* note 51, at Chapter 8; Kinsella, *supra* note 51; and N. Stephan Kinsella & Paul E. Comeaux, *Expropriation and International Law: The Illusory Requirements of Nondiscrimination and Public Purpose* (forthcoming).

The decisions in several major international arbitrations are discussed below to examine the current state of international law concerning stabilization clauses. In *Texaco*, Libya nationalized the property and rights of several oil companies in violation of a concession agreement.[77] The concession contained a stabilization clause very similar to the *Liamco* clause discussed above. The tribunal recognized the validity of a stabilization clause in a concession agreement. The clause was one factor in the tribunal's decision to declare the taking illegal and to render an award of restitution (i.e., a return of the property the government nationalized).[78] The tribunal stated that this award was "the normal sanction for non-performance of contractual obligations,"[79] although the award was in fact atypical. Nevertheless, the tribunal held that where the contract was stabilized on a certain date by specific clauses, "the decision of a State to take nationalizing measures . . . carries international consequences . . . ."[80] This holding demonstrates the potential significance of a stabilization clause to help convince an arbitrator to grant a remedy to an aggrieved investor.

In *Liamco v. Libya*, Libya had awarded concessions to Liamco in 1955 and then nationalized the concession rights in 1973.[81] The tribunal held this nationalization to be a breach of the concession and awarded approximately $80 million as damages.[82] The concession's stabilization clause was discussed earlier in this article. The tribunal held[83] that a "nationalization of concession rights . . . constitutes . . . a source of liability to compensate the concessionaire for said premature termination of the concession agreement."[84] The court did not award *lucrum cessans* (i.e., lost profits) to the investor; consequently, the investor did not receive compensation for the full value of what was taken. However, the

77. *Texaco*, 53 I.L.R. at 422.

78. *Id.* at 507. The award of restitution against a state is rare in concession cases; usually any award given is for damages only. For a discussion of the remedy of *restitutio in integrum*, see Higgins, *The Taking of Property by the State*, *supra* note 51, at 298-355.

79. *Texaco*, 53 I.L.R. at 507.

80. *Id.* at 471.

81. *LIAMCO*, 62 I.L.R. at 160-181.

82. *Id.* at 218.

83. The holding was made partially because of the stabilization clause's provision that "contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties." *Id.* at 191.

84. *Id.* at 217.

fact that a stabilization clause was present was one of the factors considered in the award of "equitable compensation"[85] by the tribunal.

A recent international arbitration that contains a significant discussion of stabilization clauses is the *Aminoil* arbitration.[86] In 1948, Aminoil was granted a concession by Kuwait "for the exploration and exploitation of petroleum and natural gas in what was then called the Kuwait 'Neutral Zone'."[87] In 1961, Kuwait became fully independent, and the concession was modified by a supplemental agreement. In December 1974, OPEC countries adopted the "Abu Dhabi formula," which effectively raised taxes on the oil produced by Aminoil, to which Aminoil objected.[88]

Negotiations between the parties were unsuccessful, and Kuwait expropriated Aminoil's assets in 1977.[89] In the ensuing arbitration, Aminoil claimed that this action was a breach of the stabilization clause contained in the concession agreement. The stabilization clause reads:

> The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.[90]

The tribunal stated that stabilization clauses are valid in principle, although it reasoned that this particular clause did not accomplish what it clearly contemplates on its face.

First, the tribunal held that the stabilization clause did not prohibit nationalization because it contained no *express* prohibition.[91] The

85. *Id.* at 217-18.

86. Government of Kuwait v. American Independent Oil Company (Aminoil), 66 I.L.R. 519, 519-31 (1984).

87. *Id.*

88. *Id.*

89. *Id.* *See also* Fernando R. Tesón, *State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration*, 24 VA. J. INT'L L. 323 (1984); Geoffrey Marston, *The Aminoil-Kuwait Arbitration*, 17 J. WORLD TRADE L. 177 (1983) (both discussing the *Aminoil* case).

90. *Aminoil*, 66 I.L.R. at 519-31.

91. *Id.*

arbitrator stated that a "contractual limitation on the state's right to nationalize . . . would be a particularly serious undertaking which would have to be expressly stipulated for . . . ."[92] He stated further that "[t]he case of nationalisation is certainly not expressly provided against by the stabilisation clauses of the Concession."[93] Thus, this particular clause did not prevent nationalization despite its apparently clear wording.

Second, the tribunal held that the fact that Aminoil agreed during protracted negotiations to allow changes to the concession "brought about a metamorphosis in the whole character of the Concession."[94] The tribunal's position, in essence, was that since the investor had been willing to compromise during negotiations, the investor had in effect implicitly agreed to a weakening of the stabilization clause. Therefore, under this diluted or weakened stabilization clause, a nationalization was permissible under the concession agreement as long as compensation was paid.[95]

The tribunal held that the existence of the clause merely warranted an award of damages, despite the wording of the stabilization clause which seemed to clearly prohibit unilateral changes in law. Nevertheless, the existence of the stabilization clause—even weakened—was an important element in the tribunal's justification of the award of damages. The standard used to determine the amount of damages was that of "appropriate compensation."[96]

The investor negotiating a stabilization clause should learn two valuable lessons from this case. The first is that a stabilization clause should be very explicit in what it is meant to prohibit. The clause should provide that the state expressly waives its right to nationalize. The second is that a stabilization clause should provide that its terms are binding regardless of subsequent compromises, negotiations, or amendments to the contract unless both parties provide expressly, in writing, to change the meaning or binding effect of the stabilization clause. This flexibility will allow the investor to negotiate changes in the contract with the state if

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 527. For the international law principle of requiring "appropriate compensation" in such cases, see *Permanent Sovereignty over Natural Resources*, para. 4, G.A. Res. 1803, U.N. GAOR, *reprinted in* DUSAN J. DJONOVICH, 9 UNITED NATIONS RESOLUTIONS, SERIES I, RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, 1962-1963, at 107 (1974). *See also* Texaco Overseas Petroleum Company v. Libyan Arab Republic, 53 I.L.R. at 489 (citing the standard "appropriate compensation" with approval as a rule of customary law).

circumstances change, without fear that a tribunal may later declare that the fact that the investor had agreed to these negotiations and somehow weakened or changed the nature of the stabilization clause.[97]

3. Enforceability of Awards of Damages

The relevance of a stabilization clause in international law is not that it will be, or even can be, specifically enforced,[98] but rather that it makes damages awarded by an international tribunal either more certain to be awarded or likely to be higher than if a stabilization clause were not present. An award of damages, besides helping to bring international opinion and pressure to bear upon the nationalizing state and thereby aiding in settlement negotiations between the parties, may sometimes be recognized and enforced in national courts against property of the defendant state within the court's jurisdiction.

Various international agreements and treaties are currently in force which are designed to assist in the enforcement of foreign arbitral awards. Perhaps the most important is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, first signed in New York in 1958, which provides for enforcement of foreign arbitral awards.[99] This provision is useful where the assets of parties may be situated in different countries and transnational enforcement is desired.[100] Obtaining an award of damages is desirable, despite problems in enforcement, as it increases the chances an investor has of obtaining compensation from the offending state. Furthermore, the mere prospect of having an award granted to an expropriated investor will help to dissuade a state from taking the investor's property in the first place.

97. The separate opinion of Sir G. Fitzmaurice in *Aminoil*, 66 I.L.R. at 524-31, which is better reasoned than the main opinion, concurs in the judgment. Fitzmaurice reasons differently and states that stabilization clauses do not need to be express to be effective, that this clause was express anyway, and that the character of the concession or of the stabilization clause had not changed due to subsequent negotiations and amendments. *Id.*

98. Although the tribunal in *Texaco* awarded restitution, such an award will not, in practice, be enforceable against the offending state, nor will an award of damages be enforceable against property within the territory of the state. "The problems . . . of enforcing such restitution awards against a recalcitrant state may be imagined." SHAW, *supra* note 6, at 521-24. *See also* Chiati, *supra* note 29, at 158. "The futility of claiming a *restitutio in integrum* has become so apparent that some litigants do not even bother to claim it." *Id.* at 161.

99. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 1959.

100. *Id.*

4. Damages Clause

One of the benefits of having a stabilization clause is the likelihood of a higher damages award than would otherwise be expected.

An additional method to help guarantee the award of the full value of the rights taken is for the investor to negotiate a damages clause. The damages clause should provide that if the state nevertheless expropriates the investor's property or other rights, the state is obliged to compensate the investor for the full value, including lost profits (i.e., both *damnum emergens* and *lucrum cessans*).

An example of this type of clause is found in a recent Ghanaian concession contract, which contained an arbitration clause with the following paragraph:

> If any Contractor's rights, interests or property provided for herein are expropriated, nationalized or otherwise taken by reason of any act of the State or any central or local governmental authority of Ghana, then the arbitrators shall apply the principle of full and fair compensation for loss of profits determined on the basis of a going concern.[101]

The term "full and fair," and even the term "lost profits," may be subject to conflicting interpretations. The damages clause should therefore provide for a specific method to determine valuation, in order to avoid disputes over which accounting method is proper. This clause, if well drafted, would also make a state more reluctant to expropriate in the first place, since much of the temptation to take property is removed if the expropriating party must pay for the expropriated property. Several decisions and authorities indicate that the amount of damages awarded may be higher if the expropriation is considered illegal under international law.[102] The concept of international "illegality" is a vague and uncertain

101. Chiati, *supra* note 29, at 166.

102. *See* SHAW, *supra* note 6, at 523-24. For a critique of this position, see ROSALYN HIGGINS, *supra* note 51, at Chapter 8. For further discussion of compensation issues, see C.F. Amerasinghe, *Issues of Compensation for the Takings of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22 (1992); Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474 (1991); Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639 (1987); Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. INT'L L. 49 (1988); Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RESOURCES L. 241 (1990); Brice M. Clagett, *Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts*, in PRIVATE INVESTORS ABROAD 12-1 (1989); William C. Lieblich, *Determining the Economic Value of Expropriated Income-Producing Property in International Expropriations*, 8 J. INT'L ARB. 37 (1991); William C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, 7 J. INT'L ARB. 37 (1990); Edith Penrose et al., *Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation*, 55 MOD. L. REV. 351 (1992); Felix Praendl, Note, *Measure of Damages in International Commercial Arbitration*, 23 STAN. J. INT'L L. 263 (1987); Haliburton Fales, *A Comparison of Compensation for Nationalization of Alien Property with Standards of Compensation Under United States Domestic Law*, 5 NW. J. INT'L L. & BUS. 871 (1983); James W. Weller, *International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 HOFSTRA L. REV. 323 (1987); Christopher P. Bauman, *An International Standard of Partial Compensation upon the Expropriation of an Alien's Property*, 19 CASE W. RES. J. INT'L L. 103 (1987).

one. Therefore, it would be advantageous for the investor to have the stabilization clause provide further that any nationalization or expropriation contrary to the terms of the agreement is, and is deemed to be by both parties, illegal and unlawful under international law. This provision should help to further ensure an award of damages which compensates the investor for the full value of the property and other contractual rights taken.

D. INVESTOR-STATE CONTRACTS IN DEVELOPING COUNTRIES

The various clauses recommended in this Article should be of particular importance to an individual investing in developing countries that do not have impressive track records of protecting private property. Since the states' own internal laws are less likely to give the investor protection under international law, an investor should attempt to have these clauses included in any contracts negotiated with these states, whether or not a particular state has in place its own laws purporting to protect foreign investment. It is likely that many states will be willing to enter into such concessions, since international arbitration between states and investors has been growing in importance recently.[103] Therefore, investors

103. "In recent years there has been an increase in the activity and promotion of international arbitration." Baxter, *supra* note 28, at 299. "[T]aking into account the growing importance of international commercial arbitration with respect to international dealings between private parties—including international transactions between private parties and State enterprises . . . it is to be expected that international arbitration will continue to play an important role between States and State enterprises on the one hand

may be successful in having these clauses inserted in contracts with at least some of the developing countries, if they insist upon them in negotiations.

IV. MIGA, OPIC, & PRIVATE INVESTMENT INSURANCE

Individuals investing in developing countries face risks, such as the risk of currency inconvertibility and expropriation, which are much greater than the risks experienced by investors who invest in Western liberal democracies. Other than relying upon the existence of BITs[104] and negotiating contractual assurances such as stabilization and international arbitration clauses,[105] an investor can also reduce political risk by purchasing political risk insurance. This insurance typically provides coverage against risks such as currency inconvertibility, expropriation, and war and is available from a number of sources, including nationally-sponsored insurance agencies,[106] private insurers, and the World Bank's Multilateral Investment Guarantee Agency ("MIGA"). This Article focuses on MIGA and on the U.S. government-sponsored insurance agency, the Overseas Private Investment Corporation ("OPIC"),[107] which

and foreign private parties on the other." Bouchez, *supra* note 28, at 115. For further discussion an investor's ability to obtain concession agreements from Russia, see Comeaux & Kinsella, *Reducing The Political Risk of Investing in Russia and Other C.I.S. Republics: International Arbitration and Stabilization Clauses*, *supra* note 3, at 21. *See also Political Risk and Petroleum Investment in Russia*, *supra* note 3, at 48; N. Stephan Kinsella, *Lithuania's Proposed Foreign Investment Laws: A Free-Market Critique*, RUSSIAN OIL & GAS GUIDE, Vol. 3, No. 2, at 60 (April 1993).

104. *See* discussion *supra* Part II.

105. *See* discussion *supra* Part III.

106. The largest government-sponsored insurance agencies, which are the U.S. Overseas Private Investment Corporation, Germany's Treuarbeit, and the Japanese Export Insurance Division, Ministry of International Trade and Industry, together represent over 80 percent of all outstanding national insurance coverage. Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 119, 122 (1992).

107. For further information on OPIC and MIGA, see The Overseas Private Investment Corporation Act, 22 U.S.C.A. §§ 2191-2200b (West 1990 & Supp. 1993); The Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* October 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988), *cited in* Rowat, *supra* note 106, at n.9; U.S. laws relating to MIGA *in* 22 U.S.C.A. §§ 290k to 290k-11 (West 1990); Steven Franklin & Gerald T. West, *The Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Developmental Role of Investment Insurance*, 14 TEX. INT'L L.J. 1 (1979) (providing a complete discussion of the origins and background of OPIC); IBRAHIM F. I. SHIHATA, MIGA AND FOREIGN INVESTMENT—ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA) (1988). *See also* Gary W. Orloff, *Private Political Risk Insurance for Energy Investors* (Maclean International Energy Network, Going International Seminar, Dallas, Texas), July 28, 1993; Klaus P. Berger, *The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach Towards Development*, 15 SYRACUSE. J. INT'L L. & COM. 13 (1988); Ibrahim F. I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 INT'L LAW. 671 (1987) [hereinafter Shihata, *Factors*]; Adeoye Akinsanya, *International Protection of Direct Foreign Investment in the Third World*, 36 INT'L & COMP. L.Q. 58 (1987); S. K. Chatterjee, *The Convention Establishing the Multilateral Investment Guarantee Agency*, 36 INT'L & COMP. L.Q. 76 (1987); Ibrahim F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV. 1 (1986).

are the insurance providers of the most interest to U.S. investors. In addition, this Article briefly discusses several private insurers that offer political risk insurance.

A. OPIC[108]

1. Background

OPIC, established under the Foreign Assistance Act in 1969,[109] is a self-sustaining U.S. government agency that provides political risk insurance, as well as project financing through direct loans and loan guarantees and a variety of investor services, to U.S. investors. OPIC's insurance is "backed by the full faith and credit of the United States, as well as by OPIC's own substantial reserves."[110] OPIC services are available for U.S. investments in more than 139 developing nations. Its goal is to encourage American overseas private investment in sound business projects, thereby improving U.S. global competitiveness, creating American jobs, and increasing U.S. exports. OPIC's political risk insurance is discussed in detail below.

108. Much of the following discussion of OPIC draws on information obtained directly from OPIC. *See e.g.*, the "Investment Insurance" pamphlet and related information supplied by OPIC. OVERSEAS PRIVATE INVESTMENT CORPORATION, INVESTMENT INSURANCE (n.d.).

109. John S. Diaconis, *Political Risk Insurance: OPIC's Use of a "Fiduciary Agent" to Facilitate Resolution of Subrogation Claims*, 23 INT'L LAW. 271 (1989).

110. OVERSEAS PRIVATE INVESTMENT CORPORATION, *supra* note 108, at 1.

2. Risks Covered by OPIC Insurance

OPIC will insure both new ventures and expansions of existing enterprises and can cover equity investments, loans, technical assistance agreements, leases, and other investment structures which subject the investor to long-term exposure. The investor may purchase insurance coverage for one or more of the following three types of risks: (1) currency inconvertibility, which is the inability to convert profits and other remittances into U.S. dollars; (2) expropriation, which is the confiscation of the investor's property by the host state; and (3) political violence, which includes war, revolution, insurrection, and civil strife. In addition, OPIC offers specialized insurance coverage for certain specific types of investments, including specialized insurance for oil and gas-related investments.

a. Currency Inconvertibility

Currency inconvertibility insurance coverage compensates investors if they cannot convert remittances from the local currency into U.S. dollars and transfer those remittance outside of the host country. It includes earnings, returns of capital, principal and interest payments, technical assistance fees, and other remittances related to investment projects. This coverage also extends to losses to the investor caused by discriminatory exchange rates.[111] Currency inconvertibility coverage does not extend to the devaluation of a country's currency. In addition, the investor may only collect on currency inconvertibility insurance if the currency was convertible into "U.S. dollars at the time the insurance was issued."[112]

b. Expropriation

Expropriation insurance protects against the nationalization, confiscation, or expropriation of an enterprise as well as creeping expropriation, which is defined as a series of illegal government actions that cumulatively deprive an investor of the financial interests in his investment. Expropriation coverage excludes losses due to lawful regulatory or revenue actions by host governments and actions provoked or instigated by the investor or foreign enterprise. For equity investments,

111. Diaconis, *supra* note 109, at 274.
112. *Id.*

the amount of compensation is based on the book value of the investment as of the date of expropriation. For loans, payment is based on outstanding principal and accrued interest.

c. Political Violence

Political violence insurance compensates for property and income losses caused by violence undertaken for political purposes. Examples of the types of violence covered are declared war, undeclared war, hostile actions by national or international forces, civil war, revolution, insurrection, and civil strife. Civil strife may be included or excluded from coverage, at the investor's option. Actions undertaken primarily to achieve labor or student objectives are not covered. The insurance may cover one or both of two types of losses—business income losses and damage to property. An investor may purchase one or both coverages.

Business income loss coverage includes income losses resulting from damage to the investor's property caused by political violence. With an "off-site" rider, OPIC will provide compensation for income losses resulting from damage to specific sites outside the investor's facility. Compensation is based on expected net income plus continuing, normal operating expenses. OPIC also will pay for expenses that reduce the business income loss, such as renting a temporary facility. Compensation is paid until productive capacity is restored, for a time period not to exceed one year.

"Damage to property" compensation is based on the adjusted cost of the property or replacement cost. Adjusted cost is defined as the least of the original cost of the item, the fair market value at the time of loss, or the cost to repair the item. OPIC will pay replacement cost up to twice the equipment's original cost, provided the item is actually replaced in the host country.

d. Special Oil and Gas Insurance

OPIC offers specialized insurance coverage to encourage petroleum exploration, development, and production in developing countries. In addition to insurance coverage for the risks discussed above, an investor may purchase "exploration" coverage and "interference with operations" coverage.

Exploration coverage expands expropriation coverage to insure against losses due to material changes unilaterally imposed by a host government on project agreements. These changes include an abrogation, impairment, repudiation, or breach of concession agreements, production sharing agreements, service contracts, risk contracts, and other agreements between the U.S. company and the host state. Such actions must last for at least six months and prevent the insured from effectively exercising its fundamental rights with respect to the project agreement, such as rights to take and export petroleum or to be paid for it. The coverage also compensates for tangible assets and bank accounts that are confiscated.

Interference with operations coverage expands political violence coverage to insure against cessation of operations for six months or more caused by political violence. Compensation for such cessation is based on the amount of investment, less returns of capital. Compensation must be repaid to OPIC, without interest, if within five years the political violence has abated and the insured can resume operations.

3. Eligibility for OPIC Insurance

OPIC political risk insurance may only be issued if the investor, the foreign country, and the investment itself meet OPIC's requirements. In addition, OPIC will take certain political requirements into account. These eligibility requirements are discussed in more detail below.

a. Eligible Investors

To be eligible for OPIC insurance, an investor must be: a U.S. citizen; a corporation, partnership, or other association created under the laws of the U.S., its states, or territories beneficially owned by U.S. citizens; or a foreign business at least 95% owned by U.S. citizens or by associations owned by U.S. citizens.

b. Eligible Projects

An investment project qualifies for OPIC insurance coverage if the investment is a new investments, a privatization, or an expansion or modernization of an existing plant or investment. Acquisitions of existing operations are eligible if the investor contributes additional capital for modernization and/or expansion There is no requirement that the foreign enterprise be owned or controlled by U.S. investors. However, in the case of a project with foreign ownership, only the portion of the investment made by the U.S. investor is insured by OPIC. Insurance is normally not available for investments in enterprises which are majority-owned and controlled by a foreign government.

Investments may take many forms: conventional equity investments and loans; construction and service contracts; production sharing

agreements; leases; and various contractual arrangements, such as consigned inventory, licensing, franchising, and technical assistance agreements.

Finally, the investor must submit a Request for Registration for Political Risk Investment Insurance before the investment is made or irrevocably committed.

c. Eligible Countries

OPIC may not offer insurance for a project in a country with which the U.S. does not have an investment agreement.[113] Currently, OPIC programs are available in 140 developing countries.[114] Investors should contact OPIC to determine the status of OPIC assistance in a particular country.

Under agreements with the host countries, the host government must approve the issuance of OPIC insurance for a project. The approval procedures vary from country to country and are available from OPIC.

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113. 22 U.S.C.A. § 2197(a) (West Supp. 1994).

114. OPIC's "Country and Area List" lists countries in which OPIC programs are generally available: Albania, Algeria, Anguilla, Antigua & Barbuda, Argentina, Armenia, Aruba, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bolivia, Botswana, Bosnia & Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, French Guiana, Gabon, Gambia, Georgia, Germany (eastern), Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Hungary, India, Indonesia, Ireland, Israel, Jamaica, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Lithuania, Madagascar, Malawi, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Federated States of Micronesia, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands Antilles, Nicaragua, Niger, Nigeria, Northern Ireland, Oman, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Sao Tome & Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, Sri Lanka, Swaziland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, Western Samoa, Yemen, Zaire, Zambia, Zimbabwe. OVERSEAS PRIVATE INVESTMENT CORPORATION, COUNTRY AND AREA LIST (January 12, 1993).

d. Political Considerations

OPIC has a legislative mandate to support projects which are responsive to the development needs and the environment of the host country and which foster private initiative and competition. In particular, OPIC must give preferential treatment to investments in countries with a per capita annual income of less than $984 in 1986 U.S. dollars.[115] If a project is given monopoly rights or other competitive advantages for more than five years, special justification for OPIC involvement is required.

The effect of a proposed investment on the U.S. economy also is closely examined. Coverage is denied to projects which are likely to have a negative impact on U.S. employment and where the host country imposes requirements that substantially reduce the potential U.S. trade benefits of the investment.

OPIC also may decline coverage to projects which are likely to have a significant adverse effect on the U.S. balance of payments. OPIC also requires that countries respect certain individual rights and internationally-recognized workers' "rights."[116]

4. Terms

a. Duration

The term of an insurance policy may extend a maximum of twenty years. For loans, leases, and transactions covered by the contractors and exporters program, the term is generally equal to the duration of the underlying contract.

b. Cost

OPIC insurance premiums are based on fixed rate schedules, which are determined by reference to the type of investment and the types of coverage sought.[117] As an example, OPIC's current base rates for coverage on oil and gas investments are as follows: for expropriation, 0.4% for development/exploration, and 1.5% for production; for political violence, 0.75%; for interference with operations, 0.4%; and for currency inconvertibility, 0.3%.[118]

115. Diaconis, *supra* note 109, at 275.

116. Rowat, *supra* note 106, at 122.

117. Orloff, *supra* note 107, at 7.

118. OVERSEAS PRIVATE INVESTMENT CORPORATION, INSURANCE RATES (August 1992).

c. Co-Insurance

OPIC will only insure and pay claims on 90% of a loss. OPIC's statute requires that investors bear the risk of loss of the remaining 10%. The only exception to this requirement is loans and leases from financial institutions to unrelated third parties, which may be insured for 100% of principal and interest.

d. Coverage Multiples and Amount of Insurance

OPIC typically issues insurance commitments equal to 270% of the initial investment—90% representing the original investment and 180% to cover future earnings. The maximum amount of coverage available for any one project is $100 million. Coverage amounts may be limited for investments in countries where OPIC has a high portfolio concentration and in highly sensitive projects.

e. Application[119]

The insurance program has a two-step application process. First, investors are required to register projects with OPIC before the investment has been made or irrevocably committed. Registration is free of charge and treated as privileged business information by OPIC. Upon receipt of the Request for Registration, OPIC will send a confirmation letter and application forms. A registration is valid for two years. Registration of a project does not commit OPIC to issue insurance, nor does it indicate that OPIC's eligibility criteria have been met.

Once the final form of an investment is determined, the investor must submit an Application for Political Risk Investment Insurance. This application provides OPIC with detailed information necessary for OPIC to determine a project's eligibility and underwriting risks.

119. Inquiries concerning insurance, including requests for the insurance registration and application forms, should be addressed to:

Applications Officer
Insurance Department
Overseas Private Investment Corporation
1100 New York Avenue, N.W.
Washington, DC 20527
Telephone: (202) 336-8799 or (800) 424-OPIC (6742)

B. MIGA[120]

1. Background

The World Bank, a multilateral lending agency and MIGA's parent company, was formed over forty years ago. It consists of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation, as well as MIGA. MIGA entered the political risk insurance market in 1988.[121] "One of its basic objectives is to increase the flow of capital and technology to developing countries . . . by complementing government-sponsored and private investment guarantee programs."[122]

Many national insurance programs, due to their respective national objectives, contain strict eligibility requirements that exclude many investors and investments. In addition, national insurance programs have limited financial resources. MIGA's insurance program overcomes some of these shortcomings and helps to fill the gaps.[123] Also, because MIGA is a multilateral agency, it can insure projects for both U.S. and non-U.S. investors.

2. Risks Covered by MIGA Insurance

Like OPIC, MIGA insurance covers risks of currency inconvertibility, expropriation, and political violence. MIGA also covers breach of contract loss as a separate class of risk coverage.[124] These coverages, which may be purchased individually or in combination, are discussed below.

120. Much of the following discussion of MIGA draws on information obtained directly from MIGA, e.g. the MIGA Investment Guarantee Guide and related information supplied by MIGA. MULTILATERAL INVESTMENT GUARANTEE AGENCY, INVESTMENT GUARANTEE GUIDE (n.d.). *See also* Rowat, *supra* note 106, at 128-30, 140-44 *passim*; Berger, *supra* note 107, at 13 *passim*.

121. Rowat, *supra* note 106, at 105. MIGA was created by the Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* October 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988), *cited in* Rowat, *supra* note 106, at 105 n.9.

122. MULTILATERAL INVESTMENT GUARANTEE AGENCY, *supra* note 120; Rowat, *supra* note 106, at 127 (citing the Preamble to the MIGA Convention).

123. Shihata, *Factors* , *supra* note 107, at 690.

124. *See generally* Rowat, *supra* note 106, at 128-29 and 141-42.

a. Currency Inconvertibility

Currency inconvertibility insurance covers restrictions of currency transfers outside of the country that prevent the investor from transferring profits or liquidation proceeds out of the host country. Excessive delays in acquiring foreign exchange caused by host government action or inaction, by adverse changes in exchange control laws or regulations, and by deterioration in conditions governing the conversion and transfer of local currency are insured as well. On receipt of the blocked local currency from the investor, MIGA pays compensation in the currency of its guarantee. Like OPIC, currency devaluation is not covered.

b. Expropriation

Expropriation coverage protects against acts that deprive the investor of ownership or control of its investments. "Creeping" expropriation, a series of acts which, over time, have an expropriatory effect, is also covered. However, an important difference is that MIGA, unlike OPIC, excludes from this coverage non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories. Unfortunately, this exclusion can allow governments to enact "general" regulations that amount to an expropriation from the investor's viewpoint, without the regulation being covered under the expropriation insurance.

For total expropriation of equity investments, MIGA pays the net book value of the insured investment. For partial expropriation of funds or assets, MIGA pays the insured portion of the funds or the net book value of the expropriated assets. For loans and loan guaranties, MIGA insures the outstanding principal and any accrued and unpaid interest.

c. Political Violence

War and Civil Disturbance coverage insures against losses arising from politically-motivated acts of war or civil disturbance, including revolution, insurrection, coup d'etat, sabotage, and terrorism. Compensation paid is similar to that paid in the event of expropriation. This coverage also extends to such events that, for a period of one year, result in an interruption of project operations essential to overall financial viability. This feature is effective when the investment is considered a total loss.

d. Breach of Contract

Breach of Contract coverage compensates investors for any breach or repudiation of a contract by the host government with the holder of a guarantee when the holder does not have recourse to another forum, or where a decision of the other forum is not available within a reasonable period of time, or where such a decision cannot be enforced.

3. Eligibility for MIGA Insurance[125]

a. Eligible Investors

MIGA requires that the investor seeking insurance be a national of a member country other than the host country. A corporation is eligible for coverage if it is either incorporated in and has its principal place of business in a member country or if it is majority-owned by nationals of member countries.

b. Eligible Projects

Insurance may be obtained for new investments that are "economically sound," originate in any member country, and are destined for any developing member country. New investments also include expansion, modernization, and refinancing of existing projects, reinvestment of earnings, and acquisitions that involve the privatization of state enterprises. Environmental impact must also be considered. Eligible investments must be new and medium- or long-term in nature. They encompass equity investments, shareholder loans, and loan guaranties issued by equity holders, provided that the loans have a minimum average maturity of three years. Loans to unrelated borrowers can be insured, provided that equity in the project is being insured concurrently.

Other forms of investment are also eligible, including technical assistance and management contracts and franchising and licensing agreements, provided they have terms of at least three years and the investor's remuneration is tied to the project's operating results.

125. *See* Rowat, *supra* note 106, at 128-30 and 140-44; Berger, *supra* note 107, at 29-37.

c. Eligible Countries

The investment must be made in the territory of a developing member country. The Summer 1993 *MIGA News* newsletter lists both member countries and countries in the process of fulfilling membership requirements as of August 30, 1993.[126]

As in OPIC, the host government must approve the project before MIGA insurance coverage will be issued. In most cases, MIGA will request the approval on behalf of the investor. In some countries, MIGA can accept a copy of the standard investment approval, usually issued by a specific agency or ministry for all foreign investments, as the approval for MIGA.

126. *Eligible MIGA Member Countries,* MIGA NEWS (Multilateral Investment Guarantee Agency, Washington, D.C.), Summer 1993, at 1, 4. The newsletter states that "as of August 30, 1993, the MIGA Convention had been signed by 139 countries (20 industrialized countries and 119 category two developing countries), whose subscriptions total 97 percent of the Agency's authorized capital. Countries listed below in italics have signed the Convention but have not yet completed all of the membership requirements." INDUSTRIALIZED COUNTRIES: Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, *South Africa*, Spain, Sweden, Switzerland, United Kingdom, United States. DEVELOPING COUNTRIES: Latin America/Caribbean: Argentina, *Bahamas*, Barbados, Belize, Bolivia, Brazil, Chile, *Colombia*, *Costa Rica*, Dominica, Ecuador, El Salvador, Grenada, *Guatemala*, Guyana, *Haiti*, Honduras, Jamaica, Nicaragua, Paraguay, Peru, *St. Kitts-Nevis*, St. Lucia, St. Vincent, Trinidad and Tobago, Uruguay, *Venezuela*. Europe/Central Asia: Albania, *Armenia*, Azerbaijan, Belarus, *Republic of Bosnia Herzegovina*, Bulgaria, *Republic of Croatia*, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, *Kyrghyzstan*, Lithuania, *Former Yugoslav Republic of Macedonia*, Malta, Moldova, Poland, Romania, Russian Federation, Slovak Republic, Republic of Slovenia, *Tajikistan*, Turkey, *Turkmenistan*, *Uzbekistan*, *Federal Republic of Yugoslavia*. Middle East/North Africa: Bahrain, Arab Republic of Egypt, Israel, Jordan, Kuwait, Libya, Morocco, Oman, Saudi Arabia, *Syrian Arab Republic*, Tunisia, *United Arab Emirates*, *Republic of Yemen*. Asia/Pacific: Bangladesh, China, Fiji, *India*, Indonesia, Republic of Korea, Malaysia, Micronesia, *Mongolia*, *Nepal*, Pakistan, Papua New Guinea, *Philippines*, Sri Lanka, Vanuatu, Western Samoa. Central & Southern Africa: Angola, *Benin*, Botswana, Burkina Faso, Cameroon, Cape Verde, Republic of Congo, Côte d'Ivoire, *Equatorial Guinea*, Ethiopia, The Gambia, Ghana, *Guinea*, *Guinea-Bissau*, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Namibia, Nigeria, *Rwanda*, Senegal, Seychelles, *Sierra Leone*, Sudan, Swaziland, Tanzania, Togo, Uganda, Zaire, Zambia, Zimbabwe.

d. Political Considerations

Political considerations are not as important under MIGA as under OPIC.[127] For example, there is no "human rights" standard that must be met by the host country, as is required by OPIC.

4. Terms

a. Amount of Insurance

MIGA's guarantee authority is limited to 150% of its unimpaired subscribed capital and reserves. Underwriting authority for individual investment projects is limited to 5% of MIGA's total capacity to issue guarantees. This portion amounts to a maximum coverage of approximately $50 million per project.

Insurance can be obtained for 90% of the amount invested plus up to an additional 180% for earnings attributable to the investment; an additional 90% can be obtained for interest accruing to increased principal for loans and loan guarantees.

For technical assistance and similar contracts, MIGA insures up to 90% of the total value of payments under the agreement. Regardless of the nature of the project, the investor is required to remain at risk for at least 10% of any loss.

b. Duration

The duration of insurance is from three to fifteen years. The standard term of coverage is fifteen years, and typically follows the term of the insured agreement for investments other than equity, such as a ten-year loan agreement. The term can be extended to twenty years if MIGA finds that the nature of the project "justifies" an extended term. MIGA may not terminate its coverage unless the insured investor defaults on its contractual obligations, but the insured may terminate coverage after three years or any anniversary thereafter.

c. Cost

MIGA is supposed to be self-sustaining, and its premiums are similar to OPIC's. Typical base rates for oil and gas coverage for currency

127. *See, e.g.*, Shihata, *Factors*, *supra* note 107, at 690.

inconvertibility, expropriation, breach of contract, and war risks are 0.50%, 1.25%, 1.25%, and 0.60%, respectively (as percentages of the total insured amount). Stand-by coverage is available for an additional 0.25%, 0.50%, 0.50%, and 0.25%, respectively.[128]

d. Co-Insurance

MIGA will cooperate with both public and private political risk insurers by entering into coinsurance and reinsurance arrangements for joint coverage of eligible investment projects.

e. Application[129]

A Preliminary Application for Guarantee should be submitted before the investment is made or irrevocably committed. Applications are treated confidentially. If MIGA determines that the investment and investor are eligible, a Notice of Registration and a Definitive Application for Guarantee are sent to the investor. There is no fee for filing either a Preliminary Application or a Definitive Application, and there is no obligation to accept a Contract of Guarantee if one is offered.

C. Private Insurance

1. Background

In the last fifteen years, private insurers have begun to offer political risk insurance that both complements and competes with government-subsidized insurance programs.[130] This rapidly growing market[131] is concentrated mainly in the U.S. and U.K. and has been estimated to amount to $200 to $350 million in annual premiums. The most versatile and experienced private insurer offering political risk insurance is Lloyd's

128. MULTILATERAL INVESTMENT GUARANTEE AGENCY, *supra* note 120, at 9.

129. For further information contact:
Multilateral Investment Guarantee Agency
1818 H Street, N.W.
Washington, D.C. 20433
Telephone: (202) 473-0179 or (202) 473-6168.
Fax: (202) 477-9886.

130. Orloff, *supra* note 107, at 1.

131. Rowat, *supra* note 106, at 125 n.84.

of London.[132] Other insurers include American International Group (AIG), Citicorp International Trade Indemnity (CITI), Professional Indemnity Association (PIA, New York), Pan Financial (London and New York), Chubb Group (New Jersey), and Poole d'Assurance des Risques Internationaux et Speciaux (P.A.R.I.S.).[133]

2. Risks Covered by Private Insurance

Private political risk insurance is generally divided into two categories: asset coverage and contract coverage. Asset coverage may include risks such as confiscation, nationalization, expropriation (including creeping expropriation), and repossession of equipment. Contract coverage may include loss from contract repudiation, currency inconvertibility, and contract cancellation due to political violence.[134] Thus, the risks covered are similar to the risks covered by government-sponsored insurance.

Of the types of risk insured against by private insurers, confiscation, nationalization, and expropriation insurance are of the most interest to energy investors. As with government-sponsored insurance, compensation is usually based upon book value. Confiscation/nationalization/expropriation insurance policies can usually be expanded to cover license cancellations, trade embargoes, strikes, riots, loss of income following expropriation, and other types of political risk.[135] In addition, each insurer will have additional limitations and qualifications as to the amounts and types of insurance it can offer.

3. Terms

The terms offered by the private insurers are between one and three years, which are significantly shorter than those offered by OPIC and MIGA. Underwriting limits range from $5 million to $300 million per risk, depending on the insurer and the country in which the investment is located.[136] These limits are in the same range as those of OPIC ($100 million) and MIGA ($50 million per project).[137]

132. Orloff, *supra* note 107, at 3.

133. Rowat, *supra* note 106, at 125 n.84.

134. Orloff, *supra* note 107, at 4.

135. *Id.* at 5.

136. *Id.* at 3; *see also* Rowat, *supra* note 106, at 126.

137. Rowat, *supra* note 106, at 126.

Private market fees are substantially higher than those of government insurance programs and "in some cases can be as much as seven percent for coverage in high risk countries."[138] Lloyd's current rate for insuring investments in the former Soviet republics is between two and three percent of the value of the investment.[139] Premiums are based on a number of factors, including the size of the investment, nationality of the investor, risks associated with the host country, risks covered by the insurance, and the structure of the investment.[140] Despite relatively higher rates, however, private insurance remains attractive to certain investors, such as those who fall outside the eligibility requirements of programs such as OPIC and MIGA.[141]

Whether OPIC, MIGA, or private insurance is best suited for any particular investment can only be determined on a case-by-case basis. On the one hand, private insurance is more flexible, can be customized to meet the needs of a particular investment, can be kept in strict confidence, and can be negotiated in days rather than months. Private insurance is also not constrained by political considerations to the same degree as is government-subsidized insurance. On the other hand, because OPIC and MIGA policies are government subsidized, they are generally less expensive; they can also be issued for terms of up to twenty years. Finally, OPIC and MIGA also have better facilities for covering currency

138. *Id.*

139. Orloff, *supra* note 107, at 6.

140. *Id.* at 6-7.

141. Sometimes the host country itself may be involved in offering insurance to investors. For example, in February of 1993 the Russian government set up the State Investment Corporation to sell political-risk insurance for foreign investors investing in Russia. *Some Cover*, ECONOMIST, Feb. 27, 1993, at 84. Additionally, the Russian Agency for International Cooperation and Development, a Russian government agency, has put together a billion-dollar program to provide political risk insurance for investors in Russia, and is also establishing new investment banks in cooperations with major international financial institutions. *Commercial Overview of Russia*, BUS. INFO. SERVICE FOR THE NEWLY INDEPENDANT STATES, (U.S. Dep't of Commerce, New York, N.Y.), July 10, 1993, at 1, 3.

The Business Information Service for the Newly Independent States ("BISNIS") provides documents via the "Flashfax BISNIS Bank," a 24-hour automated fax delivery system administered by the International Trade Administration of the U.S. Department of Commerce, containing free information on current trade and investment opportunities, trade statistics, and other information concerning the newly independent states of the former Soviet Union. BISNIS can be reached by dialing (202) 482-3145 from a touch-tone phone. The address is: United States Department of Commerce, International Trade Administration, Business Information Service for the Newly Independent States, Room H-7413, Washington, D.C. 20230. *Id.*

inconvertibility risks than do private insurers.[142] As between OPIC and MIGA, a decision as to which policy is best will often be based upon price and eligibility requirements.

V. CONCLUSION

Western investors seek to benefit themselves and the populace of developing countries by investing needed capital to finance production and economic growth. But unless political risks are minimized, investors will not be willing to invest their precious time and capital. Fortunately, as the world begins to gain a greater appreciation for the importance of property rights, methods are becoming available to lower political risks to allow investment to proceed.

Concessions, directly negotiated between the investor and the host state, containing stabilization and international arbitration clauses, are one method of reducing political risks; purchasing government-sponsored or even private insurance is still another. The protections won by BITs also serve to reduce the political risks inherent in foreign investment. BITs create a regime anchored in international law which is favorable, not hostile, to investment—a regime which attempts to prevent expropriation, direct or indirect, and to provide for full compensation when expropriation does occur.

Hopefully, for the sake of both investors and the developing countries, the trend towards greater protection of the property rights of investors will continue in this direction.

142. Orloff, *supra* note 107, at 7.