

LEGISLATION—FOREIGN RELATIONS—INTERNATIONAL TRADE REAUTHORIZATION FOR THE OVERSEAS PRIVATE INVESTMENT CORPORATION

A new foreign aid policy proposed by the Reagan Administration would put greater emphasis on the role of private United States investors in bilateral assistance programs with lesser developed countries (LDC's).¹ While this approach does reflect the political conservatism of the current Washington leadership, the planned reductions in existing foreign aid programs seem to be based on budgetary considerations rather than any fundamental shifts in policy.² One government agency particularly well-suited for implementing this new approach is the Overseas Private Investment Corporation (OPIC). OPIC's express statutory purpose is "to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States."³ Subject to periodic review and reauthorization by Congress, OPIC would have ceased to operate as an entity on September 30, 1981, without further enabling legislation. Saving legislation approved at the last minute extended OPIC's operating authority for an additional four years. The final version of that legislation is entitled *The Overseas Private Investment Corporation Amendments Act of 1981*.⁴

The Overseas Private Investment Corporation was formed in 1969 by an amendment⁵ to the Foreign Assistance Act of 1961.⁶

¹ Janssen, *Reagan Team Hopes to Cut Foreign Aid Burden by Encouraging Private Projects in Third World*, *Wall St. J.*, Apr. 14, 1981, at 56, col. 1.

² 1 [1981] MAJOR LEGISLATION OF THE CONGRESS, 97th Cong., mlc-026 (May 1981). The revised budget for fiscal year-1982 would reduce total foreign development assistance by \$1,877 million. Funding for the Agency for International Development [AID] alone would be cut by some \$486 million. Furthermore the Office of Management and Budget (OMB) has recommended that AID programs be reoriented to encourage more private sector participation. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, ADDITIONAL DETAILS ON BUDGET SAVINGS 323, 329 (1981).

³ 22 U.S.C. § 2191 (1976).

⁴ Overseas Private Investment Corporation, Amendments Act of 1981, Pub. L. No. 97-65, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 1021 (to be codified at 22 U.S.C. §§ 2191-22006) [hereinafter cited as Pub. L. No. 97-65].

⁵ Foreign Assistance Act of 1969, Pub. L. No. 91-175, § 105, 83 Stat. 805, 807 (codified as amended at 22 U.S.C. §§ 2191-2200a) (1976 & Supp. IV 1980).

⁶ Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.).

Created as an independent United States agency,⁷ OPIC was designed to operate as a self-sustaining corporation requiring no more than start-up appropriations from Congress.⁸ While the broad policy objective of the agency is foreign development assistance, OPIC specifically provides political risk insurance and financial assistance for United States investors as encouragement for private investment in countries perceived as economically or politically unstable.⁹ OPIC is empowered to insure against the risk of convertibility of foreign currency;¹⁰ government expropriation of private property;¹¹ and loss due to war, revolution, or insurrection.¹² OPIC financial assistance programs include the issuance of loan guaranties for United States investors,¹³ direct investment loans to qualifying businesses,¹⁴ and general pre-investment consultation.¹⁵

In its twelve year history, OPIC often has been the subject of criticism. In its formative years, there was a widely held belief in Congress that OPIC involvement in foreign investments was "more likely to embroil the United States in the internal politics of host countries than would otherwise be the case."¹⁶ Organized

⁷ As of this writing OPIC is still under the nominal direction of the International Development and Cooperation Agency [IDCA]. IDCA was created on Oct. 1, 1979, as a part of President Carter's Reorganization Plan No. 2. This umbrella agency was set up to coordinate the activities of IAD, OPIC, and a new Agency to be called the Institute for Scientific and Technological Coordination. Lipman, *Overseas Private Investment Corporation: Current Authority and Programs*, 5 N.C. J. L. & COM. REG. 337, 339 (1980). IDCA however has never become fully operative. The Administrator of AID has been serving as Acting Director of IDCA, as well as Chairman of the Board of OPIC, since IDCA's creation. No funds were allocated to complete its staffing in the 1982 budget. The Senate, characterizing the agency as "nothing more than another bureaucratic layer," has proposed its abolishment. If this occurs, OPIC would formally regain its status as an independent agency. S. REP. NO. 83, 97th Cong., 1st Sess. 18, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 2404, 2421 [hereinafter cited as S. REP. NO. 83].

⁸ *Extension and Revision of Overseas Private Investment Corporation Programs: Hearings and Markup of H.R. 3136 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 65 (1981) (statement of Craig A. Nalen, President, OPIC) [hereinafter cited as 1981 OPIC House Hearings].

⁹ *Id.* at 68-69.

¹⁰ 22 U.S.C. § 2194(a)(1)(A) (1976).

¹¹ 22 U.S.C. § 2194(a)(1)(B) (1976).

¹² 22 U.S.C. § 2194(a)(1)(C) (1976).

¹³ 22 U.S.C. § 2194(b) (1976 & Supp. IV 1980).

¹⁴ 22 U.S.C. § 2194(c) (1976 & Supp. IV 1980). The corporation is to give preferential consideration to small business.

¹⁵ 22 U.S.C. § 2194(d) (1976 & Supp. IV 1980). This includes the preparation of investment surveys and feasibility studies, sometimes through the stage of pilot operations. This type of assistance generally is afforded to small business. 5 N.C. J. L. & COM. REG. 337, 362, *supra* note 7.

¹⁶ S. REP. NO. 676, 93d Cong., 2d Sess. 26 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4517, 4538. Specific examples in Chile, Jamaica, and Taiwan were alluded to where it

labor groups complained that OPIC was causing the loss of United States worker jobs to "runaway industries"; whereas, OPIC favorable insurance rates were perceived as a subsidy to big business.¹⁷ Moreover, Congress found insufficient evidence at the time to suggest that the availability of OPIC programs was a significant consideration in private investment decision-making.¹⁸ As a result of such early opposition, the 1974 reauthorization of OPIC instructed the corporation to begin transferring its insurance programs to other risk sharing groups.¹⁹

When OPIC activities were reviewed by Congress again in 1978, the transfer requirement was repealed.²⁰ Although the removal of this "privatization" requirement did restore OPIC's original authority, other restrictions were invoked that reflected the contemporary concerns of the Carter Administration.²¹ Most importantly, OPIC was instructed to encourage the participation of "small business" in its investment programs,²² to give preferential consideration to lesser developed countries (LDC's) with a per capita income of \$520 or less in 1975 United States dollars, and to restrict its activities

was feared that OPIC's support of American financial projects had unnecessarily complicated U.S. foreign policy toward those countries. *Id.* at 20 [hereinafter cited as S. REP. No. 676].

¹⁷ Griffin, *Transfer of OPIC's Investment Insurance Programs to Private Insurers: Prospects and Proposals*, 8 L. & POL. INT'L BUS. 641-43 (1976).

¹⁸ S. REP. No. 676, *supra* note 16, at 17.

¹⁹ Overseas Private Investment Corporation Amendments Act of 1974, Pub. L. No. 93-390, § 2(1), 88 Stat. 763 (codified at 22 U.S.C. § 2194(A)(2) (1976)) (repealed 1978). OPIC was to begin transferring its insurance obligations to either private companies or to multilateral organizations. It was to have divested 100% of its expropriation and inconvertibility coverage by Dec. 31, 1979.

²⁰ Overseas Private Investment Corporation Amendments Act of 1978, Pub. L. No. 95-268, 92 Stat. 213, § 3(3) (codified as amended at 22 U.S.C. §§ 2191-2200a (Supp. IV 1980)). The lack of success in the transfer of OPIC liabilities was due in large part to the aversion of private companies either to assume OPIC's long-term liability (up to twenty years) or to insure against losses which might be incurred in land-based wars. H.R. REP. NO. 670, 95th Cong., 2d Sess. 17 (1978) *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 618, 633.

²¹ These provisions include instructions: (1) to decline to issue any contract of insurance or reinsurance if it is determined that the investment "would be likely to cause a significant reduction in the number of employees in the United States," 22 U.S.C. § 2191(1); to refuse to support investors found to be in violation of the Foreign Corrupt Practices Act of 1977, 22 U.S.C. § 2197(1)(1); and to consider a country's record on human rights before proceeding with a proposed project, 22 U.S.C. § 2199(1) (Supp. IV 1980).

²² 22 U.S.C. § 2200 (1976). "Small business" is defined as any U.S. business not on the Fortune 1000 (i.e., below \$117 million in annual sales in 1979). GENERAL ACCOUNTING OFFICE, REPORT TO THE SEN. COMM. ON FOREIGN RELATIONS, BY THE COMPTROLLER OF THE UNITED STATES: THE OVERSEAS PRIVATE INVESTMENT CORPORATION: ITS ROLE IN DEVELOPMENT AND TRADE, 57 n.1. (1981) [hereinafter cited as 1981 GAO REPORT] *reprinted in Overseas Private Investment Corporation: Hearings on S. 993 Before the Sen. Comm. on Foreign Relations, 97th Cong., 1st Sess. 10, 177 (1981)* [hereinafter cited as 1981 OPIC Senate Hearings].

in countries having a per capita income of \$1000 or more in 1975 United States dollars.²³

The 1981 OPIC reauthorization amendment attempts both to consolidate and enlarge the scope of the original statutory mandate.²⁴ The salient features of the new legislation are: (1) a specific mandate for OPIC activities to benefit United States trade; (2) a raise in the per capita income levels for qualifying countries; (3) a new category of political risk insurance covering "civil strife"; (4) new statutory language concerning the propriety of extension of OPIC benefits; and (5) the implementation of appropriations controls over the amount of funds OPIC may allocate for financial assistance.²⁵ Certain organizational and procedural changes also are made.²⁶

In light of the past controversy concerning the proper role of OPIC activities, perhaps the most significant new language is the recognition and approval of the agency's promotion of United States trade. As a criterion for determining whether to insure or finance particular projects, OPIC now is directed "to seek to support those development projects having positive trade benefits to the United States."²⁷ Whereas the new provision is not expected to make a dramatic change in current OPIC policy,²⁸ its inclusion does acknowledge one aspect of agency activity that has been characterized at times as an improper consideration in making decisions affecting foreign development assistance.²⁹ While development assistance remains the prime objective of OPIC, the new provision in effect gives the agency congressional authority to evaluate the overall possibilities of United States trade benefits flowing from a particular project and factor those benefits into its selection process.³⁰ Significantly, it should be noted that the original proposal by the

²³ 22 U.S.C. § 2191(2) (1976).

²⁴ Pub. L. No. 97-65, *supra* note 4.

²⁵ See generally H.R. REP. No. 195, 97th Cong., 1st Sess. 11-13 (1981).

²⁶ Pub. L. No. 97-65, *supra* note 4. These include: an increase in the number of OPIC directors to fifteen by the addition of an official of the Department of Labor and a second member representing small business, § 3(a)(1); the appointment of the U.S. Trade Representative to serve as Vice Chairman, ex officio, § 3(a)(2); technical changes in OPIC accounting practices, § 6; the removal of earlier prohibitions against risk-sharing agreements with private insurers, § 4(b)(2); and the lifting of 1978 restrictions on the support of projects involving the extraction of copper, § 8(3). Similarly 1978 restrictions against the support of projects involved in the processing or production of palm oil, sugar, or citrus crops were deleted.

²⁷ Pub. L. No. 97-65, *supra* note 4, § 2(2) (to be codified at 22 U.S.C. § 2191(i)).

²⁸ S. REP. NO. 83, *supra* note 7, at 23.

²⁹ See generally 1981 OPIC House Hearings, *supra* note 8, at 37.

³⁰ 1981 OPIC Senate Hearings, *supra* note 22, at 128.

Reagan Administration called for an even stronger emphasis on trade benefits than did the final version.³¹

In evaluating foreign development versus investor services, OPIC inherently must serve two masters. As a matter of long-range policy, its acknowledged primary purpose is to assist development processes in the poorest areas of the world.³² In matters of day-to-day operation, however, OPIC's business is to provide risk coverage and financial support to investment projects in countries and areas where investors or private insurers ordinarily would be disinclined to operate.³³ The problem is one of striking a balance between two seemingly inconsistent goals. Before OPIC can fulfill its primary purpose, prospective investors first must be convinced that a profit can be made in those countries eligible for OPIC programs. One effective stimulus of interest in a particular project is the potential for future exports of additional parts and materials to supply the new project upon its completion.³⁴ However, as this and other investment initiatives are inherent phenomena of a free market system, the inclusion of "positive U.S. trade benefits" in the OPIC objectives merely codifies, in a sense, a pre-existing *de facto* consideration. While no substantive change may result, a legal recognition of an OPIC trade mandate should end the debate over the incompatibility of trade promotion and development assistance.

The new legislation also raises the per capita income limitations set by the 1978 amendments.³⁵ OPIC is now instructed to give preferential consideration to projects in LDC's having a per capita income of \$680 or less in 1979 United States dollars and to restrict its activities in countries having a per capita income of \$2950 or more in 1979 United States dollars.³⁶ This differs from the original Administration request, which would have removed all income level restrictions and simply instructed preferential consideration for

³¹ Although identical language is found in both versions, the Administration bill positioned the new provision in the new opening "purposes" section of the law, making it appear to be of co-equal importance to development assistance. See H.R. 3136, 97th Cong., 1st Sess. § 2(2) (1981). The House Subcommittee however thought it wiser to make the provision a part of a later "criteria" section of the law, apparently in an effort to modify its impact and to make its inclusion less controversial when the bill came before the full House. 1981 *OPIC House Hearings*, *supra* note 8, at 188-89.

³² See generally Note, 10 L. & POL. INT'L BUS. 287, 300 (1978).

³³ *Id.* at 301.

³⁴ See 1981 *OPIC Senate Hearings*, *supra* note 22, at 154-55. But see 1981 GAO Report, *supra* note 22, at 28, which finds that OPIC guidelines allow other industrial countries to export as much as U.S. suppliers since the guidelines only cover mutual procurements.

³⁵ Pub. L. No. 97-65, *supra* note 4, § 2(1) (to be codified at 22 U.S.C. 2191(2)).

³⁶ *Id.*

countries having a per capita income of \$625 or less in 1975 United States dollars.³⁷ The per capita ceiling, albeit at a higher level, was reinstated by Congress apparently as a compromise strategy to avoid floor debate rather than as an affirmative effort to reduce OPIC's operational capacity.³⁸ This view is underscored by the continuing vitality of the OPIC "exceptions" policy regarding upper income level restrictions.³⁹ OPIC may disregard this restriction when a particular project promises either significant trade benefits to the United States or an extraordinarily significant development benefit to the host country.⁴⁰

As these exceptions attest, OPIC reserves considerable flexibility in the application of any definite income ceiling on its operations. Moreover, it should be noted that OPIC may operate in any country where a national security interest is involved.⁴¹ OPIC essentially will be able to continue treating the upper income level figure as only a rough approximation of the range of OPIC operations, not a strict prohibition. Nevertheless, this expansion of the formal list of eligible countries does symbolize the greater role OPIC is expected to play in development assistance. It may assist in attracting the attention of investors who might not otherwise be aware of the existing exceptions policy or, if aware, might be uncertain whether their proposed project would qualify as an exception.

It is, of course, in the interest of the agency to extend the range of eligible countries to attain prudent risk management.⁴² In order to provide preferential consideration to high-risk, low-income coun-

³⁷ H.R. 3136, 97th Cong., 1st Sess. § 2(3) (1981).

³⁸ 1981 OPIC House Hearings, *supra* note 8, at 189, 190. Countries restored under the reauthorization are:

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| Cyprus | Portugal | Panama |
| French Guiana | Romania | Turkey |
| Malta | Costa Rica | Jamaica |
| Surinam | Brazil | Argentina |
| Yugoslavia | Fiji | Korea |
| Barbados | Chile | |

Id. at 171.

³⁹ See 1981 OPIC House Hearings, *supra* note 8, at 156; see also 127 CONG. REC. 510500 (daily ed. Sept. 25, 1981) (remarks by Sen. Percy).

⁴⁰ A full catalog of exceptions are: (1) energy resource and development projects in non-OPIC countries; and mineral exploration, mining, and processing projects; (2) projects by U.S. small business and cooperatives; (3) reinsurance of private underwriters of political risk insurance; (4) insurance for letters of credit for U.S. exporters or contractors; (5) projects promising significant net trade benefits; and (6) projects promising an extra-ordinarily significant development benefit. S. REP. No. 83, *supra* note 7, 22.

⁴¹ 22 U.S.C. § 2199(1) (Supp. IV 1980).

⁴² 1981 OPIC Senate Hearing, *supra* note 22, at 151 (statement of Gerald T. West, former President, OPIC).

tries, OPIC must be able to offset those risks against projects in more highly developed, relatively low-risk countries in balancing its liabilities. While such purely business considerations may impinge on broader policy objectives, OPIC nevertheless is statutorily required to conduct its operations on a sound business footing.⁴³ OPIC's justification is that the larger revenues it receives from projects in the more developed countries provide more available funds for projects in the poorer areas.⁴⁴

The Administration also recommended the addition of the term "civil strife" to the war, revolution, and insurrection coverage.⁴⁵ OPIC urged the necessity of this language to fill the extant gap in coverage between the political risk insurance available from OPIC and the traditional casualty insurance offered by commercial carriers.⁴⁶ Whereas the pre-existing political risk insurance covered losses resulting from military actions of either revolutionary forces or government defenders, it did not cover property damage in cases where the action was not initiated or directed by any organized group, or where the removal or elimination of the host government was not the prime objective.⁴⁷

Because "civil strife" insurance generally is not offered by the private sector, Congress' approach to the proposed new coverage was cautious.⁴⁸ The suggestion of the Senate was that private insurers be encouraged to participate on a risk sharing basis with OPIC in the insuring of investments against "civil strife."⁴⁹ Further, an amendment was added requiring a complete report from OPIC within sixty days of the issuance of the first contract, such report to include: (1) definition of the losses to be covered in the contract; (2) proposed rates for coverage; and (3) an estimate of possible claims.⁵⁰ An additional report is required whenever OPIC significantly modifies the scope of the coverage.⁵¹

It should be noted that the Act does not define "civil strife."

⁴³ 22 U.S.C. §§ 2191(a), (d) (1976).

⁴⁴ 1981 OPIC House Hearings, *supra* note 8, at 114 (statement of Craig A. Nalen, President of OPIC).

⁴⁵ H.R. 3136, *supra* note 37, § 4(1).

⁴⁶ 1981 OPIC House Hearings, *supra* note 8, at 119-20.

⁴⁷ *Id.*

⁴⁸ *Id.* at 170. (comments of Craig A. Nalen, President of OPIC, during statement of Anthony Marra, General Counsel, OPIC). However the Subcommittee noted that such coverage is offered by the U.S. Export-Import Bank and the Foreign Credit Insurance Agency to U.S. exports. H.R. REP. 195, *supra* note 25, at 8.

⁴⁹ S. REP. NO. 83, *supra* note 7, at 66.

⁵⁰ Pub. L. No. 97-65, *supra* note 4, § 4(a)(4) (to be codified at 22 U.S.C. § 2194(a)(4)).

⁵¹ *Id.*

While OPIC officials have intimated that the term contemplates acts by terrorist groups or attacks aimed at United States property,⁵² its precise meaning is open to question.⁵³ OPIC explains this ambiguity as an acceptable insurance practice whereby the specific meaning and coverage of a term are decided in the negotiation process and agreed on in the contract.⁵⁴

While the House committee was in basic agreement with the proposals of the Administration bill, the Senate demanded additional procedural restrictions on the OPIC project selection process.⁵⁵ Language was introduced requiring OPIC consideration of concepts of "additionality" and "performance requirements" in its decision-making process.⁵⁶

"Additionality" connotes a determination of the viability of a particular project absent the availability of OPIC insurance or financial assistance.⁵⁷ The rationale for this concern is that OPIC should limit its activities in developing countries to those projects that would not otherwise be feasible without the benefit of OPIC support.⁵⁸ OPIC opposed this amendment,⁵⁹ maintaining that it would be impossible to isolate and quantify any one factor in the decision-making process to determine whether its presence would tip the balance in favor of a particular project.⁶⁰ The OPIC argument persuaded the Senate to discard "additionality" as a criterion for project selection in favor of a provision requiring OPIC to furnish a report to Congress no later than June 30, 1982 on methods of estimating the probability that particular investments will proceed if OPIC services are not provided.⁶¹ In effect, a compromise was reached whereby immediate implementation of the requirement was postponed for further study. If additionality requirements are to be included at a later time, additional legislation will be necessary; however, it is not altogether unlikely that OPIC may

⁵² 1981 OPIC House Hearings, *supra* note 8, at 169. (statement of Anthony Marra, General Counsel, OPIC). An example offered was a Palestinian attack on an American owned factory in Jordan where the attack was to protest the Camp David Agreements rather than as an attempt to oust the Jordanian government. *Id.* at 170.

⁵³ *Id.*

⁵⁴ *Id.* at 193 (Subcomm. Markup).

⁵⁵ S. REP. NO. 83, *supra* note 7, at 25, 26.

⁵⁶ *Id.*

⁵⁷ See generally *id.* at 249 (statement of C. Fred Bergsten, former member OPIC Board of Directors).

⁵⁸ S. REP. NO. 83, *supra* note 7, at 25.

⁵⁹ *Id.*

⁶⁰ 1981 OPIC House Hearings, *supra* note 8, at 124 (statement of Craig A. Nalen, President of OPIC).

⁶¹ Pub. L. No. 97-65, *supra* note 4, § 9(b) (to be codified at 22 U.S.C. § 2200a).

begin to make "additionality" evaluations of its own in an effort to moderate the issue.

The second Senate proposal, relating to performance requirements, remained intact. OPIC shall "refuse to insure, reinsure or finance any investment subject to performance requirements which would reduce substantially the positive trade benefits likely to accrue to the United States from the investment."⁶² "Investment incentives and performance requirements, usually as part of a comprehensive package, are offered by foreign governments to influence international investment and trade decisions."⁶³ The concern evidenced in the Senate was that these contractual obligations distort the true measure of market forces and hamper efforts to effect a balance of trade.⁶⁴ OPIC took the position that such a provision would be ineffective, as LDC development would be affected adversely and United States investors subjected to more government intervention.⁶⁵ OPIC also argued that the exclusion of United States investors from these projects would allow investors from other industrialized countries to accept the performance requirements and proceed with the project.⁶⁶ OPIC suggested that an overall United States policy dealing with this problem would be more appropriate than placing the burden on OPIC to make these considerations.⁶⁷ On this issue, however, the Senate remained unpersuaded.

While plans to implement this new provision are not yet formulated, it should be noted that only performance requirements that *substantially*⁶⁸ reduce positive trade benefits are proscribed. Presumably, there first must be a threshold finding of positive United States trade benefits in the transaction before the restriction will become operative. Upon such a finding, OPIC then will determine whether particular incentives or performance requirements substantially reduce trade benefits. Considering its basic opposition to this provision,⁶⁹ it appears likely that OPIC general-

⁶² *Id.* 2(3)(c).

⁶³ 1981 OPIC House Hearings, *supra* note 8, at 128.

⁶⁴ See S. REP. NO. 83, *supra* note 8, at 26.

⁶⁵ 1981 OPIC House Hearings, *supra* note 8, at 129.

⁶⁶ See *id.*

⁶⁷ See *id.* at 130.

⁶⁸ Compare Pub. L. 97-65, *supra* note 4, § 2(3)(c) with S. REP. NO. 83, *supra* note 7, at 123. In the compromise agreement worked out between the House and Senate, the adverb "significantly" was replaced with "substantially". Presumably this slight alteration would allow OPIC greater discretion in approving such agreements.

⁶⁹ See 1981 OPIC House Hearings, *supra* note 8, at 172 (Mr. Nalen, President of OPIC, commenting during the statement of Anthony Marra, General Counsel, OPIC).

ly will attempt to minimize the effect of the restriction absent egregious demands by host governments. While OPIC must formulate the guidelines by which such agreements are evaluated, a great deal of subjectivity will be explicit in the evaluation.

A further significant change in the new Act establishes congressional budgetary control over the amounts OPIC may issue through its loan programs.⁷⁰ While the actual funds to be disbursed need not be appropriated, commitments to guarantee loans are "authorized for any fiscal year only to the extent or in such amounts as provided in advance in appropriations Acts."⁷¹ This provision replaces prior statutory language that merely disallowed commitments resulting in a "fractional reserve less than 25 per centum of the maximum contingent liability then outstanding."⁷² This modification is in compliance with a pre-existing provision in the Act that expressly allows Congress to limit OPIC obligations in consideration of budgetary programs submitted by the President.⁷³ These budgetary controls, however, have not been viewed as a reflection on OPIC's past performance or activities,⁷⁴ but rather as a part of a broader Administration policy to tighten controls on all federal programs.⁷⁵

Subject to the same appropriations act control is the direct investment fund. Noteworthy here is the fact that the Administration originally proposed that this program of direct loans to qualifying investors be terminated.⁷⁶ The House objected to this proposal, viewing the program as particularly well-equipped to carry out OPIC's obligation to involve small business in foreign investment.⁷⁷ Therefore, the final version of the bill reinstated the direct loan program under new procedures that maintain its operations roughly at its current level.⁷⁸ However, Congress retains the authority now to terminate either loan program in any year simply by placing a zero dollar amount on allowable funds to be earmarked for the program.⁷⁹

⁷⁰ Pub. L. No. 97-65, *supra* note 4, § 5(c) (to be codified at 22 U.S.C. § 2194).

⁷¹ *Id.*

⁷² 22 U.S.C. 2195(a)(2).

⁷³ 22 U.S.C. 2195(a)(3).

⁷⁴ 1981 OPIC House Hearings, *supra* note 8, at 195 (comments of Bingham in the Subcomm. Markup).

⁷⁵ *Id.*

⁷⁶ *Id.* at 196 (comments of Mr. Lagomarsino in the Subcomm. Markup).

⁷⁷ See H.R. REP. No. 195, *supra* note 25, at 8-9.

⁷⁸ 1981 OPIC House Hearings, *supra* note 8, at 196 (comments of Mr. Lagomarsino in the Subcomm. Markup).

⁷⁹ Pub. L. No. 97-65, *supra* note 4, § 5(c) (to be codified at 22 U.S.C. 2194). This was originally

Closely related to these budgetary controls is a measure that required OPIC to return to the Treasury all funds that were appropriated for start-up costs prior to January 1, 1975.⁸⁰ OPIC must pay back each year amounts equal to 25% of the net income received for the preceding year.⁸¹ Although this provision could slow the accumulation of OPIC reserves and surplus capital, the corporation's financial position appears secure, and a long-term repayment process would not impair OPIC operations seriously.⁸² Indeed, repayment is required to be in a manner consistent with OPIC objectives.⁸³

The enactment of the 1981 Reauthorization Act, combined with a new fiscal awareness and declared policy of greater private sector participation, would seem to bode well for the future of OPIC. With this reauthorization, OPIC appears to have moved beyond the initial experimental stage in which many newly created agencies are most vulnerable to political whims and criticisms. While OPIC concededly occupies a rather narrow field of operation within the total scheme of United States foreign aid policy, its prospects at this time are especially good for assuming a greater role in both United States trade promotion and development assistance programs. If the current emphasis on private sector participation is more than rhetoric, the success or failure of OPIC in achieving its designated goals is likely to be a subject of continuing interest in the coming years.

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the method chosen to phase out the direct investment fund. 1981 OPIC Senate Hearing, *supra* note 30, at 209 (statement of Gerald T. West).

⁸⁰ Pub. L. No. 97-65, *supra* note 4 § 10 (to be codified at 22 U.S.C. 2200b).

⁸¹ *Id.*

⁸² In 1980, OPIC realized a net profit of \$64.7 million. S. REP. No. 83, *supra* note 7, at 21.

⁸³ Pub. L. No. 97-65, *supra* note 4, § 10 (to be codified at 22 U.S.C. § 2200(b)).

