

MEMORANDUM OF DETERMINATIONS

Expropriation Claim of Citibank N.A.

Sudan Claim II- Contract of Insurance No. X002 and Annex XC796

I. CLAIM

On December 1, 1999, Citibank, N.A. ("Citibank" or the "Investor") filed an application for compensation (as supplemented and amended by submissions dated March 1, 2000, June 14, 2000, October 13, 2000, December 4, 2000 and January 11, 2001, the "Claim"), seeking \$3,750,000 in compensation under the expropriation coverage (Coverage B) of OPIC Country Annex XC796 to Contract of Insurance (Master Branch - Citibank N.A.) No. X002 (the "Contract").¹ Citibank claims that the failure of the Government of Sudan and its agencies to remit to it amounts held by the Central Bank of Sudan ("BOS") as branch capital and foreign exchange deposits constitute expropriatory actions within the meaning of Sections 1.19 and 18.01 of the Contract.

OPIC finds that the Claim is valid under the Contract and that compensation is payable in the amount of \$3,750,000.

II. BACKGROUND

Citibank opened a branch in Khartoum, Sudan (the "Branch") in 1978. Throughout the Branch's 20 years of operations, Citibank was the only bank from the OECD countries to operate in Sudan. The Claim arises in connection with the liquidation of the Branch on December 10, 1998 and subsequent, unsuccessful efforts by Citibank to recover two deposits previously made with BOS: (1) a deposit in the amount of \$3,500,000 made to comply with Sudanese branch capital requirements (the "Branch Capital Deposit"), and (2) a deposit in the amount of \$250,000 made to permit the Branch to engage in foreign exchange activities (the "FX Deposit").

The following describes the circumstances under which the deposits were made with, and maintained by, BOS, and Citibank's unsuccessful efforts to recover the deposits from BOS.

Circumstances Surrounding the Branch Capital Deposit

Citibank established the Branch with initial paid-in capital of \$5,000,000 by converting \$1,500,000 into local currency for local investment, and placing a

¹ A copy of Citibank's Application for Compensation and subsequent submissions, without exhibits, as well as a copy of the Contract, are attached hereto as Appendix 1. Citibank originally sought in its application compensation in the amount of \$172,781 for certain unremitted profits, which request has been withdrawn.

\$3,500,000 deposit with BOS through Citibank's Bahrain banking center.² The original terms of the \$3,500,000 placement with BOS are reflected in a letter from BOS to Citibank dated May 8, 1979, which states in relevant part:

[W]e confirm our agreement to accept a dollar placement from your office in lieu of the capital requirement of your Khartoum Branch, with the understanding that we will be paying interest to you in New York at your Bank's cost of funds in the market place, for a period not exceeding 6 months after which if the amount in question is not utilized by your branch, the Bank of Sudan shall purchase that amount at the official buying rate plus the 25% exchange subsidy.³

Notwithstanding this original understanding, upon the expiration of the initial six month placement, BOS agreed at Citibank's request to rollover the placement for an additional six month term, to be "renewed automatically" upon maturity, provided that BOS would not be required to pay any interest on the deposit. Throughout the almost 20 years that BOS held the \$3,500,000 deposit, BOS regularly confirmed to Citibank that the six month, automatically renewing, interest free, "US Dollar placement" deposit had been in fact renewed on the same terms.⁴

Beginning around 1981, Sudan experienced severe foreign exchange shortages, and according to Citibank, repeatedly insisted that Citibank convert the Branch Capital Deposit into local currency.⁵ Despite this pressure, neither Citibank nor BOS ever converted the \$3,500,000 "US Dollar placement" to local currency. Rather, the Branch Capital Deposit was continually maintained as a six month, automatically renewing, interest-free, US dollar deposit with BOS until the liquidation of the Branch. Thus, for example, in a letter to Citibank dated October 28, 1998 relating to the "freezing" of the Branch's license and capital (described below), BOS agrees that the Branch may "keep your current capital of 3.5 million Dollars as a placement with the Bank of Sudan."⁶ Similarly, a representative of

² See copy of tested telex from the Citibank Khartoum requesting Citibank Bahrain to make a \$3,500,000 "placement" into the account of BOS with the Federal Reserve Bank of New York, value dated June 1, 1979, and copy of tested telex from Citibank Bahrain to Citibank Khartoum confirming such placement was made, attached hereto as Appendix 2. See also, attached as Appendix 3, letter from Citibank to the Ministry of Foreign Affairs of Sudan seeking approval to obtain OPIC insurance for the Branch's capital consisting of (i) a \$3.5 million "placement" with the Bank of Sudan and (ii) \$1.5 million in "asset purchases/pre-opening (start-up) expenses", and approval of such Ministry.

³ Letter attached hereto as Appendix 4. See also letter from BOS to First National City Bank (a predecessor of Citibank) dated August 22, 1977, also attached hereto as Appendix 4, confirming that Citibank may "keep a Dollar placement with the Bank of Sudan in satisfaction of the capital requirement provision. In case of selling such funds Bank of Sudan will apply its official buying rate plus the exchange subsidy of 14.875%."

⁴ See confirmations dated October 24, 1994, April 20, 1995, October 20, 1995, October 20, 1996, April 20, 1997, April 20, 1998 and October 28, 1998, attached hereto as Appendix 5.

⁵ For example, BOS confirms in a letter to Citibank dated July 22, 2000, attached hereto as Appendix 6, that it "proposed to your Branch vide ~~our~~ letter dated 19/1/1983 to sell this placement to BOS and receive local currency in exchange...."

⁶ Letter attached hereto as Appendix 7.

BOS acting as the "Liquidation Committee" for the Branch confirmed in an agreement (the "Liquidation Agreement") dated April 7, 1999 that "the foreign component" of the Branch's capital equaled "US\$ 3.5 million."⁷

In 1983, BOS increased the capital requirements for the Branch to \$10,000,000. Citibank, however, did not comply with this requirement until several years later after extensive and sometimes contentious discussions with BOS. In addition, as part of a broad governmental investigation of all foreign banks in Sudan, a special committee set up by the Office of the Attorney General of Sudan conducted extensive investigations of the Branch in 1986, resulting in allegations that the Branch violated the foreign exchange regulations. During the pendency of these issues, BOS refused to authorize the Branch to repatriate its 1985, 1986 and 1987 profits. After resolving the allegations arising from the investigation, Citibank in December 1988 complied with the increased capital requirements by reinvesting the Branch profits, which \$5,000,000 capital increase was converted into local currency.⁸

During this period of 1983 to 1988, BOS continued to demand that Citibank convert the Branch Capital Deposit into local currency. Negotiations regarding the Branch Capital Deposit culminated in 1989 with an exchange of correspondence between Citibank and BOS. According to Citibank, the context of this exchange was BOS's insistence that the \$3,500,000 placement be converted into local currency at the exchange rate in effect at the time the placement was initially made in 1979: \$1 = 0.50 Sudanese pounds ("LS"). Given that the exchange rate in effect in 1989, according to Citibank, was \$1 = LS 4.50, compliance with such BOS demand would have resulted in substantial losses for the Branch.

Because the nature of the agreement arising from the 1989 exchange of letters is relevant to OPIC's claim determination, the letters are quoted herein at length.

The 1989 Exchange of Letters

By letter to BOS dated January 16, 1989, Citibank summarized its understanding of how the issue of the Branch Capital Deposit would be resolved, which understanding was based on a meeting with BOS the previous day. The January 16th letter summarizes the proposed resolution as follows:

- (1) Citibank Khartoum shall report this item [the \$3,500,000 placement] on its local balance sheet as of 12/31/88 by booking a US dollar deposit placement with the Bank of Sudan on the asset side, offset by capital and/or capital reserves on the equity side.

⁷ Liquidation agreement attached hereto as Appendix 8.

⁸ See letter from Citibank to BOS dated December 24, 1988, and internal Citibank memorandum dated September 20, 1989, attached hereto as Appendix 9.

- (2) The rate of exchange to be used will be the current prevailing rate – as with all our foreign currency assets and liabilities. This would also be consistent with how the Bank of Sudan reports its foreign currency obligations. We further agree to report the difference between the historical rate of \$/LS 0.50 and the current official rate of \$/LS 4.50 under “capital reserves” rather than “capital”, if the Bank of Sudan so prefers.
- (3) Moreover, we confirm to you that no profit or loss will arise from this item in case of a devaluation. This is because, as agreed, we will simultaneously revalue this US dollar deposit placement (on the asset side) and our capital reserves (on the capital side). Obviously, we are assuming this will be acceptable to the tax authorities.
- (4) This placement remains non-interest bearing and is automatically renewable upon maturity.
- (5) To gain time, this placement with the Bank of Sudan shall be reflected immediately on the local balance sheet as a Citibank Khartoum US dollar deposit placement booked through Citibank Bahrain. This way, the entries can be passed immediately without having to change and update the documentation.
- (6) If the Bank of Sudan wishes Citibank Khartoum to be the “booking center” as well (and not only the lender/depositor), then the placement documentation needs to be amended, which requires more time – about a month for New York Legal Counsel and Senior Vice President approval. The good news, however, is that this step may be done independently from the local booking (item 5 above).⁹

BOS responded by letter dated February 22, 1989, in which it states in relevant part:¹⁰

After referring to our files, the deposit of \$3.5 million is considered part of the Citibank (Khartoum branch) capital and this is in line with the text of the enclosed telex from Citibank New York to the Bank of Sudan dated 28 May 1980.

Accordingly, the correct treatment of this deposit in Citibank's books is to consider it capital at the foreign exchange rate of 50 piastres as per the date of booking. We therefore ask you to correct the situation and reverse

⁹ Letter attached hereto as Appendix 10. The letter also states: “As you are no doubt aware, this long pending issue is only an accounting problem, not a cash flow problem – since these \$3.5 million have already been disbursed to the Bank of Sudan several years ago.”

¹⁰ Letter attached hereto as Appendix 11.

the deposit in your Balance Sheet to show the correct amount based on 50 piastres per dollar.

Citibank then sent a further letter to BOS, dated April 30, 1989, in which it states:¹¹

Following our letter dated January 16, 1989 and your letter of February 22, 1989 on the above matter, I am pleased to inform you that we are agreeable to reflect this \$3,500,000 capital placement on the Branch balance sheet at the historical rate of \$1 = LS 0.50.

This US Dollar placement which is booked through Citibank Bahrain will remain non-interest bearing, and automatically renewable at maturity. On Citibank Khartoum's balance sheet, it will appear as a foreign currency placement with the Bank of Sudan on the asset (debit) side, offset by capital on the equity (credit) side. Since historical rates are used for reporting purposes, there will be no gains or losses from devaluation.

When the necessary accounting entries are passed, our total paid-in capital in Sudanese Pounds will show as LS 25,000,000 as follows:

1.	\$ 1,500,000 at \$/LS 0.50 = LS	750,000
2.	\$ 5,000,000 at \$/LS 4.50 = LS	22,500,000
3.	\$ 3,500,000 at \$/LS 0.50 = LS	1,750,000
	Total: \$10,000,000	LS 25,000,000

Both of the above-quoted Citibank letters were signed by [REDACTED] then b(4)
General Manager of the Branch.

By letter dated June 24, 1989, BOS responded to Citibank as follows:¹²

We are pleased to inform you of the Bank of Sudan's consent to deal with the placement of your bank's capital with the Bank of Sudan in the following manners:

1 - Citibank (Khartoum) shall record, as received, the value of the placement on its books and then deposit the same with the Bank of Sudan in its name.

2 - The value of the placement shall be registered with the Foreign Exchange Department of the Bank of Sudan as part of the capital of Citibank (Khartoum) paid in foreign currency.

¹¹ Letter attached hereto as Appendix 12.

¹² Letter attached hereto as Appendix 13.

3 - This placement shall be kept by the Bank of Sudan in the name of Citibank (Khartoum) without interest and shall be renewed automatically. It will also be subject to all Circulars and Directions which have been or shall, in future be issued by the Bank of Sudan in respect of the capital of the branches of foreign banks operation in Sudan.

4 - This placement shall be shown on the books of Citibank (Khartoum) as a placement in its name with the Bank of Sudan, in foreign currency, on the assets side of the balance sheet and as paid capital on the liabilities side, and at a rate of exchange of 50 piastres to the dollar. It will not be subject to amendment as a result of any changes in the rate of exchange of the Sudanese pound which may occur in future.

5 - As a result of this arrangement the said capital of your bank which amounts to US\$ 10 million shall be equivalent to LS 25,000,000, detailed as follows:

a) US\$ 1.5 million at a rate of 50 piastres = LS 750,000

b) US\$ 3.5 million at a rate of 50 piastres = LS 1,750,000

c) US\$ 5 million at a rate of 50 piastres = LS 22,500,000

Total = LS 25,000,000

Citibank further responds to BOS by letter dated August 12, 1989, stating that it is in general agreement with the arrangements set forth in BOS's letter of June 24, 1989, but objects to the provision stating the placement is subject to all BOS circulars and directions on "legal/technical grounds."¹³ Specifically, Citibank expresses its concern that such provision could be interpreted as Citibank acceptance of all future BOS circulars and directions, resulting in a waiver of Citibank's right to appeal such future regulation. Citibank therefore requests that the provision be excluded from the parties' agreement.

BOS responds in a letter dated September 20, 1989 by stating that the provision to which Citibank objected "is intended to mean that the provisions of our directions and circulars referred to in said paragraph shall apply only on the Capital as a whole including the value of the said capital which forms a part of it."¹⁴

¹³ Letter attached hereto as Appendix 14

¹⁴ Letter attached hereto as Appendix 15.

The exchange of letters apparently ended at that point. Citibank notes that it obtained the advice of its local lawyer on the meaning of BOS's letter dated September 20, 1989. That advice, reflected in a letter from the local lawyer to Citibank dated September 20, 1989, states that:¹⁵

I believe the explanation contained in the letter mentioned above [BOS's 9/20/89 letter] amounts to an amendment of the provision of para. 3 of BOS letter dated 24/6/1989. By this explanation, BOS confirms that it will not give directions in respect of the placement in isolation of the remaining part of the capital. In other words, no action in respect of the capital separately, will be taken unilaterally by BOS.

By telex dated October 17, 1989 to Citibank Bahrain and Citibank New York, Citibank Khartoum advises that:¹⁶

Around October 25 (exact date to be advised later on this week after final approval by Group Executive), the USD 3.5MM "placement in lieu of capital" book by Citibank Bahrain with the Bank of Sudan (BOS) will be transferred onto Citibank Khartoum's books. The transfer will take place as follows:

- (1) Citibank Khartoum will book a USD 3.5MM placement with BOS locally and will use the funds to settle the USD 3.5MM placement in Bahrain.
- (2) Once Citibank Bahrain receives the USD 3.5MM in settlement of their outstanding placement with BOS, they will send a telex to BOS with copy to Citibank Khartoum, as follows:

"Dear Sirs,

This is to inform you that, at your request, our USD 3,500,000 (US Dollars three million five hundred thousand) placement in lieu of capital is being transferred to Citibank Khartoum's books value (tentatively: October 25, 1989). All terms and conditions remain unchanged. Please, acknowledge receipt and confirm agreement by return telex with copy to Citibank Khartoum.

Regards,

Citibank Bahrain"

- (3) Once BOS acknowledges Citibank Bahrain's telex, hopefully the same day, Citibank NY will book a new capital placement with

¹⁵ Letter attached hereto as Appendix 16.

¹⁶ Telex attached hereto as Appendix 17.

Citibank Khartoum, crediting Citibank Khartoum's [internal Citibank] account.

- (4) As a result of the above entries, Citibank Khartoum will now carry a USD 3.5MM FCY placement with BOS on the asset side of the balance sheet, offset by capital/placement from [Citibank New York] on the equity side. There is no net outflow of funds for Citibank since Citibank Bahrain's USD 3.5MM placement in lieu of capital is now replaced by a new capital placement (or capital injection) by Citibank NY with Khartoum branch.

A subsequent telex sent by Citibank Bahrain to Citibank Khartoum and Citibank NY confirms that the Branch Capital Deposit was transferred from the books of Citibank Bahrain to those of Citibank Khartoum, and the telex sent by Citibank Bahrain to BOS, in accordance with the above.¹⁷

Citibank's interpretation of the agreement reached with BOS through the 1989 exchange of letters is reflected in an internal Citibank memorandum dated September 20, 1989, in which [REDACTED] then General Manager of the Branch, seeks approval of the proposed transfer of the Branch Capital Deposit from the books of Citibank Bahrain to Citibank Khartoum. According to this memorandum:¹⁸ b(4)

The nature, terms and conditions of the placement are unchanged. ... Although the booking rate is the historical rate of \$1 = LS 0.50, we maintain the full hedge, as BOS specifically recognizes a U.S. dollar obligation to Citibank Khartoum. ... By regularizing the placement issue, we also ensure once and for all against the possibility of BOS unilaterally giving us the local currency countervalue of the placement at the historical rate, on the basis of their May 8, 1979 letter.

As indicated above, subsequent to the 1989 exchange of letter, BOS continued to confirm to Citibank on a regular basis that the "US\$ 3,500,000 placement" was renewed for an additional six month period, automatically renewable at maturity, with all terms and conditions unchanged.

Circumstances Surrounding the FX Deposit

As of the early 1980's, according to Citibank, banks in Sudan were required to place a hard currency deposit with BOS in order to engage in foreign exchange operations. In April 1983, Citibank placed such a foreign exchange deposit with BOS, in the amount of \$250,000.¹⁹ The Liquidation Agreement signed by a

¹⁷ Telex attached hereto as Appendix 18.

¹⁸ See memorandum at Appendix 9.

¹⁹ See internal memorandum from the Branch Country Corporate Officer to the Branch Controller of Operations, dated April 28, 1983, instructing the Controller to process payment of the FX Deposit, and internal memorandum from the Branch Internal Control Unit to the Branch Country Corporate Officer,

representative of BOS, acting as the Liquidation Committee, references this "FX Shop Deposit (US\$250,000)", as do the final audited financial statements of the Branch.²⁰ Citibank tried without success to locate in its records any BOS circulars or directives relating to the foreign exchange deposits.

Citibank's Unsuccessful Attempts to Recover the Deposits

In 1997, finding that Sudan supported international terrorism, the United States imposed sanctions on Sudan, and in 1998, in retaliation for the bombing of certain U.S. embassies in Africa, the United States attacked a pharmaceutical factory in Sudan thought to be connected with terrorist activities. Also in 1997 and 1998, BOS seized certain of the Branch's profits, alleging that they were derived from illegal transactions (which seizures were the subject of a separate Citibank claim for compensation under the Contract). Uncertain about its future in Sudan, Citibank requested in August 1998 that BOS "freeze" the Branch's banking license, along with the Branch's capital, until such time as Citibank could resume operations, to which proposal BOS agreed.²¹ Citibank also began the liquidation of the Branch in August 1998, which process it completed in April 1999 with the joint signing of the Liquidation Agreement by representatives of Citibank and BOS.²²

On June 25, 1999, having determined that the prospects for resumption of its banking business in Sudan were not good, Citibank notified BOS that it no longer wished to maintain its branch capital with BOS pursuant to the "freeze" arrangements, and requested the return of such capital, including the Branch Capital Deposit.²³ Subsequently, Citibank made repeated requests to BOS for the return of the Branch Capital Deposit and FX Deposit, which requests were largely ignored. Specifically, Citibank requested in writing that BOS return its Branch Capital Deposit and/or FX Deposit by letters dated November 17, 1998, April 6, 1999, April 8, 1999, June 7, 1999, June 25, 1999, September 14, 1999, January 25, 2000 and June 14, 2000, and further attempted repeatedly, including throughout the period July 2000 to January 2000, to contact BOS representatives

dated September 10, 1984, requesting approval to treat the \$250,000 "deposit paid to bank of Sudan in connection with exchange unit license" as receivable instead of a prepaid expense, both attached hereto as Appendix 19.

²⁰ See audited financial statements attached hereto as Appendix 20.

²¹ See letter dated September 7, 1998 from Citibank to BOS ("we would like to request that you freeze the license of banking activities of Citibank until circumstances allow us to come back to Sudan to pursue our business activities"), and letter dated October 28, 1998 from BOS to Citibank ("[i]n case Citibank wants to operate again in Sudan, it can request the activation of its license under the current capital, according to the regulations and conditions prevailing for the banking sector at that time."), both attached hereto as Appendix 21.

²² See Liquidation Agreement at Appendix 8.

²³ See letter dated June 25, 1999 from Citibank to BOS, attached hereto as Appendix 22.

by phone.²⁴ Despite these efforts, to date BOS has not returned to Citibank either the Branch Capital Deposit or the FX Deposit.

The 2000 Exchange of Letters

Upon receipt of Citibank's application for compensation in connection with the Claim, OPIC in March 2000 wrote directly to BOS, seeking to learn whether BOS intended to honor Citibank's requests for the return of its deposits.²⁵ BOS responded by writing to Citibank, in a letter dated April 30, 2000, which referred to OPIC's letter to BOS. In its April 30th letter, BOS states that it "has no intention whatsoever to expropriate Citibank's obligations with the Bank" and that "this pending issue is mainly and only a problem of availability of foreign resources."²⁶ BOS further advised Citibank that:

With this understanding we promise to solve this matter when conditions permit. The transfer of funds will cover the following:

- 1 - US\$3,500,000 placement with the Bank of Sudan in lieu of Citibank Khartoum capital, which amounted to LS 25,000,000. The placement was reflected on Citibank Khartoum balance sheet as LS 1,750,000. The exchange rate, which will be applied for capital conversion, will be the prevailing rate at the date of transfer.
- 2 - The foreign exchange deposit will be transferred to you as it was reflected in Citibank Khartoum's balance sheet as at 10 December 1999, i.e. the equivalent of LS 325,000, at the rate on the date of settlement.

Citibank responded to BOS in a letter dated June 14, 2000, in which it objected to BOS's proposed timing and manner of repayment.²⁷ The letter further attached and pointed to BOS's letter to Citibank dated June 24, 1989 (described above) in which BOS agreed that the Branch Capital Deposit would be treated as a placement in foreign currency on the asset side of the Branch's balance sheet, and as paid capital at the rate of \$/LS 0.50 on the liabilities side, and that the placement "will not be subject to amendment as a result of changes in the rate of exchange of the Sudanese pound which may occur in future."

BOS answered with a letter dated July 22, 2000, in which it cites the provision of the June 24, 1989 letter from BOS to Citibank that states the placement is "subject to all circulars and directives which have been or shall in the future be issued by the Bank of Sudan in respect of the capital of branches of foreign banks operating

²⁴ See above-referenced letters and "Diary of calls by [REDACTED] the Central Bank of Sudan", attached hereto as Appendix 23. b(4)

²⁵ See letter attached hereto as Appendix 24.

²⁶ See letter attached hereto as Appendix 25.

²⁷ See letter attached hereto as Appendix 26.

in Sudan,” as well as its September 20, 1989 letter (described above) stating that this “subject to” provision is intended to apply only to Citibank’s capital as a whole including the placement which constitutes part of it.²⁸ BOS further advised that:

Bank of Sudan policies concerning the deployment of capital by branches of foreign banks have changed since that time and accordingly foreign branches are required to deploy capital in the following manner:

- 1 - Sale of paid up capital in foreign currency to the Bank of Sudan against foreign currency.
- 2 - To use this capital in financing strategic imports after the approval of Bank of Sudan.

Since Citibank placement is considered to be part of its capital, and for your branch to comply with this policy change as per para. (3) of our letter dated 24.6.1989 [i.e. the “subject to” provision], Bank of Sudan proposed to your branch vide its letter dated 19/1/1983 to sell this placement to BOS and receive local currency in exchange but your branch rejected this proposal.

In light of this, Bank of Sudan cannot give Citibank a preferential treatment vis-à-vis other branches of foreign banks operating in Sudan meaning, no special protection or hedge would be offered to Citibank Khartoum

We would like to reiterate that Bank of Sudan position stays as it has been conveyed to you vide our letter dated April 30, 2000 regarding transfer of capital placement and foreign exchange deposit.

As of December 4, 2000, Citibank advised OPIC that it had completed its submission of documentation and requested a determination that compensation is payable to Citibank in the amount of \$3,750,000. However, it was not until January 11, 2001 that OPIC received certain key documents relating to the 1989 exchange of letters.

III. DETERMINATIONS UNDER THE CONTRACT

OPIC’s determination of the Claim is made difficult by the imprecise language of the correspondence between Citibank and BOS. Nonetheless, OPIC finds that the Claim demonstrates BOS agreed that the deposits would be treated as foreign currency assets of the Branch, and that BOS’s repudiation of that agreement and its failure to repay any portion of the Branch Capital Deposit and FX Deposit

²⁸ See letter attached hereto as Appendix 6.

despite Citibank's repeated requests over a period of almost two years, except on terms that were wholly confiscatory, constitute a compensable expropriatory action under the Contract.

BOS Prevented Repatriation of Branch Capital and Investment Earnings

Pursuant to Section 18.01 of the Contract, and subject to the other terms and conditions thereof, OPIC is obligated to pay compensation to Citibank, in the amount provided in Article 20 of the Contract, for any "Expropriatory Action" with respect to which the "Date of Expropriation" occurs during the "Insurance Period." The "Date of Expropriation" is the first day of the period in which an action through the duration of time became "Expropriatory Action," as defined in Section 1.19. The actions of BOS that gave rise to the Claim include BOS's complete failure to respond to Citibank's numerous requests for return of its deposits, which requests were made at least as early as November 17, 1998 in the case of the FX Deposit and June 25, 1999 in the case of the Branch Capital Deposit. As the Insurance Period extends from April 22, 1980 until April 21, 2000, the Date of Expropriation falls within the Insurance Period.²⁹ The key issue upon which Citibank's right to compensation turns, therefore, is whether or not an "Expropriatory Action" took place. That term is defined in Section 1.19 of the Contract.

Definition of Expropriatory Action

Section 1.19 of the Contract states in relevant part:

Expropriatory Action. The term "Expropriatory Action" means any action which is taken, authorized, ratified or condoned by the Government of a Project Country, commencing during the Insurance Period, with or without compensation therefor, and which for a period of one year directly results in preventing:

- (d) the Investor from repatriating, and from exercising effective control in the Project Country over, amounts received as Investment Earnings or Return of Capital, which action commences within eighteen months immediately succeeding such receipt;

The term "Government of a Project Country" is defined in the Contract in Section 1.22 to mean the governing authority or agents thereof that are in effective control of all or any part of a Project Country. The BOS falls within this definition. As BOS's actions giving rise to the claim began in 1998, OPIC finds that the one-year duration requirement of Section 1.19 has been satisfied, and (as discussed

²⁹ OPIC need not determine if and when BOS's failure to respond to Citibank's requests for return of its deposits, standing alone, would give rise to an Expropriatory Action under the Contract, but notes that Citibank's submitted its initial application for compensation on December 1, 1999.

above) that the actions taken by the BOS against the capital placement of the Branch commenced during the Insurance Period. Citibank, pursuant to Section 1.25 of the Contract, is the "Investor." "Return of Capital" is defined at Section 1.38 as distributions to the Investor of the insured investment, and "Investment Earnings" at Section 1.25 as the accumulated earnings of a Foreign Enterprise attributable to an insured investment.

The facts alleged and demonstrated in the Claim establish that Citibank was prevented by actions of BOS from repatriating in US dollars its Branch Capital Deposit and FX Deposit, which constitute Return of Capital and Investment Earnings respectively under the Contract, such that BOS's actions fall within Section 1.19(d) of the Contract.

Exclusions From Definition Of Expropriatory Action

Actions that fulfill the requirements of subsections (a), (b), (c) or (d) of Section 1.19 are nonetheless excluded from the definition of an "Expropriatory Action" if they fall within any of several exceptions set forth in subsections 1.19(1) through (7). Thus, an action is not an "Expropriatory Action" if it occurs or continues in effect as a result of, to paraphrase Section 1.19:

- (1) a legal act that is not expressly for the purpose of expropriation, serves a legitimate government objective, is not arbitrary, and does not violate generally accepted principles of international law;
- (2) failure of the Investor or Branch to take all available and reasonable administrative and judicial steps to prevent the action;
- (3) action in accordance with an agreement voluntarily made by the Investor or Foreign Enterprise;
- (4) provocation by the Investor or Branch, unless the provocation is an action taken pursuant to a request of the Government of the United States or an act in good faith in an administrative, arbitral or judicial proceeding;
- (5) insolvency or creditors' proceeding not resulting from actions of the Government of the Project Country;
- (6) bona fide exchange control actions of the Government of the Project Country; or
- (7) a lawful action by the Government of the Project Country taken in its capacity as shareholder, director or manager of the Branch.

OPIC finds that the Branch and the Investor were reasonably diligent in challenging the BOS's actions, sufficient to preclude the application of subsection

(2) of Section 1.19. OPIC further finds that the exceptions-set forth in subsections (4), (5) and (7) are not raised by the facts of the Claim. At issue therefore is whether or not the actions of the BOS occurred or continued in effect as a result of (i) an agreement voluntarily entered into by Citibank within the meaning of Section 1.19(3), (ii) a bona fide BOS exchange control action within the meaning of Section 1.19(6), or (iii) to quote in full Section 1.19(1):

any law, decree, regulation or administrative action of the Government of a Project Country which is not by its express terms for the purpose of nationalization, confiscation or expropriation (including but not limited to intervention, condemnation or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted principles of international law[.]

As these three exceptions are, in the circumstances set forth in the Claim, related, they are discussed herein together.

To determine the Claim, OPIC must first determine as a factual matter what was the nature of the agreement between BOS and Citibank regarding repayment of the Branch Capital Deposit and the FX Deposit. As indicated above, although the correspondence between the parties is imprecise on certain points, that correspondence viewed in the context of the 20 year course of dealings between BOS and Citibank leads OPIC to conclude that BOS agreed to repay the Branch Capital Deposit and FX Deposit in US dollars. Specifically, for more than 20 years, between 1979 and 2000, as described above, BOS and Citibank referred to the Branch Capital Deposit as a "US Dollar placement." Similarly, as described above, as late as April 1999, BOS referred to the 1983 FX Deposit as a US dollar deposit.

Among the specific facts demonstrated by the Claim that support the conclusion that BOS agreed to repay the Branch Capital Deposit and FX Deposit in US dollars are the following:

- Despite the transfer of the Branch Capital Deposit in 1989 from the books of Citibank Bahrain to those of Citibank Khartoum, BOS consistently confirmed to Citibank, every six months since 1979, the rollover of the Branch Capital Deposit as a six month, automatically renewing, interest free, US dollar deposit, with no change to the terms and conditions thereof.³⁰ These confirmations

³⁰ See e.g. BOS confirmations to Citibank of the rollover of the Branch Capital Deposit dated October 24, 1994, April 20, 1995, October 20, 1995, October 20, 1996, April 20, 1997, and April 20, 1998, attached hereto as Appendix 5. Of the confirmations sent by Citibank to BOS of the rollover of the placement, some are and some are not countersigned and/or stamped by BOS. In those instances where such rollover confirmation was not countersigned and/or stamped by BOS, OPIC finds that such consent to the rollover is implied from BOS's failure to timely object to the confirmation. Notably, confirmation dated as late as April 22, 1998 appears to have been countersigned and stamped by BOS.

indicate that the terms of repayment of the Branch Capital Deposit have not changed since the initial rollover of the deposit in 1979.

- The 1999 Liquidation Agreement, signed by a representative of Citibank and of BOS, acting as the "Liquidation Committee", clearly states that the "foreign component" of the Branch's capital equaled \$3,500,000, and that the "FX Shop Deposit" equaled \$250,000.³¹
- After the liquidation of the Branch, in the correspondence pursuant to which BOS agreed to "freeze" the Branch's capital and banking license, BOS continued to refer to the Branch Capital Deposit as a \$3.5 million "placement."³²
- Although the understanding between the parties created by the 1989 exchange of letters is not entirely clear, that correspondence does demonstrate that Citibank and BOS clearly agreed that the Branch would treat the Branch Capital Deposit on its balance sheet as a foreign currency asset, the fact that BOS agreed that the Branch could treat the Branch Capital Deposit as a US dollar asset implies agreement that such deposit was, for BOS, a US dollar liability.
- Notably, after the initial six month term of the placement in 1979, BOS never paid any interest for use of the Branch Capital Deposit, or for the use of the FX Deposit.³³
- Despite the pressure applied by BOS on Citibank since 1981 to convert the Branch Capital Deposit into local currency, and despite BOS' assertion that its foreign exchange policies require the conversion of foreign currency branch capital into local currency, BOS has never, in the more than 20 years that such funds were in its possession, advised Citibank that the Branch Capital Deposit had been converted into local currency.
- Citibank claims that it was never advised subsequent to 1989 of any change in BOS policies regarding conversion of foreign currency branch capital into local currency.³⁴ The record is consistent with this claim. Through the 1999 agreement to "freeze" the Branch's capital and banking license, BOS's correspondence reflects that it considered the Branch Capital Deposit and FX Deposit to be US dollar deposits. Nor is there any BOS correspondence indicating

³¹ See Liquidation Agreement, attached hereto as Appendix 8.

³² See letter from BOS to Citibank dated October 28, 1999, attached hereto as Appendix 21.

³³ With respect to the Branch Capital Deposit, see confirmations attached hereto as Appendix 5.

³⁴ Rather, Citibank asserts that BOS insisted beginning in 1981 until the 1989 exchange of letters that the Branch convert the Branch Capital Deposit into local currency.

such a policy change throughout the period from June 1999, when Citibank requested return of the deposits, to April 30, 2001, when BOS wrote to Citibank in response to OPIC's letter to BOS. Such failure to mention the legal status of the deposits is striking given that Citibank sent BOS at least eight letters and left BOS more than 20 telephone messages regarding its request for return of the deposits. It was only after OPIC wrote BOS, advising it that Citibank was claiming BOS had expropriated Citibank's deposits, that BOS first asserted that the Branch Capital Deposit and the FX Deposit should be treated, pursuant to BOS "policies," as local currency deposits.

- As evidenced by contemporaneous internal Citibank memoranda, Citibank understood that the 1989 exchange of letters with BOS resulted in an agreement to continue treating the Branch Capital Deposit as a US dollar deposit, to be repaid in US dollars.³⁵

OPIC thus finds that BOS and Citibank agreed that the Branch Capital Deposit and FX Deposit would be treated as US dollar deposits, to be repaid in US dollars, on the basis not only of specific correspondence and documentation but also, perhaps more importantly, on the consistent course of dealings between the parties over a period of almost 20 years.³⁶ Further, OPIC finds that BOS's repudiation of such agreement and refusal to repay the deposits does not fall within the above-mentioned exclusions from the definition of "Expropriatory Action" under the Contract.

In its letter of April 30, 2000, BOS offers to repay the deposits -- "when conditions permit" -- on the following terms. With respect to the Branch Capital Deposit, BOS indicates it will pay Citibank an amount equal to the value of the Branch Capital Deposit in Sudanese pounds as listed on the Branch's balance sheet -- LS 1,750,000 -- converted into US dollars at the current exchange rate.³⁷ The current exchange rate for US dollars in Sudan is approximately \$1=LS 2500. Thus, BOS offers in its April 30, 2001 letter to return to Citibank approximately \$700: less than 0.1% of the initial \$3,500,000 Branch Capital Deposit. Similarly, with respect to the FX Deposit, BOS proposes to transfer to Citibank the value of the 1983 deposit as initially reflected in the Branch's balance sheet -- LS 325,000 -- converted into US dollars at the current exchange rate, or approximately \$130.

³⁵ See internal Citibank memorandum, attached hereto as Appendix 9 ("By regularizing the placement issue, we also ensure once and for all against the possibility of BOS unilaterally giving us the local currency countervalue of the placement at the historical rate....").

³⁶ It should be noted that the Government of Sudan specifically approved OPIC's insurance of the Branch's "Placement with Bank of Sudan, U.S. \$3.5 million." See request for Ministry of Foreign Affairs' approval, and approval, attached hereto as Appendix 3.

³⁷ As discussed above, the Branch Capital Deposit was listed on the equity/capital side of Branch's balance sheet as LS 1,750,000 pursuant to the 1989 exchange of letters, which amount was calculated using the 1979 "historical" exchange rate applicable when the placement was first made.

Again, such a repayment would constitute less than 0.1% of the initial amount (\$250,000) deposited by Citibank with BOS.

Citibank, in its letter to BOS of June 14, 2000, protested that BOS's proposed terms of repayment were not consistent with the understanding between the parties that the deposits were to be treated as foreign currency deposits or, at a minimum, translated into Sudanese pounds and then converted back into US dollars using the same exchange rate. Notwithstanding such protest, BOS emphasized in its letter of July 22, 2000 that its "position stays as it has been conveyed to you vide our letter dated April 30, 2000 regarding transfer of capital placement and foreign currency deposit." Moreover, since Citibank's requests for return of the FX Deposit and the Branch Capital Deposit in November 1998 and June 1999, respectively, BOS has yet to return any portion of the deposits to Citibank.

On the basis of all the evidence cited above, OPIC finds that Citibank did not enter into a voluntary agreement permitting BOS to continue withholding repayment of the Branch Capital Deposit and the FX Deposit since Citibank's June 1999 request for their return, or consenting to the repayment terms proposed by BOS. Thus, the exception set forth in Section 1.19(3) of the Contract is inapplicable to the Claim.

Moreover, although BOS no doubt had the requisite authority to require foreign banks to convert capital paid in foreign currency into Sudanese pounds (and appears to have implemented such a policy sometime in the early 1980's), it agreed with Citibank to treat the deposits differently, that is, to continue treating them as foreign currency assets. BOS's repudiation of this agreement, and refusal to return the deposits except on terms that were wholly confiscatory, cannot be characterized as a bona fide foreign exchange control action within the meaning of Section 1.19(6) of the Contract.

Rather, BOS's actions were arbitrary and in violation of generally accepted principals of international law.³⁸ The generally accepted principles of international law relevant to the Claim are set forth in the Restatement (Third) of the Foreign Relations Law of the United States as follows:

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of property of a national of another state that is discriminatory or is not accompanied by provision for just compensation;

³⁸ BOS's actions would also appear to violate local law. Specifically, pursuant to Section 12 of the Encouragement of Investment Act of Sudan (1990), attached hereto as Appendix 27, expropriation or confiscation of investments is not permitted without a judicial order, and investors are guaranteed the right to repatriate investment capital.

- (2) a repudiation or breach by the state of a contract with a national of another state where the repudiation or breach is discriminatory or motivated by non-commercial considerations, and compensatory damages are not paid;³⁹ or
- (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.⁴⁰

Among the compelling evidence that BOS's actions were arbitrary and resulted in a taking of the deposits is the timing of BOS's repudiation of the agreement to treat the deposits as foreign currency assets and its repayment offer. For almost 20 years, despite applying regular pressure on Citibank to convert the foreign currency deposits into local currency, BOS did not advise Citibank that such conversion was required as a matter of law, did not effectuate any such conversion, and continued to refer to the deposits as "US dollar deposits." Even after Citibank liquidated the Branch, BOS, in its role as a member of the "Liquidation Committee" and in its correspondence regarding the "freeze" arrangements, persisted in characterizing the Branch Capital Deposit and FX Deposit in this manner. Nor is there any BOS correspondence during the almost one year period following Citibank's June 1999 request for return of the Branch's capital advising of any issue relating to the required conversion of the deposits. Rather, in the face of dozens of Citibank letters and telephone messages referring to its request for return of the deposits, BOS said nothing, and did nothing, with respect to the deposits. It was only after OPIC, an agency of the US Government, wrote to BOS advising it that OPIC had received an insurance claim alleging expropriation of the deposits by BOS, and that OPIC would have to decide the claim on the record before it unless BOS clarified its position, that BOS in April 2000 even responded to Citibank. Subsequently, reminded by Citibank of the 1989 exchange of letters, BOS advised Citibank that the deposits, pursuant to post-1989 BOS policies, should be considered as local currency deposits. In light of this chronology, OPIC finds BOS's unsupported contention that its actions were required by its policies unpersuasive.

Moreover, even assuming BOS policies after 1989 required conversion of the deposits into local currency, BOS's insistence on the retroactive application of the exchange rates prevailing at the time the deposits were made, given the utter collapse in the value of the Sudanese pound, provides further support for OPIC's conclusion that BOS's actions were arbitrary and contrary to international law.

³⁹ Similarly, according to the Restatement (Second) of Foreign Relations Law of the United States § 193 (1965), a violation of international law occurs where a state has breached a contract with an alien and that breach is affected in an arbitrary manner without a bona fide claim of excuse.

⁴⁰ Restatement (Third) of Foreign Relations Law of the United States § 712 (1987). See also Comment I of the same section which states that an alien enterprise that has been lawfully established is protected by international law against changes in the rules governing its operations that are discriminatory, or are so completely without basis as to be arbitrary in the international sense, i.e., unfair.

On the basis of the evidence demonstrated by the Claim, OPIC finds that BOS's actions with respect to Citibank's deposits were arbitrary, confiscatory, and therefore in violation of international law.⁴¹ For these reasons, the exception set forth in Section 1.19(1) of the Contract is also inapplicable to the Claim.

Thus, the actions taken by the BOS with respect to the Branch Capital Deposit and the FX Deposit constitute an "Expropriatory Action", as they prevented Citibank from repatriating in US dollars its deposits within the meaning of Section 1.19(d) of the Contract, and do not fall within any of the exclusions from the definition of that term under the Contract.

IV. AMOUNT OF COMPENSATION

Pursuant to Section 20.03 of the Contract, the amount of compensation payable equals the difference between the amounts attributable to the Investment that were the object of the Expropriatory Action, and any such amounts that were received by the Investor from non-OPIC sources in compensation for the loss. The Investment under the Contract is \$5,000,000 (Citibank's initial investment in the Branch). Citibank indicates that it has received no compensation for the loss of its deposits. Therefore, the amount of compensation payable under Section 20.03 equals \$3,750,000, or 100% of the sum of the Branch Capital Deposit and FX Deposit.⁴²

Section 20.01 of the Contract provides, however, that the amount of compensation payable with respect to all Expropriatory Actions having a Date of Expropriation in any Contract Period shall not exceed the lesser of the corresponding Current Insured Amount for Coverage B in effect on the first day of such contract period and any lesser amount of the Current Insured Amount for Coverage B in effect thereafter. It further states, by reference to Article 5 of the Contract, that in no event shall the aggregate compensation payable for Coverage B under the Contract exceed the Maximum Insured Amount for Coverage B under the Contract.

OPIC has previously paid to Citibank under the Contract compensation in the amount of \$1,055,607, with respect to certain Expropriatory Actions of BOS, the Date of Expropriation for which occurred in March 1998. Here, the Date of Expropriation corresponding to the actions of BOS which gave rise to the Expropriatory Actions occurred in a different Contract Period, namely the period commencing on June 1, 1999 and ending on April 21, 2000. The compensation

⁴¹ OPIC notes that Citibank suggests in its Claim that BOS's actions were not only arbitrary but discriminatory, including as retaliation for the actions of Citibank in implementing US Government sanctions against Sudan for sponsoring international terrorism, and the 1998 bombing by the US Government of a pharmaceutical factory in Sudan.

⁴² The Risk Retention Agreement between OPIC and Citicorp Insurance USA, Inc., dated as of July 1, 1996, which effectively amends the self-insurance provisions of the Contract, increases the maximum insured amount to 100% of the covered expropriated funds.

payable pursuant to Section 20.03 (\$3,750,000) is less than the Current Insured Amount applicable for such period (\$5,000,000), and will not, when added to all other payments made under Coverage B of the Contract, exceed the Maximum Insured Amount (\$5,000,000). The amount of compensation payable under the contract is therefore \$3,750,000.

V. ASSIGNMENT TO OPIC

Pursuant to Section 19.03 of the Contract, compensation will be paid under this Claim to the Investor upon completion of the required assignments to OPIC.

VI. CONCLUSION

For the foregoing reasons, OPIC concludes that the Claim of the Investor is valid and that the Investor is entitled to compensation in the amount of U.S. \$3,750,000.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: 

Its: Acting President and Chief Executive Officer

Date: May 14, 2001