

MEMORANDUM OF DETERMINATIONS

Political Violence and Expropriation Claims of Bucheit International Ltd. Contract of Insurance No. E177

I. INTRODUCTION

Effective as of September 30, 1994 (the “*Effective Date*”), OPIC issued OPIC Contract of Insurance No. E177, a Form 234 KGT 12-85 (Second Revised) NS equity contract (Exhibit 1) (the “*OPIC Contract*”), to Bucheit International Ltd. (the “*Investor*”) with respect to the Investor’s contribution of up to \$710,000 of “branch capital” (the “*Contribution*”) to Bucheit International Ltd.- Gaza branch (“*Bucheit*”), located in Gaza City, Gaza. Bucheit was to use the Contribution to purchase equipment and machinery to be used for the expansion of a concrete casting facility in Gaza City, Gaza (the “*Facility*”). The Facility was to manufacture pre-cast concrete floors and walls for use in commercial projects in Gaza and Israel (the “*Project*”).¹

II. THE INSURANCE CONTRACT

On August 17, 1994, the Investor filed a registration with OPIC for coverage of its Contribution. On September 15, 1994, OPIC received the Investor’s application for insurance for the Project. On the Effective Date, OPIC and the Investor executed the OPIC Contract, which provided standard coverage against inconvertibility, expropriation, and political violence risk. The active amount of coverage was \$639,000 for each of inconvertibility and expropriation, and \$3,300,000 for political violence.² The OPIC Contract terminated as of March 29, 1996 (the “*Contract Termination Date*”).

On December 7, 1994, Bucheit executed a lease (the “*Lease*”) with Avigdor Lev-Ari (“*Lev-Ari*”) (Exhibit 11), the receiver of assets that had been pledged to Bank Hapoalim B.M. (the “*Bank*”). The Lease covered certain items of equipment (collectively, the “*Leased Equipment*”) that were owned by the Bank and leased to Bucheit for installation at the Facility.³ In response to the Investor’s request, on January 4, 1995, OPIC and the Investor executed an Assignment and Consent to Assignment of and Security Interest in Proceeds Payable under Overseas Private Investment Corporation Contract of Insurance No. E177 (the “*Assignment*”) (Exhibit 12), pursuant to which OPIC consented to (a) the assignment by the Investor to Lev-Ari

¹ Although Bucheit was planning to use the Contribution to purchase certain machinery and equipment, the loss of which is the subject of the Investor’s expropriation claims (see Section III.B), Bucheit leased the Facility and most of the equipment used for the Project.

² The Investor elected a higher amount of political violence coverage because the Investor bore the risk of loss with respect to the Facility pursuant to the terms of a lease between Bucheit and Avigdor Lev-Ari (the “*Lease*”).

³ See Appendix A to the Lease entitled, “Items of Equipment”. The Lease required Bucheit to insure the Leased Equipment against risk of loss and name Lev-Ari as beneficiary under the OPIC Contract during the Lease term.

of proceeds in an amount up to \$1,500,000 payable to the Investor under the OPIC Contract with respect to the Leased Equipment, and (b) the Investor's grant to Lev-Ari of a security interest in such proceeds. The Lease expired on December 7, 1999. According to the Investor, the Total Expropriation Claim (as defined below) specifically excludes the Leased Equipment.⁴

III. CLAIMS HISTORY

The Investor has submitted numerous documents setting forth three separate claims for compensation under the OPIC Contract. These documents include: (a) a notice of application (the "**Political Violence Notice**") for compensation under political violence coverage (for purposes hereof, OPIC is treating the Political Violence Notice as a claim for compensation) (the "**Political Violence Claim**"); (b) a claim for expropriation of funds coverage (the "**Expropriation of Funds Claim**"); and (c) an application for compensation under expropriation coverage (the "**Total Expropriation Claim**"). The Political Violence Claim, the Expropriation of Funds Claim, and the Total Expropriation Claim are referred to herein collectively as the "**Claims**".

On January 14, 2002, OPIC presented to the Investor's counsel for comment a Draft Memorandum of Determinations (the "**Draft MOD**"). In response, on March 29, 2002, the Investor's counsel submitted to OPIC formal written comments to the Draft MOD (the "**MOD Comments**") and notified OPIC that the Investor was withdrawing the Political Violence Claim and Expropriation of Funds Claim.^{4a} Although the Investor's counsel also requested that OPIC's Memorandum of Determinations (this "**Memorandum**") eliminate any discussion and final determination with respect to the Political Violence Claim and Expropriation of Funds Claim, this Memorandum addresses and resolves both claims, as OPIC considers the Investor's history with respect to submitting claims for compensation under the OPIC Contract relevant. Also, if the Political Violence Claim and Expropriation of Funds Claim were not resolved herein, the Investor could reinstate these claims at a later date. A comprehensive, final determination is, therefore, appropriate.

A. Political Violence Claim

In December 1995, OPIC disbursed \$1,100,000 of a \$2,000,000 loan to Bucheit (the "**OPIC Loan**"), the proceeds of which were to be used to expand the Facility.⁵ In January, 1996, the Facility stopped operating and the Investor abandoned it. On March 8, 1996, the Investor

⁴ In the August 10, 2001 "Second Supplement to Claim for Total Expropriation" (the "**Second Supplement**") (Exhibit 10), the Investor's counsel stated that "none of the identified items of equipment that were subject to th[e] [L]ease are included in [the Investor]'s Claim for Total Expropriation of vehicles, equipment and machinery set forth in its May 25, 2001 submission." See also Note 50.

^{4a} See Exhibit 47.

⁵ On December 22, 1995, OPIC entered into a loan agreement with Bucheit (the "**OPIC Loan Agreement**") with respect to the OPIC Loan, which was secured by Bucheit's pledge of the Facility as well as all of Bucheit's assets located in Gaza. As additional security, The Bucheit Children's Trust (the "**Trust**") pledged to OPIC an office building located in Washington, D.C. that was owned by the Trust. See Note 20.

submitted to OPIC the Political Violence Notice (Exhibit 2) and stated that the Investor sought recovery of its insured investment under the political violence coverage of the OPIC Contract.⁶ During an April 1, 1996 meeting with OPIC (the “*April 1996 Meeting*”), the Investor claimed that the Investor’s loss of “start-up costs and other out-of-pocket expenses” constituted an insurable investment under the OPIC Contract. The Investor also stated that its inability to recover these costs and expenses in a sale to local investors out of concern for the security situation in Gaza constituted a political violence claim under the OPIC Contract.⁷

In an April 26, 1996 letter to the Investor (Exhibit 25), OPIC advised the Investor that OPIC would not consider the recovery of such costs and expenses to be an insurable event within the scope of coverage of the OPIC Contract. The Investor did not reply to OPIC’s letter and has neither had any further correspondence with OPIC regarding the Political Violence Notice nor submitted any notice of claim under the political violence coverage of the OPIC Contract since the April 1996 Meeting. Although the Political Violence Notice was the only documentation that the Investor submitted to OPIC with respect to the Political Violence Claim, and although the Investor’s counsel notified OPIC in the MOD Comments of its withdrawal of the Political Violence Claim, as discussed above, and for the reasons set forth below, this Memorandum addresses the Political Violence Notice and resolves the Political Violence Claim as if the Investor had submitted a completed application for compensation.

B. Expropriation Claims

Following several meetings and letters between the Investor and OPIC, the Investor submitted to OPIC in August, 2000, a “formal notification of a claim” for reimbursement under the expropriation coverage of the OPIC Contract (Exhibit 3), in which notice the Investor alleged that “before March 30, 1996” the Palestine Authority (the “*PA*”) expropriated equipment and money due to the Investor and pledged to OPIC under a debenture securing the OPIC Loan.⁸

On September 21, 2000, OPIC met with the Investor to discuss both the Investor’s failure to elect any active expropriation coverage for the coverage period September 30, 1995 through March 29, 1996 (the “*Third Election Period*”) as well as documents that OPIC had provided to the Investor on May 11, 2000 (the “*May 2000 Documents*”), which the Investor contended established the Investor’s expropriation claim. In a September 22, 2000 letter to OPIC (Exhibit

⁶ In the Political Violence Notice the Investor claimed that it was seeking compensation from OPIC because “the recent terrorist acts and the impending backlash that will follow” had compromised the future of the Project.

⁷ See discussion in Section V.B below. Interestingly, despite the Investor’s assertions that, by April 1, 1996, it had already incurred losses that are the subject of both the Expropriation of Funds Claim and Total Expropriation Claim, the Investor did not raise either claim at the April 1996 Meeting.

⁸ It is relevant to OPIC’s determination of both the Expropriation of Funds Claim and the Total Expropriation Claim that the Investor acknowledged that the OPIC Contract terminated on the Contract Termination Date because the Investor claims that the PA expropriated the Investor’s funds and Bucheit’s equipment after the Contract Termination Date (see discussion in Sections V.E. and V.F.2 below). The Investor stated, “Since the expropriations took place before March 30, 1996, when the contract expired, we request your immediate payment under the terms of the contract.” See also Affidavit of Bernard J. Bucheit, Jr. (undated) (the “*May 2001 Affidavit*”) (Exhibit A), wherein Bernard J. Bucheit, Jr. (“*Mr. Bucheit*”), certified that the OPIC Contract terminated on March 29, 1996.

4), the Investor clarified its understanding of the OPIC Contract and set forth its Expropriation of Funds Claim. The Investor alleged that, beginning in January, 1996, the PA Ministry of Finance expropriated \$240,000 of funds that were due to the Investor and pledged to OPIC to secure the OPIC Loan.⁹

In an October 23, 2000 letter to the Investor (Exhibit 5), OPIC stated that OPIC had reviewed the Investor's September 22, 2000 letter and earlier correspondence, as well as points that the Investor made at the September 21, 2000 meeting, and concluded that the Investor had not provided sufficient information to permit OPIC to make a positive determination on either the Expropriation of Funds Claim or the Investor's allegation that the PA had expropriated Bucheit's equipment. In a February 5, 2001 letter to the Investor (Exhibit 6), OPIC addressed the Investor's August, 2000 notice of claim and related correspondence, and stated that OPIC found nothing to change the conclusions that OPIC set forth in the October 23, 2000 letter. OPIC did, however, invite the Investor to present to OPIC by March 1, 2001 any additional arguments and documents in support of the Investor's expropriation claim so that OPIC could reach a determination based on final documentation.¹⁰

Pursuant to a February 26, 2001 letter from the Investor to OPIC (Exhibit 7), the Investor submitted additional information in support of its Expropriation of Funds Claim and reiterated its position that the Investor had elected expropriation of funds coverage for the Third Election Period in accordance with the terms of the OPIC Contract. Pursuant to a March 5, 2001 "notice to expand claim" (Exhibit 8), the Investor expanded its Expropriation of Funds Claim to include the Total Expropriation Claim and alleged that, beginning in 1994, the PA illegally seized and retained original title documents to the equipment owned by the Investor when such equipment was shipped into Gaza for delivery to the Project site.¹¹

On May 4, 2001, OPIC met with the Investor and the Investor's counsel to discuss the March 5, 2001 notice. At this point, because the Investor had submitted three inconsistent and incomplete claims, OPIC suggested that the Investor submit one final, complete, and comprehensive claim for compensation upon which OPIC could make a final determination.

⁹ The Investor also stated that it was pursuing the \$240,000 loss through the D.C. district court, the U.S. Congress, and the Department of State (the "**DOS**"). See Note 13.

¹⁰ OPIC stated that after March 1, 2001, OPIC would consider the Investor's application for compensation to be complete and reach a determination on the matter based on all documentation received by such date. It is important to note that since March 1, 2001, the Investor has made at least three submissions to OPIC setting forth various claims for compensation under the OPIC Contract.

¹¹ In such notice, the Investor claimed that from discovery in the Bucheit Litigation (as defined in Note 13) and "[w]ith the additional information recently acquired we have reason to believe that the PA violations began with our early shipments of equipment into Gaza in 1994 ... [and that] the new disclosures reveal that the PA seized all the original titles to all of the equipment shipped into Gaza by [the Investor] beginning in 1994." The Investor added, "All other documentation stays as submitted, except that with the latest revelations we add, the acts of expropriation began in 1994 with the illegal seizing of the titles to our equipment."

In response, the Investor's counsel submitted to OPIC on May 25, 2001 a "Supplement to Claim for Total Expropriation" (the "**May 2001 Supplement**")¹² but requested a further extension of time to submit final documentation with respect to the Expropriation of Funds Claim.¹³ Although the Investor's counsel never submitted any final documentation and, in fact, notified OPIC in its March 29, 2002 submission (see Exhibit 47) that the Investor was withdrawing the Expropriation of Funds Claim, as discussed above, and for the reasons set forth below, this Memorandum addresses and resolves the Expropriation of Funds Claim as if the Investor had submitted final documentation.

In the May 2001 Supplement, the Investor's counsel stated that the Investor is seeking \$639,000 of compensation under its expropriation coverage with respect to two allegations: first, that PA customs officials illegally seized and retained original titles to the Investor's equipment during the period January 1 through September 30, 1995 (the "**Shipping Period**"); and second, that after the Equipment was delivered to the Project site on September 30, 1995 (the "**Delivery Date**"), the PA took such equipment and used it for other projects without compensation to the Investor.

Because the May 2001 Supplement was unclear as to whether the Total Expropriation Claim involved other acts of the PA, the Investor's counsel submitted to OPIC on August 10, 2001 a "Second Supplement to Claim for Total Expropriation" (the "**Second Supplement**"), in which the Investor's counsel clarified the scope of the May 2001 Supplement.¹⁴ On August 21, 2001, the Investor's counsel sent OPIC a letter in furtherance of the Second Supplement (Exhibit 10A) and enclosed documents that the Investor's counsel stated should have been included therein. At this point, the Investor's counsel told OPIC that he considered the Total Expropriation Claim to be complete; however, on October 30, 2001, the Investor's counsel submitted to OPIC a "Third Supplement to Claim for Total Expropriation" (the "**Third Supplement**") (Exhibit 10B), to which he attached the "Declaration of Itzchak Lehrer, Vice President, Ocean Company Ltd." (the "**Lehrer Declaration**"), and on November 28, 2001, submitted to OPIC a "Fourth Supplement to Claim for Total Expropriation" (the "**Fourth Supplement**") (Exhibit 10C), in which the Investor's counsel included a statement (the "**PA/PLO**

¹² The Investor's counsel stated that the May 25, 2001 letter and attachments were submitted "in further Notice and Application of the pending claim of [the Investor] for payments under coverage provided under Articles IV, V, and IX of the ... OPIC Contract ... as the result of "total expropriation". See Exhibit 9.

¹³ In the May 2001 Supplement, the Investor's counsel requested additional time on the basis that he wanted to benefit of further discovery from the PA and the Palestine Liberation Organization (the "**PLO**") in Bernard J. Bucheit v. Palestine Liberation Organization, et al. (CA No. 00-1455 GK) (the "**Bucheit Litigation**"), a matter currently before the U.S. District Court for the District of Columbia.

¹⁴ See Exhibit 10. In response to OPIC's confusion over the scope of the Total Expropriation Claim, the Investor's counsel clarified that the Total Expropriation Claim did not include a claim for either (a) taxes paid by the Investor or rebates due to the Investor from either the PA or the Israeli Government, or (b) losses of anticipated sale proceeds from the Investor's inability either to license or sell the Investor's equipment in 1998, or to remove the Equipment for the Investor's own use elsewhere in Gaza. (The Investor had previously raised both of these allegations in the May 2001 Supplement.) In response to confusion over what equipment the Investor was claiming had been expropriated by the PA, the Investor's counsel also stated that such equipment was reflected on Bucheit's September 30, 1995 balance sheet (the "**1995 Balance Sheet**") and was, therefore, included in the Total Expropriation Claim.

Statement”) made by the PA and Palestinian Liberation Organization (the “*PLO*”) that was excerpted from the Defendants Reply to Plaintiff Statement of Material Facts (the “*Defendants’ Reply*”) in Bernard J. Bucheit v. Palestine Liberation Organization, et al. (CA No. 00-1455 GK), a matter currently before the U.S. District Court for the District of Columbia, all in support of the Total Expropriation Claim.¹⁵

IV. SUMMARY OF DETERMINATION

This Memorandum examines three categories of issues with respect to each of the Claims: (a) whether the acts alleged by the Investor satisfy the substantive requirements of, and therefore, fall within the scope of coverage set forth in, the OPIC Contract; (b) whether the Investor has breached any duties under, or made any misrepresentations in connection with, the OPIC Contract so as to constitute a default thereunder; and (c) the amount of compensation, if any, payable by OPIC. In conjunction with its discussion of the substantive requirements as to scope of coverage, this Memorandum also addresses whether the Investor (i) elected active amounts of coverage for the periods during which the Investor claims that such acts and losses occurred and (ii) satisfied the procedural requirements for filing timely applications for compensation.

For the reasons set forth below, OPIC denies each of the Claims on the basis that the Investor failed to meet the substantive and procedural requirements set forth in the OPIC Contract. OPIC finds, therefore, that the Investor has failed to establish claims for which OPIC is required to pay compensation.

A. Failure to Substantiate Claims

In order to demonstrate that losses claimed by the Investor fall within the scope of coverage of the OPIC Contract, the Investor must demonstrate that all of the requirements set forth in the OPIC Contract with respect to each Claim have been satisfied. While in this case the Investor has submitted numerous documents that the Investor maintains satisfy the requirements set forth in the OPIC Contract with respect to each Claim, the Investor has, in fact, failed to provide adequate proof with respect to any of the Claims that the acts complained of, and the losses allegedly resulting therefrom, actually satisfy such requirements.

First, with respect to the Political Violence Claim, the Investor has failed to demonstrate that the bombings in early 1996 caused any loss to the Project or that the “start-up costs and other out-of-pocket expenses” allegedly incurred by the Investor constitute a “permanent loss of tangible property” as required under Article VI of the OPIC Contract.

¹⁵ Although OPIC and the Investor’s counsel both consider the Total Expropriation Claim to be the only application for compensation that the Investor has finally and conclusively submitted to OPIC (see discussion in Section III above), this Memorandum resolves any claim described in the Political Violence Notice as well as the Expropriation of Funds Claim inasmuch as the facts now available conclusively establish that such claims are without merit.

[Footnote 16 is intentionally omitted]

Second, with respect to the Expropriation of Funds Claim, the Investor has failed to demonstrate that the expropriated funds constituted a return of, or earnings on, the insured investment as required by Article IV of the OPIC Contract.

Finally, with respect to the Total Expropriation Claim, the Investor failed at the outset to substantiate either that PA customs officials actually seized and retained original title documents relating to the Investor's equipment or that the PA subsequently expropriated such equipment, also as required by Article IV of the OPIC Contract. While the Investor and its counsel have stated that OPIC should deem conclusive, and, in fact, is expected to rely upon, statements made by the Investor and by Bernard J. Bucheit, Jr. ("**Mr. Bucheit**"), the unsubstantiated statements of an insured do not constitute evidence in any case. Moreover, in this case, as discussed on pages 41-42 below, the Investor's statements are, for the most part, inconsistent and not credible on their face.

Therefore, with respect to each of the Claims the Investor has failed to meet the substantive requirements of the OPIC Contract.

B. Failure to Elect Active Amounts of Coverage

Under the OPIC Contract, compensation with respect to each Claim cannot exceed the active amount of coverage in effect on the date that an expropriatory effect commences. In this case, Section 1.06 of the OPIC Contract requires the Investor to elect active amounts of coverage and pay premiums on or before each semi-annual anniversary of the Effective Date in the amounts specified in the OPIC Contract.

While the Investor chose appropriate political violence, inconvertibility, and expropriation coverages during the first semi-annual contract period (September 30, 1994 through March 30, 1995) (the "**First Election Period**") and for the next succeeding semi-annual contract period (March 31, 1995 through September 29, 1995) (the "**Second Election Period**") and, together with the First Election Period, the "**First Two Election Periods**"), the Investor failed to elect active amounts of political violence, inconvertibility, and expropriation coverages during the periods during which the Investor claimed that losses occurred.

The Investor does not dispute the fact that it deliberately chose no active political violence coverage for the Third Election Period, which includes March, 1996, the month during which the Investor claims that it incurred losses due to political violence, and does not dispute the fact that it chose no active expropriation coverage for the Third Election Period, which includes the period subsequent to September 30, 1995, the period during which the Investor claims that losses arising out of expropriation occurred.

The only dispute, therefore, is whether the Investor chose active coverage for "expropriation of funds" during the Third Election Period. This dispute is easily resolved, however, because not only does OPIC not offer separate "expropriation of funds" coverage, but, even if such coverage were available, after careful review of the record, OPIC has concluded that the Investor did not intend to elect such coverage during the Third Election Period.

Therefore, even if the Investor had met the substantive requirements of the OPIC Contract and successfully substantiated each of the Claims, no compensation would be payable under the OPIC Contract because the Investor failed to elect active amounts of political violence, and expropriation coverages during the period during which the Investor claims that it incurred losses.

C. Failure to File Timely Claims

The OPIC Contract requires the Investor to submit a completed application for compensation within the specific time period set forth in the OPIC Contract with respect to each Claim. With respect to each of the Claims, however, the Investor failed to file a completed application within the time frame required by the OPIC Contract.

First, while the Investor filed the Political Violence Notice immediately after the bombings allegedly occurred in early 1996, the Investor not only failed to provide OPIC with information substantiating the Political Violence Claim, but the Investor never followed through on the Political Violence Claim and never filed a completed application in connection therewith.

With respect to the Expropriation of Funds Claim, the Investor waited until September, 2000 to file the Expropriation of Funds Claim, which was over four years after the Investor was required to file a completed application in order to comply with the terms of Article IV of the OPIC Contract.

Similarly, the Investor waited until May 25, 2001 to file the Total Expropriation Claim, which was over five years after the Investor was required to file a completed application in order to comply with the terms of Article V of the OPIC Contract.

Therefore, even if the Investor had met the substantive requirements of the OPIC Contract, elected the appropriate active amounts of coverage and paid the appropriate premiums, because the Investor failed to file the Claims within the required time frames, no compensation would be payable under the OPIC Contract.

D. Material Breaches and Misrepresentations

Article IX of the OPIC Contract sets forth the duties that the Investor must fulfill as a condition to payment of any compensation with respect to each Claim. These duties include, but are not limited to, making true and complete statements in connection with the OPIC Contract, paying premiums in accordance with the terms of the OPIC Contract, and maintaining financial statements in accordance with the terms of the OPIC Contract. Section 9.02 of the OPIC Contract states that a material breach of any such duty under, or a material misrepresentation by the Investor in connection with, the OPIC Contract shall constitute a default. Upon any such default OPIC may refuse to make payments to the Investor and may terminate the OPIC Contract effective as of the date of the breach by giving notice to the Investor. Pursuant to Section 9.04 of

the OPIC Contract OPIC may permit the Investor to cure a breach in a manner satisfactory to OPIC.

The Investor failed to fulfill five specific duties under the OPIC Contract:

First, as discussed below with respect to each of the Claims, the Investor failed to elect any active political violence, inconvertibility, or expropriation coverage for the Third Election Period as required by the terms of Section 1.06 of the OPIC Contract. While Section 8.06 of the OPIC Contract allowed the Investor to decrease active amounts of coverage, the Investor could do so only if it gave prior notice to OPIC and so long as the active amount elected was not less than the lesser of the book value of the insured investment and \$3,300,000, the coverage ceiling. Not only did the Investor fail to provide OPIC with such prior notice, but the Investor's purchase of other insurance from Trust International Co. Ltd. ("**Trust International**") and its statements that it intended to purchase only "expropriation of funds" coverage during the Third Election Period demonstrated that the Investor did, in fact, have an insurable interest at risk during the Third Election Period. Therefore, not only did the Investor breach its obligation to elect active coverage when it had an insurable interest at risk, but, as discussed below, the Investor also made a material misrepresentation to OPIC.

Second, the Investor failed to pay the appropriate premiums for the Third Election Period as required by Sections 9.01.5 and 1.06 of the OPIC Contract. Consistent with Section 9.04 of the OPIC Contract, however, OPIC permitted the Investor to cure this breach. OPIC had several discussions with the Investor regarding the Investor's failure to pay premiums and sent several notices to the Investor indicating OPIC's intent to terminate the OPIC Contract if the premiums were not paid by the Contract Termination Date. Because this breach was material and was not cured, pursuant to Section 9.02 of the OPIC Contract, the OPIC Contract was terminated effective as of the Contract Termination Date.

Third, as discussed above, the Investor failed to file timely applications with respect to each of the Claims. The Investor never submitted a completed application for the Political Violence Claim, submitted the Expropriation of Funds Claim over three years after the Investor was required to file an application under the OPIC Contract (and the Expropriation of Funds Claim remains incomplete as of the date hereof), and submitted the Total Expropriation Claim over five years after the Investor was required to file an application under the OPIC Contract. Therefore, with respect to the Expropriation of Funds Claim and Total Expropriation Claim, the Investor breached its obligations under the OPIC Contract.

Fourth, the Investor failed to maintain financial statements in accordance with the terms of Section 9.01.6 of the OPIC Contract, which requires the Investor to maintain in the United States true and complete copies of records and current financial statements of Bucheit necessary to compute and substantiate compensation. The only financial information that the Investor provided to OPIC was an unaudited balance sheet for the period ending September 30, 1995 (the "**1995 Balance Sheet**") (Exhibit X). The 1995 Balance Sheet was never finalized or certified, and was not prepared in accordance with U.S. generally accepted accounting principles ("**U.S. GAAP**"), as required by the OPIC Contract. Moreover, the 1995 Balance Sheet fails to substantiate compensation for any of the Claims.

Finally, the Investor failed to make a true and complete statement in connection with the OPIC Contract as required by Section 9.01.1 of the OPIC Contract. As discussed below, in late 1995 the Investor told OPIC that the Investor had nothing at risk in the Project and that the book value of the insured investment was zero. Because the Investor did, in fact, have an insurable interest at risk during the Third Election Period, the Investor not only made contradictory statements to OPIC, but the Investor also misrepresented to OPIC that the Investor had no investment at risk in late 1995. Such a material misrepresentation constitutes a default under the terms of the OPIC Contract and allows OPIC to refuse payment of any compensation thereunder.

Therefore, even if OPIC had determined that the Claims were valid and that the Investor had met the substantive and procedural requirements of the OPIC Contract, the OPIC Contract provides that, because the Investor materially breached its obligations under, and made a material misrepresentation in connection with, the OPIC Contract, OPIC has no obligation to pay any compensation to the Investor for claims brought thereunder.

E. No Compensation Payable

For the reasons set forth above, OPIC has determined that no compensation is payable to the Investor for any of the Claims.

V. SUMMARY OF EVENTS, CORRESPONDENCE, AND MEETINGS

A. Background

In March, 1995, the Project was completed and generating revenue, and Bucheit had secured two contracts for building materials. In August, 1995, OPIC representatives visited the Facility and confirmed that the Project was complete as of August 15, 1995.¹⁶

On March 1, 1995, the Investor signed a letter of engagement with International Company for Auditing & Accounting (“ICA”) to provide all financial auditing and taxation services. ICA was to work with the Investor’s accountants at the time, Berg Kaprow & Lewis (“BKL”), who were tabulating Bucheit’s pre-opening expenses.¹⁷ OPIC accepted ICA as the Investor’s independent accountants. As part of the due diligence for the OPIC Loan, OPIC requested certified financial statements from Bucheit for the period January 1, 1995 through September 30, 1995. On December 6, 1995, ICA furnished to OPIC the 1995 Balance Sheet, which was unacceptable to OPIC because it did not conform to U.S. GAAP. According to the Investor, no financial statements were prepared for Bucheit prior to September, 1995, because Bucheit was a “start-up company”.¹⁸

¹⁶ The Investor stated during a July 23, 2001 telephone call with its counsel and OPIC (the “*July 2001 Call*”) that an opening ceremony for the Project took place on August 15, 1995. (See Exhibit C)

¹⁷ See Affidavit of Bernard J. Bucheit, Jr. (dated August 10, 2001) (the “*August 2001 Affidavit*”) (Exhibit B).

¹⁸ See Exhibit C. ICA prepared the following financial statements for Bucheit: statement of cash flow through September 1995, income statement through September 1995, and general ledger trial balance as of September 30, 1995. See Exhibit 40.

On December 22, 1995, OPIC disbursed \$1,100,000 of the OPIC Loan. Bucheit was to use the proceeds for working capital and to purchase a crane and several trucks as part of the expansion of the existing Facility. In January, 1996, the Facility stopped operating, and the Investor abandoned the Project suddenly in mid-January, 1996.¹⁹ Bucheit subsequently defaulted on the OPIC Loan in early 1997.²⁰ In late February and early March, 1996, several bombings occurred in Jerusalem and Tel Aviv. In a March 6, 1996 letter from the Investor to Abdul Samia Efrangi, a Bucheit director (“*Efrangi*”), the Investor notified Efrangi that the Investor intended to file a political violence claim against OPIC under the OPIC Contract for loss of the Investor’s investment in the Project due to recent terrorist attacks in Israel.²¹ The Investor told Efrangi that the Investor intended to either sell the Facility or, if that could not be accomplished, move the Project equipment out of Gaza.²²

B. Political Violence Notice

On March 8, 1996, the Investor sent OPIC the Political Violence Notice. At the April 1996 Meeting, the Investor asserted that its inability to recover start-up costs and out-of-pocket expenses in a sale to local investors out of concern for the security situation in Gaza would constitute a political violence claim. In an April 26, 1996 letter to the Investor, OPIC responded that such costs and expenses would not be compensable within the scope of coverage of the OPIC Contract because such coverage extended only to damage or loss of tangible assets of the Project. OPIC also reminded the Investor that, in contrast with the First Two Election Periods, the Investor had not elected any active amount of coverage, and OPIC had not received any premium payment, for the Third Election Period. OPIC also advised the Investor that the

¹⁹ While the Investor stated at the April 1996 Meeting that the Project’s operation had been “temporarily shutdown in January-February due to terrorist activity that [the Investor] believed threatened [Bucheit]’s ability to operate the business as well as the safety of [Mr. Bucheit’s] children and other non-resident employees” and that Bucheit “could not operate due to border closings which prevented [Bucheit] from receiving supplies” (see Exhibit 25B), the Investor has never claimed that it abandoned the Project because of such terrorist acts or failure to receive supplies.

²⁰ OPIC declared the OPIC Loan in default in early 1998. OPIC foreclosed on the OPIC Loan and, through the sale of the Washington, D.C. office building pledged by the Trust, eventually recovered all of the disbursed amount except for approximately \$50,000 in outstanding interest payments. OPIC subsequently assigned the promissory note evidencing the OPIC Loan to the Trust in consideration for repayment. The Trust is now involved in the Bucheit Litigation.

²¹ See Exhibit 24. Following receipt of the Investor’s letter, Efrangi notified the U.S. Embassy in Tel Aviv of various problems Efrangi found with the Project. In a March, 1996 meeting with the Embassy, Efrangi claimed that the Investor owed between \$250,000 and \$350,000 in back wages to factory workers, local partners, various suppliers, vendors, and creditors in Gaza. Efrangi asked for U.S. Embassy assistance in persuading the Investor to pay these outstanding amounts so that Efrangi could keep the Facility operating and avoid the Facility’s confiscation by creditors and suppliers. (See Exhibits 24A, C) During meetings with the DOS in April, 1996, Efrangi told the DOS that the Investor indicated a desire to abandon the Project before the February and March, 1996, terrorist incidents. Efrangi speculated that the Investor might have been attempting to use the terrorist incidents and the Project’s resulting closure to escape from obligations and to collect insurance from OPIC. (See Exhibit 24B; see also discussion at Notes 60-62.)

²² See Exhibit 24. Apparently, none of the Project equipment was ever moved out of Gaza but instead was merely relocated to Bucheit’s factory site in Dir Al Balah, Gaza. See discussion in Section V.F.2.

Investor was required to maintain an active amount of coverage under the OPIC Contract at certain minimum active amounts if the Investor had any continuing investment at risk. OPIC also stated that it would terminate coverage as of the Contract Termination Date if OPIC did not receive full payment of the premium, plus interest, for the Third Election Period.²³

In the April 26, 1996 letter, OPIC also reminded the Investor that the OPIC Contract required the Investor to maintain financial statements in accordance with U.S. GAAP in order to validate coverage elections and to compute the amount of compensation payable under the OPIC Contract in the event of a valid claim.²⁴ The Investor did not reply to OPIC's letter and did not send the premium for the Third Election Period. Apart from the MOD Comments notifying OPIC that the Investor was withdrawing the Political Violence Claim (see Section III above), the Investor has had no further correspondence with OPIC regarding the Political Violence Notice.²⁵

C. Coverage Elections for the First Two Election Periods: September 30, 1994 - March 30, 1995, and March 31, 1995 – September 29, 1995

Following execution of the OPIC Contract, in an October 7, 1994 letter to the Investor (Exhibit 13), OPIC notified the Investor that the Investor was responsible for electing amounts of coverage under the OPIC Contract and for paying the appropriate premium for the First Election Period. On October 7, 1994, OPIC received from the Investor full payment of a \$16,437.60 premium due for such First Election Period (Exhibit 14). Similarly, under cover of a March 20, 1995 letter from the Investor to OPIC (Exhibit 15), the Investor attached a completed "Election of Political Risk Insurance Coverage" form (OPIC's standard election form) signed by Mr. Bucheit (the "**March 1995 Form**") for the Section Election Period. On the March 1995 Form, the Investor elected inconvertibility, expropriation, and political violence coverage for the Second Election Period.²⁶ On March 24, 1995, OPIC received \$16,437.60, the full amount of premium due and payable for the Second Election Period (Exhibit 19).

²³ See Exhibit 25.

²⁴ Id. In an April 9, 1996 letter (Exhibit 25A), OPIC requested a detailed description of Bucheit's use of the OPIC Loan proceeds, unaudited financial statements for the period ending September 30, 1995, and audited financial statements for the fiscal year ending December 30, 1995. OPIC also requested a detailed accounting of Bucheit's outstanding obligations. To this date, the Investor has not complied with this request.

²⁵ While the Investor has had no further communications with OPIC regarding the Political Violence Notice, the Investor did communicate with OPIC's Finance Department regarding the OPIC Loan. In a May 20, 1996 letter, the Investor stated that the Facility "will be attempting limited production starting on today's date". During a May 28, 1996 phone call, the Investor stated that the PA "was now able to receive some supplies (such as cement and steel) and that [Bucheit] had also received some supplies." See Exhibit 25B.

²⁶ See Exhibit 15. In the March 20, 1995 letter, the Investor stated that while the Investor was preparing the March 1995 Form, the Investor noticed that there were "no notations in the third column with regard to 'Coverage Type'" and that, since the Investor was "issued Political Violence Insurance, [the Investor] included these figures in the third column [and] ...inserted the numbers from section 1-3 of [the OPIC Contract] into the appropriate fields." As such, the Investor inserted in the third column under "Coverage Type", "Coverage C (Pol. Violence)". The Investor also typed in the following numbers on the March 1995 Form:

D. Coverage Elections During the Third Election Period: September 30, 1995 - March 30, 1996

On September 29, 1995, the Investor sent OPIC an “Election of Political Risk Insurance Coverage” form signed by Mr. Bucheit (the “*September 1995 Form*”) for the Third Election Period (Exhibit 20). While the September 1995 Form included boxes for each of the three coverage types (inconvertibility, expropriation, and political violence), with a coverage ceiling and premium rate specified for each, in contrast with the Investor’s completion of the March 1995 Form, the Investor failed to insert on the September 1995 Form either any active amounts of coverage or any premium subtotals. The Investor did, however, insert in the “total premium due” box, “\$887.50”, the amount of the administrative fee that would have been due for the Third Election Period.²⁷

(a) under “Active Amount”, the dollar amounts of coverage for each of inconvertibility, expropriation and political violence (\$639,000 for each of inconvertibility and expropriation, and \$3,300,000 for political violence);

(b) under “Premium Rate” for political violence coverage, “0.39000”;

(c) under “Premium Subtotals”, the premium rate for each of the three coverages (\$1,150.20 for inconvertibility, \$2,300.40 for expropriation, and \$12,987.00 for political violence); and

(d) under “Total Premium Due”, “\$16,437.60”.

The March 1995 Form was signed by “B.J. Bucheit, Jr., President”.

In a March 21, 1995 fax, OPIC notified the Investor that OPIC’s billing system had produced an error with respect to the March 1995 Form and confirmed that the March 1995 Form should have included a coverage ceiling in the amount of \$3,300,000 and a premium rate of .0039 for political violence coverage. OPIC also confirmed that the \$16,437.60 premium total calculated by the Investor on the March 1995 Form was correct and forwarded a new invoice to the Investor. (See Exhibit 16)

In a March 21, 1995 fax, the Investor forwarded to OPIC a revised March 1995 Form signed by “B.J. Bucheit, Jr., President”, on which the Investor inserted the following numbers on the corrected March 1995 Form:

(a) under “Active Amount”, “\$639,000” for each of inconvertibility and expropriation coverages, and “\$3,300,000” for political violence coverage;

(b) under “Premium Rate”, “0.39000” for political violence coverage;

(c) under “Premium Subtotals”, \$1,150.20” for inconvertibility, “\$2,300.40” for expropriation, and “\$12,987.00” for political violence; and

(d) under “Total Premium Due”, “\$16,437.60”. (See Exhibit 17)

Finally, by letter dated March 21, 1995, the Investor sent OPIC a copy of the final March 1995 Form, stating the Investor’s coverage elections. (See Exhibits 18, 19)

²⁷ In the Investor’s September 22, 2000 letter to OPIC (Exhibit 4), the Investor stated that the Investor did, in fact, elect on the September 1995 Form \$240,000 of expropriation of funds coverage for the Third Election Period. The Investor has made several inconsistent statements, however, as to whether the Investor intended the \$887.50 payment to represent the administrative fee or the premium payable for expropriation of funds coverage (setting aside for the moment that the September 1995 Form made no provision for electing only expropriation funds

In October and November, 1995, OPIC had several telephone calls with the Investor to discuss the Investor's choice not to elect any active coverages for the Third Election Period following the Investor's election of active coverages for inconvertibility, expropriation, and political violence for the First Two Election Periods.²⁸ Despite having signed the March 1995 Form and the September 1995 Form personally, Mr. Bucheit claimed that he had never seen the OPIC standard election form before, saw it for the first time in September, 1995, and filled it in to the best of his ability. Mr. Bucheit also claimed that he told OPIC during these calls that the Investor was unfamiliar with the OPIC election form and was not interested in inconvertibility or political violence coverage "since all contracts were in dollars and the Investor had purchased a builders risk policy locally that offered more coverage than OPIC at the same cost".²⁹ At the September 21, 2000 meeting with OPIC, however, the Investor described the Investor's failure to elect any active amount of expropriation coverage for the Third Election Period as an "oversight" and claimed that it was only after consulting with OPIC that the Investor chose not to elect any inconvertibility or political violence coverage for such Third Election Period.

The Investor claims that it advised OPIC in late 1995 that, although the Investor did not require inconvertibility or political violence coverage for the Third Election Period, the Investor wanted to purchase \$240,000 of expropriation of funds coverage for the Third Election Period in order to cover an estimated one-month's sales volume. The Investor claims, therefore, that, since the cost of the expropriation of funds coverage was \$864, and because the Investor was required to remit the greater of the total premium due and the administrative fee due, the Investor paid the

coverage under the OPIC Contract). For example, the Investor stated in its September 22, 2000 letter that the "cost of coverage was \$864" ($\$240,000 \times .0036\%$) but that, following OPIC's instructions to pay the greater of the total premium due and the administrative fee due, the Investor paid OPIC \$887.50 and inserted this amount in the "total premium due" box on the September 1995 Form. In an October 30, 2000 letter to OPIC (Exhibit 27), however, the Investor stated that OPIC had no basis to claim that the Investor made a "'premium' payment of \$886.50"; the Investor then stated that OPIC had no basis to claim that the Investor failed to pay a premium for the Third Election Period. The Investor then stated in a February 26, 2001 letter to OPIC (Exhibit 7) that expropriation of funds coverage "carried a premium of \$864", and that when the Investor filled in the "total premium due" box on the September 1995 Form, the Investor was following OPIC's instructions to pay the greater amount. The Investor stated, "we never discussed paying OPIC an administrative fee which would provide no coverage at all. ... OPIC offered expropriation of funds coverage and we accepted the offer and paid for it with a premium that was deposited by OPIC". (See Exhibit 27)

Consistent with Section 1.07 of the OPIC Contract, the September 1995 Form instructed the Investor to pay the "greater of the Total Premium Due or the Administrative Fee Due" for the Third Election Period. OPIC charges an administrative fee in order to cover OPIC's administrative costs if the amount of active coverage under a contract is very low or nonexistent. As OPIC explained to the Investor in its November 15, 2000 letter (see Exhibit 30), payment of the administrative fee is required where an investor has not elected any active coverages in order to avoid termination of the OPIC Contract (which cannot be reactivated) so that the OPIC Contract can continue in force and the insured can elect active coverage on a future election date.

²⁸ Because Section 8.06 of the OPIC Contract required the Investor to carry an amount of active coverage at least equal to the book value of the insured investment, when the Investor subsequently elected no active coverage for the Third Election Period, the election was questioned within OPIC, and OPIC subsequently contacted the Investor. (See Exhibits 21, 22)

²⁹ See Exhibits 7, 27.

“greater amount” and inserted “\$864” in the “total premium due box”.³⁰ According to the Investor, “[OPIC] accepted this request and offered no further document to [the Investor] while OPIC accepted [the Investor]’s payment for that coverage. The Investor overlooks the fact, however, that not only did the Investor fail to elect any active expropriation coverage on the September 1995 Form, but the Investor did not, in fact, insert on the September 1995 Form the premium that would have been payable for the \$240,000 of expropriation of funds coverage that the Investor claims to have purchased. Contrary to the Investor’s assertion, the Investor inserted “\$887.50” (the amount of the administration fee), and not “\$864”, into the “total premium due” box and has acknowledged that the \$887.50 represented the administrative fee, and not the premium due for such coverage.³¹

OPIC’s records show, however, that the Investor told OPIC that the book value of the insured investment was zero and that the Investor was not, therefore, required to elect any active coverage.³² In response, relying on this representation, OPIC explained to the Investor that if the Investor elected no active coverage under the OPIC Contract, the Investor would have no active coverage under the OPIC Contract until the next renewal period.³³

The Investor claims that it had notified OPIC in late 1995 of the Investor’s decision to rely on dollar-denominated contracts instead of OPIC inconvertibility coverage, and that the Investor had purchased a policy locally to cover all of the equipment instead of purchasing OPIC political violence coverage.³⁴ OPIC denies that the Investor notified OPIC of such changes in coverage. Had the Investor wanted to make such changes, the Investor would have had to have notified OPIC prior to September 30, 1995 of the Investor’s decision not to elect coverage for the Third Election Period, which the Investor failed to do.³⁵ Moreover, even if the Investor had wanted expropriation of funds coverage to cover amounts due to it under the OPIC Contract, OPIC would not have agreed to provide such coverage, as expropriation of funds coverage extends only to a narrow category of funds and does not include accounts receivable. The Investor’s account of its coverage election for the Third Election Period is, therefore, plagued by inconsistencies.

OPIC’s position that the Investor did not elect any active coverage during the Third Election Period is confirmed by the Investor’s own March 11, 2001 fax to OPIC, wherein the

³⁰ See Exhibit 4.

³¹ See Exhibit 27; see also Note 40.

³² See Statement of Michael S. Landry (undated) (Exhibit 21).

³³ Id.

³⁴ See Exhibit 4. In its September 22, 2000 letter to OPIC, the Investor addressed the Expropriation of Funds Claim and stated that the Investor “required” expropriation of funds coverage, “based on estimated sales and an estimate of \$240,000 [that] was proffered for the estimated one month loss of receivables [due to Bucheit] from the PA.”

³⁵ Not only would such elections have been contrary to the OPIC Contract (which requires an investor to carry an amount of active coverage equal to the net book value of the insured investment), “expropriation of funds” coverage does not exist as a separate form of expropriation coverage under the OPIC Contract.

Investor stated, “In September 95 [the Investor] sent OPIC a payment note, ‘Total Premium Due’, and did not select an active amount on the form sent them by OPIC, but paid the higher amount, administrative fee, as requested knowing that [the Investor] would expect reduced coverage as desired by [the Investor]”.³⁶

As discussed above, following the April 1996 Meeting, OPIC met with representatives of the Investor to discuss the Project. In an April 26, 1996 letter to the Investor, OPIC reminded the Investor that the Investor had represented to OPIC in late 1995 that the Investor had nothing at risk. OPIC reiterated the circumstances of the Investor’s coverage election for the Third Election Period and reminded the Investor that, if the Investor had a continuing investment in the Project and wished to keep the OPIC Contract in force, the Investor was required to maintain the minimum active amounts specified in such letter.³⁷

The Investor did not reply to OPIC’s letter and did not pay any premium by the Contract Termination Date. On September 27, 1996, OPIC informed the Investor that the OPIC Contract was terminated as of the Contract Termination Date for non-payment of premium (Exhibit 26).

No communications between OPIC and the Investor took place following OPIC’s September 27, 1996 letter until OPIC received the Investor’s August, 2000 notice of expropriation claim, wherein the Investor acknowledged that the OPIC Contract had expired on March 30, 1996. (See Exhibit 3)

E. Expropriation of Funds Claim

On September 22, 2000, the Investor submitted to OPIC the Expropriation of Funds Claim, in which the Investor alleged that, beginning in January, 1996, the PA expropriated \$240,000 of funds that were due to the Investor and pledged to OPIC to secure the OPIC Loan.³⁸

³⁶ See Exhibit 34.

³⁷ See Exhibit 25, wherein OPIC stated that: (a) the Investor was required by the OPIC Contract to elect for each coverage thereunder an active amount not less than the lesser of the book value of the insured investment or the coverage ceiling for that coverage, (b) when the Investor paid the administrative fee (but not the premium) for the Third Election Period, OPIC agreed to permit the Investor to pay no premium based on the Investor’s representations that the Investor had nothing at risk, and (c) if the Investor had a continuing investment in the Project and wanted to keep the OPIC Contract in force, the Investor was required to maintain the minimum active amounts described in such letter. If the Investor had any investment at risk, therefore, the Investor made a misrepresentation to OPIC and would be in default under the OPIC Contract. See Section VIII.

³⁸ See Exhibit 4. The Investor claimed that the PA ministry of finance expropriated funds due to the Investor beginning in January, 1996 “with a final \$50,000 payment on a contract,” and continuing through the date of such notice “with monthly rental payments for Bucheit’s crane of \$9000/mon. due Bucheit which was paid in cash and checks to others.” See also the Investor’s March 11, 2001 fax to OPIC (Exhibit 34), wherein the Investor reiterated the Investor’s claim that funds had been taken by the PA beginning in January 1996. See also the Investor’s February 26, 2001 letter to OPIC (Exhibit 7), wherein the Investor repeated the Investor’s position regarding election of expropriation of funds coverage and claimed that the PA “purposely diverted funds earned by [the Investor] in an on going series of predicate acts meant to defraud [the Investor] of funds, and thereby expropriating those funds.”

The Investor demanded \$240,000 of compensation from OPIC based on estimated sales and an estimated one-month's loss of receivables due from the PA.

In its letter of the same date, the Investor acknowledged that it returned the September 1995 Form to OPIC without any boxes except the "total premium due" box filled in and claimed that it selected an active amount to cover the book value of a month's earnings "(aka accounts receivable)" and paid "the higher premium as requested".³⁹ The Investor also claimed that it calculated a premium of \$864.00 for the expropriation coverage and remitted to OPIC \$887.50, the greater of the administrative fee and the premium, in compliance with OPIC's instructions.⁴⁰ The Investor claims that because OPIC deposited the payment "and was satisfied with Buecheit's submission", the Investor had properly elected effective expropriation of funds coverage.⁴¹

In an October 23, 2000 letter to the Investor (Exhibit 5), OPIC responded to the Investor's September 22, 2000 notice of claim as well as to earlier correspondence and meetings, and stated that the Investor had not provided sufficient information to permit OPIC to reach a positive determination on the expropriation of funds and equipment claims that the Investor had raised in the August, 2000 and September 22, 2000 letters.⁴² OPIC continued that, even if the accounts receivable that the Investor claimed had been expropriated by the PA had fallen within the scope of coverage under the OPIC Contract, such events occurred either after the Contract Termination Date or within the Third Election Period, during which time the Investor had elected no active coverages. OPIC also advised the Investor that the Investor's position that the Investor had inadvertently failed to choose expropriation coverage (while deliberately intending not to elect political violence and inconvertibility coverage) was contrary to other information that the

³⁹ See Exhibit 34; but see also Exhibit 7, wherein the Investor contradicted itself by stating that the \$240,000 "funds in question were not so called 'accounts receivable', but in fact, payments for work performed and purposely diverted to others thru the actions of the Finance Minister. This wrongful action by the PA prevented [the Investor] from transferring funds abroad EX-F and from controlling them in the host country."

⁴⁰ The Investor claimed that he arrived at the \$864 premium amount by multiplying the \$240,000 expropriation of funds coverage it allegedly elected on the September 1995 Form by the .0036% premium rate for such coverage (See Exhibit 4). Pursuant to Section 8.06 of the OPIC Contract, however, the Investor could pay the administrative fee, and not the premium, only where the book value of its insured investment was zero or negative. Following this logic, the Investor would have had no claim for compensation under the OPIC Contract for any loss occurring during the Third Election Period.

⁴¹ In its September 22, 2000 letter (Exhibit 4), the Investor did not address the fact that it had failed to fill in any of the boxes captioned "Active Amount" for any of the coverages under the OPIC Contract. The Investor also disregarded the statement on the September 1995 Form that "minimum election requirements for Active Amounts are specified in the [OPIC] Contract" and that "failure to elect appropriate Active Amounts ... may ... jeopardize your company's coverage". (See Exhibit 16)

⁴² OPIC stated that the Investor had not supported its allegation that the PA had expropriated money and equipment due to the Investor and pledged to OPIC, and stated that, in any event, the accounts receivable that the Investor claimed had been expropriated by the PA were not within the scope of coverage under the OPIC Contract. OPIC also explained that expropriation of funds coverage protects an investor against wrongful action by a government that affects funds constituting a return of, or earnings on, the insured investment, and that such acts must prevent the investor from transferring such funds abroad and from effectively controlling such funds in the host country. OPIC concluded, therefore, that OPIC's coverage did not apply to accounts receivable, which are "neither returns of investment nor dividends". See Exhibit 5.

Investor had provided to OPIC. Therefore, OPIC concluded that the Investor knowingly elected to have no coverage in place during the Third Election Period.

In an October 30, 2000 fax to OPIC, the Investor responded to OPIC's October 23, 2000 letter and attempted to present what the Investor referred to as a "coherent" claim for compensation due to the PA's alleged expropriation of funds. The Investor claimed that the September 1995 Form showed that the Investor had "paid a premium of \$887.50" to OPIC for the Third Election Period and that the Investor had "seen this document for the first time, ... filled it in to the best of their knowledge and returned it to OPIC." The Investor also stated that if OPIC could not resolve the claim, the parties should proceed to arbitration. (See Exhibit 27)

During November, 2000, OPIC and the Investor exchanged several pieces of correspondence, pursuant to which OPIC repeatedly stated its position that the Investor had failed to make a plausible claim for expropriation and payment of compensation under the OPIC Contract.⁴³ In a November 2, 2000 letter to the Investor, OPIC acknowledged the Investor's right to invoke arbitration under the OPIC Contract but suggested that it would be more effective if the Investor made its "most persuasive case to OPIC first".⁴⁴

In light of the continued exchange of correspondence between OPIC and the Investor, OPIC requested on February 5, 2001 that the Investor provide OPIC with a complete, final, and comprehensive application for compensation so that OPIC could assess the claim in its entirety.⁴⁵ In response, the Investor submitted additional information in support of its Expropriation of Funds Claim⁴⁶ and submitted to OPIC on March 5, 2001, the Total Expropriation Claim, in which the Investor alleged that, "beginning in 1994", the PA illegally seized and retained original titles to certain items of equipment when the equipment was shipped into Gaza for delivery to the Project site and "thereby directly deprived the [I]nvestor of fundamental rights to the equipment in Gaza." (See Exhibit 8) At this point, because the Investor had submitted three incomplete and inconsistent claims, OPIC suggested that the Investor submit one final, comprehensive claim upon which OPIC could make a final determination. In response, the Investor submitted the information set forth in Section F below. In addition, as discussed in Section III above, the Investor's counsel then submitted to OPIC on March 29, 2002 the MOD Comments, wherein he notified OPIC that the Investor was withdrawing the Expropriation of Funds Claim.

⁴³ See, e.g., Exhibits 28 - 32.

⁴⁴ See Exhibit 28. In response, the Investor notified OPIC on January 15, 2001 (Exhibit 33) that the Investor was requesting arbitration under the OPIC Contract with respect to the PA's alleged expropriation of funds, and requested OPIC to agree in writing to the Investor's use of the D.C. District Court as the venue for alternative dispute resolution. OPIC spoke with the Investor on January 22, 2001 regarding the arbitration issue and explained that the OPIC Contract provided for arbitration to be administered only by the American Arbitration Association, and that the Investor had, therefore, no legal right to chose an alternative forum. OPIC's position was restated in its February 5, 2001 letter to the Investor (see Exhibit 6). No further communications regarding arbitration have taken place between OPIC and the Investor.

⁴⁵ See Exhibit 6.

⁴⁶ See, e.g., Exhibits 7, 34-36.

F. Total Expropriation Claims

In the May 2001 Supplement, the Investor's counsel submitted to OPIC a \$639,000 Total Expropriation Claim based on (i) the alleged illegal seizure and retention by PA customs officials of original "title documents" relating to the Equipment (as defined below) during the Shipping Period and (ii) the PA's alleged expropriation of such Equipment after the Equipment was delivered to the Project site. On August 10, 2001, the Investor's counsel submitted the Second Supplement⁴⁷, and on August 21, 2001, the Investor's counsel supplemented the Second Supplement.⁴⁸ On October 30, 2001, the Investor's counsel submitted to OPIC the Third Supplement, to which he attached the Lehrer Declaration.⁴⁹ Finally, on November 28, 2001, the Investor's counsel submitted to OPIC the Fourth Supplement, in which he included the PA/PLO Statement. The Investor's counsel claimed that the PA/PLO Statement "would seem to conclusively confirm [the Investor]'s proof concerning the taking at the border and holding by the PA Customs Authority of all title documents for the [E]quipment ...".^{50a}

⁴⁷ See Exhibit 10.

⁴⁸ See Exhibit 10A.

⁴⁹ See Exhibit 10B. The Lehrer Declaration was executed on October 22, 2001. In the Lehrer Declaration, Itzhak Lehrer ("**Mr. Lehrer**"): (a) stated that he was, on such date, Vice President of Ocean Company Ltd. (the "**Shipping Agent**"), and that the Shipping Agent handled the shipment of the Investor's equipment and goods into Gaza in August or September, 1995; (b) summarized the Palestinian legal requirement that "all goods being transported into Gaza be accompanied by bills of lading, certificates of origin, commercial invoices and similar documents showing the origin of the goods and their stated value", and stated that "[w]ithout such documentation, goods would not be permitted into Gaza"; (c) stated the "customary" process for retention of such documentation by Palestine customs officials and allocation of customs duties between Palestine and Israel, and stated that "[t]he documentation normally would then be returned to the consignee in the ordinary course of business; and (d) stated that the Investor's equipment and goods were successfully delivered into Gaza. Mr. Lehrer concluded that, "[t]herefore, [the Shipping Agent] must have given the documentation accompanying the goods to Palestinian customs officials who, as noted, would have retained the documentation to allow the determination of the allocation of taxes between Israel and Palestine. The Palestinian customs officials would not have given a receipt for the documentation." It is important to note several deficiencies in the Lehrer Declaration. First, Mr. Lehrer has not declared that he had first-hand knowledge of either the shipment of the Equipment into Gaza or its delivery to the Project site, or that he was even employed by the Shipping Agent during the Shipment Period or on the Delivery Date. Second, Mr. Lehrer's statements indicate that he has no first-hand knowledge of the retention by PA customs officials of original title documents. In addition, Mr. Lehrer states only his knowledge of what would happen in the ordinary course of business when goods are shipped into Palestine and addresses how PA customs officials would handle "documentation accompanying the goods" and not original title documents in particular.

^{50a} See Exhibit 10C. The Investor's counsel stated, "From a recently filed Defendants Reply to Plaintiff Statement of Material Facts in the United States District Court for the District of Columbia, Docket No. 00 1455 GK ("**Defendants' Reply**"), Defendants, The Palestine Liberation Organization and The Palestinian Authority, state in paragraph 9 as follows:

'The Palestinian Customs officials retained the documents for Custom purposes pursuant to local Palestinian laws. These documents are released to the owner once the equipment is exported out of the country. This is done in order to protect local investors and contractors from being deprived of their right pursuant to any contracts entered into with the company.'" (the "**PA/PLO Statement**")

(Definition in italics added)

1. *Title Documents*

With respect to the first part of the Total Expropriation Claim, the Investor alleges that PA customs officials at the Gaza border retained original documents evidencing the Investor's ownership of, and title to,⁵⁰ certain vehicles, equipment and materials (collectively, the "**Equipment**")⁵¹ that the Investor claims to have exported from the U.S. and delivered to the

⁵⁰ The Investor stated during the July 2001 Call that the Crane, Flatbed Trailers, Lowboy Trailer, Kenworth Cab, Container, and Plymouth Van (each as defined in Note 51) constituted all of the items of equipment that the Investor owned and imported from the United States to Gaza, and that no other items of equipment, machinery, or vehicles were the subject of the Total Expropriation Claim. For example, the Investor claims that the Leased Equipment was delivered to the Project site through the United Kingdom and is not, therefore, included in the Total Expropriation Claim. See Exhibit 9F. In support of this assertion, the Investor attached to the Total Expropriation Claim a copy of an insurance policy issued by Trust International Insurance Co. Ltd. ("**Trust International**") for the period December 1, 1995 through November 1, 1996 that appears to cover the Leased Equipment and not the Equipment. It appears, however, that Trust International did, in fact, insure the Equipment as well during the Third Election Period, which is consistent with the Investor's statement to OPIC in late 1995 that the Investor had purchased a policy locally to cover the Equipment. The fact that the Investor purchased this insurance proves, however, that the Investor had an investment at risk during the Third Election Period and, therefore, misrepresented to OPIC that the Investor had no investment at risk. Such a misrepresentation constitutes a default under the OPIC Contract that gives OPIC the right to withhold any payments of compensation. See Section VIII.

⁵¹ The Investor attached to the Total Expropriation Claim several instruments that identify various items of equipment that are the subject of the Total Expropriation Claim and the valuations for each:

1. Copy of a June 13, 1995 commercial invoice (the "**Commercial Invoice**") that identifies the following items of equipment:

- (a) one used Grove rough terrain crane, Serial Number 48973, sold "as is" (valued at \$33,000) (the "**Crane**"),
- (b) one used 40-foot flatbed trailer, SN E32898, sold "as is" (valued at \$4,000),
- (c) one used 40-foot flatbed trailer, SN WX810358, sold "as is" (valued at \$4,000) (together, the "**Flatbed Trailers**"),
- (d) one detachable lowboy trailer, Serial Number 5319, sold "as is" (valued at \$7,000) (the "**Lowboy Trailer**"), and
- (e) one used Kenworth tractor truck cab, Serial Number 1XKEDB9X2F361193, sold "as is" (valued at \$8,200) (the "**Kenworth Cab**").

TOTAL: \$56,200 (see Exhibit 9A);

2. Chart that includes a hand-written note to "Ghassan" dated November 1, 1995, and that requests that the following valuations be given "to the insurance company" for "replacement cost" purposes:

- (a) Crane: \$363,000,
- (b) Flatbed Trailers: \$34,240,
- (c) Lowboy Trailer: \$53,600,

(d) Kenworth Cab: \$90,950, and

(e) “container of equipment, parts, etc.” (the “*Container*”): \$56,600.

TOTAL: \$542,490 (see Exhibit 9D-1). After subtracting the value of the Container (which was not included on the Commercial Invoice), the Investor’s valuation of the Equipment for insurance purposes was approximately ten times the amount of the Investor’s investment in the Equipment. Moreover, this amount is \$430,290 greater than the total amount set forth on the Commercial Invoice;

3. Letter dated October 18, 1995 from the Investor to BKL listing the same items of equipment. Mr. Bucheit, who signed the letter, stated: “The equipment and container of miscellaneous items as stated below have been legally transferred to Bucheit International Limited and their valuation is as indicated”:

(a) Crane: \$363,800,

(b) Flatbed Trailers: \$34,240,

(c) Lowboy Trailer: \$53,500,

(d) Kenworth Tractor: \$90,950, and

(e) Container: \$56,000.

TOTAL: \$598,490 (see Exhibit 42). Again, after subtracting the value of the Container, the Investor’s valuation of the Equipment was even more inflated than the Investor’s valuation for insurance purposes; moreover, this amount is \$486,290 greater than the total amount set forth on the Commercial Invoice;

4. Copies of two undated dock receipts (together, the “*Dock Receipts*”) that identify the Kenworth Cab, the Lowboy Trailer, the Crane, and the Flatbed Trailers but do not include any valuations. (See Exhibits 9B, 9C) Pursuant to a hand-written note from Kurt Bucheit, the Investor authorized Ogden Ashdod Ltd. to arrange transportation of these five items from Haifa, Israel, to Erez, Gaza (see Exhibit 9D);

5. Copy of an “Ohio certificate of title” (the “*Van Title*”) for a 1994 Plymouth van (the “*Plymouth Van*”), ID Number 2P4GH2530RR766105 with a value of \$17,204.15 (see Exhibit 9E).

The Crane, Flatbed Trailers, Lowboy Trailer, Kenworth Cab, Container, and Plymouth Van are referred to herein collectively as the “*Equipment*”.

6. Copy of the 1995 Balance Sheet, which includes the following entries:

(a) “Machinery & Equipment”: \$638,634.86, and

(b) “Trucks & Autos”: \$220,000.00

TOTAL: \$858,635 (see Exhibit X); and

7. March 12, 2001 letter from the Investor to OPIC (see Exhibit 35) that encloses “so a proper valuation can be attributed to our loss” “an accountants certificate and schedule furnished OPIC in 1995”. Attached to the letter is a schedule that attributes a “Directors valuation” of \$598,490 to “value of plant and machinery sent from US to Gaza”. TOTAL: \$598,490.

In addition, OPIC had in its files a hand-written chart attached to a July 27, 1998 letter from the Investor to OPIC in which the Investor referenced OPIC’s July 20, 1998 request for a list of Bucheit assets that could be liquidated in order to repay the OPIC Loan (see Exhibit 9K). The Investor stated that “no breakdown of costs, freight to Israel,

Project site during the Shipping Period.⁵² The Investor claims that during the Shipping Period, the Investor, through its agents, transported from Baltimore, Maryland, through Haifa, Israel, and

Israeli charges, identifying numbers on equipment and manufacturer were available. This should be sufficient to determine a sale value in place.” The chart identifies the following items:

- (a) Crane: \$188,000,
- (b) Flatbed Trailers: \$19,000,
- (c) Lowboy Trailer: \$28,000,
- (d) Kenworth Tractor: \$17,000, and
- (e) Container: \$33,000.

TOTAL: \$315,000 (see Exhibit 9J). Again, after subtracting the value of the Container, this amount is \$258,800 greater than the total amount set forth on the Commercial Invoice. The chart also notes an additional \$78,000 in freight costs. Here, it should be noted that, dealing with OPIC, as creditor under the OPIC Loan Agreement, the Investor lowered the value of the Equipment by about half.

During the July 2001 Call, Mr. Bucheit clarified that the Total Expropriation Claim included all of the Equipment and stated that no equipment, machinery, or vehicles other than the Equipment were listed on the 1995 Balance Sheet. According to Mr. Bucheit, therefore, the value of the Total Expropriation Claim is reflected on the 1995 Balance Sheet (\$639,000). Mr. Bucheit also stated that no other equipment was exported from the United States into Gaza, which contradicts the August 2001 Affidavit, wherein Mr. Bucheit certified that “additional machinery and equipment was purchased for the Investor by the management in Gaza from local firms in Gaza or imported from Israel and this equipment was entered on the books of [the Investor] by their local accountants, ICA.” Mr. Bucheit also stated that the Crane had been purchased by the Investor in 1988, and was rebuilt by the Investor and transferred to Bucheit in early 1995. See Exhibit C.

Note, however, that Mr. Bucheit’s statements here, as well as statements he made in the August 2001 Affidavit (wherein he certified that the Equipment was “totally reconditioned at [the Investor]’s expense before shipment to Gaza), conflict with the information stated on the Commercial Invoice, wherein each of the items listed therein was sold by the Investor to Bucheit “as is” as of June 13, 1995. The Investor’s statements also conflict with the statement made by the Investor’s counsel in the Second Supplement that the Equipment was promptly delivered to the Project site “in ‘good as new’ condition”. These statements conflict yet again with the Investor’s statement in a June 19, 1995 letter to the Government of Israel Ministry of Transport (Exhibit 41), wherein the Investor stated that, since the Crane, Flatbed Trailers, Lowboy Trailer, and Kenworth Cab were “used” and had been depreciated on a seven year basis, the Investor carried the items on its books at 5% of purchase price. The Investor added, “these values are well below commercial invoice amounts.”

During the July 2001 Call, Mr. Bucheit also stated that because commercial invoices were needed in order to import the Equipment into Gaza, the Investor created the Commercial Invoice and included the valuations set forth thereon “for customs purposes only”. He stated that the “actual” value of the Equipment as on the Investor’s books was as set forth in the 1995 Balance Sheet. In the August 2001 Affidavit, Mr. Bucheit explained the discrepancy between the valuation for customs purposes versus the valuation entered on the 1995 Balance Sheet by stating, “the pre-owned equipment sent from Ohio had a book value placed on it after consultation with [the Investor]’s freight forwarder and Gaza importer as related to pre-owned equipment. [The Investor] wrote to Israel minister of transportation on June 19, 95 explaining how their commercial invoice amounts were determined and their reason for the low commercial valuations. (*[The Investor] was advised by freight forwarders that Israeli customs would place their own valuations [on] used equipment*)”. [italics in original]

⁵² In the Investor’s March 5, 2001 fax to OPIC (Exhibit 8), the Investor stated, “the original titles traveled with the equipment from its point of origin to Gaza, the PA has retained these titles in violation of [the Investor]’s rights, and

into Gaza at Erez Junction, “three (3) shipments of vehicles, equipment and materials ... all destined for and delivered to the Project site in Gaza”. The Investor also claims that each item of Equipment was accompanied by individual “commercial invoices, certificates of origin, packing lists, and bills of lading” (collectively, the “**Documents**”), and that the Shipping Agent hand-delivered originals of the Documents to uniformed customs officials of the Palestine Ministry of Finance at Erez Junction, Gaza. The Investor further asserts that, “consistent with the Protocol on Economic Relations between the PLO and Israel” (the “**Protocol**”) ⁵³, PA customs officials kept originals of the Documents when the Equipment was imported into Gaza, alleging that the customs officials needed the originals in order to secure a rebate for the Investor of duties and fees that the Investor had previously paid to Israeli authorities.⁵⁴

The Investor’s counsel also maintains in the Fourth Supplement that the PA/PLO Statement excerpted from the Defendants’ Reply (see Note 50a) “would conclusively confirm [the Investor]’s proof“ that when the Investor imported the Equipment into Gaza, PA customs officials actually took and retained at the Gaza border originals of all of the Documents. The Investor goes on to claim that both the PA and PA customs officials have consistently refused to provide the Investor with originals of, or written acknowledgement of the transfer to customs officials of, these Documents⁵⁵ and argues that because the PA has refused to return originals of

now it is clear that it is why [the Investor] could not license any of their equipment in Gaza, sell or remove our equipment in Gaza, list any of the specific equipment on the debenture filed by OPIC in Gaza and of course never collect on the rebates from the PA for customs or other duties paid in Israel on manufacturing equipment shipped into Gaza. The *original titles* were held by the local authorities as it crossed the border, and that explains the fact we never could collect from the authority on our rebates. ... All other documentation stays as submitted [to OPIC], except that with the latest revelations we add, the acts of expropriation began in 1994 with the illegal seizing of the titles to our equipment.” [emphasis added] As discussed in Section VI.C.1.b, however, even if the Investor could prove that PA customs officials actually seized and retained the original titles, such seizure and retention would not deprive the Investor of its fundamental interest in the insured investment (*i.e.*, in the Equipment) because keeping such titles is not tantamount to actually taking title to the Equipment from the Investor. All the Investor would need to do is to recreate bills of sale or other appropriate invoices for the Equipment in order to document their transfer.

⁵³ The Protocol on Economic Relations between the Government of the State of Israel and the P.L.O., Representing the Palestinian People (Paris, April 28, 1994) (Exhibit 46).

⁵⁴ The Investor claims that PA officials kept the originals of the Documents in accordance with Article 6(B) of the Protocol and that these violations were a systemic series of acts that “revealed that the PA seized all the original titles to all of the [E]quipment shipped into Gaza by [the Investor] beginning in 1994”. See Exhibit 8

⁵⁵ The Investor attaches three pieces of correspondence to support its assertion:

(a) a November 15, 1997 hand-written note from Mr. Bucheit to Tim Gilman at the U.S. Embassy, wherein Mr. Bucheit asked Gilman, “if Mr. Samia [Efrangi] has a proper bill of sale for the van in his garage, the Grove crane, the computer, the Kenworth truck, or the three trailers, or the other equipment reported stolen ask him to prove it.” (See Exhibit 9G);

(b) a May 26, 1997 hand-written note from Mr. Bucheit to Hasan Abdel Rahman of the PLO, in which Mr. Bucheit stated, “I tried on ‘3’ occasions to have you look into the very serious transgressions in Gaza and whatever reason you chose to ignore my appeals to you.” (See Exhibit 9H); and

(c) a July 12, 1999 letter from Mr. Bucheit to Minister Nashashebi of the Palestine National Authority Ministry of Finance, in which Mr. Bucheit listed several “serious violations” that have occurred, none of which, however addresses the issue of the original Documents allegedly taken by PA customs officials.

the Documents, the Investor lacks proper evidence of title to the Equipment. The Investor claims that, as a result, the Equipment has remained in the possession and control of the PA, thereby constituting total expropriation of the Project.⁵⁶ (See Exhibit 9)

2. Equipment

With respect to the second part of the Total Expropriation Claim, the Investor does not dispute that the Equipment was delivered to the Project site.⁵⁷ The Investor claims, however, that, sometime after the delivery, the PA expropriated the Equipment by “consistently refusing the Investor’s access to, and denying the Investor possession of”, such Equipment. The Investor claims that the Equipment has been and remains “totally expropriated” by the PA since the “Initial Policy Period” (which the Investor’s counsel has defined as “September 30, 1994 through September 30, 1995”).⁵⁸ The Investor also claims that the PA seized the Equipment and, beginning on September 1, 1997 and continuing until March, 1999, used the Equipment at other sites in Gaza without permission from, or compensation to, the Investor.⁵⁹ Although Mr. Bucheit stated in the August 2001 Affidavit that the PA had recently sold the Crane and that the buyer had agreed to pay the Investor “an additional \$7,000” for the Investor’s agreement to the sale, the Investor maintains that its attorney in Gaza has been unable to locate any of Bucheit’s other equipment. (See Exhibit B) Moreover, the Investor’s counsel concludes that, apart from the Crane, “to the best of Mr. Bucheit’s knowledge, based on reports from persons who visited the

Instead, the only mention of the Equipment is Mr. Bucheit’s claim that he would receive a “five year income tax moratorium, a rebate on all V.A.T. and customs duty on our machinery and equipment paid in Israel for the machinery delivered to Gaza.” (See Exhibit 9I).

The Investor has confirmed that its Total Expropriation Claim does not include a claim for taxes that the PA has not refunded to the Investor.

With respect to the November 15, 1997 note, however, the Investor overlooks two facts: first that, because Efrangi was a Bucheit director, if Efrangi did, in fact, have the bills of sale for the Equipment in his possession, the PA could not have taken such documents; and second, that if Efrangi did, in fact, have the Plymouth Van in his possession, the PA could not have taken that either.

⁵⁶ The Investor claims, for example, that it attempted to sell various pieces of Equipment in Gaza to repay the OPIC Loan, but without the necessary papers any sale proved impossible. The Investor also claims that because PA customs officials retained originals of the Documents, the Investor “was never able to purchase PA license plates for any of their vehicles because they never received their documents back from the PA”. (See Exhibit A)

⁵⁷ See Exhibit 9, where the Investor states that the Equipment was “in fact, admitted into Gaza and initially delivered to the Project site”.

⁵⁸ *Id.* The Investor’s counsel stated in the May 2001 Supplement that the PA’s actions have denied the Investor the ability to “maintain, repair or use [the Equipment] and/or earn revenues for its Gaza enterprise in order to pay its loan obligations to OPIC and others” and that this denial by the Palestine Authorities “has further prevented [the Investor] from licensing or selling [the Equipment] to third parties, as it attempted to do several times in 1998, or even remove [the Equipment] for [the Investor]’s own use elsewhere in Gaza.”

⁵⁹ The Investor claims that all of Bucheit’s equipment “(with the exception of the leased plant that was bolted down at the site) has been working on PA projects throughout Gaza without [the Investor]’s authorization and the PA has ignored all pleas to return the same.”

Project [s]ite ... [the Investor] has no other knowledge as to the whereabouts, condition or identity of the possessors of the remaining machinery, equipment and vehicles delivered to [the Investor] to the [s]ite as part of its capital contribution.”⁶⁰

To support its expropriation claim, the Investor alleges that on March 12, 1996, after workers in Gaza notified Bucheit management that moulds and equipment had been confiscated from the Project, the Investor instructed Bucheit management to send all equipment, moulds, and material to the Bucheit facility site in Dir Al Balah, Gaza. According to the Investor, the Investor’s manager notified Bucheit management on September 7, 1997 that the “crane, trailer, crane carrier, surveying equipment, computer and van” had been removed from the Project site and were scattered around Gaza. The Investor maintains that it notified the prosecuting attorney in Gaza on October 1, 1997 (with a copy to OPIC and the U.S. Embassy in Tel Aviv) that Bucheit’s equipment had been stolen and that the Investor was trying to recover it.⁶¹

The Investor’s claim is inconsistent with the record, however. First, according to a report prepared by the Department of State (the “*DOS*”) in early 1998 entitled, “Background Paper: The Investment of Bucheit International, Ltd. In The Gaza Strip” (the “*Embassy Report*”), following Mr. Bucheit’s request that U.S. Government officials address his assertions that the PA had expropriated the Equipment, the DOS investigated the Investor’s complaints and concluded that the Investor had provided no evidence to support his allegation of expropriation.⁶² The

⁶⁰ See Exhibit 10. Because the Equipment was pledged to OPIC to secure the OPIC Loan, OPIC Finance requested assistance from the U.S. Embassy in Tel Aviv. In a December 22, 1999 cable to the Embassy (Exhibit 44), OPIC requested that the Embassy ask Dr. Nabeel Shaath, PA Minister of Planning and International Cooperation, about any knowledge Shaath might have had regarding the Crane, and requested a meeting between OPIC and the PA Ministry of Finance to obtain information on payments made by the Ministry of Finance to the Investor for work performed or for payments made to third parties for use of the Investor’s equipment.

⁶¹ See Exhibit 5. For instance, the Investor claims that “some of the equipment ha[d] been taken by or on behalf of [PA] personnel and employed under at least one fraudulent lease at sites in Gaza, including the Kajeno Project-Gaza Beach and Gaza Emergency Port for Military Financial Administration, without any permission from or compensation to [the Investor].” To substantiate the claim, the Investor also submitted to OPIC on April 2, 2001, several pieces of correspondence relating to the Crane, which the Investor claims was operating at a port in Gaza without the Investor’s approval and which the PA refused to turn over to the Investor’s representatives in Gaza. (See Exhibits 36, 36A) The Investor stated in its March 11, 2001 letter to OPIC (Exhibit 34) that, beginning in early 1996, the PA, without the Investor’s permission, seized the Crane and signed a fraudulent lease for its use. The Investor stated that the Crane “is at the seaport today and still the PA refuses to turn over the [C]rane or its keys to [the Investor]’s attorney in Gaza.” This information was superseded by the Investor’s August 2001 Affidavit, as discussed above.

The Investor also claimed that since 1998, the Investor and OPIC have attempted to sell the Equipment to buyers outside Gaza but that “the PA has refused to turn over any equipment nor allow its movement in spite of a debenture agreement filed in Gaza by OPIC which granted OPIC a first lien position on all of [the Investor]’s assets.” However, this portion of the Total Expropriation Claim is simply inaccurate as to any attempt by OPIC to sell. As discussed in Note 20, OPIC foreclosed on the OPIC Loan in 1998, sold the building owned by the Trust, recovered the full amount of the OPIC Loan, and subsequently assigned the promissory note evidencing the OPIC Loan to the Trust.

⁶² See Exhibit 45. Mr. Bucheit had requested that the U.S. Government address Bucheit’s commercial difficulties and disputes as well as his assertions that the PA expropriated the equipment. For example, according to the Embassy Report, on September 30, 1997, Mr. Bucheit claimed that the Crane and a trailer had been removed from the Project site and were being used to construct a fishing pier, and on October 30, 1997 complained to Palestine

Embassy Report concluded, however, that the Investor's assertions that the PA had a role in Bucheit's commercial difficulties and disputes were unfounded and that the Investor had provided no evidence to support its allegations that refunds of import taxes were due or that expropriation of Bucheit's assets had occurred. In fact, according to the Embassy Report, when U.S. Government officials asked Mr. Bucheit for additional details about the alleged expropriation, Mr. Bucheit described "complicity by PA officials in allowing his partners and directors to use Bucheit assets for gain". Because Mr. Bucheit did not present evidence of PA expropriation or complicity, the DOS viewed these disputes as local law matters not involving the U.S. Government. The Embassy Report concluded: "The [Bucheit] investment in Gaza is plagued by disputes between the American and local partners/directors. There is neither an appropriate role for the State Department, OPIC, or Embassy Tel Aviv with regard to arbitrating and resolving these disputes Assertions that the Palestinian Authority has expropriated [Bucheit] property or improperly held back import tax refunds have not been substantiated."

Second, the Investor has admitted that it fabricated the Total Expropriation Claim. In response to the Embassy Report, the Investor prepared a report (the "***Bucheit Report***") that it sent to Congressman James Traficant on April 20, 1998 (Exhibit 43). In the Bucheit Report the Investor replied to each of the points addressed in the Embassy Report. Referencing the section of the Embassy Report entitled, "Disputes with the Palestinian Authority", the Investor stated: "Bucheit's equipment – (Collateral for the O.P.I.C. Loan) has been taken without [Bucheit's] knowledge or approval and against their will and [is] reportedly being used on a Palestinian Authority project. Bucheit does not claim the equipment was expropriated by the Palestinian Authority but since Bucheit cannot institute criminal investigations or action they followed instructions from the PLO in D.C. and notified the prosecuting attorney four times without a single response." [emphasis added] This statement is completely consistent with the results of the DOS investigation as summarized in the Embassy Report, which not only determined that Bucheit's commercial problems involved local disputes among Bucheit partners but also concluded that the Investor had failed to substantiate its claim that any equipment had been expropriated by the PA or anyone else.

Finally, the record demonstrates that, contrary to the Investor's assertions that the Investor has no knowledge of the whereabouts of the Equipment, almost all of the Equipment was, in fact, stored at Bucheit's factory in Dir Al Balak, exactly where the Investor instructed Bucheit management to send the Equipment in March, 1996. According to the Attachment Report relating to a complaint filed against Bucheit by Trust International on October 25, 1997,⁶³ after a judgment was entered in favor of Trust International in early 1998, representatives of the

legal authorities that additional equipment had been removed from the Project site without Bucheit's consent. Mr. Bucheit had claimed that these actions were taken by Gazan businessmen who were originally represented to OPIC as shareholders and directors of the Investor. Mr. Bucheit then filed a criminal complaint in Gaza seeking recovery of the equipment but claimed his complaint had been ignored. According to the Embassy Report, U.S. Government officials were actively involved in assisting Mr. Bucheit in resolving these disputes.

⁶³ In its complaint, Trust International claimed that it insured all of Bucheit's equipment and property pursuant to an insurance policy having a monetary value of NIS 134,695 (approximately U.S.\$44,000) and that Bucheit had failed to pay outstanding amounts due thereunder. Trust International then filed a Request for a Temporary Attachment against Bucheit, which resulted in the Gaza District Court's placing a temporary attachment on all of Bucheit's assets, tools and equipment, including "the [Plymouth Van], as well as the [C]rane working in Gaza Port...".

Gaza District Court went to the Gaza home of Mr. Abed Alsamia Alfaranji, a Bucheit representative, and attached the Plymouth Van. Thereafter, the District Court representatives went to the Gaza Port and attached the Crane, and finally went to the Bucheit factory building in Dir Al Balak and attached “a large permanent crane in the company yard, two vehicle chassis, four machines and ten molds [sic] for the pouring of concrete and a small quantity of building iron.” The representatives also attached a “white model ’85 tow truck”, which appears to be the Kenworth Cab.

VI. DETERMINATIONS UNDER THE CONTRACT

A determination under an OPIC insurance contract addresses three categories of issues with respect to each claim: (a) whether the acts complained of satisfy all of the elements required to bring such acts within the scope of coverage set forth in the insurance contract; (b) whether the investor has breached any duties under, or made any misrepresentations in connection with, the insurance contract; and (c) the amount of compensation, if any, payable by OPIC. In addition, with respect to the first category, this Memorandum addresses: whether the Investor (i) satisfied the procedural requirements for filing timely applications for compensation and (ii) elected active amounts of coverage for the periods during the Investor claims that such acts and losses occurred.

For the reasons set forth below, OPIC denies each of the Claims on the basis that the Investor failed to meet the substantive and procedural requirements set forth in the OPIC Contract. OPIC concludes, therefore, that the Investor failed to establish claims for which OPIC is required to pay compensation.

A. Political Violence Notice

Because the Investor failed to meet the substantive and procedural requirements set forth in the OPIC Contract, the Investor has failed to establish a compensable claim.

1. Scope of Coverage Under OPIC Contract

Section 6.01 of the OPIC Contract sets forth the standards that the Investor must meet in order to demonstrate a compensable claim for political violence.

Section 6.01 states:

“Compensation is payable, subject to [certain] exclusions and limitations, if political violence is the direct and immediate cause of the permanent loss (including loss of value by damage or destruction) of tangible property of the foreign enterprise or for which the foreign enterprise bears the risk of loss used for the project”.

“‘Political Violence’ means a violent act undertaken with the primary intent of achieving a political objective, such as declared or undeclared war, hostile action by national or international armed forces, civil war, revolution, insurrection, civil strife,

terrorism or sabotage. However, acts undertaken primarily to achieve labor or student objectives are not covered.”

The OPIC Contract therefore requires the Investor to demonstrate that political violence was the direct and immediate cause of permanent loss of tangible property belonging to Bucheit and used for the Project.

For the reasons set forth below, because the Investor failed to meet this substantive requirement, the Investor has failed to establish a compensable claim.

During the April 1996 Meeting, the Investor took the position that its inability to recover start-up costs and other out-of-pocket expenses in a sale to local investors out of concern for the security situation in Gaza constituted a political violence claim. As discussed earlier in this Memorandum, OPIC did not consider such costs and expenses to be an insurable event under the OPIC Contract because they did not constitute a “permanent loss of tangible property of the foreign enterprise or for which the foreign enterprise bore the risk of loss used for the project”. While the Investor stated in the Political Violence Notice that “recent terrorist acts and the impending backlash that will follow has seriously compromised the future of our project”, the Investor failed to demonstrate not only that the February and March, 1996 bombings were the cause of any loss to the Project, but also that “start-up costs and other out-of-pocket expenses” constituted a “permanent loss of tangible property” of Bucheit or the Project. Therefore, these losses fall outside the scope of political violence coverage of the OPIC Contract. OPIC notified the Investor on April 26, 1996 that OPIC would not consider these costs and expenses to be an insurable event within the scope of coverage of the OPIC Contract. The Investor never replied to OPIC’s letter.

Therefore, based on the facts that the Investor has presented to OPIC, the Investor has failed to meet the substantive requirements of Section 6.01 and has failed to demonstrate that the alleged acts fall within the scope of political violence coverage under the OPIC Contract.

2. Election of Active Amounts of Coverage under OPIC Contract

Even if the Investor had met the substantive requirements of Article VI of the OPIC Contract, the OPIC Contract limits compensation payable to the active amount of political violence coverage in effect on the date of a loss.

As previously discussed, the OPIC Contract required the Investor to elect active amounts of coverage and to pay premiums on or before each semi-annual anniversary of the Effective Date. The active amounts of coverage initially elected by the Investor included \$3,300,000 of political violence coverage. While the Investor chose active coverage for political violence, inconvertibility, and expropriation during the First Two Election Periods, the Investor intentionally chose not to elect any active political violence coverage during the Third Election Period, the time during which the Investor claims that the terrorist events occurred and the Investor suffered losses as a result thereof (late February and early March, 1996). In fact, the

Investor has claimed that it notified OPIC that the Investor wanted to eliminate political violence coverage entirely for the Third Election Period.⁶⁴

Although the Investor had the right to decrease amounts of active coverage under the OPIC Contract, it could only do so provided that it complied with the requirements of Section 8.06 of the OPIC Contract, which states:

“By prior notice to OPIC effective as of the next due date for premiums, the Investor may increase or decrease the Active Amount for any coverage for the remainder of the contract, subject to the following limitations:

- (a) Active Amount shall not exceed the Coverage Ceiling;
- (b) The Coverage Ceiling shall be reduced automatically by compensation paid by OPIC; Active Amount shall also be reduced for the remainder of the annual election period to which the claim relates;
- (c) For inconvertibility, expropriation, and political violence coverages, Active Amount shall not be less than the lesser of book value of the Coverage Ceiling for that coverage.”

Therefore, even if the Investor had intended to reduce its political violence coverage for the Third Election Period, the Investor was required by Section 8.06 to notify OPIC of any decrease in political violence coverage by September 30, 1995, the beginning of the Third Election Period. The Investor did not, however, provide OPIC with advance notice of its interest in decreasing the active amount of political violence coverage.⁶⁵ More importantly, however, the Investor represented to OPIC in late 1995 that the Investor had nothing at risk in the Project and that the book value of the insured investment was zero. Relying on that representation, OPIC advised the Investor that the Investor could keep the OPIC Contract in effect by paying only an administrative fee but reminded the Investor that the Investor would have no active coverage until the next renewal period (March 30, 1996 through September 29, 1996). Interestingly, because the Investor did, in fact, chose other coverage for political violence loss, the Investor clearly retained something at risk in the Project. Therefore, the Investor violated the

⁶⁴ See, e.g., Exhibit 27, wherein the Investor stated: “Approximately October 10, 1995 Mr. Bucheit advised ... OPIC of the following: ... Political violence coverage was not required since [the Investor] had arranged for that coverage in Gaza.”; and Exhibit 6, wherein the Investor stated: “I explained to [OPIC] that I ... was interested in eliminating the coverage for ... political violence.” See also the Investor’s February 26, 2001 letter to OPIC (Exhibit 7), wherein the Investor stated that he explained to OPIC in late 1995 that the Investor wanted to eliminate OPIC political violence coverage because the Investor had purchased a builder’s risk policy locally that offered more coverage than OPIC’s coverage at the same cost.

⁶⁵ The Investor maintains that it did, in fact, tell OPIC that the Investor had decided to rely on a builder’s risk policy instead of OPIC coverage. OPIC disputes this account because such an election would have been contrary to Section 8.06 of the OPIC Contract. An investor may cancel OPIC coverage for any reason but must elect coverage at the level prescribed in Section 8.06 so long as coverage is in effect. In either event, OPIC finds that the Investor intentionally chose not to elect political violence coverage under the OPIC Contract for the Third Election Period.

requirements of Section 8.06 of the OPIC Contract, which restricts the amount of active coverage to the lesser of book value and the coverage ceiling. See Section VIII.

Therefore, OPIC concludes that the Investor did not elect any active political violence coverage during the Third Election Period.

3. Timeliness of Filing Application

Even if the Investor had met the substantive requirements of Article VI of the OPIC Contract and elected active political violence coverage as required by the terms of Section 1.06 of the OPIC Contract, the Investor did not file a completed application with OPIC within three years of the alleged loss, as required by Section 8.01 the OPIC Contract.

Section 8.01(c) of the OPIC Contract states:

“A notice demonstrating the Investor’s entitlement to political violence compensation for loss of assets (Article VI) must be filed within six months of a loss. The notice, together with proof of the amount of compensation due will be considered a completed application, which must be filed within three years of the loss.”

In addition, Section 8.01 states, “An application for compensation shall demonstrate the Investor’s right to compensation in the amount claimed.”

As discussed in paragraph 1 above, Section 6.01 of the OPIC Contract sets forth the standards that the Investor must meet in order to demonstrate a compensable claim for political violence. Therefore, a completed application consists of a notice demonstrating the Investor’s entitlement to compensation for loss of assets, together with proof of the amount of compensation due.

In the Political Violence Notice, the Investor demanded repayment of its insured investment based on terrorist events that had allegedly occurred in Israel during the previous two weeks and the Investor’s view that impending backlash would follow. Although the Investor submitted the Political Violence Notice immediately after the Investor claimed that it incurred tangible losses in accordance with the requirements of Section 8.01(c), as discussed above, the Investor failed to demonstrate that it incurred a loss of assets and failed to submit to OPIC a completed application for a political violence claim, together with proof of the amount of compensation due, within three years of the loss. In fact, after submitting the Political Violence Notice, the Investor submitted neither any documentation to support a political violence claim nor any proof of the amount of compensation due. In fact, the Investor never raised the Political Violence Notice with OPIC again.

Therefore, because the Investor failed to file a completed application with OPIC within the three-year required time frame, the Investor failed to meet the requirements set forth in Section 8.01 of the OPIC Contract.

4. Conclusion

Based on: (a) the Investor's failure to demonstrate any loss of tangible property to Bucheit or the Project; (b) the Investor's undisputed and deliberate choice not to elect active political violence coverage during the Third Election Period (as demonstrated by the Investor's consistent statements to OPIC regarding such intent); and (c) the Investor's failure to file a timely, completed application for political violence compensation, OPIC finds the Political Violence Claim to be invalid and determines, as discussed below, that no compensation would be payable to the Investor.

B. Expropriation of Funds Claim

Because the Investor failed to meet the substantive and procedural requirements set forth in the OPIC Contract, the Investor has failed to establish a compensable claim.

1. Scope of Coverage under OPIC Contract

Section 8.01 of the OPIC Contract requires the Insured to demonstrate its right to compensation in the amount claimed in order to establish a compensable claim for expropriation. Section 8.01(b) of the OPIC Contract states:

“An application for expropriation compensation (Article V) must be filed within six months after the Investor has reason to believe that all requirements of Article IV have been satisfied.”

Section 4.02 of the OPIC Contract deals specifically with expropriation of funds and states:

“Compensation is payable for an expropriation of funds that constitute a return on the insured investment or earnings on the insured investment if an act or series of acts:

(a) satisfies the governmental action, illegality and duration requirements [of] Section 4.01(a), (b) and (d) [of the OPIC Contract]” (i.e., such act is attributable to the PA, violated international law, and continued for six months); and

(b) “directly results in preventing the Investor from (1) repatriating the funds and (2) effectively controlling the funds in [Gaza].”

(Such requirements are referred to herein as the “***Expropriation of Funds Requirements***”.)

For the reasons set forth below, because the Investor failed to meet the Expropriation of Funds Requirements, the Investor has failed to establish a compensable claim.

Section 4.02 of the OPIC Contract requires the Investor to demonstrate that the expropriated funds constitute a return of, or earnings on, the insured investment (e.g., in the form of a dividend). The Investor claims that the PA expropriated funds due to Bucheit resulting in a loss in excess of \$240,000. The Investor has contradicted itself, however, first by claiming that this amount represents a “one month loss of receivables”, “monthly rental payments” and “payment on a contract” (see Exhibit 4) and then by stating that such funds “were not so called ‘accounts receivable’, but, in fact payments for work performed and purposely diverted to others thru [sic] the actions of the [PA] Finance Minister.” (See Exhibit 7) Because none of these losses constitutes a return of, or earnings on, the insured investment, such losses do not fall within the scope of expropriation coverage of the OPIC Contract.

Moreover, under Section 4.02, compensation would be payable only if the PA’s acts directly resulted in preventing the investor from repatriating, or transferring the funds abroad and from controlling such funds in Gaza. While the Investor claims that the PA’s acts “prevented [the Investor] from transferring funds abroad EX-F and from controlling them in [Gaza]” (see Exhibit 7), the Investor still has not demonstrated, or even alleged, that the funds in question constitute a return of, or earnings on, its insured investment.

The Investor also maintains that the May 2000 Documents substantiate the Expropriation of Funds Claim and the Investor’s allegations that such transactions were improper, fictitious, or involved a conspiracy among the PA, local banks and the Investor’s local partners. The May 2000 Documents neither substantiate these points nor demonstrate either that the funds constituted a return of, or earnings on, the Investor’s investment, or that the PA either prevented the Investor from repatriating the funds or controlled the funds in Gaza. In fact, OPIC has determined that the May 2000 Documents indicate that funds received for work performed and rental income from use of the Equipment were actually used to pay accumulated project debts, such as payments to suppliers and workers. (See Exhibit 5)

Therefore, based on the facts the Investor has presented to OPIC, the Investor has failed to meet the Expropriation of Funds Requirements and has failed to demonstrate that the alleged acts fall within the scope of expropriation coverage under the OPIC Contract. Moreover, even if the Investor were to submit additional facts, the Investor would still fail to demonstrate a right to compensation under the OPIC Contract.

2. Election of Active Amounts of Coverage under OPIC Coverage

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract, the OPIC Contract limits compensation payable to the active amount of expropriation coverage in effect on the date of a loss.

As discussed above, the OPIC Contract required the Investor to elect active amounts of coverage and to pay premiums on or before each semi-annual anniversary of the Effective Date. The active amounts of coverage initially elected by the Investor included \$639,000 of expropriation coverage. While the Investor chose active expropriation coverage during the First Two Election Periods, the Investor elected no active expropriation coverage for the Third Election Period, the time during which the Investor claims that the PA began expropriating

funds and the Investor suffered a loss as a result thereof. While the Investor has not disputed the fact that it chose no active inconvertibility, political violence, or expropriation coverage for the Third Election Period, the Investor maintains that it did, in fact, elect \$240,000 of “expropriation of funds” coverage, as evidenced by the Investor’s payment of an administrative fee, instead of a premium, for the Third Election Period. The Investor argues, therefore, that it had effective expropriation of funds coverage for the Third Election Period.

The Investor’s position is not tenable, however, for two reasons: first, OPIC does not offer separate “expropriation of funds” coverage under the OPIC Contract; and second, the evidence submitted by the Investor to support its argument that it believed it was purchasing “expropriation of funds” coverage is not credible. The documents and correspondence that the Investor has produced to OPIC demonstrate that the Investor did not, and did not intend to, elect any active expropriation of funds coverage for the Third Election Period. After the Investor submitted the September 1995 Form to OPIC, OPIC questioned the Investor’s basis for electing no coverage and was told by the Investor that the Investor “had no investment at risk” during the Third Election Period. OPIC then clarified with the Investor that the Investor’s failure to elect active coverage meant that the Investor had no coverage for the Third Election Period.⁶⁶ Although OPIC received the \$887.50 payment of the administrative fee (even though the Investor inserted that amount in the “total premium due” box), OPIC had not received any payment of premium from the Investor. The Investor was instructed to pay the higher of the administrative fee and premium due for the Third Election Period; however, even if the Investor could have chosen expropriation of funds coverage separately,⁶⁷ it seems unlikely that the Investor would have inserted \$887.50”, and not “\$864.00” (the cost of such coverage), in the “total premium due” box if the Investor did, in fact, intend to elect \$240,000 of “expropriation of funds” coverage.

In addition, the Investor’s arguments that it had never seen the OPIC standard election form before and was not familiar with the 1995 Election Form are not plausible. Mr. Bucheit, President of the Investor, signed both the September, 1994 OPIC standard election form and the March 1995 Election Form. The Investor accurately and completely filled in these two forms and returned them to OPIC with the appropriate amount of premium due. (See discussion in Section V.C. above.)

Moreover, even if the Investor wanted to choose no active expropriation coverage for the Third Election Period, as discussed above, the Investor could do so only if the Investor had no investment at risk, or if the investment that was made had no book value, in either of which case no compensation from OPIC would be payable. Not only did the Investor have an investment at risk, but the investment had a book value greater than zero. As discussed above, therefore, the Investor would have been required to notify OPIC of such a decrease in coverage prior to September 30, 1995, which the Investor failed to do.

⁶⁶ As discussed above, Section 8.06 of the OPIC Contract required the Investor to carry an amount of active coverage equal to the net book value of the insured investment.

⁶⁷ The Investor could not have intended specifically to elect expropriation of funds coverage because OPIC’s standard election form does not contain a separate election of coverage for expropriation of funds.

Finally, since the OPIC Contract terminated as of March 29, 1996, the Investor had no coverage for events or losses that occurred after that date.

Therefore, OPIC concludes that the Investor did not elect any active “expropriation of funds” coverage for the Third Election Period.

3. Timeliness of Filing Application

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract and elected active expropriation coverage as required by the terms of the OPIC Contract, the Investor did not file a completed application with OPIC within the time frame required by Section 8.01 the OPIC Contract. As discussed above, Section 8.01 requires the Investor to file a completed application with OPIC within six months after the Investor had reason to believe that the Expropriation of Funds Requirements had been met.

In August, 2000, the Investor filed with OPIC for the first time a notice of claim due to the PA’s alleged expropriation of equipment and money due to the Investor. In its September 22, 2000 letter to OPIC, the Investor stated it was “making a claim” for \$240,000 for an “estimated one month loss of receivables due from the PA”. The Investor also stated that the May 2000 Documents that OPIC provided to the Investor established “written proof that the PA ministry of finance expropriated funds due Bucheit and OPIC beginning in Jan 96, and still continues causing Bucheit a loss of well over the OPIC coverage of \$240,000 ...”.⁶⁸ The Investor relies on this so-called “written proof” not only to establish the Expropriation of Funds Claim but also to demonstrate that the Investor filed the Expropriation of Funds Claim within six months after the Investor had reason to believe that the Expropriation of Funds Requirements had been satisfied.

From a procedural perspective, however, the Expropriation of Funds Requirements are satisfied when the expropriatory effect has continued for six months. Therefore, since the Investor claims that the PA began expropriating funds in January, 1996 (and that such expropriation continued through the time of its May, 2000 submission to OPIC), the six-month time limit set forth in Section 4.02 would have been met by mid-1996. The Investor would then have had six more months within which it was required to file an application for expropriation compensation in accordance with the requirements of Section 8.01(b). Therefore, in order for the Investor to have made a timely filing in accordance with the terms of the OPIC Contract, the Investor would have had to have filed the Expropriation of Funds Claim by February, 1997 (six months after the Investor had reason to believe that the Expropriation of Funds Requirements had been satisfied); instead, the Investor waited until September, 2000, more than four years after the Expropriation of Funds Requirements were met, before it filed its first notice of claim with OPIC.

⁶⁸ See Exhibit 4. The May 2000 Documents consisted of information that the PA provided to OPIC detailing four financial transactions that took place on September 28, 1995, November 23, 1995, January 1, 1996, and December 19, 1996. The materials recorded identifying information as to the transactions, such as the date, amount, payor, payee, bank, and in some cases, use of funds. As OPIC stated in its October 23, 2000 letter to the Investor, however, OPIC found that the May 2000 Documents did not substantiate an expropriation claim.

Therefore, because the Investor failed to file an application within the required time frame, the Investor has failed to meet the requirements set forth in Section 8.01 of the OPIC Contract.

The Investor requested in the May 2001 Supplement that it have additional time to submit final documentation in support of the Expropriation of Funds Claim. For the reasons given above, it is apparent that, due to the OPIC Contract terms, the Investor cannot demonstrate a right to compensation under the OPIC Contract by submitting additional facts. Moreover, OPIC has independent grounds to deny the Expropriation of Funds Claim, as discussed in paragraphs 1 and 2 above.

4. Conclusion

Based on: (a) the Investor's failure to satisfy the Expropriation of Funds Requirements; (b) the Investor's inconsistent and implausible statements regarding its supposed election of only expropriation of funds coverage during the Third Election Period; (c) the Investor's misrepresentation as to the value of its investment for the purpose of avoiding payment of premiums due under the OPIC Contract; and (d) the Investor's failure to file a timely application for expropriation compensation, OPIC finds the Expropriation of Funds Claim to be invalid and determines, as discussed below, that no compensation would be payable to the Investor.

C. Total Expropriation Claim

Because the Investor failed to meet the substantive and procedural requirements set forth in the OPIC Contract, the Investor has failed to establish a compensable claim.

1. Title Documents

a. Scope of Coverage Under OPIC Contract

As discussed in Section B.1. above, Section 8.01 of the OPIC Contract requires the Investor to demonstrate its right to compensation in the amount claimed in order to establish a compensable claim for expropriation. Also as discussed in Section B.1. above, Section 8.01(b) requires the Insured to file an application for expropriation compensation within six months after the Insured has reason to believe that all requirements of Article IV have been satisfied.

Section 4.01 of the OPIC Contract deals specifically with total expropriation and sets forth the following standards that the Investor must meet in order to demonstrate a compensable claim for total expropriation:

- “(a) the acts are attributable to a foreign governing authority which is in de facto control of the part of the country in which the project is located;

- (b) the acts are violations of international law (without regard to the availability of local remedies) or material breaches of local law;
- (c) the acts directly deprive the Investor of fundamental rights in the insured investment (Rights are ‘fundamental’ if without them the Investor is substantially deprived of the benefits of the investment.); and
- (d) the violations of law are not remedied and the expropriatory effect continues for six months.”

(Such requirements are referred to herein as the “*Total Expropriation Requirements*”.)

For the reasons set forth below, because the Investor failed to meet the Total Expropriation Requirements, the Investor has failed to establish a compensable claim.

The Total Expropriation Requirements require the Investor to demonstrate that the acts were attributable to a foreign governing authority in de facto control of Gaza. While the PA was a “foreign governing authority” in de facto control of” Gaza during the Shipping Period (the period during which the Investor claims that the PA expropriated original Documents), in order for this portion of the Total Expropriation Claim to be compensable, the Investor must also demonstrate that: (i) the alleged acts are attributable to the PA; (ii) the PA acted in violation of international law or materially breached local law; and (iii) such acts directly deprived the Investor of fundamental rights in the insured investment, i.e., in the Equipment.

If the Investor were to demonstrate that the alleged acts were committed by PA customs officials, OPIC would agree that such acts were attributable to the PA. However, the Investor has failed to demonstrate that PA customs officials actually seized and retained originals of the Documents. The Investor has provided three pieces of evidence in support of this portion of the Total Expropriation Claim: (a) the August 2001 Affidavit, in which Mr. Bucheit provides a statement of what he believes has occurred and on which the Investor and its counsel have maintained OPIC should rely; (b) the May 2001 Supplement, in which the Investor’s counsel relies on the Protocol as proof of the acts that the Investor has alleged; (c) the Lehrer Declaration, in which Mr. Lehrer states his knowledge of the actions that PA customs officials take in the ordinary course of business when items are imported into Gaza; and (d) the Fourth Supplement, in which the Investor’s counsel presents the PA/PLO Statement, which relates to “documents” generally and neither to the Documents at issue here nor to originals of such Documents.^{68a} Unfortunately, not one of these documents demonstrates that PA customs officials actually seized and retained originals of the Documents when the Equipment was imported into Gaza during the Shipping Period.

^{68a} Although the Investor’s counsel submitted to OPIC only the PA/PLO Statement and not the Defendants’ Reply (from which the PA/PLO Statement was excerpted), OPIC has obtained a copy of the Defendants’ Reply, which includes the PA/PLO Statement under the heading, “Material Facts in Dispute” (see Exhibit 10D). OPIC interprets the PA/PLO Statement to refer only to customary practices of PA customs officials and not to events that occurred specifically with respect to the Documents, originals of the Documents, or the Equipment.

In the August 2001 Affidavit, Mr. Bucheit stated that “the equipment and vehicles covered under the [OPIC Contract] were imported into Gaza through the Israeli border crossing during the period of January 95 thru September 95 in compliance with the [Protocol]. The terms of the [Protocol] required all shipments entering Gaza to be accompanied by original documents duly endorsed. This was the case for all [Bucheit] shipments into Gaza The Protocol ... required each side present original documents for clearance and verification for tax rebates.”

The Investor’s claim that PA customs officials kept originals of the Documents in accordance with the Protocol is repeated by the Investor’s counsel in the May 2001 Supplement, wherein he stated, “consistent with the [Protocol], Article 6(B), [PA] customs officials kept these Documents, alleging that they were needed by them in order to secure a [tax] rebate for [the Investor] of all duties and fees previously paid on these same items to Israeli authorities. These Palestinian Customs officers, nevertheless refused to provide [the Investor’s] agents with any receipt or written acknowledgement of the transfer of these Documents to them.”

The Investor’s position that the Investor was required to hand over to PA customs officials originals of particular documents evidencing the Investor’s title to, and ownership of, the Equipment is not tenable. First, no “Article 6(B)” of the Protocol exists and, assuming that the Investor’s counsel intended to reference Article VI generally, Article VI addresses taxes on local production and not imports policy. In addition, the portion of the Protocol that pertains to freight shipments into Gaza states only that PA customs officials are responsible for inspecting imported items and for providing copies of the required customs documents to Israeli officials.⁶⁹ Second, the Protocol does not require that originals of any specific documents be presented to PA customs officials or that PA customs officials retain originals thereof. Therefore, the statement made by Mr. Bucheit in the August 2001 Affidavit as well as the statements made by the Investor’s counsel in the May 2001 Supplement that the Equipment “could not have physically and/or legally entered Gaza without the related Documents being tendered to Palestinian Customs personnel at the border” are unfounded.

The Lehrer Declaration is equally unsupportive of the Investor’s claim for two reasons: first, Mr. Lehrer has not declared that he has any first-hand knowledge of either the shipment of the Equipment into Gaza or the Equipment’s delivery to the Project site, nor does Mr. Lehrer state that he was even employed by the Shipping Agent at that time. Second, Mr. Lehrer states only what he believes to be the Palestinian law and customary practice when goods are imported into Gaza, and fails to address either customary or actual practices of PA customs officials with respect to original title documents. In fact, the Lehrer Declaration fails to make any mention of original title documents whatsoever. Mr. Lehrer concluded, “[The Investor]’s equipment and goods were successfully delivered into Gaza. Therefore, Ocean Company’s agent handling the shipment necessarily must have given the documentation accompanying the goods to Palestinian

⁶⁹ See Protocol, Art. III, Para. 14a, which states:

“The [PA] will have full responsibility and powers in the Palestinian customs points (freight-area) for the implementation of the agreed upon customs and importation policy as specified in this protocol, including the inspection and the collection of taxes and other charges, when due. Israeli customs officials will be present and will receive from the Palestinian customs officials a copy of the necessary relevant documents related to the specific shipment and will be entitled to ask for inspection in their presence of both goods and tax collection.”

customs officials who as noted would have retained the documentation to allow the determination of the allocation of taxes between Israel and Palestine. The Palestinian customs officials would not have given a receipt for the documentation.”⁷⁰

In addition, contrary to the Investor’s position that the PA/PLO Statement “confirm[s] [the Investor]’s proof” that PA customs officials retained and failed to return originals of the Documents, the PA/PLO Statement fails to address specifically either the Documents or originals of the Documents, and makes no mention of either the Investor or the Equipment. (See Note 50a) In fact, notwithstanding the fact that the Investor’s counsel provided OPIC with only an excerpt from the Defendants’ Reply, upon examination of the Defendants’ Reply itself, it is impossible to connect the phrase, “These documents are released to the owner once the equipment is exported out of the country” to any of the Investor, the Documents, originals of the Documents, or the Equipment.

Most importantly, however, in the Bucheit Report, the Investor has admitted that copies, and not originals, of invoices, and not necessarily documents evidencing title, were provided to PA customs officials at the Gaza border when the Equipment was imported. In the Bucheit Report the Investor stated, “Under the [Protocol] and heretofore mentioned Palestinian Draft Investment Law, Bucheit was promised a rebate for custom and purchase taxes imposed on machinery and equipment collected in Israel en route to Gaza. Bucheit has certification with invoices paid in Israel and *copies* left with the [PA] at the border. It is our understanding that our accountant in Gaza, starting in 1995, submitted our documentation to the [PA] for rebate (which Israel had passed on) and until this time we have not received any money. We have copies on file in Ohio of all fees paid in Israel, but not of submitted documents to verify the facts.” [emphasis added] Moreover, it appears that the genesis of this portion of the Total Expropriation Claim is the Investor’s desire to obtain customs and tax rebates on the Equipment from Israel and not a claim of expropriation. This position is consistent with the text of the May 2001 Supplement, wherein the Investor’s counsel discussed at great length the failure by Palestinian or Israeli authorities to rebate such taxes, fees and duties.⁷¹

The record is also consistent with the Investor’s admission in the Bucheit Report. Based on the November 7, 1995 letter from the Investor to the Shipping Company (Exhibit 37), it does not appear that the Investor believed that PA customs officials had, in fact, retained originals of the Documents. In the letter, the Investor requested the Shipping Agent to send “‘official’ invoices from the customs authorities as soon as possible” so that the Investor could determine where the Investor’s money was spent. Moreover, in a February 13, 1996 letter from the Investor to ICA (Exhibit 39), the Investor insisted that originals of the Documents were at the Bucheit factory and reasoned that “these documents were required to bring the equipment into Gaza. If they were not there we could not have moved the equipment into Gaza and these should be at the factory.” In turn, ICA needed originals of the Documents to certify the 1995 Balance Sheet (see Exhibit 38).

⁷⁰ See Note 49.

⁷¹ See Exhibit 9. In fact, it was because the May 2001 Supplement included the tax rebate issue that OPIC requested the Investor’s counsel to clarify the scope of the Total Expropriation Claim, which the Investor did. See Note 14.

Therefore, not only has the Investor failed to prove that PA customs officials actually seized and retained originals of the Documents, but the Investor's own admission in the Bucheit Report that copies, and not originals, of the Documents were given to PA customs officials, demonstrates that the Investor's claim is not credible.

Moreover, even if the Investor had successfully demonstrated that PA customs officials did, in fact, seize and retain originals of the Documents, the Investor has failed to demonstrate that such seizure and retention deprived the Investor of its fundamental rights in the insured investment, *i.e.*, in the Equipment. Not only does the taking of title documents not constitute a taking of the corresponding property (*i.e.*, the Equipment), but the Investor could easily replace any missing original title documents if needed. This is precisely why Section 4.01 of the OPIC Contract states that "rights in the insured investment ... are 'fundamental' if without them the Investor is substantially deprived of the benefits of the investment". In this case, had the Investor not abandoned the Project, he could have either operated the Project successfully without the Equipment (because the Equipment comprised only a part of the Facility) or could have operated the Project using the Equipment without the need for any original Documents. The Investor's claim that he did not have any original title documents for the Equipment only became relevant to him when he wanted to sell the Equipment, which was after September 30, 1995, the period during which the Investor had no expropriation coverage under the OPIC Contract. Indeed, even though the Investor claims that it has never had the original title document for the Crane, the Investor claims that he did, in fact, find a purchaser of the Crane, thereby relieving the Investor of any loss with respect thereto.⁷² In any event, expropriation of documents is not covered by the OPIC Contract – the Investor would have to have demonstrated a claim for total expropriation of the Equipment.

Even if the Investor had satisfied the Total Expropriation Requirements, however, OPIC finds the Investor's claim not to be credible for several reasons:

First, the record demonstrates that the Investor prepared various instruments listing the Equipment yet setting forth completely different valuations depending on the instrument's purpose. For instance, the greatest disparity in Equipment valuation can be seen when comparing total amounts set forth in the Commercial Invoice (\$56,200) and comparable entries on the 1995 Balance Sheet (\$858,634.86).⁷³ While the Investor insists that OPIC rely solely on the 1995 Balance Sheet to confirm the Equipment's true value for purposes of compensation under the OPIC Contract, it is difficult to overlook the fact that the total amount set forth in the Commercial Invoice is less than ten percent of the value set forth on the 1995 Balance Sheet. Although the Investor confirmed during the July 2001 Call that the Commercial Invoice was prepared solely for customs purposes and intentionally set forth values that were lower than the Equipment's true value, it is difficult to believe the Investor's statements with respect to the Claims after the Investor has acknowledged that it purposely lowered the value of the Equipment on the Commercial Invoice in order to avoid paying higher customs duties. In addition, the Investor now asserts that it was only because the Investor could not obtain the original

⁷² See discussion in Section V.F.2. above.

⁷³ Note that the Investor has not provided OPIC with an invoice covering the Container (*see* Note 51).

Documents from PA customs officials that ICA could not complete its audit of the 1995 Balance Sheet, and, therefore, the Investor could not fulfill its obligations to maintain the required accounting records under either the OPIC Loan Agreement or the OPIC Contract.

Second, pursuant to the OPIC Loan Agreement, Bucheit pledged the Gaza assets (including the Equipment) to OPIC in December, 1995 to secure the OPIC Loan. If the Investor truly did not have proper title to, or ownership of, the Equipment at that time, Bucheit would not have had the legal right to pledge such Equipment to OPIC. At no time, however, did Bucheit notify OPIC's Finance Department that Bucheit was unable to pledge the Equipment.

Therefore, based on the facts that the Investor has presented to OPIC, the Investor has failed to meet the Total Expropriation Requirements and has failed to demonstrate that the alleged acts fall within the scope of expropriation coverage under the OPIC Contract.

b. *Election of Active Amounts of Coverage Under OPIC Contract*

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract, the OPIC Contract limits compensation payable to the active amount of expropriation coverage in effect on the date of a loss.

As discussed above, the OPIC Contract required the Investor to elect active amounts of coverage and to pay premiums on or before each semi-annual anniversary of the Effective Date. The active amounts of coverage initially elected by the Investor included \$639,000 of expropriation coverage. There is no dispute that the Investor had elected active expropriation coverage during the First Two Election Periods (which included the Shipping Period); however, because the Investor has claimed that as a consequence of the alleged seizure and retention by PA customs officials of originals of the Documents, the Equipment was effectively expropriated after the Equipment was delivered to the Project site on September 30, 1995, the Third Election Period is the relevant period for determining whether the Total Expropriation Claim is valid. This position is consistent with the Investor's claim that the Equipment was expropriated "since the Initial Policy Period".

The Investor does not dispute the fact that the Equipment was successfully delivered to the Project by September 30, 1995. In addition, the Investor stated in the May 2001 Supplement that the 1995 Balance Sheet shows that the Equipment was an asset of Bucheit and in its "possession and control" in Gaza. Thus, any deprivation of the Investor's rights would have had to have taken place after September 30, 1995; however, the Investor did not elect any active expropriation coverage for the Third Election Period. The Investor confirmed this fact through its own statements to OPIC in September and October, 1995, when the Investor represented to OPIC that the Investor had no investment at risk at that time. Although the Investor has repeatedly maintained that it elected active "expropriation of funds" coverage during the Third Election Period, the Investor has never argued that it elected active coverage for total expropriation during the Third Election Period.

Therefore, OPIC concludes that the Investor did not elect any active expropriation coverage during the Third Election Period.

c. *Timeliness of Filing Application*

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract and elected active expropriation coverage as required by Section 1.06 of the OPIC Contract, the Investor did not file a completed application with OPIC within the time frame required by Section 8.01 of the OPIC Contract. As discussed above, Section 8.01 requires the Investor to file a completed application within six months after the Investor had reason to believe that the Total Expropriation Requirements had been met.

On March 5, 2001, the Investor's counsel submitted to OPIC a "notice to expand claim" and set forth for the first time the Total Expropriation Claim. As discussed above, because the Investor's submissions were incomplete and inconsistent, the Investor's counsel submitted to OPIC the May 2001 Supplement, wherein the Investor's counsel claimed that PA customs officials retained originals of the Documents during the Shipping Period and that, because neither the PA nor PA customs officials have returned such originals to the Investor, the PA effectively expropriated the Equipment "since" the Initial Policy Period.⁷⁴ The Investor's counsel also stated that the application was timely because, "[a]s amply documented by OPIC's own files, since early 1995, [the Investor] has continuously kept OPIC informed and on Notice of the evolving factual developments of [PA] actions constituting, in their totality "Total Expropriation". At no time before March 5, 2001, however, had the Investor ever discussed with OPIC, or notified OPIC of, this aspect of the expropriation claim.

The Investor has submitted to OPIC three letters that the Investor claims demonstrate that the Investor made repeated efforts to obtain originals of the Documents from the PA beginning in November, 1997.⁷⁵ Not only do the letters fail to support the Investor's assertions, but the record demonstrates that the Investor was aware that original title documents could not be located at least as early as November, 1995.⁷⁶ Therefore, in order for the Investor to have made

⁷⁴ See Section V.F.2.

⁷⁵ These documents consists of a November 15, 1997 letter from Mr. Bucheit to the U.S. Embassy (Exhibit 9G), a May 26, 1997 letter from Mr. Bucheit to the PLO (Exhibit 9H), and a July 12, 1999 letter from Mr. Bucheit to the Palestine National Authority (Exhibit 9I).

⁷⁶ While the Investor's counsel claimed in the March 5, 2001 "notice to expand claim" (Exhibit 8) that it "recently acquired" additional information from the Bucheit Litigation that led the Investor "to believe that the PA violations began with [the Investor's] early shipments of equipment into Gaza in 1994", the record shows that the Investor was looking for the Documents in late 1995. In a November 7, 1995 letter to the Shipping Agent (Exhibit 37), the Investor requested "official invoices" from PA customs authorities "as soon as possible" so that the Investor could determine "where [its] money was spent". In addition, in a February 1996 note from Ibrahim Sabbah, an accountant at ICA ("*Sabbah*"), to Mr. Bucheit (Exhibit 38), Sabbah stated that he did not find the "Documents" in the factory and needed them urgently to start the audit account. The Investor replied on February 13, 1996 (Exhibit 39) that Sabbah's request for the documents for the machines "confused" the Investor and that all of the documents were at the factory, reasoning that "these documents were required to bring the equipment into Gaza. If they were not there we could not have moved the equipment in. We were required to send the original documents to get the equipment into Gaza and these should be at the factory."

In an April 16, 1996 letter to OPIC (Exhibit 25C), Sabbah advised OPIC that the Bucheit accounts were completed except for the "missing documents which still remains with Mr. Bucheit". Sabbah stated that Bucheit continued to refuse to send documents to ICA indicating "the cost of the machines, equipment and some detailed invoices we

a timely filing in accordance with the terms of the OPIC Contract, the Investor would have had to have filed the Total Expropriation Claim by November, 1998 (six months after the Investor had reason to believe that the Total Expropriation Requirements had been satisfied); instead, the Investor waited until March and May, 2001, more than five years after the Total Expropriation Requirements were met.

Therefore, because the Investor failed to file an application within the required time frame, the Investor failed to meet the requirements set forth in Section 8.01 of the OPIC Contract.

d. Conclusion

Based on: (a) the Investor's failure to satisfy the Total Expropriation Requirements; (b) the Investor's failure to elect active expropriation coverage during the Third Election Period or thereafter; and (c) the Investor's failure to file a timely application for expropriation compensation, OPIC finds this portion of the Total Expropriation Claim to be invalid and determines, as discussed below, that no compensation would be payable to the Investor.

2. Equipment

a. *Scope of Coverage Under OPIC Contract*

With respect to this portion of the Total Expropriation Claim, for the reasons set forth below, because the Investor failed to meet the Total Expropriation Requirements, the Investor has failed to establish a compensable claim.

As discussed above, while OPIC agrees that the PA was a "foreign governing authority in de facto control of" Gaza at the time of the alleged expropriation of the Equipment, the Investor has failed to demonstrate a fundamental element - that the PA actually seized, stole or confiscated the Equipment - and has, once again, provided no evidence to substantiate its claim other than its own statements.

The Investor's claim is inconsistent with the record, however. First, according to the Embassy Report (Exhibit 45), the DOS investigated the Investor's complaints and concluded that the Investor had provided no evidence to support its allegation of expropriation.⁷⁷ The Embassy Report concluded that the Investor's assertions that the PA had a role in Bucheit's commercial difficulties and disputes were unfounded and that the Investor had provided no evidence to support its allegations that refunds of import taxes were due or that expropriation of Bucheit's assets had occurred. In fact, according to the Embassy Report, when U.S. Government officials asked Mr. Bucheit for additional details about the alleged expropriation, Mr. Bucheit described

asked him to clarify". According to Sabbah, the delay in completing the accounts resulted from the fact that the invoices had not been registered in ICA's books from the beginning and that, despite repeated requests of Mr. Bucheit to present such invoices to ICA, Mr. Bucheit had not sent them and was "refusing to cooperate with [ICA] to "create an issue for claiming on his OPIC insurance."

⁷⁷ See Note 62.

“complicity by PA officials in allowing his partners and directors to use Bucheit assets for gain”. Because Mr. Bucheit did not present evidence of PA expropriation or complicity, the DOS viewed these disputes as local law matters not involving the U.S. Government. The Embassy Report concluded: “The [Bucheit] investment in Gaza is plagued by disputes between the American and local partners/directors. There is neither an appropriate role for the State Department, OPIC, or Embassy Tel Aviv with regard to arbitrating and resolving these disputes Assertions that the Palestinian Authority has expropriated [Bucheit] property or improperly held back import tax refunds have not been substantiated.”

Second, the Investor has admitted that it fabricated the Total Expropriation Claim. In the Bucheit Report (Exhibit 43), the Investor replied to each of the points addressed in the Embassy Report. Referencing the section of the Embassy Report entitled, “Disputes with the Palestinian Authority”, the Investor stated: “Bucheit’s equipment – (Collateral for the O.P.I.C. Loan) has been taken without [Bucheit’s] knowledge or approval and against their will and [is] reportedly being used on a Palestinian Authority project. Bucheit does not claim the equipment was expropriated by the Palestinian Authority but since Bucheit cannot institute criminal investigations or action they followed instructions from the PLO in D.C. and notified the prosecuting attorney four times without a single response.” [emphasis added] This statement is completely consistent with the results of the DOS investigation as summarized in the Embassy Report, which not only determined that Bucheit’s commercial problems involved local disputes among Bucheit partners but also concluded that the Investor had failed to substantiate its claim that any equipment had been expropriated by the PA or anyone else.

Finally, the record demonstrates that, contrary to the Investor’s assertions that the Investor has no knowledge of the whereabouts of the Equipment, almost all of the Equipment was, in fact, stored at Bucheit’s factory in Dir Al Balak, exactly where the Investor instructed Bucheit management to send the Equipment in March, 1996. According to the Attachment Report relating to a complaint filed against Bucheit by Trust International on October 25, 1997,⁷⁸ after a judgment was entered in favor of Trust International in early 1998, representatives of the Gaza District Court went to the Gaza home of Mr. Abed Alsamia Alfaranji, a Bucheit representative, and attached the Plymouth Van. Thereafter, the District Court representatives went to the Gaza Port and attached the Crane, and finally went to the Bucheit factory building in Dir Al Balak and attached “a large permanent crane in the company yard, two vehicle chassis, four machines and ten molds [sic] for the pouring of concrete and a small quantity of building iron.” The representatives also attached a “white model ’85 tow truck”, which appears to be the Kenworth Cab.

Therefore, the Investor has failed to demonstrate that the alleged acts were attributable to the PA and that the Investor was deprived of fundamental rights in the insured investment, i.e., in the Equipment. Moreover, based on the record and on the Investor’s own admission in the Bucheit Report, OPIC finds the Investor’s overall claim not to be credible.

Therefore, based on the facts that the Investor has presented to OPIC, the Investor has failed to meet the Total Expropriation Requirements and has failed to demonstrate that the alleged acts fall within the scope of expropriation coverage under the OPIC Contract.

⁷⁸ See Note 63.

b. *Election of Active Amounts of Coverage Under OPIC Contract*

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract, the OPIC Contract limits compensation payable to the active amount of expropriation coverage in effect on the date of a loss.

As discussed above, the OPIC Contract required the Investor to elect active amounts of coverage and to pay premiums on or before each semi-annual anniversary of the Effective Date. The active amounts of coverage initially elected by the Investor included \$639,000 of political violence coverage. The Investor intentionally chose no active expropriation coverage for the Third Election Period, however, which began on the Delivery Date, the date on which the Investor claims that the expropriation of the Equipment began.

As discussed above, the Investor claims that the PA's actions took place after the Equipment was delivered to the Project site and that the Equipment has remained "totally expropriated" by the PA since the Initial Policy Period. Although the Investor has repeatedly maintained that it elected active "expropriation of funds" coverage during the Third Election Period, the Investor has never maintained that it did, in fact, elect active coverage for total expropriation during the Third Election Period.

Therefore, OPIC concludes that the Investor did not elect any active expropriation coverage during the Third Election Period.

c. *Timeliness of Filing Application*

Even if the Investor had met the substantive requirements of Article IV of the OPIC Contract and elected active expropriation coverage as required by Section 1.06 of the OPIC Contract, the Investor did not file a completed application with OPIC within six months after the Investor had reason to believe that the Total Expropriation Requirements had been met.

In August, 2000, the Investor filed with OPIC for the first time a notice of claim alleging that the PA had expropriated the Investor's equipment. On March 5, 2001, the Investor submitted a "notice to expand claim", pursuant to which the Investor expanded its Expropriation of Funds Claim to include the Total Expropriation Claim. Because the information that the Investor had provided to OPIC was incomplete and inconclusive, however, OPIC requested that the Investor submit final, complete, and comprehensive information to support its expropriation claims. In the May 2001 Supplement, however, the Investor did not present any new or additional arguments or proof in support thereof; instead, the Investor merely restated its earlier position. Even though Mr. Bucheit has certified that certain events occurred, and the Investor's counsel has told OPIC that OPIC is expected to rely on these statements as fact, the Investor has not provided OPIC with any additional information in support of this portion of the Total Expropriation Claim.

Because the Investor claims that the PA's taking of the Equipment occurred after the Delivery Date, the six-month requirement set forth in Section 4.01 of the OPIC Contract would

have been met by March, 1996. Therefore, in order for the Investor to have made a timely filing in accordance with the terms of the OPIC Contract, the Investor would have had to have filed the Total Expropriation Claim by September 1996 (six months after the Investor had reason to believe that the Total Expropriation Requirements had been satisfied); instead, the Investor waited until March and May, 2001, more than five years after the Total Expropriation Requirements were met.

Therefore, because the Investor failed to file an application within the required time frame, the Investor failed to meet the requirements set forth in Section 8.01 of the OPIC Contract.

d. *Conclusion*

Based on: (a) the Investor's failure to satisfy the Total Expropriation Requirements; (b) the Investor's failure to elect active expropriation coverage during the Third Election Period; and (c) the Investor's failure to file a timely application for expropriation compensation OPIC finds this portion of the Total Expropriation Claim to be invalid and determines, as discussed below, that no compensation would be payable to the Investor.

VII. MATERIAL BREACHES AND MISREPRESENTATIONS BY THE INVESTOR

Article IX of the OPIC Contract sets forth the duties that the Investor must fulfill as a condition to payment of any compensation with respect to each Claim. These duties include, but are not limited to, making true and complete statements in connection with the OPIC Contract, paying premiums in accordance with the terms of the OPIC Contract, and maintaining financial statements in accordance with the terms of the OPIC Contract.

Section 9.02 of the OPIC Contract states that a material breach of any such duty under, or a material misrepresentation by the Investor in connection with, the OPIC Contract shall constitute a default. Upon any such default OPIC may refuse to make payments to the Investor and may terminate the OPIC Contract effective as of the date of the breach by giving notice to the Investor. Pursuant to Section 9.04 of the OPIC Contract, however, OPIC may permit the Investor to cure a breach in a manner satisfactory to OPIC.

Because the Investor failed to satisfy the following conditions, even if the Investor had demonstrated a compensable claim and met the procedural requirements set forth above, OPIC would not be required to pay such claim.

The Investor failed to fulfill five specific duties under the OPIC Contract:

First, as discussed below with respect to each of the Claims, the Investor failed to elect any active political violence, inconvertibility, or expropriation coverage for the Third Election Period as required by the terms of Section 1.06 of the OPIC Contract. While Section 8.06 of the OPIC Contract allowed the Investor to decrease active amounts of coverage, the Investor could do so only if it gave prior notice to OPIC and so long as the active amount elected was not less than the lesser of the book value of the insured investment and \$3,300,000, the coverage ceiling.

Not only did the Investor fail to provide OPIC with such prior notice, but the Investor's purchase of other insurance from Trust International and its statements that it intended to purchase only "expropriation of funds" coverage during the Third Election Period demonstrated that the Investor did, in fact, have an insurable interest at risk during the Third Election Period. Therefore, not only did the Investor breach its obligation to elect active coverage when it had an insurable interest at risk, but, as discussed below, the Investor also made a material misrepresentation to OPIC that constituted a default under Section 9.02 of the OPIC Contract.

Second, the Investor failed to pay the appropriate premiums for the Third Election Period as required by Sections 9.01.5 and 1.06 of the OPIC Contract. Consistent with Section 9.04 of the OPIC Contract, however, OPIC permitted the Investor to cure this breach. While Section 9.01.5 of the OPIC Contract provides the Investor with sixty days in which to cure the default with respect to failure to pay the premium, despite several communications between the Investor and OPIC, the Investor never paid the premium. Because this breach was material and was not cured, pursuant to Section 9.02 of the OPIC Contract, the OPIC Contract was terminated effective as of the Contract Termination Date.

Third, as discussed above, the Investor failed to file timely applications with respect to each of the Claims. The Investor never submitted a completed application for the Political Violence Claim, submitted the Expropriation of Funds Claim over three years after the Investor was required to file an application under the OPIC Contract (and the Expropriation of Funds Claim remains incomplete as of the date hereof), and submitted the Total Expropriation Claim over five years after the Investor was required to file an application under the OPIC Contract. Therefore, with respect to the Expropriation of Funds Claim and Total Expropriation Claim, the Investor breached its obligations under the OPIC Contract.

Fourth, the Investor failed to maintain financial statements in accordance with the terms of Section 9.01.6 of the OPIC Contract, which requires the Investor to maintain, until either the deadline for filing an application for compensation has expired or until final action has been taken on a claim, current financial statements of Bucheit "necessary to compute and substantiate compensation", including records documenting the investment, annual balance sheets, annual statements of income, retained earnings, cash flow and related footnotes, all prepared in accordance with U.S. GAAP. The only financial information that the Investor provided to OPIC was the 1995 Balance Sheet. The 1995 Balance Sheet was never finalized or certified, and was not prepared in accordance with U.S. GAAP. Moreover, the 1995 Balance Sheet fails to reflect the Contribution and does not substantiate compensation for any of the Claims.

Finally, the Investor failed to make a true and complete statement in connection with the OPIC Contract as required by Section 9.01.1 of the OPIC Contract. As discussed above, in late 1995 the Investor told OPIC that the Investor had nothing at risk in the Project and that the book value of the insured investment was zero. Because the Investor did, in fact, have an insurable interest at risk during the Third Election Period, the Investor not only made contradictory statements to OPIC, but the Investor also misrepresented to OPIC that the Investor had no investment at risk in late 1995. Such a material misrepresentation constitutes a default under the terms of the OPIC Contract and allows OPIC to refuse payment of any compensation thereunder.

Therefore, even if OPIC had determined that the Claims were valid and that the Investor had met the substantive and procedural requirements of the OPIC Contract, the OPIC Contract provides that, because the Investor materially breached its obligations under, and made a material misrepresentation in connection with, the OPIC Contract, OPIC has no obligation to pay any compensation to the Investor for claims brought thereunder.

VIII. COMPENSATION PAYABLE

The OPIC Contract requires the Investor to demonstrate the Investor's right to compensation in the amount claimed.

A. Political Violence Claim

Section 7.01 of the OPIC Contract states that OPIC shall pay compensation for a loss due to political violence provided that the Investor has satisfied the requirements of Article VI and subject to certain limitations. Section 7.02 of the OPIC Contract limits compensation payable to the active amount of coverage in effect on the date of a loss. Not only did the Investor fail to meet the requirements of Article VI, but the Investor also failed to elect active amounts of political violence coverage for the Third Election Period, the period during which the alleged losses occurred. Moreover, OPIC determined that the Political Violence Claim was not valid and that, as discussed above, the Investor has breached its obligations under the OPIC Contract.

Therefore, even if OPIC were to have found that the Political Violence Claim was valid, no compensation would be payable under the OPIC Contract.

B. Expropriation of Funds Claim

Section 5.02 of the OPIC Contract states that OPIC shall pay compensation for a loss due to expropriation of funds provided that the Investor has satisfied the requirements of Article IV and subject to certain limitations. Section 5.04 of the OPIC Contract limits compensation payable to the active amount of coverage in effect on the date that an expropriatory effect commences. Not only did the Investor fail to meet the requirements of Article IV, but, even assuming that the Investor could elect separate "expropriation of funds" coverage, the Investor also failed to elect active amounts of expropriation coverage for the Third Election Period, the period during which the alleged expropriatory effect began. Moreover, OPIC determined that the Expropriation of Funds Claim was not valid and that, as discussed above, the Investor has breached its obligations under the OPIC Contract.

Therefore, even if OPIC were to have found that the Expropriation of Funds Claim was valid, no compensation would be payable under the OPIC Contract.

C. Total Expropriation Claim

Section 5.01 of the OPIC Contract states that OPIC shall pay compensation for a loss due to total expropriation provided that the Investor has satisfied the requirements of Article IV and subject to certain limitations. Section 5.04 of the OPIC Contract limits compensation payable to the active amount of coverage in effect on the date that an expropriatory effect commences. Not only did the Investor fail to meet the requirements of Article IV, but the Investor also failed to elect active amounts of expropriation coverage for the Third Election Period, the period during which the alleged expropriatory effect began. Moreover, OPIC determined that the Total Expropriation Claims were not valid and that, as discussed above, the Investor has breached its obligations under the OPIC Contract.

Therefore, even if OPIC were to have found that the Total Expropriation Claim were valid, no compensation would be payable under the OPIC Contract.

IX. CONCLUSION

For the foregoing reasons, OPIC concludes that Political Violence Claim, the Expropriation of Funds Claim, and the Total Expropriation Claims are invalid and that the Insured is not entitled to compensation.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: _____
Peter Watson
President and Chief Executive Officer

Marcia L. Nordgren
August 2, 2002