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In this Issue:

Contributory Fault in Investment Disputes: the Due Diligence Bar

Mariano Gomezperalta *explores contributory fault in investment disputes by taking an in-depth look at some of the cases in which it has played a role.*

After hours of discussing the investors' problems with local communities, the mayor ended the meeting by saying, "If someone would have asked us, we would have never suggested our province for the project." Three different ethnic groups lived in the project location. They all spoke different dialects and had conflicting political views on foreign investment in the region. A renowned group of international investors was now facing serious difficulties with these local groups who were blocking the construction phase of a multi-million dollar project.

The investors returned to their headquarters and retrieved the project files to determine if someone had checked with the mayor whether he thought the investment site was viable. A quick review of the files revealed that the mayor was right. Despite all of the studies showing that the project site was commercially feasible, there was no indication of someone actually asking the local authorities for their views on the viability of the project site from a social/political perspective. While there was a substantial amount of documents showing that the investors had applied for and obtained all relevant licenses and permits from the local authorities and numerous papers addressing the company's efforts to educate local communities about the purpose and effects of the project, no one bothered to ask the mayor's office what they thought about the project site. A more detailed review of the company's due diligence process also revealed that the existence of a bilateral investment treaty between the investors' state and the host country was almost irrelevant for purposes of deciding the project location. The investors' due diligence questionnaire consisted of hundreds of questions but only one of them (phrased as a statement) related to the existence of a BIT with the host government: "There is a Bilateral Investment Treaty in place with the host government. Yes [box checked]." The mayor's remarks evidenced serious

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An Interview with Robert O'Sullivan

Robert O'Sullivan *recently retired from the Overseas Private Investment Corporation (OPIC) after a long career in that agency's legal department, where he accumulated a vast body of experience and knowledge of political risk investment insurance losses and claims. We asked him to share some of that lore and his thoughts on some related matters.*

Mac Johnston (MJ): A lot happened over the course of your 32-year tenure at OPIC. What was your title upon retirement?

Robert O'Sullivan (RO): I was the Acting Deputy General Counsel and the Associate General Counsel for Insurance and Claims.

MJ: How long were you the Acting Deputy General Counsel?

RO: About 3 years, from the time that Deborah Burand came in as General Counsel to the time that I left.

Officially, I managed to get the job abolished because I didn't think that OPIC should have a Deputy General Counsel. That was my great management triumph! But then, when Deborah was leaving, she wanted to designate one of the associate general counsels as senior, so the position was penciled back in on the organizational chart and the new General Counsel, Don De Amicis, wanted me to keep the title (even though, when working with him, I was able to give more attention to insurance and claims than when Deborah was General Counsel). We were both focused on the transition process in which my responsibilities would be assumed by other lawyers.

MJ: I have the impression that the Deputy General Counsel carries a lot of the burden and does a lot of things that the General Counsel doesn't want to do, like personnel.

RO: Yes, it's true that the Deputy can wind up doing a lot of administrative tasks that the General Counsel prefers to delegate and special projects that the General Counsel has conceived but doesn't have the time to implement, so the job can be a bit frustrating. It's not so much that it's more work, but that the work isn't

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Contributory Fault in Investment Disputes: the Due Diligence Bar (cont'd)

deficiencies in the due diligence process and suggested that the investors may have been at least partially responsible for the project's failure.

The principle of contributory fault

The principle of contributory fault has become increasingly relevant in investment disputes, as it allows respondent states to question whether the liability and/or the damages are in fact wholly attributable to the state's actions or omissions. In investment arbitration cases, claimant investors must demonstrate to the tribunal that the unlawful act or omission by the respondent caused the claimant's loss. The United Nations Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Draft Articles"), which have been supported by the U.N. General Assembly and the International Court of Justice, provide that a responsible state is obliged to make full reparation for the injury "caused by the intentionally wrongful act of a State." If the respondent state, however, is able to prove that the claimant contributed to that loss, it is likely that the amount of compensation will be reduced or maybe even voided. The contributory fault defense is a means to weaken the claimants' submissions with respect to the causation link between the state's conduct and the injury caused to the investor. It can also be an important factor in determining the state's liability in the first place.

The contributory fault defense is a means to weaken the claimants' submissions with respect to the causation link between the state's conduct and the injury caused to the investor.

Article 39 of the ILC Draft Articles provides the basic rules for contributory fault:

> "In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

Even though the ILC Draft Articles deal primarily with diplomatic protection, an ICSID annulment committee has stated that there is no reason not to apply "the same principle of contribution to claims for breach of treaty provisions brought by individuals."

The Commentaries to the ILC Draft Articles (which are highly persuasive in arbitration cases) provide that:

> "…not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, [the principle of contributory fault] allows to be taken into account only those actions or omissions which can be considered as willful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights […] It follows that something which is not willful, negligent or otherwise culpable falls out with the principle expressed in Article 39."

A less restrictive approach towards contributory fault can be found in the UNIDROIT Principles of International Commercial Contracts, which are a private codification of certain rules governing private commercial contracts. The UNIDROIT Principles seem to be cited less in investor-state cases given that UNIDROIT's focus is on private law (with occasional incursions into public law). They do provide, however, a useful perspective on contributory fault:

> "Where harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties."

Arbitration tribunals have had different views towards contributory fault defenses. For example, in *Cargill Inc. v United Mexican States*, Mexico alleged that US claimant investors from the high fructose industry had contributed to their own losses by pressuring the US government to adopt a restrictive interpretation of NAFTA to block Mexico's sugar exports to the US. When the US cancelled Mexico's access to the US sweeteners market, Mexico retaliated with a special tax on soft drinks sweetened with US fructose which forced Mexican bottlers to use Mexican sugar instead of US fructose. The tribunal did not accept Mexico's arguments that the claimants had contributory fault and determined that the special tax was discriminatory and inconsistent with Mexico's obligations under NAFTA. In *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* and *Lauder v. The Czech Republic*, the Czech Republic faced two cases with identical facts. The arbitral tribunals, however, accepted the Czech Republic's contributory fault defense in only the *Lauder* case and relieved the state from liability. Not all respondent states have been successful with their contributory fault defenses but tribunals tend generally to accept the existence of the principle as a valid defense.

Business Risk and Contributory Fault

In the late 1990s, a group of Malaysian investors intended to develop a self-sufficient satellite city in an agricultural site in Santiago de Chile. The project included the construction of houses and apartments for diverse socioeconomic strata as well as schools, hospitals, universities, supermarkets and other service structures. Although the Chilean government issued the initial approvals by the Foreign Investment Committee and publicly endorsed the project (the Malaysian investors alleged that the President of Chile even toasted for the success of the project at a gala dinner), the zoning

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Contributory Fault in Investment Disputes: the Due Diligence Bar (cont'd)

licenses were never issued by the government and the Malaysian investors sued Chile in arbitration for their lost capital expenditures (the "MTD case"). The arbitral tribunal decided that Chile had breached the fair and equitable treatment obligations contained in the Chile-Malaysia BIT by authorizing an investment that could not take place given Chile's urban policies. It was clear, however, that the investors were also at fault as they failed to perform adequate due diligence and exercised poor business judgment during the initial phases of the project. The investors missed the fact that the land had been declared an exclusive agricultural site two years before the investment was made and apparently based their investment decision on a favorable recommendation to invest in Chile issued by a two-man team after only four days in the country. The investors also paid full price, up-front, for the project landsite and made aggressive assumptions with respect to the issuance of the required development permits. The tribunal recognized that the investors had made decisions which significantly increased their risks in the transaction and accepted Chile's contributory fault defense. In its decision, the tribunal stated that:

> "The BITs are not an insurance against business risks and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile's actions."

Needless to say, deciding how much compensation should be reduced in respect of contributory fault is a very complicated issue. Tribunals may take an "all, half or nothing" approach but there are no clear guidelines…

Once the MTD case tribunal established that the investors had contributed to their own loss, the arbitrators had to address the question of proportion. Needless to say, deciding how much compensation should be reduced in respect of contributory fault is a very complicated issue. Tribunals may take an "all, half or nothing" approach towards the compensation payable by the respondent state, but there are no clear guidelines (other than the need to evaluate it on a case by case basis). In the MTD case, the arbitral tribunal determined that the actions of both parties were material for the losses and decided to split the damages 50/50. Chile challenged the 50/50 split in an ICSID Annulment Committee, but the decision to share the losses equally was confirmed by the committee.

"BITs are not an insurance against business risks…Claimants should bear the consequences of their own actions as experienced businessmen." — *MTD Tribunal*

Management Risk and Contributory Fault

When an investor clearly has contributed to the injury it may have suffered with its own negligence or willful misconduct and such negligence or misconduct is a direct, foreseeable and proximate cause of the injury, a tribunal will likely reduce the state's liability or, if there are no other intervening state causes, it may relieve the state entirely from liability. What happens, however, in cases in which no negligence or willful misconduct can be found in the investor's "contributory" actions? This situation is illustrated by *Gemplus & Talsud v. United Mexican States*—one of the most shocking fact patterns in the history of investment arbitration, which also resulted in one of the longest awards ever written (382 pages).

Car theft in Mexico had historically been linked to serious criminal activities such as kidnappings and drug trafficking. Increased social

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Why We've Changed Our Newsletter's Name

As you may have noted, our newsletter is now the *RW Political Risk Newsletter* and no longer the *Political Risk Insurance Newsletter*. The change reflects the evolution of our practice, and the broader perspective that we have been bringing to our readers by including articles on matters that go beyond political risk insurance, such as investment disputes and arbitration. We think the wider scope of our newsletter will provide our readers with a more balanced approach towards political risks and attract a larger variety of views on subjects that are increasingly interacting with political risk insurance.

An Interview with Robert O'Sullivan (cont'd)

typically the work you want to do. The positive aspect was that I could act as a source of institutional knowledge for two new general counsels.

MJ: What kinds of errors do people often make when submitting a claim or in dealing with a loss situation?

RO: You held a very interesting symposium with both public and private insurers a few years ago, and it brought out some very helpful points. From OPIC's experience, I would say, the common error is not taking the contract into account when making the claim: in other words, not establishing that what happened was within the scope of coverage and dealing with the compensation issues and the responsibilities of the insured under the contract. As to the scope of coverage, an effective claim requires reading the contract language instead of making some kind of intuitive or impressionistic judgment. The insured has to get into the details of the specific situation and do so objectively. On compensation, I think many people don't realize the extent to which these contracts imbed accounting principles, and so they may not have the records to begin with, which gets into the duties issue—the insured may not have kept the records that it was supposed to keep. There may be no records; they may not be the right records. And trying to make up for that could be a drawn out process. I think a lot of investors don't really accept that resolving political risk claims is an interactive process, that they're supposed to respond to the questions and take them seriously. At least in OPIC's case, the insurer is trying to reach the right result; but if the insured keeps insisting that they've answered the questions already or that the insurer doesn't need to ask the questions, then it will be difficult to reach a determination or it will take a great deal longer than it would have if the insured had been properly prepared and responsive. OPIC does provide guidelines on submitting claims that I think are helpful and I'm sure other insurers do the same, but they're not often followed.

> [The] mistakes that investors make are often in the election of coverage, rather than in the claims process.

MJ: Have there been cases where an insured with an otherwise valid claim has made mistakes that cost them, either by invalidating the claim or diminishing the compensation they may have gotten from it?

RO: I think that the mistakes that investors make are often in the election of coverage, rather than in the claims process. OPIC and other insurers have fairly broad definitions of what expropriation is, for example, and will treat a lot of different investments or different transactions as investments that can be insured separately. Suppose, for example, the investor has an equity investment in a project and also a performance guarantee at risk and decides to insure only the performance guarantee against wrongful calling. The investor could have a perfectly valid expropriation claim as to the equity, as well as a wrongful calling claim, but would have no expropriation coverage as to the equity investment. The investor may have an arbitral award default claim eventually as to the guarantee, but nothing more. For various reasons, investors often have insured and uninsured investments in the same project.

Deciding how much of insurance to take is also a major difficulty, and even with the standard equity coverage, an investor has to be skilled at making projections to decide how much coverage to take over a 20 year period as well as what annual election to make. Arbitral award default coverage is even more difficult. How can you possible tell how much is going to be at stake in a dispute that hasn't arisen yet? So I think that those are the situations where investors wind up uninsured or very much underinsured.

MJ: And some people are over-insured in these cases.

RO: Some people are over-insured, particularly if they haven't read the accounting provisions that they have—that the net book value of the investment is the typical measure of recovery, or limit of recovery.

MJ: Should the election of coverage, particularly when it comes to the amount, be the investor's problem or should something be done to try to make it easier for them to deal with the uncertainty?

RO: It would be good to come up with a solution to that! [*laughter*] I think the difficulty for insurers is they have to know what their maximum exposure is. It's in their accounting statements, financial statements, and so on. Having a completely open-ended potential liability would be really difficult.

MJ: Do you find that brokers are an asset in technical matters like this?

RO: Some brokers can definitely be an asset if they themselves have a grasp of the technical aspects of this. They can also help the insured understand what it may not understand about the insurance coverage or the elections generally. I have been in certain situations where the broker has played a very useful role there.

MJ: Do you think that OPIC's ability through its bilateral agreements with host governments to deter insured losses, or to obtain recoveries, has diminished over the years?

RO: I don't think that that particular benefit of the agreements has diminished. The agreements are just procedural agreements for the program. They're not indemnity agreements: just because OPIC makes a claim payment, the foreign government doesn't have to reimburse OPIC. OPIC is just subrogated to the claims of the investor. The current form of the agreement broadens the subrogation

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rights slightly and improves the arbitration provision (based on the experience in the Dabhol case), so, if anything, OPIC's recovery rights are now stronger, but they still depend upon merits of the investor's claim against the government. The agreements were particularly useful when OPIC's claims were largely inconvertibility claims and OPIC could rely upon not just the agreements, but internal mechanisms within the US Government to use the foreign currency that OPIC acquired. Together, the agreements and internal procedures created a routine way to recovering on inconvertibility claims.

> OPIC's recovery rights [under its bilateral agreements with host governments] are now stronger, but they still depend on merits of the investor's claim against the government.

MJ: Does OPIC's openness about claims and its agency status make its approach to some claims matters different from that of a private PRI insurer? And if so, does it make it harder to settle a claim where there are ambiguities or there is a need to balance fairness and strict adherence to the letter of the policy?

RO: It is true that when a detailed rationale for a decision has to be made public, there's a certain discipline, and if you have to stretch to reach the right result, the stretching can become kind of obvious, but, after all, an insurer is supposed to be giving some weight to the reasonable expectations of the investor. When getting to the right result requires skipping a few steps or blurring a few issues, the determination is more difficult to write, but those public determinations reinforce that OPIC is trying to give the investor the benefit of the insurance, and that's a useful message.

A recent example of this is the American International School of Bamako in Mali. It was OPIC's first valid forced abandonment claim. If you read the determination, you can see that various minor requirements for compensation were waived. Forced abandonment coverage was designed to protect international schools that had to pick up and move in the event of political violence, so if, because of technicalities, OPIC's product didn't provide compensation in the situation for which it was developed, OPIC would have defeated its own initial purpose if it had not made the contract work.

MJ: Do you think it's easier for you than it is for a private insurer?

RO: I think that they do at least provide a letter to the insured. They don't get into same detail as OPIC claim determinations, and their explanations aren't public, but they at least provide some sort of explanation to the insured for what they've done or not done.

MJ: Do you think that private political risk insurers would do well to be more open about claims, including abandoning their usual confidentiality provisions in the contracts (assuming that policyholders would agree also)?

RO: I think that they have a perhaps undeserved reputation of not paying claims, and if they were more open at least as to the number of political risk insurance claims paid in what category, that would be helpful. I don't know if they would go to the extreme of releasing claims determination letters, but a bit more openness might be in their own interest. It's also a public interest issue. OPIC has a claims history that's public, but it's influenced very much by restrictions upon OPIC from time to time. In some cases, it means that OPIC was spared some huge international crisis. For example, OPIC was out of business in Latin American for the Latin American debt crisis, so OPIC's Latin American experience isn't as useful to an analyst as if OPIC had been dealing with the crisis. Often, because of developmental requirements, OPIC doesn't support categories of projects that might be extremely vulnerable, such as acquisition of large amounts of land for passive investment, a rather vulnerable investment, particularly in Latin America and Central America. OPIC's country eligibility issues get in the way: OPIC has not been open in China, a major destination for US foreign investment, for over 20 years, so OPIC's claims history has nothing to say about China risk.

> I think that [private political risk insurers] have a perhaps undeserved reputation of not paying claims, and if they were more open at least as to the number of political risk insurance paid in what category, that would be helpful.

MJ: Count your blessings…

RO: Perhaps. Once in a while, we really are spared, but the requirements for country agreements and the application of restrictions on foreign assistance have also been a bit of a frustration at times.

MJ: The "pledge of shares" issue is a hardy perennial. In practice, has it been an obstruction in claims against OPIC? Since OPIC has been both a lender and insurer on the same projects, what do you think is the best way to deal with the issue, either beforehand or after a problem arises?

RO: The major impact, unfortunately, has been that, when investors realize what the problem is, they decide not to buy the insurance. So it's been an obstacle to *issuing* the insurance in a number of cases. In cases where everyone realizes what the issue is after the fact, depending on the situation, it can be worked out. There have been efforts to work it out particularly with other government agencies and with international institutions and multilateral institutions—sometimes on a general basis, but more often on a case-by-case basis. The arrangement might be something like a partial release of

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An Interview with Robert O'Sullivan (cont'd)

the shares or a release of the shares necessary to make the claim…in short, I don't have a solution to the pledge of shares issue. [*laughing*]

MJ: What would you like to see changed at OPIC?

RO: At the institutional level, there hasn't been substantive revision of the OPIC legislation for years, and there are all sorts of things that really ought to be readjusted to reflect current realities. The eligible investor definition—that really cripples the insurance department, for example—has been a problem since I've been at OPIC.

MJ: I remember our founder, Robert Wray, who was General Counsel at AID when OPIC was coming into being, used to say, "The statute means what the General Counsel says it means." [*laughing*]

RO: There are a lot of General Counsels who feel that way. In fact, a former OPIC General Counsel wrote a memo confirming that an agency ought to be given deference in interpreting its own legislation.

MJ: At what point does legislative history become irrelevant? Because for a long time, OPIC gave great deference to legislative history, as ancient testimony or what have you, which after 30 years or something, shouldn't be binding. Should it?

RO: If it's overtaken by something else, I suppose, and clearly so. One example is the foreign government approval (FGA), which was a requirement that the foreign government approve OPIC support for each project. There's a lot of legislative history about how wonderful the FGA concept is and how it's an essential part of OPIC agreements. As practical matter, OPIC began to realize that the problems created by the requirement outweighed any advantages. And so, FGAs were made more and more automatic, until they were eliminated from the standard agreement. Now, the State Department has blessed the new version of the agreement with no foreign government approval, and so that legislative history has been overtaken by events. But the eligible investor legislative history is different in that OPIC has tried several times to get the statutory requirement revised without success within the Executive Branch, much less on the Hill, so that legislative history has some real vitality.

MJ: I guess you shouldn't ask the question if you don't want to know the answer.

RO: Right! Yes, so in short, I guess it depends on the history.

MJ: What are the best and worst aspects of being a government attorney? To some extent, you've already answered that…

RO: Well the worst, yes. I mean the bureaucracy and the pay certainly are issues. But being a government lawyer is personally and professionally very rewarding. You're doing interesting things and things that are important. I think having a meaningful professional role is some compensation for the downsides.

MJ: What's the biggest change that you've witnessed at OPIC?

RO: The big change is the growth of the finance program, which occupies most of the time of most OPIC lawyers. Taking into account direct loans, guarantees and the investment funds, it just dwarfs the insurance program, whereas in the early 1980s, it was the reverse.

Being a government lawyer is personally and professionally very rewarding. You're doing interesting things and things that are important. I think having a meaningful professional role is some compensation for the downsides.

MJ: The insurance program has, I guess you can say, correspondingly declined and that may be—and this is my opinion—due to a couple of things. One is the eligibility and policy constraints on what can be insured, and the other is just the natural force of the private sector in this field. Has OPIC struck the right balance in its dealings with the private sector?

RO: Well, I only hear about that secondhand, but it almost seems that OPIC retreated from the most profitable parts of the market. That may be the right thing to do. There were endless proposals to privatize OPIC, to have OPIC operate in a way that would encourage the development of a private political risk sector, so, in a way, OPIC has achieved what it was supposed to achieve by helping that market grow. But whether the balance is right depends on whether the current situation serves the needs of the insured investors. Are the investors getting the coverage they need at a reasonable price from the private sector? There still are large projects that only OPIC will touch and new products that only OPIC will try initially, so there's a lot of activity there, but a great deal of OPIC's coverage in recent years has gone to covering the operations of not-for-profit corporations and relief organizations that have assets exposed to political risk but have relatively small exposure in any one of the many countries where they're operating. It's the kind of coverage that the private sector probably wouldn't want to bother with because the premium would be too low, and it would be cumbersome to issue and administer.

MJ: What are you doing now that you're retired?

RO: I've been catching up on all of the things that people neglect because they have to work, and that's more of a full time job than I ever anticipated! One thing leads to another so, believe it or not, I have a full calendar during the day. I'm on the board of the high school that I went to in New York and they've got some big projects going on so I'm getting more active in that. I am also teaching a PRI course with Ken Hansen this fall at Georgetown.

MJ: Thank you very much!

RO: Thank you! ■

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concerns over the widespread theft of vehicles led to strong public support for a national vehicle registry. In 1995, Presidential Candidate Ernesto Zedillo promised the establishment of a reliable, first class, national vehicle registry (the "RENAVE"). Given that the registry would contain all relevant information relating to the ownership and use of vehicles, there was no question from the government or the general public that the registry's database had to meet the highest security standards. President Zedillo determined that the national vehicle registry would best be operated by a private concessionaire, especially since all prior government attempts to establish a vehicle registry had failed. He also designated Dr. Raul Ramos, a talented and internationally respected public official, as the technical leader of the project within the federal government.

Dr. Ramos carried out an impeccable bidding process. Under the terms of the tender, the national registration of vehicles and the payment of the registration fees were to be mandatory for all vehicles in all Mexican states. This made the project very attractive for both local and foreign investors—over 90 companies registered for the bidding process. In December of 1999, Mexico awarded the concession to a consortium formed by Argentine and French investors. The consortium appointed Argentine citizen Ricardo Cavallo, a shareholder of one of the investors, as the general manager of the project. The consortium initiated operations under a pilot program shortly after the concession was awarded. The government published an official bulletin requiring all vehicles to be registered by December 15, 2000.

Most Mexican states cooperated with the federal government and the concessionaire during the establishment of the RENAVE and its pilot phase. The exception was Mexico City. At the time, Mexico City was one of the few states that was governed by the opposition party. The mayor of Mexico City politically and publically embraced the idea that the registration fees were too onerous for the people of Mexico City. Her views on the project had a nationwide effect, since Mexico City was the state with the largest number of cars (around 5 million). If Mexico City challenged or questioned the validity of the RENAVE project, other states would find it politically appealing to relieve vehicle owners—the Mexican middle class—from the payment of the registration fees. The general manager of the concession, Mr. Cavallo, moved quickly to launch an aggressive campaign to explain the benefits of the RENAVE, appearing in television interviews and in a significant amount of newspaper reports. Cavallo became the face of the project. His marketing campaign included hundreds of ads and even pictures of himself inside a registration booth, encouraging citizens every day to register their vehicles.

On August 24, 2000, the people of Mexico woke up to a surprising revelation on the front page of their main newspaper: Cavallo had been identified in a photograph by five former political prisoners in Argentina as the person who had tortured them in the Mechanics School of Argentinean Navy during the Argentine dictatorship of the 1970s. The front page, which read "Director of RENAVE accused of being a criminal," also revealed that Cavallo was being accused of auto theft, document forgery, terrorism and torture by Judge Baltazar Garzon in Spain. Cavallo attempted to flee Mexico that day but was arrested at the Cancun airport by the Mexican police and Interpol. Spanish authorities requested that Mexico extradite Cavallo so that he could be tried in Spain for crimes of genocide, terrorism and torture committed against Spanish nationals in Argentina. The allegations in Spanish courts included widespread torture, murder, forced dispossession of prisoners' property and systematic forgeries made to facilitate thefts of property, including vehicles. These allegations were lethal to the RENAVE concession, as no one would expect vehicle owners to provide personal information to someone with Cavallo's reputation. The issue was no longer whether this information could be used for car theft, but whether it could be used for other criminal activities such as kidnappings, extortion or murder.

Dr. Ramos informed the concessionaire that the government would perform an immediate inspection of the RENAVE computer system and asked the concessionaire to provide all security passwords and files to the government and delete all back up information to ensure no one would be able to make improper use of the RENAVE database. Shortly after the inspection, the government ordered a "technical intervention" of the RENAVE in an effort to calm the Mexican public and the huge media storm generated by the Cavallo story.

Ten days after these government measures were taken, Dr. Ramos was found dead in a forest just outside Mexico City. The circumstances surrounding his death remain unknown. The initial news reports indicated that he had committed suicide as a letter (allegedly written by him) was found at the scene. This was also the version supported by all expert police reports. It was widely believed, however, that Dr. Ramos had been murdered by criminal interests in Mexico who either opposed the RENAVE project or were seeking to use the RENAVE as a means to facilitate criminal activities.

> Mexico [submitted] that there had been contributory fault by the investors who were responsible for appointing Cavallo as the general manager of the concession and making him the face of the project.

The RENAVE concession was unilaterally terminated by the government several months later. The investors claimed that the government's termination had been contrary to Mexico's obligations under the France and Argentina BITs and submitted their claim to international arbitration. Mexico's defense in the arbitration proceedings was, among other things, that there had been contributory fault

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John Salinger Retires

Many people—underwriters, brokers, and buyers—have contributed to the explosive growth of the trade credit and political risk market over the last several decades, but none more than John Salinger, who retired this year as President, AIG Trade & Political Risk, AIG P&C Inc. Salinger arrived at AIG in 1985, amidst overwhelming claims, an ECA-dominated market, and no great market confidence in the staying power of a nascent private sector player. Under his leadership, not only did AIG become a major provider of PRI/TCI coverage, but his advocacy for the private sector and his vision of a productive and complementary relationship between public and private underwriters helped bring about the diverse and robust marketplace that prevails today. He also gained a reputation as a champion of prudent underwriting practices, often in the face of competitive pressure. Nowadays John Salinger can be found on golf courses around Scottsdale, Arizona. We wish him well. ■

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by the investors who were responsible for appointing Cavallo as the general manager of the concession and making him the face of the project. Mexico stated during the hearings that "whatever prospects [the Concession] had for its public acceptance and viability were destroyed by the Cavallo scandal."

The tribunal rejected Mexico's contributory fault defense at the liability stage, concluding that none of the investors had any actual knowledge of Cavallo's criminal past and they were not at fault in failing to discover Cavallo's identity. During the quantum review, Mexico requested that the tribunal reduce any damages payable to the claimants by 50% given that the claimants had been responsible for appointing Cavallo. The tribunal rejected Mexico's submission and stated that there was no way the investors could have known or foreseen the Cavallo scandal. They also pointed out that not even the government of Mexico had been able to find any evidence in its direct, state-to-state, consultation process with Argentina that Cavallo had been involved in any criminal activities; Argentina's response to Mexico was that Cavallo's record was clean. The tribunal determined that neither Mexico nor the claimants knew or could have known of Cavallo's alleged crimes and that the investors did not contribute to the project failure and did not have any fault in this case. Interestingly, the tribunal did not question at all the importance of the Cavallo incident with respect to the concession. It acknowledged that it had been a "highly significant event" which "[damaged] the public confidence" in the project. The tribunal therefore seems to have been comfortable with the conclusion that the "Cavallo risk", i.e., the risk associated with the investors freely appointing Cavallo as the general manager of the concession, had to be borne entirely by the respondent state.

Country Risk and Contributory Fault

Other countries have claimed in investment arbitration proceedings that external intervening circumstances have been the direct cause of the injury to investors. In particular, Argentina submitted in several of its investor-state cases that the critical economic conditions of the country (as opposed to state actions) caused several projects to fail during the Argentina crisis of 2001. In the RENAVE case, however, Mexico did not point to extraneous elements which were outside the control of both the claimant and the respondent but to a specific decision by the investors to appoint Cavallo as the manager of the concession. Perhaps this is not a question of contributory fault, but rather one of allocation of risk: if the RENAVE dispute would have been between two private parties, who would have borne the Cavallo risk? ■

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