MANAGING POLITICAL RISK IN新兴市场
PROJECT FINANCINGS
(Course # LAWG 2050-10)
Fall 2015

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 5020.
Contract drafting exercise: to be distributed Oct. 28; due Nov. 18.
Final examination: December 12, in-class, closed-book, at 10:00 a.m., lasting three (3) hours.

Required readings, which are listed on the following pages, are available in Courseware. Weekly discussion questions will, and additional required readings may, also be posted on Courseware.

Office Hours:
Faculty will generally be available after class and at other times by prior appointment. Mr. O'Sullivan can be reached at and by telephone at . Mr. Hansen can be reached at and by telephone at .
Readings

This course is largely conducted as a seminar, and so the quality of the course 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 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 (Sept. 2): 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. 9): 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. 16): 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, investor-state arbitration as a recovery mechanism and risk mitigant, and 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 [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. 23) 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 though 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. 30)  

**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) partial expropriations.

**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 Determination: 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. 7):  

**Expropriation Coverage: Variations (Part II)** (O’Sullivan)

This session will consider a variety of ways in which coverage is provided against regulatory risks, wrongful callings of letters of credit by governments, and sovereign and sub-sovereign payment default risks.

**Readings (35 pages):**

**Arbitral Award Default**

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

**Wrongful Calling:**

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

**Partial Expropriation Coverage:**

- MIGA Contract of Guarantee for Equity Investments (2012) [focus: Articles 4 and 6 and related definitions in Article 1].
Session VII (Oct. 14): 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. 21): 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. 28) 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 insurer and insured consider necessary.

This session 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.

This session is intended as preparation for the drafting exercise that will be distributed at the end of this session. That exercise will require revision of a standard form to cover a project structure that differs considerably from structures that the form fits readily. Your assignment is to make it work.

**Distribution of contract drafting exercise.** Submit names of any groups assembled to complete assignment. (Assignment is due Nov. 18 at the beginning of 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 6) (*in materials for Session I*).

**Session X (Nov. 4): 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.

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 XI (Nov. 11): 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 I 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 XII (Nov. 18): 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) (in materials for Session VII) [focus: pp. 9-16, plus related definitions in Article X].

**Session XIII (Dec. 2): 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 drafting exercise will be reviewed. 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. 12, 10:00 a.m.)