MANAGING POLITICAL RISK IN EMERGING MARKET
PROJECT FINANCINGS
(Course # LAWG 2050-10)
Fall 2016

SYLLABUS

Course Description:
The course examines concepts of political risk and means by which certain political risks can be managed in planning and structuring foreign direct investments, particularly through the role of political risk insurance supporting investments in project financings in emerging markets. Classes will be a combination of lecture and guided discussion based on assigned readings. Students will have opportunity to analyze and revise contracts. Course requirements will include a contract drafting exercise that will be scored as 20% of the course grade. Class participation is expected and will be used as a basis for rounding course grades up in borderline cases.

The readings include both articles about the issues and examples of political risk insurance contract forms used by private insurers, national government agencies and multilateral institutions as well as determinations in actual claims. Source material will expose students to public policy issues that underlie the decision to issue such insurance and the resolution of related investment disputes. Associated issues in international law, insurance law, and dispute resolution will be addressed.

There are no course prerequisites. Relevant background will be provided in readings and presentations.

The course will be taught jointly by Robert C. O'Sullivan, formerly Associate General Counsel for Insurance and Claims at the Overseas Private Investment Corporation (OPIC), and Kenneth W. Hansen, a partner at the law firm of Chadbourne & Parke LLP and formerly General Counsel of the Export-Import Bank of the United States and Associate General Counsel at OPIC.

Course Requirements:
Weekly class meetings: Wednesdays, 5:45-7:45 p.m., in Hotung 1008.
Contract drafting exercise: to be distributed Oct. 26; due Nov. 9.
Final examination: December 10, in-class, closed-book, at 10:00 a.m., lasting three (3) hours.

Required readings, which are listed on the following pages, are available on Canvas. Weekly study questions are also available there, and additional required readings may be posted there.

The study questions are intended as a study guide for the readings as well as an indication of what may be discussed in class. Not all of the questions can be discussed, but students are welcome (though not required) to identify particular questions that they would like to be included in the class discussion. The objective is to stimulate and encourage discussion in class.

Also, not later than the day before each session, each student will prepare and submit a short written answer (about half a page, no more than one page) to a question relating to that session that will have been identified at the end of the preceding class. It may be taken from the study questions or be a new question, possibly a practice exam question. While the answers will not be graded, students will receive comments. The objective is to help prepare students to answer exam questions.
Readings

This course is largely conducted as a seminar, so the quality of sessions depends very much on student preparation and participation. To benefit from the class discussion and participate in it, you must do a certain amount of advance preparation. The assigned readings include original, unedited documents. Realistically, you may not be able to read everything closely in its entirety. If you focus on the portions of the readings suggested below, you will be prepared for each session and able to contribute to its success.

Session I (Aug. 31): Introduction: Political Risk in International Investment and Structures and Related Issues in International Project Financings (O’Sullivan and Hansen)

The session will provide an overview of the course, an introduction to the variety of political risks that arise in emerging market project financings and the arrangements that have been derived to mitigate them. We will also review some typical project financing structures, discussing the roles of participants, and some issues that arise, in international project financings, including the political risks that will be the focus of the course.

Readings (25 pages):


Mac Johnston, “A Primer on Investment Insurance Underwriting” [focus: pp. 1-10 (Sections I-IV)];

Chadbourne & Parke LLP, Project Financing Techniques [focus: pp. 1-6]; and

Project structure diagrams [focus: all].

Session II (Sept. 7): International Law on Foreign Direct Investment (O’Sullivan)

This session will review the international legal principles that underlie international investment as well as the allocation of political risk. Topics will include international law regarding expropriation, denial of justice and state responsibility to foreign investors under customary international law and applicable conventions. Discussion will include the roles of bilateral investment treaties and investment provisions in free trade agreements.

Readings (35 pages):

U.S. Model BIT [focus: prologue, Section A (Art. 1-7, 12-14 and 18) and Annexes A and B];

State Department Comments on Model BIT [focus: all];

UK BIT with Bosnia [focus: Art. 1-6, 10];

OPIC Investment Incentive Agreement with the Maldives [focus: prologue and arts. 1-3]; and

Session III (Sept. 14): Dispute Resolution (O’Sullivan)

This session will investigate resolution of disputes arising under political risk insurance contracts, both between insurers and their clients and between insurers and offending host governments, including investor-state arbitration as a recovery mechanism and risk mitigant, and the breakdown of agreed dispute resolution procedures as an insurable political risk.

Readings (37 pages):

D. Rivkin, "International Arbitration" in American Bar Association, Section of Litigation, Commercial Arbitration for the 1990's (1991) [focus: pp. 123-133];
R. O’Sullivan, “International Arbitration: A Partial Update” [focus: all];
U.S. Model BIT (in materials for Session II) [focus: Section B, pp. 26-30; skim pp. 30-38; (contrast with arbitration process as described in Rivkin article)];
M. Kantor, "The Limitations of Arbitration" Journal of Structured and Project Finance (Fall, 2002), pp. 1-10 [focus: all];
J. Werner, “When Arbitration Becomes War” Journal of Int’l Arbitration (2000), pp. 97-103 [focus: all]; and
F. Johnston and R. Wray, “Insuring Arbitration Outcomes” Robert Wray PLLC PLI Newsletter (October 2005) [focus: all].

Session IV (Sept. 21) Expropriation Coverage: Basic (O’Sullivan and Hansen)

This session will consider how expropriation risk is defined and allocated in political risk insurance contracts for international investment transactions. The first cases involve overt government action or inaction or creeping expropriation.

Readings (45 pages):

OPIC Memoranda of Determinations:
Caterpillar (Venezuela, 2013);
Global Forestry Management Group (Russia, 2011); and
SAIC (Venezuela, 2004).

[For these OPIC claim determinations, as well as those assigned for Sessions V through VIII, focus on the first parts (the factual background and the determinations as to whether the events were within the scope of coverage.]

OPIC updated form of Equity Investment Insurance Contract [Focus: Secs. 2.03, 4.01, 4.03, and 5.03]; and
OPIC form of Institutional Lenders Insurance Contract (Form 234 KGT 5-73 (Rev. 2/09)) [focus: Articles IV and V].

Session V (Sept. 28) Expropriation Coverages: Variations (Part I) (Hansen and O’Sullivan)

This session will consider a variety of ways in which coverage is provided against (i) contract breaches by host governments and (ii) regulatory risk.
Readings (49 pages):

**Sovereign/Subsovereign Payment Default:**
- OPIC Memorandum of Determinations: Bank of America (India, 2003);
- Excerpt from Bank of America PRI Contract for the Dabhol Project [focus: all];
- Dabhol project contract structure diagram.

**Regulatory Risk (compensated under basic coverage):**
- OPIC Memorandum of Determinations: Ponderosa (Argentina, 2005); and
- Ponderosa project contract structure diagram.

**Breach of Contract:**
- World Bank Form of Partial Risk Guarantee Agreement [focus: Section 1 (*The Guarantee*) and related definitions in Section 2.2 (*Definitions*)].

**Session VI  (Oct. 5):  Expropriation Coverage: Variations (Part II)  (O’Sullivan)**
This session will consider a variety of ways in which coverage is provided against partial expropriation, wrongful callings of letters of credit by governments, and sovereign and sub-sovereign payment default and other breach of contract risks.

Readings (35 pages):

**Partial Expropriation Coverage:**
- MIGA Contract of Guarantee for Equity Investments (2012) [focus: Articles 4 and 6 and related definitions in Article 1].

**Wrongful Calling:**
- OPIC Memorandum of Determinations: Uniworld Holdings, Ltd. (Serbia, 2008).

**Arbitral Award Default**
- OPIC Memoranda of Determinations:
  - Green Mining (Guyana, 1998); and
  - MidAmerican Energy Holdings (Indonesia, 2000).

**Session VII  (Oct. 12):  Political Violence  (Hansen and O’Sullivan)**
This session will consider aspects of political violence risks, including definitions and causation requirements.

Readings (35 pages):

- OPIC Memoranda of Determinations:
  - Sector Resources Ltd. (Colombia, 2002) re: damage requirement and compensation for loss of business income;
Keene Industries (Liberia, 1991) re: replacement cost and valuation issues; and
AISB (Mali, 2013) re: forced abandonment; and
OPIC updated form of Equity Investment Insurance Contract (in materials for Session IV) [focus: Secs. 2.04, 4.01, 4.04, 5.05 and 5.06].

Session VIII (Oct. 19): Currency Risks (Hansen and O’Sullivan)
This session will review currency risks that are currently insurable – inconvertibility and non-transfer— and contrast them with those that are generally not, while considering what expansion of coverage might be feasible.

Readings (29 pages):
OPIC Memoranda of Determinations:
Caterpillar (Venezuela, 2006); and
First National Bank of Boston (Venezuela, 1996);
K. Hansen, “PRI Primer: An Introduction to Investment Insurance against Political Risks,” (in materials for Session I) [focus: pp 6-8];
OPIC updated form of Equity Investment Insurance Contract (in materials for Session IV) [focus: Secs. 2.02, 4.01, 4.02 and 5.02]; and
OPIC form of Institutional Lenders Insurance Contract (Form 234 KGT 573 (Rev. 2/09)) (in materials for Session IV) [focus: Articles II and III]; and
MIGA Contract of Guarantee for Loans (2012) [focus: Article 5 and related definitions in Article 1].

Session IX (Oct. 26) Revising Form PRI Contracts (Hansen and O’Sullivan)
PRI contracts are more negotiable than consumer insurance contracts, but only in exceptional circumstances are they entirely custom drafted for a particular investment project. The starting point of negotiation is typically a form contract of the insurer, modified only as the insured considers necessary and the insurer deems acceptable.

This session, which is intended as preparation for the drafting exercise, will examine issues that an insurer considers in preparing form contracts and adapting them to a specific project and investment. Considering the diverse forms of investment and the diversity of possible project structures, a form contract has to fit a variety of deals, or at least be susceptible to adaptation to fit a variety of deals. At some point, however, the insurer will recognize that drafting a new form contract for a specific type of investment is preferable to drastic and potentially confusing adaptation of an existing form to cover it.

Contract drafting exercise
This exercise will entail revision of a standard form contract to expand coverage beyond what is explicitly available under that form. Your assignment will be both (i) to draft the key revised contract provisions to expand the coverage as requested and (ii) to advise the insurer of the legal and policy implications of issuing such coverage, suggesting where to draw the line and why.
Exercise will be distributed at the end of this class. Students have the option of working alone on this exercise or forming a group. All participants in a group will receive the grade given to their group’s work product. Students who wish to form a group must email both professors before this session to identify the members of their group. Assignment is due at the beginning of the Nov. 9 class.

Readings (35 pages):
OPIC form of Equity Investment Insurance Contract *(in materials for Session IV)*;
[Read the OPIC equity contract in its entirety and have it available in class for reference. This is the form that you will be revising for the drafting exercise.]

Project structure diagram (Figure 14) *(in materials for Session I)*.

**Session X (Nov. 2): Agency PRI Contract Forms** (Hansen and O’Sullivan)

This session will review in detail political risk insurance contracts from two public sector insurers (MIGA and OPIC). Assorted eligibility, underwriting, policy and political issues will be identified and discussed.

Readings (27 pages; skim 60 pages):
MIGA Convention [Read Articles 1 to 22; focus closely on Articles 11 to 14]; and
OPIC Statute (22 USC 2191 et seq.) [focus: secs. 231, 231A, 234(a) and (f), 234A, 237 (a),(b), (e) and (f) to (m), and 238(a) to (c)].

*Skim and have available in class for reference:*
OPIC form of Equity Investment Insurance Contract *(in materials for Session IV)*;
OPIC form of Institutional Lenders Insurance Contract (Form 234 KGT 5-73 (Rev. 2/09)) *(in materials for Session IV)*;
MIGA Contract of Guarantee for Equity Investment (2012) *(in materials for Session V)*; and

**Session XI (Nov. 9): Commercial PRI Contract Forms** (Hansen)

This session will review in detail form political risk insurance contracts of commercial insurers. Assorted underwriting and drafting issues will be identified and discussed. These private sector contracts will also be compared and contrasted with the public sector contracts reviewed in the prior class.

*Contract drafting exercise is due at the beginning of class.*

Readings (40 pages):
D. Bederman, “Creditors’ Claims in International Law,” *The International Lawyer*, vol. 34, no. 1 (Spring, 2000) [focus: all (pp. 235-254)];
Zurich Emerging Market Solutions' form of Political Risk Insurance Contract (Lender) (Nov. 2004) [focus: pages 7-10, plus related definitions in Article II];
Zurich Emerging Market Solutions' form of Political Risk Insurance Contract (Equity) (Mar. 2004) [focus: pages 7-11, plus related definitions in Article II]; and
Sovereign’s form of Lenders’ Policy (May 9, 2003) [focus: pp. 9-16, plus related definitions in Article X].

Session XII (Nov. 16): Determining Compensation (O’Sullivan)

This session will examine in more detail compensation questions arising under the case studies discussed in the previous five sessions. Some potential pitfalls to seemingly meritorious claims will be explored. In addition, the drafting exercise will be reviewed.

Readings (8 pages, plus review of assorted OPIC claims memoranda of determinations):

K. Hansen, “PRI Primer: An Introduction to Investment Insurance against Political Risks” (in materials for Session I) [focus: pp.9-12];

Mac Johnston, “A Primer on Investment Insurance Underwriting” (in materials for Session I) [focus: pp. 11-14 (Sections V-VI)]; and

Read the parts of the several claim determinations assigned for Sessions IV to VIII that deal with the amount of compensation due and conditions affecting payment of compensation.

Session XIII (Nov. 30): Alternative and Innovative Strategies for Managing Political Risks; Course Review; Course Evaluation (Hansen and O’Sullivan)

This session will consider techniques beyond insurance for managing political risk (such as local partners, country experience, local legal regimes, offshore sales, bilateral investment treaties and multilateral conventions). This session will also review path-breaking developments and continuing challenges in the development of political risk insurance coverages. Discussion will focus on developments in covering currency devaluation risk and regulatory risk.

The class will also offer an opportunity to discuss and clarify issues from prior classes in preparation for the final exam. The course evaluations will be completed.

Readings (27 pages):


K. Hansen, “New Product for Devaluation Risk," Project Finance NewsWire, June 2001 [focus: all, pp. 9-12]; and

MIGA Contract of Guarantee Non-shareholder Loans; Non-Honoring of Financial Obligations by a State-owned Enterprise [focus: pages 5-23 and related definitions in Article 2 (Definitions)].
Final Examination (Dec. 10, 10:00 a.m.)