Volume 5 | Issue 2 Article 3

1-15-1978

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Allen P.K. Keesee

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ALLEN P.K. KEESEE*

INTRODUCTION

It has been well and often noted that while legal considerations are but one of many factors that determine whether a given locale is an appropriate investment situs, such considerations are among the most important in making such a decision.

> Many elements, of diverse character, contribute to the formation of a country's investment climate. There are political, psychological, cultural and other elements involved. Strictly legal elements are also present, and most of the other elements directly affect the foreign investor through legal forms and mechanisms. Moreover, . . . in order to effect any short-run change in a country's investment climate, legal means have to be used.[1]

It is quite correct to assert that "the firm's basic need is to determine the best strategy for generating a profit over the

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* B.A. Yale University, 1968; J.D. Harvard Law School 1972; Associate, Simpson, Thatcher & Bartlett 1972-1975. Presently, counsel, Overseas Private Investment Corporation (OPIC). OPIC is an agency of the United States Government organized in January, 1971 to stimulate private capital investment in developing nations; to make direct loans in either local currencies or in U.S. dollars and in the financing of pre-investment surveys; to offer insurance against currency in convertibility, expropriations, and damages from war, revolution and insurrection; and to provide U.S. lenders protection against commercial and political risk by guaranteeing repayment of principal and interest on loans made to eligible investors.

1. A. Fatouros, *Legal Security for International Investments*, LEGAL ASPECTS OF FOREIGN INVESTMENT 699 (W. Friedman 1959).

relevant time horizon, not to gain maximum legal security per se, and that legal counsel should be employed in a consulting capacity, not as the final architect of a business relationship."[2] Nevertheless, when financial risk analysis has "cleared" the project and political risk analysis has "cleared" the country, it is the attainment of that very "legal security per se" which assumes paramount importance and which it is the responsibility of investor's counsel to provide.

It is the premise of this article that for two reasons in particular the role of counsel in aiding entities making investments in non-oil, less-developed countries ("LDC's") has recently become, and will increasingly be, significantly more pivotal than it has been heretofore. Those reasons, it is posited, are that (i) in the fundamental bilateral monopoly[3] condition of virtually all

2. R. ROBINSON, INTERNATIONAL BUSINESS MANAGEMENT: A GUIDE TO DECISION MAKING, 529 (1973).

3. A concise recapitulation of the main elements of bilateral monopoly appears in the draft edition of Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. OF INT'L L. AND COM. 319 (1975), in the author's files:

> The theory of bilateral monopoly emphasizes the bargaining process involved in foreign direct investment. The bilateral monopoly model focuses on the two major participants involved in the investment process—the foreign investor and the host government. Each of these participants has a greater or lesser degree of monopoly control over a certain set of resources which the other considers desirable; and the two participants engage in a bargaining process to determine how these resources will be used and how the product of using these resources—such as profits—will be divided. The outcome of the bargaining process is a set of 'conditions of entry' or rules which the host country government and foreign investor agree to abide by.
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> The bilateral monopoly model has certain important limitations which must be spelled out. The model focuses on the two major participants in the bargaining process while relegating other participants to a secondary role. These other participants who can and do affect the outcome of the bargaining process include the home country government of the foreign investor which can increase or reduce the attractiveness of an investment by changing the home country tax laws; local entrepreneurs in the host country who may be involved in a partial-ownership arrangement; or foreign investors from other countries who may be willing to undertake the same investment. A thorough analysis will of course attempt to show how these additional factors may effect the outcome of the bargaining process.
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> The foreign investor approaches the developing country with a certain set of desirable resources. This usually includes a combination of financial capital or access to such capital, technology which has been acquired through research and development abroad, management skills, and access to international markets. Depending on the nature of the investment involved, the investor has greater or lesser monopoly control over the resources at his disposal. The extreme examples of a firm which possesses monopoly control over desirable resources is IBM. If a country wants to be the site of a plant which produces the most advanced computers or computer components, it has the choice of either accepting IBM or foregoing its desire and instead acquiring a second or third rate computer firm. In this situation, IBM is to a great extent free to dictate its own terms of entry. On the other hand, in the automobile industry there are a large number of firms with home offices in several countries with substantially equivalent access to technol-

LDC/MNC[4] relationships, the balance of power has shifted away from the MNC's; and that (ii) the ongoing accumulation of large OPEC[5] petro-surpluses in addition to the virtual exhaustion by 1976 of LDC credit lines has laid the foundation for the creation of an LDC "mega-deficit" condition which will further destabilize the LDC/MNC bilateral monopoly structure. Given

ogy, capital and management. When the representative from General Motors approaches the authorities of a developing country, both he and the authorities of that country know that GM does not possess a great degree of monopoly control over the resources of the automotive industry. Thus, if GM does not want to establish a plant, perhaps Ford, Fiat, or Toyota will. Because of this lack of monopoly control, the representative from GM faces a much different bargaining situation than his colleagues at IBM. He must be prepared to enter the foreign country on terms which are less than ideal if he is to be permitted to enter at all.

The country which the foreign investor wishes to enter also possesses monopoly control over certain resources to a greater or lesser degree. Primarily these are access either to certain natural resources or market areas. At the extreme in the host country perspective are the oil producing countries which possess a valuable resource not easily obtainable in many geographical areas. Likewise, certain countries such as Brazil offer large populations and high growth economies which are extremely attractive to producers of consumer products. The oil producing countries and the countries with very attractive consumer markets are able to place restrictions on entry which are far less than ideal and still be able to attract foreign investors. On the other hand, countries with relatively small populations or low average incomes or few natural resources have little to offer other than possibly low wage rates for export producers. These countries are not in a position to place heavy demands on foreign investors without losing investments altogether.

The outcome of the bargaining process depends on the monopoly strength of the parties. The more desirable the resources of one of the parties and the more effective the party's control over these resources, the more likely is the agreement to be weighted in his favor. The agreement between the parties can take the form either of a contractual agreement which will specify the terms which the parties have agreed on; or may consist only of the investor's acquiescence to the established standards of the host country (typically set forth in a foreign investment law).

A full exposition of the theory may be found in R. VERNON, RESTRICTIVE BUSINESS PRACTICES: THE OPERATIONS OF MULTINATIONAL UNITED STATES ENTERPRISES IN DEVELOPING COUNTRIES, U.N. publication E. 72 II.D.16 (1972), and C. KINDELBERGER, AMERICAN BUSINESS ABROAD, chs. 1 & 4 (1969).

4. The terms "investor," foreign investor," and "MNC" (multinational corporation) are used interchangeably herein. The terms refer to any entity which invests, whether through debt or equity, in any LDC, whether in the public or private sector. They thus include entities ranging from commercial banks lending to foreign governments or to foreign branches of US companies, to contractors joint-venturing with private overseas partners or themselves making the entire capital and technological investment in a private project.

5. The "Organization of Petroleum Exporting Countries" was established in 1960 and currently maintains its headquarters in Vienna, Austria. As of May, 1977 its membership was composed of Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Quatar, Saudi Arabia, United Arab Emirates, and Venezuela.

the propensity of bank lending standards to vary in inverse proportion to liquidity, and given the condition of hyper-liquidity which petro-earnings promote, there is no reason to believe that lending activity, whether balance-of-payments or project oriented, will soon abate.[6] Similarly, given the pressure on public corporations to compile respectable earnings records and given their tendency to undertake LDC projects and co-ventures whenever and wherever attractive manufacturing, mining, or assembly opportunities surface, there is little reason to believe that that sort of incremental investment will decline below the relatively low level, as compared to the 1960's, to which it has already descended.

The ultimate consequence of this continued debt and equity investment in the context of a deteriorating LDC financial environment seems virtually certain to be the confrontation of investors and their counsel with a significantly larger number of "work-out"[7] situations than they faced in pre-mega-deficit years. This prospect, in turn, imposes new responsibilities on investor's counsel and requires him to refocus his attention away from his traditional concern with negotiating for his client the best possible deal-entry terms and onto the question of developing for his client the best safeguards against work-out contingencies. It calls, in essence, for a shift from what might be termed a "front-end perspective" to what might be termed a "work-out" perspective.

6. *See*, Davis, *How Risky is International Lending*, 1-2 HARV. BUS. REV. 135 (1977):

> Given the need to cover overhead, to provide a justification for their existence, and to build a base of earnings assets, business development teams from literally thousands of offices, owned by hundreds of banks, are seeking lending opportunities. While a sharp reassessment of risk and reward took place in 1974 as a result of the collapse of Bankhaus Herstatt and other serious losses, the same competitive pressures on loan margins, maturities, and credit quality which characterized the buyer's market for international credit in 1973, are present in 1977. . . . With few exceptions, the most significant overseas losses have been incurred in real estate, tanker finance, and the occasional corporate credit. Bad management—usually in the form of overexpansion, willingly assisted by eager bankers—lies behind a very large proportion of the losses. . . . [I]n many cases it was the bankers' willingness—if not enthusiasm—to provide funds for a property developer, tanker owner, or national development program which created a debt service level that the borrower could not meet when the worldwide recession struck. . . .

7. The term "work out" as used herein refers to any process, or procedure, including negotiation, rescheduling, arbitration, and litigation, not initiated voluntarily by the investor but rather necessitated by the fact that the investment recipient or guarantor had breached, or appeared likely to breach, the original terms of the investment. The term would thus include the investor's response to defaults; currency blockage; expropriation; violations of guaranties, mortgages, and negative covenants; and breaches of any other type of investment agreement, guaranty, contract or undertaking.

This paper will attempt first to demonstrate that because of intrastructural changes in the LDC/MNC relationship and the prospect of particularly extreme LDC balance-of-payments problems in the future, there is over the near-to-mid-term a strong probability that most LDC investments will at some stage of their life cycle experience a work-out phase. The heightened, as opposed to diminished, role of investor's counsel will be noted, and four specific areas—local counsel, local law, documentation and collateral—will be reviewed to indicate how counsel, in his new role, can neutralize certain risks which are likely to arise in the work-out context. Emphasis will be on illustration of approach in these areas, rather than on exhaustive enumeration of specific recommendations.

THE WORK OUT PERSPECTIVE AND U.S. COUNSEL PERCEPTIONS

The quest for *security per se* under conditions of work-out anticipation must be grounded in counsel's conviction that work-out is, in fact, a real probability.

Counsel's convictions in this area are critical since the perspective he imports into a deal at its inception will impinge upon virtually every detail of the investment structuring and documentation, and so have a substantial cumulative impact upon the shape of the ultimate agreement. It has been correctly observed that "a contract is truly read only when a dispute arises and every word [may then be deemed] of doubtful application . . . ."[8]

If, then, an investment agreement, when truly read in the context of a work-out dispute, is to meet the test of close scrutiny and provide real security to the investor, it must be drafted by counsel from a perspective which recognizes the high probability that work-out problems will, in fact, arise.

It is particularly important that this point be recognized unequivocally by counsel since there are pressures which could lead counsel to de-emphasize the effort to achieve investment security if its overriding importance were not clear to him. Two such pressures are the possible doubts on the part of the investor as to the need for elaborate work-out-oriented security precautions; and the tradeoffs, in terms of yield maximization and

8. H. DE VRIES, FOREIGN LAW AND THE AMERICAN LAWYER 39 (1969).

the attainment of other desirable *return-oriented* contract provisions, that may have to be made if the other party to the agreement is to be induced to accept the security arrangements proposed by investor's counsel.

The following discussion of the *mega-deficit* and *destabilized monopoly* syndromes is intended to substantiate the premises that work-out difficulties are in fact quite likely to arise; that work-out scenarios are likely to become investor's counsel's prime concern in the mega-deficit era; and that adoption of a *work-out perspective* is a necessary response to that development.

The Mega-Deficit

The extent of OPEC reserve accumulation over the 1973-1977 period has been widely publicized and extensively discussed.[9] Virtually no responsible commentator has attempted to gainsay the fact that such accumulation has caused substantial LDC payments deficits to date and is likely to continue to have that effect into the foreseeable future. But what has been said in an attempt, perhaps, to find some semblance of a silver lining in what is a very grey cloud indeed, is that the commercial banking sector has done an excellent petro-surplus recycling job; changing patterns of OPEC import procurement will benefit LDC's as well as OECD[10] countries and will ameliorate the mega-deficit problem to some extent; and standby arrangements such as the Witteveen Facility[11] will "tide over" the LDC's, and the few

9. *See*, P. ODELL, OIL AND WORLD POWER: BACKGROUND TO THE OIL CRISIS, (3d ed. 1974) *esp.* ch. 7; J. LEVY CONSULTANTS CORPORATION, FUTURE OPEC ACCUMULATION OF OIL MONEY: A NEW LOOK AT A CRUCIAL PROBLEM (N.Y. June 1975); *The OPEC Surplus*, WORLD FINANCIAL MKTS. (Morgan Guaranty Trust Company, March 1976), at 10; and *Id.* May 1976, at 5.

10. The Organization for Economic Cooperation and Development was established under a Convention signed in Paris on the 14th of December 1960. Its present membership includes Australia, New Zealand, Japan, the United Kingdom, Ireland, Iceland, Canada, the United States, Norway, Sweden, Finland, Denmark, the Federal Republic of Germany, Turkey, Greece, Italy, Austria, Switzerland, The Netherlands, Belgium, France, Luxembourg, Spain and Portugal. The OECD's primary function is the coordination of economic policy among member states.

11. The Witteveen Facility is a supplementary financing facility of the International Monetary Fund. The Executive Directors of the IMF have approved the establishment of the Witteveen Facility to make available financial resources to nations with serious balance-of-payments problems. Thirteen nations, including the United States, have indicated their readiness to make funds available for this Facility. The total resources of the Facility are expected to be approximately $10 billion dollars. (*Witteveen Report*, *infra*, note 14). The probable United States contribution to the Facility will equal 1.45 billion Special Drawing Rights, or approximately 1.7 billion dollars. As of this writing, the IMF had agreed upon terms and conditions of borrowing with the creditor nations and of lending with prospective debtor nations. IMF-Creditor bilateral agree-

needy OECD's like Britain and Italy "until conditions improve."[12]

Unfortunately, what does not appear to have been fully appreciated as of this writing is that there does not appear to be any realistic scenario according to which "conditions" will in fact improve.

Any foreseeable abatement in the size of the OPEC, or more accurately, the Kuwaiti-Quatari-Saudi-Emirates, petro-surplus is insignificant at best. For 1977, for example, the surplus fell only $3 billion from the $38 billion figure for 1976.[13] For the 1978-80 period the prognosis is for a cumulative deficit on the order of $220 billion, with virtually all of the surplus side of the account accruing to the Gulf States, and approximately 40% of the deficit being born by the LDC's.[14]

While private commercial banks have funded almost exactly 75% of the $225 billion cumulative oil deficit run-up in the three-year period of 1974-76,[15] clear signals have been emitted by the private financial sector to the effect that the banks have neither the desire nor the capability to continue in that role after 1977.[16]

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ments are awaiting creditor execution. The Facility will become operative upon the execution of bilateral agreements pledging at least 7.75 billion Special Drawing Rights.

12. For expressions of this relatively optimistic view of the recent past and near-term future *see* Sargen, *Commercial Bank Lending to Developing Countries*, ECON. REV. (Spring 1976) *esp.* at 24-25:

> Prior to the oil crises (1967-72) the external public debt of non-OPEC developing countries . . . grew at a steady rate of 14 percent per annum . . . There was a noticeable acceleration in debt outstanding and debt service in 1973 but this was offset by extraordinarily high commodity prices . . . [hence] a decline in 'real' debt outstanding . . . [I]t is . . . evident that [for 1974-75] there has been a marked acceleration in LDC external debt in nominal terms [e.g., . . .] over 20 percent. . . [R]eal debt outstanding, [however, has accelerated at] an annual rate of about 11.5 percent in 1974-75, compared with 8 percent in 1967-73. This means . . . that debt has grown much more slowly in real terms than in nominal terms.

13. WORLD FINANCIAL MKTS., November 1977, at 4.

14. BRETTON WOODS AGREEMENT AMENDMENTS ACT OF 1977, REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, on S. 2152, 95th Cong., 1st Sess. at 8 (1977) (hereinafter cited as the *Witteveen Report*).

15. *Id.* at 7.

16. A financial newsletter published by the Chase Manhattan Bank stated in its February 1977 edition:

> Although no precipitous drop in level of bank lending to LDCs as a group can now be forecast for 1977, there is no question but that both the rate of increase of bank credit to this group of countries and the levels of net lending to particular countries are declining and will continue to

During the summer and fall of 1977 it became fashionable to assert that the Witteveen Facility would somehow fill the void that the self-modulation of lending activity by the private sector would create. Yet, as testimony at the September, 1977 Senate hearings on United States participation in the Facility made clear, the Facility is not intended to replace private activity but rather to promote it.

> The intent [of the Facility] is to recreate the conditions favorable for the continued lending of the private commercial banks to oil deficit debtor countries [in the amount of at least $140 billion during 1978-80] . . . [T]he private banks will have to continue lending at approximately the same level [as in 1974-76] if the continued large deficits of oil importing countries are to be financed . . . . [T]he primary function of this facility will be to bolster the confidence of the private capital markets in the ability of deficit countries to repay . . . . This will then enable the private banks to continue lending.[17]

Increased participation by the International Monetary Fund ("IMF") in further LDC loans appears to be the only circumstance under which the private banking community would be prevailed upon to drop its announced reluctance to maintain 1974-1976 lending levels.[18] This participation, as suggested by various parties, assumes various theoretical forms.

For Undersecretary of State Richard Cooper, testifying before the Senate Foreign Relations Committee in the Witteveen hearings, it meant supplying a (by now infamous) "good housekeeping seal of approval [for countries seeking loans], which [would] encourage banks in terms of the viability of the policies of the countries in question."[19] For a high official of the Bank of Italy the "real role of the IMF was that of 'certifier of member countries' credit worthiness."[20] For the Chairman of one of the "big six"[21] U.S. banks, which hold roughly 35% of LDC private

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> decline. The non-oil LDCs have utilized a substantial amount of the unused borrowing capacity they possessed at the time of the OPEC price increases of late 1973, and banks are subjecting new credit requests to increasingly rigorous reviews. As a result, the ability of the LDCs either to postpone adjustment to the direct and indirect consequences of higher oil prices or to follow a strategy of gradual adjustment is becoming increasingly limited.

INT'L FINANCE, Chase Manhattan Bank Economics Group, Feb. 21, 1977, at 1; *see also* WORLD FINANCIAL MKTS., (Morgan Guaranty Trust Company, January 1977), at 1.

17. *Witteveen Report*, *supra* note 14, at 19, 20.

18. An organization of central banks of participating countries for the purpose of controlling the fluctuation of currencies in the world marketplace; promotes international monetary cooperation and elimination of trade restrictions; assists the International Bank for Reconstruction and Development (World Bank) in promoting economic development of Lesser Developed Countries.

19. *Witteveen Report*, *supra* note 14, at 19.

20. *The Real Role of the IMF*, EUROMONEY, October 1977 at 141.

21. The "Big Six" U.S. banks are the Bank of America, Citibank, Chase

debt,[22] the IMF's function would be to pass on "information directly germane to credit worthiness," to exercise its "unique capability to encourage national monetary and economic policies in constructive directions," and in general to "collaborate" with the private sector through use of its "power of conditionality."[23] In this latter view, "[b]y the use of parallel but separate loan agreements co-ordinated through cross-default clauses, both the IMF and the commercial banks would be protected by the 'conditionality' requirements of the IMF. . .".[24]

Interesting as these theories are, they seem to have little to do with reality and certainly are peculiar grounds upon which to base affirmative credit judgments.

In point of fact, the presence or absence of the IMF in a loan situation can hardly change the basic fact that the LDC mega-deficit already totals $180 billion, that "there is no foreseeable end to the accumulating surplus of the oil producers. . ."[25], and that there is little chance of even the current LDC mega-deficit ever being repaid.[26]

The commercial bank/IMF cross-default provisions vaunted by the "big six" spokesman do not materially improve the chances of pay-back. At best, they merely insure that everyone

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Manhattan Bank, Morgan Guaranty Trust Company, Manufacturers Hanover Trust Company, and the Chemical Bank.

22. ECON. REV., *supra* note 9 at 22.

23. Houge, *How the Banks Should Work With the Fund*, EUROMONEY, 57 (Oct. 1977).

24. *Id.* at 60.

25. *Witteveen Report, supra* note 14 at 32.

26. *See* Davis, *How Risky is International Lending*, 1-2 HARV. BUS. REV. 135 (1977):

> There is no doubt that international banks as a whole,. . . now have an irrevocable commitment to the financial health of a variety of country borrowers . . . Wistful preferences for traditional corporate customers and talk of 'squeezing out' sovereign risk borrowers ignore the reality of the massive existing exposure of the banking community to a number of major sovereign borrowers. These borrowers cannot possibly reduce, much less pay off, their current level of foreign debt and will require new lending for the foreseeable future just to meet maturing obligations.

and *Still Lending to LDC's Despite High Risks*, BUS. WEEK, Nov. 1, 1976, at 96:

> The fact remains that the world's big banks—with the U.S. banks in the lead—are owed $70 billion by the developing countries and the likelihood of collecting on those loans—which looked so bright just a few months ago—look a good deal less so today. The situation could ease if the world economy suddenly revives. If it does not, then the danger of major defaults or of a debt moratorium by the LDCs remains very real.

will be in the same bankruptcy court at the same time; at worst, they are dangerous in that they enable one lender to exercise a power to precipitate defaults out of all proportion to the size of his loan. As was observed with respect to the cross-default clauses in contemporary Zaire loan agreements;

> The formal calling of default by even one of the ninety-odd commercial banks would not necessarily have got them their money back, but would certainly have had most serious consequences reaching far beyond commercial bank lenders to Zaire's governmental and institutional creditors.[27]

Finally, there are severe limits on the real-world use that can be made of "conditionality":

> If the problem is shifted to the IMF, certain additional difficulties arise from the nature of the restrictions the IMF will impose: The rate of growth of the economy of the LDC is slowed; its imports are reduced; unemployment rises. In brief, an internal economic setback, unacceptable politically to the ruling government in the LDC, is suggested and, if the loan is taken, occurs.[28]

The Senate Foreign Relations Committee observed on the same point,

> The internal policy adjustments, the shift of resources from consumption to investment, deflationary policies designed to reduce imports, and possible reduction in social services, in effect, reducing living standards, are likely to be politically hazardous to the countries which attempt to implement them . . . . As the IMF negotiations with the United Kingdom demonstrated, even advanced industrial democracies confront agonizing political dilemmas in the course of such negotiations.[29]

In sum, it may well prove impossible in terms of LDC domestic politics to comply with IMF conditionality standards. The consequence would be a reduced flow of private loans with resultant severe LDC payments imbalances and domestic supply shortages. In this environment, an entire gamut of work-out problems—foreign exchange blockage, interference with operations of foreign-affiliated projects, rescheduling of governmental obligations and default on government guarantees—is likely to develop.

The Destabilized Monopoly

The need for what might otherwise appear an excessively cautious approach to LDC investment is also grounded in the premise that there exists ultimately, if not initially, a fundamental conflict of interest between LDC governments and capital-exporting investors. This condition of dynamic antagonism,

27. *Zaire Promises to Do Better*, EUROMONEY, December 1976, at 114.
28. *Awash in a Sea of Debt—Banks and LDCs*, THE BANKERS MAGAZINE, 19-20 (Summer 1977).
29. *Witteveen Report*, *supra* note 14 at 17.

characteristic of the bilateral monopoly market structure, would result whether an investment were of debt or of equity and whether the recipient entity were a government or a private project. Despite public pronouncements to the contrary by U.S. business and governmental leaders, occasionally so relentlessly optimistic as to appear ingenuous,[30] the foreign investment record of the past decade has been one of accelerating goal divergence as between host governments and foreign investors. This acceleration has been manifested by the increased pace of LDC intervention in private projects[31] and is virtually certain to be given new impetus by the decline in LDC credit-worthiness, and the concomitant increase in the governmental default risk which will accrue from the development of a mega-deficit condition.[32] More serious than the mere fact of the existence of a bilateral monopoly condition and its probable destabilization by payments deficit pressures, is the fact that already the balance of power within the monopoly has shifted noticeably away from the investor. One of the first observers of foreign investment affairs to analogize the LDC/foreign investor relationship to that of the classical bilateral monopoly noted as early as 1968 that the position of the MNC competitor was gradually being eroded:

> [In foreign investment] the possibilities for misunderstanding are enormous . . . [A]ntagonism between host country and investing company rests not only on different production functions and factor proportions, and an unsavory historical record . . . in addition, their interests diverge. Both are interested in bigger pies, but for a pie of any given size, more for one means less for the other . . . Most instances of direct investment in less developed countries are akin to bilateral monopoly, where the reserve prices of the two parties are far apart . . . [and in this] bilateral, non-zero-sum game represented by direct investment in the less-developed country, there has been a

30. *See*, *Multinational Investment and Global Purpose*, address by Lee A. Iacocca, President, Ford Motor Company, VITAL SPEECHES OF THE DAY, Vol. XXXXII, No. 23, Sept. 15, 1977; *but see The Challenges Facing the Multinational Corporation*, address by Nolan B. Sommer, Vice-President, American Cyanamid Company, VITAL SPEECHES OF THE DAY, Vol. XLIV, no. 3, Nov. 15, 1977.

31. *See* Hawkins, Mintz and Provissiero, *Governmental Takeovers of U.S. Foreign Affiliates: A Postwar Profile*, Occassional Paper No. 7, Center for Multinational Studies, Washington, D.C., Feb. 1975.

32. *See*, *Still Lending to LDC's Despite High Risks*, BUS. WEEK, Nov 1, 1976 at 86; *Poorer Countries Face Test of their Ability to Repay Bank Loans*, Wall St. J., Apr. 14, 1977, at 1, ed. 6; *Commercial Banks Ride Tiger in Developing Countries*, Christian Sci. Monitor, October 17, 1977, at B6, col. 1.

steady shift in the advantages from the side of the company to that of the country.[33]

One index of the extent to which LDC governments perceive themselves as having attained a dominant position vis a vis the MNC's is the extent to which they are willing to unilaterally restructure the terms of interaction between countries. There can be little doubt that as competition among MNC's has grown, as technology in some industries has become more readily available, and as host governments have become more sophisticated in economics and politics, such unilateral restructuring, most often in the form of expropriation, has become a widespread phenomenon. During the 1960-1974 period, no less than 875 discrete instances of expropriation occurred involving 62 different host countries. Far from abating after the initial spate of interventions consequent on the arrival on the international scene in the late 1950's of the plethora of fledgling post-colonial governments, the pace of expropriation accelerated during the early 1970's. While the 1960-1969 timeframe showed an average of 45.5 expropriations per year for all regions, the 1970-1973 rate was nearly double that, or 93.3 per year.[34] Nor do these statistics include the 1973 and 1974 petroleum industry expropriations which may have included relatively few discrete events but whose effect in terms of value lost by foreign firms was extreme.

The commercial risks of overseas investment have grown equally precipitously. One study conducted by Chemical Bank during 1974, indicated that of 17 mature projects surveyed, 14, or 82%, had encountered some form of significant financial difficulty, ranging from cost overruns to marketing problems; 8, or 47%, during some portion of the financing period failed to generate sufficient cash flow to cover principal payments, despite the fact that projected coverage of total debt service including interest ranged from a low of 1.10 to a high of 4.77; 2, or, 12%, went bankrupt; and 6, or 35%, failed to generate the level of cash flow originally projected.[35]

If this is the track record of the pre-mega-deficit years, the years before LDC credit lines had been fully drawn down and before raw material prices had escalated radically, the prospects for the mega-deficit era can hardly be better. Some commentators have gone so far as to conclude from the pre-

33. C. KINDLEBERGER, AMERICAN BUSINESS ABROAD, 147-150 (1969).

34. *Permanent Sovereignty Over Natural Resources*, Report of the Secretary General, 28 U.N. ECOSOC, U.N. Doc. A/9716 annex at 6 (1974).

35. Castle, Project Financing—Guidelines for the Commercial Banker, THE J. OF COM. BANK LENDING (Apr. 1975).

mega-deficit record, utilizing a rationale that could be applied as well to sovereign loan defaults, that because the interventionist trend appears to be gaining rather than losing momentum, and because the interventions, or defaults, as the case may be, are perpetrated by sovereign governments rather than by private sector entities, the position of the MNC's has deteriorated to the point that there is little investors can legally do to protect themselves and minimize investment loss exposure.

> . . . [T]he numbers of takeovers are increasing. They may well continue to increase for some years, as the new sophistication of host country policy making, the modern wave of nationalism, and the strength of competition among MNC's all combine to make expropriation both feasible and politically desirable for host governments. These same factors also make the trend competitively and legally beyond the effective resistance of the MNC's themselves. . . .[36]

It must, in sum, be acknowledged that the MNC position within the bilateral structure has been eroded by growing LDC sophistication and militancy; that conventional legal measures have not prevented this erosion; and that the onset of the mega-deficit era seems likely to exert even greater pressures on LDC/MNC legal relationships.

THE PIVOTAL ROLE OF INVESTOR'S COUNSEL

The suggestion that investors are legally impotent in the face of LDC militancy and the deterioration of the investment milieu has much to recommend it. There are patent challenges posed by these developments that are of a different order of magnitude than those posed to investor and counsel by the familiar inter-firm competitive model. Nonetheless, it would be incorrect to conclude that the negotiation of substantive legal agreements had been rendered futile or of strictly academic interest because of the propensity of sovereign borrowers, guarantors, coventurers and governments to violate agreements at will and the probability that under mega-deficit conditions they would do so with increasing frequency. Deteriorating investment conditions, on the contrary, make the conclusion of secure legal arrangements all the more important and counsel's role as risk neutralizer all the more pivotal. "[T]he investor has to be made reasonably certain of the future . . . ; he must be made to believe that there is little or no possibility of the creation of an

36. *Supra* note 26, at 17.

unfavorable legal situation at a later date which will be detrimental to his investment. . .".[37]

If counsel is to provide the investor with such "reasonable certainty" he must recognize that as investment risks increase, so increase both the pivotal importance of his role, and his responsibility to anticipate work-out problems and devise deal-structuring and documentation techniques which provide protection against them.

The Need for "Efficient" Documentation

One's initial reaction to the foregoing recital may well be, "Right, exactly, and that's just why project and development loan documents, joint venture agreements, and equity investment packages are already so voluminous. That's precisely why investors get sponsor guaranties, completion agreements, cross-default provisions, central bank guaranties, and host government undertakings." However, this response hardly addresses the conditions of financial stress, destablized bilateral monopoly and work-out probability that exist today. The primary reason for the inadequacy of the response is that it emphasizes the quantity, or tonnage, of documentation, rather than its quality, or efficiency. Reliance on the conventional paperwork of the pre-mega-deficit era can prove seriously inadequate under current and foreseeable conditions of oil-price financing stress, exacerbated country against company antagonism, and increased work-out frequency.

As early as 1959, one commentator observed that,

> In the case of many of the underdeveloped countries today, . . . it is impossible to predict with confidence that conditions of stability and security will exist during the period of dynamic change ahead.
>
> . . .
>
> Thus arises the need for legal guarantees given [e.g.] by the state or states concerned to the prospective foreign investors in order to assure them that they will receive, in the future as well as today, certain definite legal treatment, as specified in the guarantees. . . .
>
> [However, it must be concluded] that no guarantee can today provide complete security (even from non-business risks). The lack of security of investments in foreign, and especially underdeveloped, countries is due to, and is a manifestation of, the general lack of stability in today's economic as well as political situation. It is not possible to provide complete security for investment where the underlying economic and political conditions are unstable . . . . It is not possible to state that any guarantee [is] certain to survive a radical change in the guaranteeing country's general political, economic, and social structure. Survival is possible but is by no means sure.[38]

37. A. Fatouros, *Legal Security for International Investments*, LEGAL ASPECTS OF FOREIGN INVESTMENTS, 699 (W. Friedman 1959).

38. *Id*. 700-732.

Again, this judgment, in concluding that it is impossible to provide for investment security by legal means, is too severe. It does suggest, however, that a ritualistic reliance upon the "standard forms" of investment documentation and the conventional methodology of legal risk reduction is inappropriate in the context of high work-out probability.

That even the most carefully drafted host government guaranty will be of little utility if not augmented by more substantive arrangements, is well illustrated by the case of the expropriation of the Texaco Overseas Petroleum Company ("TOPCO") and California Asiatic Oil Company ("CALASIATIC") petroleum concessions in 1973-1974 by the Libyan Arab Republic ("LAR").

The concession agreements in question were originally concluded between 1955 and 1968 and amended by mutual agreement in 1963 and 1966.[39] Each deed was entered into pursuant to Libya's Petroleum Law of 1955, and was virtually a verbatim copy of a model contract contained in that Law. Clause 16 of the model contract explicitly provided that "the Government of Libya, the [Petroleum] Commission and the appropriate authorities will take all steps necessary to ensure that the Company [TOPCO or CALASIATIC] enjoys all the rights conferred by the Concession. The contractual rights expressly created by this Concession shall not be altered except by the mutual consent of the parties."[40]

An amendatory decree promulgated in 1961 reaffirmed the government's commitment to the principals of due process and *pacta sunt servanda* ("agreements are to be respected"), stating that:

> (1) The . . . Government . . . and [all] competent authorities . . . shall take all steps that are necessary to ensure that the Company enjoys all rights conferred on it by this concession, and the contractual rights expressly provided for in this concession may not be infringed except by agreement of both parties. . .
> (2) This concession shall be interpreted during the period of its effectiveness in accordance with the provisions of the Petroleum Law and the Regulations issued thereunder at the time of the grant of the

39. Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic; International Arbitration; Preliminary Award and Award on the Merits, Aug. 1977; in the author's files.
40. *Id.* Preliminary Award, at 2.

concession, and any amendments to or cancellation of these Regulations shall not apply to the contractual rights of the Company except with its consent."[41]

Similarly, a July 1963 amendment specifically provided that nothing contained therein should adversely affect the contract rights granted concessionaires under the 1955 Law.[42]

Despite these assurances, by Decrees of Nationalization of September 1, 1973, and February 11, 1974, first 51% and then the remaining 49% of the ownership of the concessions was transferred to the "Arab Gulf Exploration Company," an entity 100% owned by the LAR.[43] The oil companies, exercising rights specifically granted in the concessions, submitted the matter to international arbitration. Libya refused to name an arbitrator and made no appearance in any of the procedural hearings, save for the submission of a conclusory memorandum in July 1974 purporting to demonstrate that the expropriations were acts of state and were therefore non-arbitrable. The companies, as provided in the concessions, requested the President of the International Court of Justice to appoint a sole arbitrator to adjudicate the dispute.

The sole arbitrator was named in December 1974. On January 19, 1977, he rendered an award on the merits in favor of TOPCO and CALASIATIC, granting their request for *restitutio in integrum* and allowing Libya until June 30, 1977, to comply with the decision.[44] As of that expiration date, compliance had not been effected. As will be discussed below, had it not been for the availability of legal remedies quite unrelated to the terms of the concessions, it is highly unlikely that the Companies would have received any compensation at all, much less *restitutio in integrum*.[45]

What is striking about the LAR/Texaco case in terms of the adequacy of host government undertakings is, first, the clarity with which the Libyan obligations were stated and, second, the frequency with which they were reaffirmed and ratified. Yet even under these relatively ideal conditions, the undertakings were discarded when expediency so required.

Another illustration of LDC *contra pacta* behavior is provided by a recent case involving a construction contract entered

41. *Id.* at 3.

42. *Id.* at 4.

43. *Id.* at 6.

44. *Id.* Award on the Merits, at 90.

45. The term "restitutio in integrum" literally translated means "full compensation;" however, for an analytical discussion of the phrase as it is applied to international law, *see id.* at 76 and note 62, *infra*.

into between an American company and the Government of Afghanistan. There, the construction contract definitely, although in imprecise language, mandated the submission of all disputes to a panel of arbitrators upon the reasonable demand of either party for such arbitration.[46] A dispute arose at the completion of the project over the payment by the Government of roughly $2 million in cost overruns incurred by the contractor. Despite the arbitration provisions the government refused even to discuss arbitration until it was all but forced to do so by the contractor's invocation of remedies, including diplomatic pressure, completely outside the four corners of the construction contract.

Juxtaposing, on the one hand, the probability that the onset of mega-deficit conditions will aggravate the destabilization of the LDC/MNC bilateral monopoly relationship, and, on the other, the limited efficiency of conventional documentation under work-out conditions, there appears to be a need to develop and define a new legal methodology better adapted to the elements of the changed LDC investment environment, subsuming both the structuring and documentation aspects of a deal and stressing the provision of adequate investment security.

The following sections, drawing primarily on investment experiences in Central America and East Africa, discuss a number of steps that counsel can take to implement a "work-out perspective" and develop such a problem-oriented methodology.

Local Counsel

Provision of adequate security must begin with the selection of local counsel of the highest caliber available in the particular LDC jurisdiction. There is no need to dwell upon the mechanics of selection, the methods of fee calculation, or the cross-cultural

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46. The arbitration clause stated:

Arbitration—Should legal action become unavoidable, the parties to this Contract agree to submit their disputes, before any court action, to an arbitration committee, two members of which will be nominated by the respective parties and a third one appointed by the first two. If an agreement is not reached within thirty (30) days on this third member, he will be appointed by the International Chamber of Commerce. The expert members must not be directly interested in the disputed matter or be shareholders, directors, counselors, or employees in the organization of either of the parties. Each party shall pay for the eventual expenses of his expert and the prorated expenses of the third member.

idiosyncrasies to which U.S. counsel may wish to show some deference; these aspects of dealing with local counsel have been discussed at length elsewhere.[47] Indeed, the frequent discussions of these relatively insubstantial aspects of the inter-relationship between U.S. and local counsel have to a large extent diverted attention from issues of greater moment which should have a far greater claim on U.S. counsel's attention.

As a starting point, in all inter-counsel relationships where the local attorney is *not* operating in an essentially non-legal capacity (e.g., where U.S. counsel is *not*, as perhaps is the case in Saudi Arabia, Kuwait, and some other Gulf jurisdictions, limited to selecting from among a small pool of attorneys who are valued primarily for their social and political contacts and acumen), local counsel should be closely monitored and rigorously supervised by U.S. counsel. This supervisory effort should take a number of forms. First, written, rather than verbal, opinions should be obtained from local counsel on all matters of significant legal concern. This requirement should be adopted not because U.S. counsel or client intends to sue if incorrect opinions are forwarded but rather because the combination of (i) local counsel's, perhaps subliminal but nonetheless very real, awareness that such suit could under some circumstances be brought and (ii) his being required to set forth in writing and in defensible form the rationale underlying his advice, will in all probability result in the provision of a more accurate and closely reasoned opinion than would have been the case had the advice been given in verbal form only.

The foregoing may seem an obvious prescription; and yet the tendency to accept relatively casual telephone or in-person, over-lunch assurances appears widespread and it may often have extreme consequences. In recent work-out litigation in Kenya and Zambia, local firms in each jurisdiction verbally assured visiting U.S. counsel that contemplated bankruptcy, or "winding-up," actions, to be instituted under the respective local descendants of the British Companies Act, would be straight forward and relatively cut-and-dried exercises. In point of fact, it eventuated that in Kenya there were available several defenses to the action concerned, several issues of fact required to be proved, and several issues of equity to which the court, in view of the pertinent precedents, could accord substantial weight. Because of local counsel's assurances that the case,

47. *See*, Wilson, *International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel*, 10 INT'L L. 325 (1976).

which was quite complex both factually and as a matter of law, would be disposed of in a virtually procedural fashion and largely on the basis of judgments already obtained by the petitioner/investor in the United States, U.S. counsel and client gave far less attention to briefing and "horse shedding" local counsel as to the facts, the U.S. law and the equity issues concerned than they would have if they had been accurately apprised of the complexity of proving the case in local court.

This lack of forewarning also deprived U.S. counsel of the opportunity to analyze in detail the local statutes applicable to the litigation. This situation resulted in the invocation by local counsel of an element of the local winding-up statute which was not only unnecessary to petitioner's case but which was actually detrimental in that it allowed defendant to introduce issues which called for determination on an *ex aequo et bono* basis rather than for determination on the strictly factual issue of solvency. Introduction of these issues was almost certainly more favorable to defendant than to petitioner.

It would also have been appropriate for U.S. counsel to have reviewed applicable local case law. Developed under the British Companies Act, based primarily on United Kingdom [UK] and East African litigation, and divergent from the norms of United States bankruptcy practice in several significant respects, the case law contained a number of elements with which U.S. counsel should have become conversant. Among those divergent elements were the magistrate's broad discretion to refrain from ordering a winding-up despite clear evidence of insolvency, the magistrate's discretion to rewrite the contract upon which the action was based, and the difficulty of obtaining prejudgment attachment orders. Each of these elements proved to have an adverse impact upon petitioner's case. Had U.S. counsel had an opportunity to review local winding-up practice and to devise tactics to deal with the problems presented, the litigation would probably have proceeded more expeditiously and to a more favorable conclusion.

In Zambia, the fact that U.S. counsel had no opportunity to independently verify local procedural requirements resulted in the litigation's failing even to reach the hearing stage. Because of Zambia counsel's failure to check the relevant *Authentication of Documents* statute, an affidavit basic to petitioner's case was authenticated by the Zambia Embassy in Washington, D.C., rather than by the U.S. Embassy in Lusaka as the statute required. The affidavit was thus deemed inadmissible by the court, and petitioner's case was thrown out with costs to defendant.

Examples of this sort of local counsel inefficiency are unfortunately not difficult to educe. In a recent work-out situation on a project loan in Costa Rica, the corporate group of which the debtor was a member filed jointly for voluntary receivership. The U.S. investor held guaranties, executed by several solvent subsidiaries, of debt owned by the parent, which itself was clearly insolvent. Collateral was the plant and equipment of one of the guarantor subsidiaries. Normal Costa Rican practice was for affiliated corporations to file for receivership severally rather than as a group, the apparent motivation for the adoption of the joint format by the debtor group being to create a situation where certain unsecured creditors could utilize their voting power in a combined creditors meeting to prevent the secured creditors from foreclosing on their collateral. The investor successfully prevented the adoption of the joint format, and the question then arose as to whether the investor was entitled under Costa Rican law, by virtue of the guaranties it held, to vote in subsidiary creditor meetings. If it could, it intended to allow the receivership to go forward since it would still be in a position to prevent the unsecured creditors from adopting any plan that would have barred secured creditors from foreclosing. If it could not, it intended to oppose the receivership as to the subsidiaries since it would be unable to prevent the unsecured creditors from voting through a no-foreclosure rule.

After being verbally assured by local counsel that as a guaranty holder with an insolvent primary obligor, the investor would be entitled to vote in meetings of subsidiary creditors without calling the guaranty, U.S. counsel traveled to Costa Rica and requested a written opinion on the matter. After lengthy discussions among U.S. and local counsel and after local counsel at U.S. counsel's behest had researched the question further, it was discovered that in fact, contingent creditors were not entitled under Costa Rican law to vote in meetings of the guarantor's creditors. The investor was thereupon required to shift its legal attention from the structuring of optimum receivership arrangements to an effort to persuade the referee not to grant the receivership until the investor had been able to negotiate satisfactory understandings with the unsecured direct creditors of the subsidiaries.

A similar problem arose concerning a legal opinion forwarded by a U.S. lender's counsel to a U.S. borrower investing in Costa Rica for execution by borrower's local counsel. The opinion included a "standard" representation that the borrower had taken all steps necessary to register the loan with the appropriate host government agency so that problems of reconversion of Costa Rican colones to dollars would be minimized. Borrower's local counsel rote copied the opinion letter, executed it, and duly returned it despite the fact that no registration procedure could even be initiated until a dollar check had been forwarded to Costa Rica and had been presented there to a commercial bank for redeposit with the Banco Central. Fortunately this error was caught when lender's U.S. counsel queried lender's local counsel on precisely what steps the borrower had taken to effect the alleged "registration." Had not this inquiry been made and the error caught, it is not at all clear whether the proper post-disbursement registration steps would ever have been taken.

The point of these illustrations is not that local counsel are incompetent and that U.S. counsel are omniscient; the point is simply that, as the cliche rightly has it, a chain is only as strong as its weakest link. As has been correctly observed, "[t]he courts in many developing countries are not ideal places for the foreign investor to press claims arising from his carefully worded agreements. If the local courts are the final resort, they are usually not particularly friendly toward the foreign investor. . .".[48] There is little logic in a U.S. investor's retaining skilled U.S. counsel; in U.S. counsel's becoming intimately familiar with the documentation, the factual context, and the applicable U.S. law; and then having both the investor and his U.S. counsel go to bat in a foreign court where opponents may be local creditors or indeed the government itself, with local counsel who is insufficiently familiar with applicable U.S. law, the facts and even the law of his own jurisdiction, and without basic advice from local counsel on the aspects of local law that need to be scrutinized. Representation which might be tolerable in a $5,000 tort action should clearly be unacceptable in a multimillion dollar investment work-out situation. The bottom line is simply that U.S. counsel must be totally familiar with local

48. Wells, *Negotiating with Third World Governments*, 1-2 HARV. BUS. REV. 72-77 (1977).

law and that local counsel must be equally knowledgeable with respect to the facts of the case, the applicable U.S. law, and the law of his own jurisdiction.

Two additional features to be aware of in dealing with local counsel are the need for the "legal work-horse" of local counsel's firm to speak English (presupposing U.S. counsel does not speak the host country language), and the need for the local firm itself to be well regarded in the jurisdiction.

At the inception of a recent financing involving a project in El Salvador, it was necessary for U.S. counsel to choose a firm in the host country to act as local counsel. During the course of a meeting with the senior partner of one candidate firm which had been well recommended by two U.S. MNC's, it became clear that the partner was indeed alert, accommodating, and politically well-connected. These qualities would have been ample recommendation had the legal task been simply the establishment of a Salvadorian corporation, the procurement of a government license, the negotiation of a *zonafranca* lease, or any other assignment not involving the probability of work-out. Yet in the context of a project investment, or indeed of any long-term arrangement subject to substantial financial uncertainties, the partner and his firm would have been a poor choice as local counsel to a foreign investor represented by non-Spanish speaking U.S. counsel. The reason was that the partner had never, even in his early years in practice, undertaken the "shirt sleeve" research work in his firm. His primary function, as appears to be the case with senior partners in many LDC firms, had always been to consult with government officials, other counsel, and clients, but never to become intimately familiar with the nuances and intricacies of local law. The "shirt sleeve" work, on the other hand, had been relegated to a younger associate who, as a subsequent meeting demonstrated, had an excellent knowledge of local law but whose English was ungrammatical and imprecise. Such a division of labor might have been acceptable either where all parties used a common language or where the prospective investment was virtually certain to be trouble-free. In situations where work-out problems can reasonably be expected to arise, however, and where it will in all probability, become necessary to discuss and evaluate not merely the alternative first responses to adverse developments, but the full range of consequences following from each of those responses and the end-result of each such "decision tree" branch, it is critical that at least one member of the local firm possess both

English language ability and an in-depth knowledge of local law.

Similarly, the "appearance" of law firm suitability must never be allowed to substitute for the actual acceptability of the firm before the local bench. In some LDC jurisdictions the "best known" firms, and indeed perhaps the best for routine drafting, licensing or tax work, may be staffed largely with Europeans remaining from colonial days. While they may serve well as solicitors, they may be relatively ineffective as barristers. An example of this problem was encountered in a particular African jurisdiction where European local counsel, after being chastised with undue severity by the presiding judge for a relatively trivial technical defect in a pleading, readily admitted that in his view, the magistrate's attitude could only be explained by cross-cultural animosities. Within a week U.S. counsel had retained more compatible local counsel to act as barrister and the case preceeded noticeably more smoothly.

With the possibility of this sort of difficulty in mind, U.S. counsel in the event of work-out litigation, should position himself to retain at least for court-room functions and preferably for the overall conduct of the case, local counsel who are fully in the mainstream of national culture and who will interact well with the local bench.

A corollary to the foregoing rules is that logistics should never be permitted to determine the outcome of a case. At times one hears commentary by U.S. counsel to the effect that "Well, if we were handling this one in New York (or, e.g., Houston or Chicago) it would be a cinch, but having it in Kabul makes things a lot harder." The fact that that observation contains a grain of literal truth should never be used by counsel as justification for fatalistically allowing logistical problems to go unremedied. Rather, at the first indication that the distance between respective counsels' offices is significantly hindering document delivery, or more seriously, inter-counsel consultation on litigation strategy, local statute and case law implications, or negotiating tactics, U.S. counsel should take vigorous steps to overcome the problems encountered and establish communications mechanisms that will insure that consultations can be held readily and in sufficient detail to assure efficient handling of the case.

Obviously, reliable telephone links are desirable. Telex linkage is not only desirable but an absolute *sine qua non*. English speaking operators and secretaries are also important. Adequate in-country translation facilities should be available, and available immediately, if need be, particularly in civil law countries utilizing the notarial system, where a notary may refuse to attest to the truthfulness of an imprecise translation, necessitating revisions which may be even more costly in terms of missed tactical opportunities than they are in terms of absolute expense. Travel to the project country for frequent consultations in the pre-litigation phase of a work-out, and the presence of U.S. counsel in-country during the litigation itself is advisable and almost always cost-justifiable.

Having put the requisite document delivery, witness production, and legal consultation mechnisms in place early on, U.S. counsel should not hesitate to make full use of them. Extensive telephone and telex traffic between U.S. and local counsel, while at times involving some redundant discussion, will in most instances serve a number of purposes besides the obvious one of effecting the exchange of information between counsels. The secondary and tertiary effects of frequent, and even redundant, communication will include demonstrating to local counsel the importance U.S. counsel attaches to the case, keeping local counsel's attention focused on U.S. counsel's case rather than allowing it to drift to other matters, and obliging local counsel to provide consistent, well-reasoned and defensible advice, rationale, and case law on a particular point in a number of successive communications. In an ideal world, it would not be necessary to rely on communications traffic to induce these effects; they would result automatically from local counsel's concern with carrying out his assignment conscientiously. In the real world however, it cannot be assured that a foreign investor's case will receive appropriate attention without a "special effort" from U.S. counsel. Given that local counsel's full attention is a basic component of any successful work-out campaign, U.S. counsel should utilize the communications facilities at his disposal to insure that his client does in fact get the overseas legal services that he is paying for.

Local Statutes and Regulations

The need to provide effectively against the difficulties that may be anticipated in work-out situations imposes on U.S. counsel the responsibility to scrutinize certain provisions of local law which do not ordinarily receive substantial attention when counsel, focusing primarily on structuring and documenting the deal to provide the best yield, the most management control, the largest concession area, etc., does not consider security in a work-out context the primary concern. Additionally, review of these statute areas entails the obligation to draft investment documentation in such a way that the pitfalls and opportunities that counsel finds in the statutes are effectively neutralized or exploited, as the case may be.

A salient area of legal concern has traditionally been the host country's investment code. Emphasis is commonly laid on scrupulous compliance with the "investment purpose" and "ownership" conditions the code sets out for customs exemptions, tax holidays, and in some cases, such as Saudi Arabia, low interest loans. In many instances the details of the documentation required under statutes other than the investment code to evidence the fact that the investment has in fact been made in approved form may be less carefully considered.

Virtually all jurisdictions with nonconvertible currencies, and even many with ostensibly convertible currencies, (e.g., the West African CFA franc zone), require the registration of incoming capital as a condition of allowing the reconversion of local currency project proceeds to repatriable hard currency.[49] This appears to be a straightforward requirement and one not likely to be infringed. And yet difficulties may arise where the investment may flow to a number of jurisdictions or to a number of recipients in a single jurisdiction.

In the case of a recent textile project investment, financing was extended to a Panamanian holding company doing business through subsidiaries located in Costa Rica. The loan was to be disbursed to the parent in Costa Rica and was ostensibly to be used to pay down bank overdrafts incurred by a subsidiary for the importation of project related machinery. When U.S. counsel required that the parent comply with the terms of the loan agreement and register the loan with the Costa Rican Ban-

49. The CFA franc is issued by the African Financial Community (Communaute Financiere Africiane) a financial grouping of seven West African countries associated with France. As of December 1971, one U.S. Dollar equaled 255.785 CFA francs. The CFA franc is not pegged to gold; the French Government guaranties to convert within the franc zone at the rate of one French franc equal to 60 CFA francs. AMERICAN UNIVERSITY, AREA HANDBOOK FOR IVORY COAST, p. xiii (2d ed. 1973).

co Central, the parent resisted on the grounds that the overdraft paydowns had, in violation of the loan agreement, already been made and had been paid in dollars to the U.S. headquarters of the creditor banks. The parent had adopted this course of action in order to avoid the transaction costs involved in converting dollars to Costa Rican colones in order to effect registration and then reconverting colones to dollars to pay down the overdrafts. In order to obtain Banco Central registration under these circumstances, the borrower had to reacquire dollars in the full amount of the loan and have them converted to colones. Despite the lender's insistence that this be done, the borrower continued to delay performance because, as ultimately became apparent, its financial condition had, even in the few months since disbursement, deteriorated to the point where it would have had to pay a high rate of interest in order to borrow the funds needed to effect the registration.

Finally, after protracted correspondence and delay the parent took out short-term colones loans, bought dollars, registered the loan, received colones for the registered dollars, and paid off the short-term loans. To avoid this sort of registration problem and to maximize the chances of trouble-free repatriation, the investor should be thoroughly familiar with host country investment registration laws, and tailor the investment agreement provisions prescribing the borrower's registration obligations and setting out the timing and manner of disbursement to the requirements of those regulations.

A more serious registration problem arose in connection with an African investment involving a loan to a Delaware parent for flow-through to a Liberian operating subsidiary. The investment was properly registered in Liberia, but the loan agreement failed to effectively require that additional registrations be effected when the loan proceeds were disseminated by the subsidiary to its branch offices in other East and West African countries. As a result, in order to obtain exchange control approval for remission of earnings and capital from the branch jurisdictions, it became necessary to demonstrate *de novo* to the local exchange control authorities that the amounts sought to be remitted had in fact been imported as foreign exchange.

Under conditions of efficient management and lender/borrower cordiality, that sort of demonstration would probably not be inordinately difficult to effect. On the other hand, in workout circumstances such as those involved in the Liberian investment, financial records may be inadequate or even nonexistent, the borrower may have no interest in facilitating repatriation, and it may even seek to induce the host government to refuse permission for conversion of local to hard currency. In anticipation of such circumstances it is essential that investor's U.S. counsel make every effort to insure that incoming investments, whether in cash or in kind, are properly valued and registered in every jurisdiction into which they flow. It is an elementary task to draft into an investment agreement a covenant requiring such registration, but a substantially more difficult task to monitor and enforce the covenant. If enforcement is to be effective the investment agreement should both require the investor's prior consent to any cross-border asset transfers, and provide for spot-checks by investor-approved auditors as to the disposition of obligor assets at any given time.

A second traditional concern in the area of host country law is that of foreign exchange regulation. As with investment code compliance, there are some aspects of exchange control regulation that typically do not appear, from the literature and from personal experience, to receive substantial attention but which in a work-out context can cause serious problems for the foreign investor.

The virtually inevitable concomitant of a work-out situation is the necessity that recipient-to-investor repayments be effected in a manner other than that prescribed by the original investment agreement. In many jurisdictions the foreign exchange statute provides that a non-resident may not exercise control over local currency without specific exchange control authorization to do so. The applicable Kenya statute, for example, provides that,

> Except with the permission of the Minister, no person shall do any of the following things in Kenya, that is to say—
>
> (a) make any payment to or for the credit of a person resident outside the scheduled territories; or
>
> (b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories; or
>
> (c) place any sum to the credit of any person resident outside the scheduled territories.[50]

The Kenya Regulations further provide that

> . . . In any proceeding in a prescribed court and in any arbitration

50. Laws of Kenya, Cap. 113, The Exchange Control Ordinance, Section 7.

proceeding, a claim for the recovery of any debt, shall not be defeated by reason only of the debt not being payable without the permission of the Minister and of that permission not having been given or having been revoked.[51]

The Zambia statute, also modeled on antecedent British statutes, is substantially similar.[52]

Despite the availability of this provision in the Kenya Ordinance, a creditor of a Kenya borrower, if he has not obtained the requisite exchange authorization prior to commencing suit for repayment of funds owed, would be well advised either to plead his specific intention to obtain such authorization before taking control of the funds in question or, if the creditor has already gained *de facto* control of certain debtor assets and is seeking *de jure* sanction for that control, initiate attempts to avail himself of the retroactive approval provisions included at Section 20(2) of the Kenya Ordinance.[53]

Neither of the above courses of action is inordinately difficult or risky, although it is far from certain that retroactive approval can be successfully requested in all circumstances. The investor's primary problem, however, and the reason in particular that he might seek retroactive approval, is that prior to receipt of the authorization to hold the sums in dispute, he is at a disadvantage in any attempt to prevent the funds from falling into the hands of the debtor or of any other creditor who is either a resident or, if a non-resident, holds exchange approval. Once control of the funds passes from the investor's or neutral control, they may be dissipated before, and even if, the investor ultimately prevails.

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51. Laws of Kenya, Cap. 113, The Exchange Control Ordinance, Fourth Schedule , Section 4(1).

52. Laws of Zambia, Cap. 593, Exchange Control, Subsidiary Legislation, Section 3, Part III, paragraph 8, Payments in Zambia:

Except with the permission of the Minister, no person shall—
- (a) make any payment to or for the credit of a person resident outside Zambia; or
- (b) make any payment to or for the credit of a person resident in Zambia by order or on behalf of a person resident outside Zambia; or
- (c) place any sum to the credit of any person resident outside Zambia; . . .

The provision with respect to repayment of debts is found at, Laws of Zambia, Cap. 593, Exchange Control, Subsidiary Legislation, Section 3, Part VII, paragraph 36, Legal Proceedings, etc.

53. Section 20(2) provides: (2) Without prejudice to subsection (1) of this section, the Minister may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the competent authority, and the said acts shall have effect accordingly.

A second foreign exchange problem little recognized but likely to arise under work-out conditions concerns the definition of the status of funds segregated by the resident debtor for benefit of the non-resident investor. Again using Kenya as an example, the relevant statutes are Exchange Control Ordinance Section 7, quoted above and, Section 8, which states:

> (1) Except with the permission of the Minister, no person in Kenya shall, subject to the provisions of this section, make any payment outside Kenya to or for the credit of a person resident outside the scheduled territories, and no person resident in the scheduled territories shall in Kenya do any act which involves, is in association with or is preparatory to the making of any such payment.

Section 7 brings into question the legality of any unapproved segregation of funds for repayment of investment debts where the non-resident investor is able to exercise any meaningful form of control over the segregated account. Such control could be deemed to be present if the account were in the investor's name; if an investor signature were required, even on a joint basis, for withdrawals; if the account were subject to letters of instruction, whether or not revokable, from the debtor informing the depository bank that the account were only to be operated with investor concurrence; or, conceivably, if executed copies of the debtor/investor agreement pursuant to which the account had been opened were delivered to the depository institution and an assertion later made by the investor that such delivery had rendered the bank a *de facto* fiduciary, which could not disburse the funds to the account party without approval from the investor.

Section 8, in turn, can be interpreted to bar repayments from "offshore" collateral accounts established by the Kenya branch, or from other branches in respect of monies owed by the Kenya branch.

Under conditions of investor/debtor cooperation, application for and procurement of the requisite exchange approvals would ordinarily not be difficult, assuming that the debtor had maintained adequate records of capital imports. Under work-out conditions, however, the borrower may well seek to obstruct repayment. Records can be "lost" and approval applications deferred. Indeed, the very elements of account control essential to the investor's security may be alleged by the debtor, rival creditors, or the local foreign exchange authority to constitute violations of provisions such as Sections 7 and 8, above. With these unpleasant possibilities in view, counsel should thoroughly research local exchange control regulations, obtain a written opinion from local counsel confirming that proposed repayment arrangements are not violative of those regulations, and obtain the same representation from the recipient, supplemented by a statement that it acknowledges its obligations to make all payments and transfers of whatever nature in compliance with local exchange regulations and to comply with local law, generally.

Another area of host country law that may not be adequately examined during the conventional negotiating and drafting stages of investment structuring but which becomes all-important in a work-out context is that of host country bankruptcy law. In some respects, foreign bankruptcy systems may vary from the U.S. system to the investor's advantage, and in other respects to his disadvantage. A relatively favorable feature is that in most Companies Act jurisdictions,[54] such as Zambia, a creditor petitioning for involuntary winding-up does not have to allege and prove that the debtor has committed an "act of bankruptcy." The pleadings will be sufficient if they demonstrate that the debtor is insolvent and unable to pay its debts.

An unfavorable feature would be that in civil law jurisdictions, such as Costa Rica, officers and directors of a firm may be subject to personal liability if they have knowledge that the firm is insolvent but nevertheless allow it to continue in business. This contingent liability can motivate debtor management to file for receivership on the basis of considerations of personal welfare rather than on the basis of what is best for the firm. This, in turn, is likely to result in "surprise" filings effected before the investor has been fully apprised of, and had an opportunity to respond to, the firm's financial deterioration.

Pledges of debtor stock may prove of little value in preventing disadvantageous voluntary filing by the debtor if host country corporation law, while recognizing the validity of pledges in general, imposes time-consuming restraints on the manner in

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54. A reference to a country which has come under the influence of the British common law, is currently—or was—a member of the British Commonwealth that has adopted a Companies Act to license, govern and regulate a business enterprise (and its conduct) within its jurisdiction.

which stockholder voting power can be used once the pledge is foreclosed. Under Liberian law, for example, voting for directors occurs at an annual meeting,[55] and special meetings can only be called by specified corporate officers.[56] In the face of hostile management, therefore, foreclosing pledgees could be prevented from gaining effective control of the debtor until it had been subjected by management to the jurisdiction of the bankruptcy court. The need to review the interrelationship of local bankruptcy and corporation law provisions with this sort of work-out difficulty in mind is clear.

A final area of host country law which assumes particular importance in the work-out context is that covering the recognition and enforcement of foreign judgments. Companies Act jurisdictions typically have a series of statutes in force prescribing differing recognition criteria for judgments originating in different groups of forum states. Uganda, for example, has one recognition statute which is applicable only to judgments rendered by the courts of Tanzania, Kenya and Malawi. This statute recognizes virtually no defenses and, for enforcement purposes, places properly endorsed judgments of the three named jurisdictions on the same basis as a Uganda judgment.[57]

A second Uganda recognition statute applies to judgments originating in the United Kingdom, Northern Ireland, and any Commonwealth nation that has signed a reciprocal recognition treaty with the United Kingdom. Recognition may be granted if the Court deems it "just and convenient" and if none of six enumerated criteria are violated.[58]

Finally, a third statute prescribes rules applicable to the recognition of judgments of all forum states not named in the first two statutes. The provisions with respect to defenses to recognition specify, in pertinent part:

> On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
>
> (a) shall be set aside if the registering court is satisfied—

55. Liberian Code of Laws of 1965, Tit. 4 (Associations Law), ch. I (Corporations), § 27.
56. *Id.* § 21.
57. Laws of Uganda, Cap. 46, The Judgments Extension Act.
58. *Id.* Cap. 47, The Reciprocal Enforcement of Judgments Act, §§ 3(1) and 3(2)(a)-(f).

(i) that the judgment is not a judgment to which this part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or
(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
(iv) that the judgment was obtained by fraud; or
(v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or
(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made . . .[59]

The availability of a variety of statutes with variegated recognition options and differing arrays of possible defenses makes it incumbent upon counsel to structure the investment so that the investor will be able to take maximum advantage of the enforcement opportunities provided by the statutes, with minimum exposure to the risk of having the judgment refused recognition because of the successful invocation by the opposition of one of the specified defenses.

Broadly speaking, this structuring effort resolves itself into the identification of probable asset fora and the determination of how to obtain judgments in those fora, whether by *de novo* suit or by suit for recognition of a judgment imported from another jurisdiction.

The specific determinations that should be made at the outset of the structuring process include (i) identification of present and probable future locations of obligor assets; (ii) comparison of the favorability of recognition law and *de novo* suit law in such asset jurisdictions; (iii) determination, in asset jurisdictions where actions for recognition rather than actions *de novo* will be relied upon, of which *de novo* jurisdictions receive most favorable recognition treatment for their judgments; (iv) determination of which, among such *de novo* jurisdictions, would be the best situs for suit to be laid; and (v) evaluation of how to meet the requirements of that most favorable *de novo* forum to insure that it will have jurisdiction over the issue which is likely to be litigated.[60]

59. *Id.* Cap. 48, The Foreign Judgments (Reciprocal Enforcement) Act.
60. Specifically dealing with item (v), for example, if the issue were the violation by a sovereign of its guaranty to make foreign exchange available, it would be necessary to determine whether the sovereign's waiver of the defense of lack of jurisdiction as to the asset forum was sufficient to establish juris-

With these determinations in hand, counsel can proceed with the structuring process, keeping in mind the specifics of his particular investment and certain general considerations as to what constitutes advantageous structuring for recognition purposes.

Imported judgments will be preferable where the law of the asset jurisdiction is more favorable to the investor in the recognition area than it is in the area of *de novo* suit (e.g., on the debt or in contract). In the case of Uganda as an asset jurisdiction, for example, its most favorable recognition statute, the provision relating to Kenya, Tanzania, and Malawi, is virtually defense-free. If counsel believed that an investor could do better suing on his debt in Malawi than in Uganda he might well decide, even if the investment would otherwise have involved only Uganda, to structure the deal so that Malawi was made a viable suit forum. An adequate legal relationship, such as branch-branch, borrower-guarantor, or subsidiary-parent, would, of course, have to exist between the respective entities in the asset and *de novo* suit jurisdictions in order for such structuring to be effective.

The investor is afforded greater work-out security if at least one asset jurisdiction is located outside the project country. Whether or not an asset jurisdiction other than the project country will in fact be available will turn on the specific structuring of each individual investment.

A non-project-country asset jurisdiction would be available if the structuring included an obligor which held assets outside the project country, and there were sufficient grounds to establish that that asset forum had jurisdiction over an attachment action brought by the investor and arising out of the investment agreement. These requirements would generally be fulfilled where the obligor was a legal resident of the asset forum, or had

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diction or whether additional provisions would have to be made, such as, e.g., specifying that payment on the guaranty were to be made in the asset jurisdiction.

Moreover, with respect to the effect of place of payment on determination of proper situs of an action, see, e.g., J. Zeevi and Sons v. Grindlays Bank (Uganda) Limited, 37 N.Y. 2d 220, 226, 371 N.Y.S. 2d 892, 897 (1975).

> . . . [T]he facts establish a cause of action accruing within New York . . . [D]efendant contracted to pay . . . and [the letter of credit] took effect . . . in New York . . . In this instance New York was the locus of repudiation . . .

specifically submitted to its jurisdiction. Where the obligor was the project operator, it would probably be a legal resident of the project forum, and thus specific submission to the jurisdiction of the asset forum would be required.

A non-project-country asset forum might not, on the other hand, be available if the parent of the investment recipient were a holding company and had substantial liens against its non-project-country assets, or if the investor had secured his investment through mortgages on the operating entity's project country assets.

Whatever the final arrangements reflected in the investment documentation, it is clear that the scrutiny of recognition statutes and the analysis of *de novo* suit and asset jurisdictions are steps that should be taken by counsel early in the structuring process.

Increasing Documentation Efficiency

After selection of competent local counsel and close analysis of local law, a third phase of the implementation of a "work-out perspective" would be the improvement of the efficiency of investment documentation. This effort consists, in essence, of anticipating the particular work-out difficulties that may be encountered in a given investment and drafting contractual provisions in specific response to them.

Where, for example, the adversary party is a sovereign entity, the investor would be well advised to conduct drafting negotiations in such a way that if work-out problems did ultimately eventuate, he would be able to demonstrate that the documentation with respect to which the dispute had arisen had been freely negotiated and had not been imposed through overweening bargaining power. It is prudent, in this regard, to obtain the following representations from sovereign borrowers, guarantors, co-venturers and governments as an integral part of the investment documentation:

(1) that all previously executed agreements, undertakings and contracts of whatsoever nature are reaffirmed;

(2) that the individuals executing the agreement on behalf of the government are empowered to do so;

(3) that under the constitution and statutes of the country, no other act of any branch or department, and no ratification, is necessary to make the agreement binding on the country under its municipal law and enforceable in its courts;

(4) that the government has itself reviewed, or has caused independent consultants to review, project structure, loan terms, guaranty

provisions, management agreements, etc., and is satisfied that the terms thereof are fair and equitable as to it;

(5) that it has caused counsel to examine all pertinent documentation and that it understands and agrees with all terms, conditions and provisions thereof; and

(6) that in the event of any nationalization, expropriation, or other taking of, or interference with, the property or rights of the investor, compensation shall be paid in accordance with international law and calculated on the basis of the greater of fair market value, based on capitalization of earnings, over a specific period, or net book value.[61]

Where the borrower is a private entity a different set of concerns is present. The emphasis with a private borrower or co-venturer must be on the monitoring of corporate financial operations and the prevention of the dissipation of corporate assets. A number of steps can be taken to achieve these objectives.

The investment agreement should forbid the use of bearer shares and allow the use of nominatives only. In most jurisdictions where bearer shares are recognized, for example in Liberia and Costa Rica, they are widely regarded as devices employed primarily to facilitate tax evasion. Their reputation in Costa Rica is such that where they are employed a 10% net capital tax is imposed, whereas no such tax is imposed if nominative shares are utilized. For the lender or foreign equity participant, the presence of bearer shares entails the literal impossibility of knowing from one day to the next who the real owners of an entity are. Thus, bearer shares should be avoided at all costs.

The investment agreement should further provide that appraisals will be required for all collateral and that they are to state that they have taken into specific account the original or acquisition cost to the obligor of the property being appraised. The inclusion of the acquisition cost figure provides within the agreement a reference point which may be of value to the parties for whose benefit the appraisal is prepared in determining the reasonableness of its conclusions. The utility of such a reference figure was illustrated by a recent project loan case in Haiti. There the borrower was to provide as collateral three parcels of land which he had stated were worth a total of $250,000. An

61. Representations of this type were made by Zaire, with the apparent approval of its U.S. counsel, in connection with the project referred to *infra* p. 348.

appraisal ordered by the lender and conducted by a local firm placed the value at just under $90,000, but more significantly, disclosed the fact that the recorded deeds to the borrower recited purchase prices, none paid more than four years earlier, totaling only $12,000. Lender's counsel opined that the true value of the tracts, including appreciation, was probably close to $50,000. Needless to say, additional collateral was promptly requested. The lesson is that while very few lenders would accept a borrower's unsubstantiated asset valuation, all too many will accept uncritically virtually any "independent" appraisal. "Independent" should never be assumed to mean "accurate"; appraisals should always be double-checked. Similarly, the fact that before on-shipment to the project, certain collateral has appraised out at something resembling adequate value does not necessarily mean that the collateral will arrive at the project site or, if it does arrive, that it will remain there. If the collateral is equipment, whether new or used, the investor should verify its condition at the time of on-site delivery and the fact that all the components of the collateral that were supposed to be delivered on-site have, in fact, arrived. Periodic spot checks to verify the location and quantity, of the equipment and inventory collateral are also advisable. If the collateral includes land and buildings, a title report, legal-description check by local counsel, or independent survey should be utilized to confirm that the land parcel intended to be mortgaged has in fact been validly secured on a first-lien basis, and that the buildings are in fact sited within the boundaries of the secured parcel. Where there is resistance by the investment recipient to provide collateral because of the cost of mortgage taxes or financing agreement filing and notarization fees, and if the lender is unwilling to make the collateral request on a "take it or leave it" basis, the cost of the fees in question can be added to the loan amount. Borrower reluctance to pay fees should never be the determinative factor in whether or not to require collateral.

Negative covenants are no substitute for adequate collateral, in that they can be violated with relative ease and impunity. In general, the lender has no recourse against other creditors for interference with the lender's contractual rights even if there is public notice of the existence of the covenants. Actions against the borrower for violation of the covenants are likely to be superfluous in a work-out context where the loan agreement has probably already been breached as to payment of principal and interest. To provide effective insurance against violation of negative covenants it is important to specify in the investment agreement that a condition precedent to disbursement is the amendment of the corporate charter of the obligor or guarantor to (i) deprive any officer, director or shareholder of the authority to conclude any agreement violative of the covenants and (ii) provide that the charter section so limiting corporate authority may not be rescinded or amended without the prior written consent of the investor. This approach should lend substantial color to the investor's argument, should the negative covenants be violated, that the creditors in violation hold invalid and unauthorized obligations and that they had, because of the charter, ample notice that any violations of the negative covenants would be *ultra vires*.

Financial monitoring is an area which usually receives substantial emphasis in conventional loan and co-venturing documents but not always in an efficient fashion. The typical "unaudited-quarterlies-and-audited-annuals" formula is not adequate in circumstances where a work-out can reasonably be anticipated. In the case of an investment involving a new venture or start-up, the submission of end-of-month work sheets for the first 12 to 18 months is an entirely appropriate requirement. It is not enough to specify in investment documents that accounts and records should be maintained on a current basis and in accordance with U.S. accounting principles; the investor should have a means of verifying that the requirements are being observed and have an effective sanction which may be invoked if they are not. Quarterlies should be personally certified by the borrower's chief financial officer. Both the borrower's accountant and the outside auditor should be required to certify that the accounts are in fact maintained in accord with U.S. principals. The accountant should further certify that bookings are current within 30 days.

The independence of the auditor is clearly of paramount importance.[62] The low bidder is certainly not necessarily the firm to retain. Ideally, the auditor should be, and usually is, the project country affiliate of an internationally known firm. In choosing among several candidates of internationally high repute, the lender would be well advised to select a firm with which it already has a business relationship. Not only do pre-

62. *Accord*, J. BAKER AND T. BATES, FINANCING INTERNATIONAL BUSINESS OPERATIONS, 127 (1971).

existing relationships take much of the uncertainty out of the choice, but more importantly, they should provide the investor with back-up leverage, vis-a-vis the auditor's U.S. office, which will enable him to obtain fast action and candid answers when the circumstances of a work-out situation so require. "Where the investment is a joint venture, it is advisable to include in the venture agreement a provision stating that either party to the agreement may at its discretion require that all books of account, financial records, and other documentation relevant to venture operations be made available to auditors designated by such party, so that thorough "spot-checks" can be made at any time.[63]

Where the investment is a loan, whether to a public or private entity, the investment agreement must be drafted so that the obligor is not allowed to divest itself of any material portion of its assets. If the obligor is a private company, a stated condition precedent should be that the most recent audited financials include a break-out of major assets, movable and immovable, tangible and intangible. This is particularly important if the loan is being made to a member entity of a corporate group where asset shifts may be effected with relative ease by mere book alterations. If the obligor is a government or governmental agency, the loan agreement will probably specify that the segregation by the government or agency of any of its foreign exchange earnings for the benefit of creditors other than the investor is a default. In addition, however, the agreement should also designate as a default the transfer by the obligor of any material portion of its assets without a proportionate assumption of the investor's obligation by the transferee. Finally, whether the borrower is public or private, the "use-of-proceeds" clause should be as specific as possible. Where project loans are concerned, the device of allowing disbursement only against specific letters of credit has much to recommend it.

Need for Offshore Collateral

The survey by U.S. counsel of host country statutes and case law pertinent to work-out conditions, and the modification of conventional documentation to respond specifically to work-out problems are necessary steps in the augmenting of investment security. They are not, however, sufficient. Sufficiency in regard to investment security can only be achieved by maximizing the investor's access to the obligor's collateral and the exposure

63. A provision of this type was recently included in a major joint venture agreement concluded by an American company with the Government of Egypt.

of that collateral to attachment and levy. If the investment involves a loan to, a guaranty by, or cooperation with a governmental entity, it is particularly important that the collateral be sited "offshore." If the investment involves only a private project or borrower, the collateral must still be effectively reachable and should also be located in part outside the project country.

With respect to LDC governmental obligations, there can be little doubt that mere contractual undertakings, without more, are far from sufficient to provide an assurance of prompt, complete and default-free performance. Some observers have argued that the prospect of LDC governmental contract violations should not be exaggerated since such governments clearly "need" the international equity markets and the multinational technology exporters too much to risk offending them excessively by wholesale defaults, indiscriminant nationalizations, and arbitrary guaranty violations. "It should . . . be noted," opined one respected observer, "that the need of capital in underdeveloped countries is not a temporary one. Therefore, they cannot afford, in the great majority of cases, to alienate foreign investors by failing to fulfill their promises."[64] Another commentator has more recently written that

> [d]efaults by sovereign borrowers have occurred, . . . these defaults have almost always involved a political breakdown. . . . [T]here is a tremendous resistance . . . to default being allowed to occur, except, of course, where a new government chooses quite deliberately to cut itself off from the international market for political and ideological reasons . . . . [A] situation would have to be very bad indeed for default to occur. It certainly is not in the lenders' interest and [it is doubtful] that a real case can be made for it being in the borrowers' . . . .[65]

It is, however, becoming increasingly obvious that in actuality many LDC governments, whether for political, ideological or other reasons, have little fear of such "market place" reaction. Some governments have doubtless observed that "even cases of outright confiscation have a way of being forgotten by future investors who see themselves in a good bargaining position."[66]

64. A. Fatouros, *Legal Security for International Investments*, LEGAL ASPECTS OF FOREIGN INVESTMENT, 699 (W. Friedman 1959).

65. Parkenham, *The Debts of Less Developed Countries—The Challenge for Commercial Banks*, J. OF COM. BANK LENDING, 25-26 (May 1976).

66. Wells, *Negotiations with Third World Governments*, 1-2 HARV. BUS. REV. 72-77 (1977).

In the same vein, it has been suggested that even "general legislation may, in practice, give more certainty than *ad hoc* contracts that purport to be binding for 15 or more years, but which in reality are changed as bargaining powers shift."[67]

Similar conclusions have been drawn with respect to nationalizations in Africa and could be applied with equal validity to sovereign defaults, reschedulings, foreign investor guarantee breaches, and other contractual right violations in most regions of the underdeveloped world:

> In Africa . . . legislative safeguards did not grow out of the local culture and have not been fully legitimized in their short existence; international law is regarded as belonging to the rich countries; gunboat diplomacy is out of style and economic sanctions are only partially effective; the damage to investment climate, inflow of foreign investment, and credit worthiness of the nationalizing country are taken lightly; the country's honor might be questioned, but not too seriously since the world realizes that justice may be on the side of the poor country which is revolting against foreign domination.[68]

Regardless of the relative validity of the theoretical arguments on this point, there are numerous real-world examples of situations in which the only compensation received by investors whose debts have been repudiated, assets seized or contractual rights violated by host governments has been attributable to the availability of governmental assets in "off-shore" locations. The Texaco-LAR Arbitration discussed above provides an excellent example of the need for investor access to off-shore collateral. As noted above, the deadline set by the Arbitrator for LAR compliance with the Arbitration Award came and went with no indication of any intention on the part of the LAR to comply. Only when, well after that date, the companies signaled their intention to interdict the marketing of Libyan crude through suits in attachment at point-of-sale ports, did Libya agree to enter into negotiations on compensation.[69]

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67. Smith & Wells, *Mineral Agreements in Developing Countries: Structures and Substance*, 69 THE AM. J. OF INT'L L. (1975).

68. Rood, *Compensation of Takeovers in Africa*, THE J. OF INT'L L. AND ECON. 521-522 (1977).

69. Personal interviews by the author. A settlement has recently been agreed upon pursuant to which the LAR will make payments of $76 million to each company. It should be noted that the unsuccessful "hot oil" suit brought against the LAR by a subsidiary of the British Petroleum Company in respect to expropriations similar to those experienced by TOPCO and CALASIATIC was different in a material respect from the suits the American companies proposed to institute. BP had requested and obtained in arbitration not an award of *restitutio in integrum* but of damages. The BP litigation claim, which alleged ownership of the crude oil pumped by the LAR-owned Arab Gulf Exploration Company, was denied by the court on the grounds that under both Libyan and Italian law, concessionaires only succeed to the "fruits of the concession" by, and after, extracting from the earth the resources—28 in question. Since the BP arbitral award had not purported to restore to BP its position as concessionaire

Similarly, prior to the settlement negotiated by the Overseas Private Investment Corporation in 1972 between the post-Allends Government of Chile and the Kennecott Copper Corporation in respect to the July 1971 expropriation of Sociedad Minera El Teniente S.A.,[70] virtually the only compensation obtained by Kennecott, or its operating subsidiary, the Braden Copper Company, was derived from the sale of ingots Braden was able to attach and sell at offshore delivery ports.[71]

In the District Court case[72] which lead to the Supreme Court's decision in *Alfred Dunhill of London, Inc.*, v. *The Republic of Cuba, et al.*,[73] the former owners, in this case Cuban nationals whose cigar factories were expropriated, or "intervened", by the Castro regime recovered nothing from the Cuban government but rather secured partial compensation only by utilizing the U.S. judicial system to recover from American importers payments made to the Cuban intervenors for cigars exported prior to intervention.

Offshore collateral, or "leverage", also provided the only source of recompense to a U.S. company whose Ethiopian subsidiary was nationalized by the Mengistu regime in July 1975. The host government made no attempt to provide compensation for the takings other than establishing a "compensation

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but only to award it damages for loss of that position, the ownership claim could not be upheld. B.P. Exploration Company (Libya) Limited v. Astro Protector Compania Naviora, et al, Decision of the Court of Syracusa (Italy), February 15, 1973; 13 INT'L LEGAL MATERIALS 106, esp. 113-4 (1974).

For additional examples of compensation obtained solely from off-shore assets see the description of arrangements concluded with the Soviet Union, Yugoslavia, Romania, Poland, Czechoslovakia and Cuba in H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS, 433-436 (1976).

70. $67,000,000 Overseas Insurance Settlement Trust, Direct Placement Memorandum, December 1972, in the author's files, at 1-2.

71. *See*, Braden Copper Company v. Le Groupment d' Importation des Metaux, Decision of the Court of Extended Jurisdiction of Paris, 29th Nov. 1972; 12 INT'L LEGAL MATERIALS 182, at 187-98 (1973), upholding Braden's third party attachment action; *but see* Sociedad Minera El Teniente S.A. v. Aktiengesellschaft Nordolentsche Affinerie, Decision of the Superior Court of Hamburg, January 22, 1973; 12 INT'L LEGAL MATERIALS 251, esp. 279-81 (1973), rejecting third party attachment on ground that despite the fact that the El Teniente expropriation violated German public policy, there was not a sufficient effect upon the German legal system or sufficient violation of German interests to meet the statutory test which was a precondition to the denial of effect within Germany of the acts of a foreign sovereign.

72. Mendez v. Gaber, Coe & Gregg, 345 F. Supp. 527 (S.D.N.Y. 1972).

73. 425 U.S. 682 (1976).

committee" which over its more-than-two-year life, did not even decide on amounts due, much less authorize any payments.

Fortunately for the parent company, prior to the time that its subsidiary's property was seized, the subsidiary had discounted with the Commercial Bank of Ethiopia, in return for export financing, a series of trade acceptances owed to the subsidiary by the offshore parent. After expropriation, the parent refused to make payment on the acceptances to the Bank and so avoided a portion of the loss. Because the Bank had itself been nationalized in 1972, it would almost certainly be deemed in litigation to be an organ of the Ethiopian Government, and since in taking up the acceptances it was engaged in a commercial rather than a sovereign act, there would appear to be little risk that a government collection suit against the company would prove successful.[74]

A final example of private sector self-help occurred in 1975 when the Continental Grain Company reportedly was able to force the Government of Zaire to resume payments on a $16 million debt by holding back monthly wheat deliveries to the main government flour mill, thereby causing "lines and hoarding" at bakeries across the country.[75]

Explanations for the tendency of government obligors to respond more readily to financial coercion than to contractual duty are not difficult to educe.

> In spite of the provisions in the agreement and the appeals on the part of the investor for 'sanctity of contract,' it is rare for a major mining or manufacturing agreement to remain unchanged for more than a few years. . . .
>
> The terms required to attract an investor are usually quite different from those required to retain him. Most of his capital, once it is invested, is captured in the country. . . [A]ny risk and uncertainty recognized by both parties at the outset is forgotten as soon as the project is visibly successful. As a result, the stage is set for quick renegotiation.
>
> When it sees its interests threatened, the government usually acts administratively, regardless of the content or omissions of the agreement.[76]

Other observers have noted with respect to long-term mineral concessions and development contracts in the less developed areas of the world that,

> . . . a not unusual feature of their history is that they are renegotiated by the government over the course of their life. The balance of power shifts. . . . [Subsequent to execution of the original agreement,] one

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74. Personal interviews by the author.
75. Wash. Post, December 7, 1977, at 1, col. 2.
76. Wells, *Negotiating with Third World Governments*, 1-2 HARV. BUS. REV. 72-77 (1977).

> finds renegotiations taking place between an increasingly skilled administration that knows what it has, believes it could soon run matters by itself and sees the returns of the investor as exorbitant (forgetting the original risks run by the firm) and an increasingly vulnerable outside firm with high sunk costs.[77]

In sum, once the investor has made his investment, and assuming that he is not in a high-technology industry,[78] he has little leverage vis-a-vis the host government unless he has the ability to reach outside the project country for assets owned by the host government, payments owed to it or supplies which it needs. Verification of the availability of offshore assets, whether of a governmental or of a private entity, is therefore a critical step in the provision of maximum security to the investor. There is little point in drafting efficient documentation and, in the event of a work-out, conducting successful litigation or arbitration, and then finding no assets against which to enforce the judgment or award.

Location of obligor assets, of course, is only half—and by far the easier half—of the battle. The assets, once located, must be reachable by the investor in the event that he is forced to look outside the project country for satisfaction of his judgment or arbitral award.

Ideally, the investor should be able to avoid extensive involvement with recognition statutes and bring *de novo* suits in attachment in the asset jurisdiction itself and levy there without crossing borders. This is advantageous since just as "it is not unreasonable to think that an arbitration award connected with a national legal system may perhaps be easier to enforce [in that country than elsewhere],"[79] so it is not unreasonable to assume that it would be easier to enforce a judgment rendered by the legal system of the asset jurisdiction than one rendered elsewhere. In order to achieve some certainty of being able to bring a successful suit on the agreement in an asset forum, the inves-

77. In the Matter of the Arbitration Between the Anaconda Company and Chile Copper Company, and Overseas Private Investment Corporation, 29-30, Case No. 16-10-0071072, American Arbitration Association, (D.C. Opinion, July 17, 1975).

78. A discussion of the relative advantages accruing to high-technology investors as opposed to low-technology investors is beyond the scope of this paper but has been amply discussed elsewhere. *See*, for a brief overview, *Why the Multinational Tide is Ebbing*, FORTUNE, Aug. 1977 at 111.

79. *Supra* note 34, at 11.

tor would have to have a basis of jurisdiction over the defendant or the *res* in the jurisdiction in which he believed the obligor's assets would be likely to be found. The submission-to-jurisdiction clauses contained in conventional investment agreements, whether with private or sovereign obligors, do not generally provide the investor with the flexibility he requires if he is to deal with assets wherever they may be found. Coventional provisions typically recite the obligor's agreement to submit to suit on the instrument in any of several specified fora, e.g., "any State or Federal court of or in the State of New York or in any court in England, the Republic of France, or [the project country]" and that it waives for itself and its property any defense of, *inter alia*, lack of jurisdiction, as to those fora. In point of fact, however, obligor-related assets, whether movable or immovable, are likely to be found in any number of other jurisdictions besides those specified in the submission-to-jurisdiction clause. This is particularly true with respect to movable assets in the period leading up to and including a work-out.

One solution to the problem was embodied in a document entitled the *Republic of Zaire Agreement* drafted in 1975, intended to be used in connection with the financing of a major developmental project which was ultimately not carried forward. Section 10 of the Agreement provided for submission to jurisdiction by, and appropriate arrangements for service of process on, the guarantor,

> in any jurisdiction within which any property or asset whatsoever, tangible or intangible, now or hereafter controlled, owned of record or owned beneficially by the [guarantor or any agent thereof] . . . is . . . situated on the date of service of process on the [guarantor] . . .[80]

The inclusion of a provision of this type would enable the investor to seek attachment orders in any forum in which he could locate assets of the investment obligor. If the obligor were a government it would be necessary in addition to obtain appropriate waivers of the act-of-state and sovereign immunity defenses and representations that the government's execution of the investment agreement was a commercial, rather than sovereign, act.

Even if these waivers were obtained, of course, it would not be certain that a sufficient contractual nexus with the forum would be found by the courts of the particular asset jurisdiction in which the investor sought to enforce a waiver clause such as Section 10, *supra*. Nevertheless, given the increasing tendency

80. "Government of Zaire Agreement" at 14, draft of October 28, 1975, in the author's files.

of tribunals in most jurisdictions to give force to the clear agreement of the parties,[81] the chances of successful invocation of such a clause would appear substantial. Certainly, the possible benefits to be derived from the availability of a "Section 10" remedy are sufficient to justify a determined effort by counsel to procure its inclusion in investment documentation wherever feasible.

CONCLUSION

The foregoing comments make no pretense of being a comprehensive description of all the steps that should be taken to guard against adverse work-out developments.

There is no discussion, for example, of the act-of-state or sovereign immunity issues, since, as was recently stated in *Trendex, Ltd. v. Central Bank of Nigeria*,[82] application of the doc-

81. *See*, The Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 10, 11 (1972); (upholding choice of forum clause in international towage contract);

> . . . [S]uch clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. [Citation omitted]. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. It is merely the other side of the proposition recognized by this Court in National Equipment Rental Ltd. v. Szukhent, 375 US 311 (1964), holding that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction. In so holding, the Court stated:
>
> [I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party or even to waive notice altogether.' 375 U.S. 311, 315-16. This approach is substantially that followed in other commonlaw countries including England. [Note omitted]. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. [Note omitted]. It accords with ancient concepts of freedom of contract . . . .

See also Scherk v. Alberto-Culver Co., 417 U.S. 506, 512 (1974), to the same effect. The Court in *Scherk* emphasized the need to respect the agreement of the parties in order to afford them the certainty of forum they bargained for:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Nevertheless, it is not unreasonable to believe that the Court would also enforce a forum provision that emphasized flexibility, or effectiveness of remedy, rather than certainty if that is the consideration the parties had bargained for.

82. WEEKLY LAW REPORTS, October 1, 1976, 121 SOLICITOR'S J. 85, February 4, 1977.

The *Trendex* case was one in which Lord Denning, on behalf of the sitting Lords, held that the Central Bank of Nigeria would not be entitled to assert the trines is quite individualistic as to country, and either doctrine by itself would be worthy of a full volume of analytical discussion.

These comments are intended, rather, to illustrate the broad nature of the problems counsel will face in LDC investments, the general perspective he must apply to structuring the deal, and the type of arrangements he must make, whether in terms of controlling local counsel, learning local law, or providing for offshore collateral, in order to provide for the investor effective *security per se.*

These comments, in essence, are intended to demonstrate that counsel must have good "anticipation" with respect to work-out problems and know exactly what response will be available in any given contingency. Unless counsel does have these qualities, the syndromes subsumed in the terms "mega-deficit" and "destabilized bilateral monopoly" can for the LDC investor over the coming years mean, at best, serious yield attrition and, at worst, complete loss of his investment.

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defense of sovereign immunity, in a suit brought on an international contract, where the transaction underlying the contract was essentially commercial, rather than sovereign, in nature. This decision represented a marked break with previous British case law on this point, and if sustained, would bring British practice into harmony with that on the Continent and in the United States.