

## MEMORANDUM OF DETERMINATIONS

Political Violence Claim of Tea Importers, Inc. and C & W Trading Company, Inc.,  
Rwanda - Contracts of Ins. Nos. 9890, 9891 and 9969 (together, the "Contracts")

### I. CLAIM

By letters dated March 20 and May 3, 1996 (Tab 4), Tea Importers, Inc. ("Tea Importers") filed a political violence claim with OPIC under the Contracts. The claim is based upon Damage<sup>1</sup> to tangible property owned by Societe Rwandaise pour la Production et la Commercialisation du The ("SORWATHE"). OPIC finds that Tea Importers and C & W Trading Company, Inc. ("C & W") should be compensated for the losses detailed below according to their insurance under the Contracts in the amount of \$8,317.32 and \$1,561.25, respectively, a total of \$9,878.57.

### II. FACTUAL BACKGROUND

The hostilities in Rwanda began with the October 1, 1990 invasion by the Rwandan Patriotic Front ("RPF")<sup>2</sup> from neighboring Uganda, which led to a prior claim by Tea Importers for compensation by OPIC that was paid in the amount of \$6,169.41 on May 8, 1991. A second claim in the amount of \$53,965.56 was paid after the crisis flared up again in early 1993.

By March 1994, the situation in Rwanda had deteriorated into full-scale civil war, with troops from the elite Presidential Guard battling Tutsi guerrillas in the streets of the capital, Kigali. There were also reports of armed units assassinating government officials, Catholic clerics, and Rwandan employees of foreign aid agencies. Americans living in Rwanda were evacuated.<sup>3</sup>

The crisis in Rwanda soon exploded into a tragedy of historic proportions. Nearly one million Rwandans were massacred in what has been termed a genocide, and more than two million are living in refugee camps.

Following the civil war, reprisals and revenge killings took place in villages and prisons, and the judicial system failed to stop these bloody outbreaks. Refugees were arrested on the basis of accusations, without arrest warrants or proper investigations.

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<sup>1</sup> All terms capitalized, unless for grammatical reasons, and not otherwise defined herein are used as defined in the Contracts.

<sup>2</sup> The RPF is led by ethnic Tutsis, who, along with the Hutus, comprise the two major ethnic groups in Rwanda. The RPF is opposed to Hutu rule, established when the Tutsi monarchy was overthrown in 1959. For more information on the ongoing crisis, see the Memorandum of Determinations regarding Tea Importers' previous claim under the same policies, dated April 30, 1991.

<sup>3</sup> See news articles (Tab 8).

People were thrown into prisons on suspicion of participation in the genocide, and many died either in overcrowded jails or in revenge attacks.

Sometime between May and June 1995, the Assistant General Manager of SORWATHE fled the country because the government was threatening to arrest him. He fled to Uganda in the company car, a 1987 Peugeot 505. When the employee arrived in Kampala, he called SORWATHE to have someone pick up the car and bring it back to Rwanda. When the car was returned to Rwanda, it was confiscated by the Ministry of Defense of Rwanda. Tea Importers filed a claim with OPIC on March 20, 1996.

### III. THE CONTRACTS

There are two insured investors under the three Contracts, all of which are standard form 234 KGT 12-70 (Rev) contracts. Tea Importers is the insured Investor under Contract No. 9969 (Tab 5) and Contract No. 9890 (Tab 6). C & W is the insured Investor under Contract No. 9891 (Tab 7). Although Tea Importers and C & W are separate businesses, both are owned by members of the Wertheim family. For the purposes of this memorandum, OPIC will treat the claim as having been filed on behalf of both Investors since both companies are beneficially owned by the same persons.

#### A. Contract of Insurance No. 9969

Investor Tea Importers entered into Contract No. 9969 in April, 1981 for the purpose of insuring the original Investment that was made in order to construct the tea processing facility and establish the tea plantation. It consolidates and supersedes two previous contracts (8920R and 8921W, which were executed in 1976). The insured Investment, 90% of the Investor's investment, consists of up to \$239,400, of which \$63,000 is in the form of subordinated debt and \$176,400 is in the form of equity, representing up to 15,481 shares (a 21.22% interest in SORWATHE).

The Contract was amended in 1983 to include coverage against civil strife. In 1984 it was amended again to increase the Maximum and Current Insured Amounts.

#### B. Contract of Insurance No. 9890

The original Investor under Contract No. 9890 was O.H. Clapp & Co., which was merged into Tea Importers in 1986. This Contract was entered into in September 1980 to insure an investment in the expansion of the Rwanda tea processing facility. The insured Investment under this Contract is up to \$170,460, representing 90% of the total investment under the Contract, all of which is in the form of equity. As a result of the Investment, the Investor acquired 15,683 shares of stock in SORWATHE, representing a 19.8% equity interest.

The Contract was amended in 1983 to include coverage against civil strife. In 1984 it was amended again to increase the Maximum and Current Insured Amounts.

C. Contract of Insurance No. 9891

Contract No. 9891 (issued in September 1980) insures an investment made by C & W for the purpose of expanding the existing tea processing facility in Rwanda. The insured Investment consists of up to \$66,000, amounting to 90% of C & W's total equity investment under the Contract. As a result of the Investment, C & W acquired 6,112 shares of stock, representing a 7.7% equity interest in SORWATHE.

The Contract was amended in 1983 to include coverage against civil strife. In 1984 it was amended again to increase the Maximum and Current Insured Amounts.

IV. DETERMINATIONS UNDER THE CONTRACTS

OPIC hereby makes the following determinations:

A. Section 1.07. That Damage has occurred.

The Contracts, as amended, define "Damage" as:

(a) injury to, (b) disappearance of, or (c) seizure and retention of Covered Property (any of which events, for the purposes of this Section, shall be referred to as a "Loss") directly caused by an act of (1) war (whether or not formally declared), (2) revolution or insurrection, or (3) civil strife, terrorism or sabotage. An act of revolution or insurrection is an act committed by an organized group having as its principal objective either the violent overthrow of the established political authorities or the ouster of such authorities from a specific geographic area. An act of civil strife, terrorism or sabotage is a violent act undertaken by an individual or group with the primary intent of achieving a political objective.

The issues raised by this provision of the Contracts are: (1) whether the acts causing the injury were acts of war, revolution, insurrection, civil strife, terrorism or sabotage; (2) whether such injury was directly caused by such action; and (3) whether the injury was to Covered Property.

1. The events leading to the Loss constitute at least civil strife as defined in the Contracts.

Based on published accounts of the conditions in Rwanda during May through June 1995 when SORWATHE's car was taken by the government, OPIC determines that the conditions of unrest that existed constituted at least civil strife within the meaning of the Contracts. The RPF initially stated that their primary objective was

the right to citizenship for Rwandan refugees living stateless outside Rwandan borders and denied entry into the country by the Rwandan government. The Rwandan government accused the RPF of attempting to reinstall a Tutsi monarchy in place of what it claimed was a legitimate political regime. After Hutus killed several hundred thousand Tutsis, the Tutsi-led RPF managed to seize control of the government. Millions of Hutus then fled to refugee camps along the Zaire-Rwanda border, some protected by French peacekeeping forces. Political violence continued at the time of the Loss, if not at the level of active civil war, then at the level of civil strife in the form of reprisals for earlier acts of violence and intimidation of Hutus by Tutsis. There is a Hutu government in exile, and the camps are dominated by soldiers and militia of the former government, who posed a constant threat of invasion.

## 2. Political violence was the cause of the Loss.

Section 1.07 of the Contract provides that:

An act shall be considered the direct cause of a Loss if there is an unbroken chain of causes and effects from the act to the Loss, without the intervention of any force operating actively from an independent source, and the Loss would not have occurred but for the event.

OPIC finds that direct causation is established. As discussed above, the fighting between the RPF and government forces constitutes at least civil strife. The Rwandan government did not requisition SORWATHE's car independently of the civil strife. According to the Investor, the manager heard that he was going to be accused of participating in the ethnic killing. Like others threatened with arrest in the prevailing conditions, he had little prospect of a fair trial or humane pretrial detention and fled the country. The Rwandan authorities confiscated the vehicle because it had been used to enable a person accused of a political violence - related act to escape the country. Clearly the Loss would not have occurred but for the conditions of political violence that existed.

## 3. The property lost constituted Covered Property under the Contracts, and none of the Exclusions apply.

"Covered Property" is defined in Section 1.05 as tangible property owned by the Foreign Enterprise or of which the Foreign Enterprise bears the risk of loss and which is used in connection with the Project and located in the Project Country on the Date of Damage. The vehicle in question clearly constituted Covered Property. It was owned by SORWATHE, located in Rwanda, and used in connection with the Project. Furthermore, the car is not excluded from the definition of "Covered Property" as it was not "bullion, documents or the tangible evidence of other property (tangible, intangible or real), e.g. accounts, bills, currency, debentures, deeds, manuscripts, money or securities." Neither may the car be excluded under section 25.04, which provides:

Any Covered Property which has suffered Damage due in whole or in part to the failure of the Investor or the Foreign Enterprise to take all reasonable measures to protect and preserve such Covered Property shall be excluded from the computations provided in section 25.01.

Under this provision, if the Investors or the Foreign Enterprise had failed to take any action reasonably available to it to prevent the Damage from occurring, OPIC would not compensate for such Damage. However, OPIC is satisfied that there were no such measures available to SORWATHE or to the Investor. SORWATHE has requested the return of the car, but this has not occurred and will probably not occur, since political violence is ongoing and there does not seem to be any proper judicial system.

B. Section 24.01. That total compensation paid is 9,878.57

Section 24.01 of the Contracts provides that the amount of compensation is the lesser of the Net Investment as of the Date of Damage, or the Investor's Share of the amount of Damage, less any Other Compensation received by the Investor for the same Damage, and the Investor's share of any Other Compensation received by the Foreign Enterprise for the same Damage.

The Contracts further limit the amount of Damage to: (1) the Current Insured Amounts for Coverage C in effect on the first day of the Contract Period during which the Date of the Damage occurred; and (2) the maximum liability of OPIC under Article 5 of the Contracts. Article 5 states that OPIC's maximum liability shall not exceed the Maximum Insured Amount specified in the Special Terms and Conditions in effect with respect to equity securities.

1. Section 25.01. That the amount of Damage to Covered Property is \$20,276.26

The amount of Damage to an item of Covered Property is defined under Section 25.01 of the Contracts as:

(T)he Actual Cash Value, immediately prior to the Date of Damage, of the Covered Property which has suffered Damage, but not exceeding the lesser of (i) the reasonable cost of repairing or replacing such Covered Property with property of like kind and quality within a reasonable time after such Damage, or (ii) the amount by which the Damage reduced the fair market value in the Project Country on the Date of Damage of such Covered Property.

The term Actual Cash Value is defined under Section 1.02 of the Contracts as follows:

Under Coverage C, the term "Actual Cash Value" for any item of Covered Property owned by the Foreign Enterprise means on any date the reasonable cost thereof to the Foreign Enterprise (adjusted if necessary to reflect abnormal deterioration in the physical condition of such item). For the purpose of this Section, "reasonable cost" means the basic cost of any item (not to exceed fair market value in the United States of America at the time of the acquisition) plus freight, insurance, import duties, cost of installation and such other direct costs related to such item as have been, in accordance with the principles of accounting referred to in Article 9, capitalized and charged to such item on the books of account of the Foreign Enterprise.

For the purposes of these Contracts, the Actual Cash Value of the vehicle may be treated as its original cost. The car was purchased in 1987 for 1,600,000 Rwanda Francs.<sup>4</sup> An exact date of purchase was unavailable, however an average of the quarterly exchange rates of the Rwandan franc in 1987 was 78.91 Rwanda franc to the U.S. dollar (Tab 9). This makes the Actual Cash Value of the car approximately \$20,276.26.

2. That the Investors' Share of the amount of Damage is \$9,878.57

The Contracts contain a complex formula for the calculation of the Investor's Share according to the investor's equity and debt interests in the Foreign Enterprise. In the Winter 1984 issue of Topics, OPIC notified insured investors that at the time of making a claim, each investor could choose to calculate Investor's Share either as specified in its contract or alternatively according to a formula based strictly on the extent of an investor's equity investment (Tab 10). The formula based solely on equity (the "Equity Formula") is more favorable to the Investor than the formula in the Contracts.

Under the Equity Formula, Investor's Share on the Date of Damage is calculated as a fraction:

(a) the numerator of which shall be the book value of the equity shares of the Foreign Enterprise owned by the Investor and (b) the denominator of which shall be the book value of the total stockholders' equity in the Foreign Enterprise.

C & W Trading owns equity securities representing 7.7% of the insured investment in the Foreign Enterprise. Since the total amount of Damage equals \$20,276.26, C & W Trading's share of the amount of Damage is \$1,561.25. Tea Importers owns equity securities totalling 41.02% of the insured Investment in the Foreign Enterprise. Thus, its share of the amount of Damage is \$8,317.32. Adding together Tea Importers' share of the amount of Damage and C & W Trading's share of

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<sup>4</sup> See Letter from J.H. Wertheim, May 3, 1996 (Tab 4).

the amount of Damage, the total Investors' Share of the amount of Damage equals \$9,878.57.

3. Section 1.24. That the compensation determined to be due does not exceed the Net Investment.

Tea Importers submitted a financial statement reflecting the financial condition of SORWATHE as of December 31, 1995 (Tab 11). The statement is not prepared in accordance with principles of accounting generally accepted in the United States of America, as prescribed in Section 9.01 of the Contracts. However, since financial statements are required only for the purpose of determining Net Investment, a cap on compensation, and not compensation itself, this requirement can be waived without prejudice to OPIC, given the apparent margin by which Net Investment exceeds the amount of compensation otherwise due.

According to the financial statement, SORWATHE then had net assets of RF 1,260,083,057. From this, OPIC subtracted total liabilities of RF 87,018,883. The difference is RF 1,173,064,174. Using the exchange rate of RF 218.42 per Dollar, the net book value of the Foreign Enterprise is \$5,370,681.13. The Net Investment (the share owned by the Investors and attributable to their insured Investments) is \$2,380,554.41 (90% x 49.25% x \$5,370,681.13). This Net Investment far exceeds the amount of the claim (Tab 9).

4. Section 1.06. That the compensation determined to be due does not exceed the total Current Insured Amount for Political Violence Coverage under the Contracts.

OPIC records confirm that in May and June 1995, the period including the Date of Damage, the total Current Insured Amount in effect under the Contracts for Political Violence Coverage was \$1,131,046. Thus, the compensation determined to be due does not exceed the Current Insured Amount.

5. Section 23.01. That Tea Importers promptly notified OPIC of the Damage.

The Contracts require that the Investor give prompt notice of any action which it has reason to believe may cause or has caused Damage. Tea Importers notified OPIC by letter on March 20, 1996. OPIC finds this notification sufficient, as the delay from the Date of Damage did not prejudice OPIC in its processing of the claim.

6. Sections 2.01 and 2.05. That Tea Importers and C & W Trading were on the dates of execution of the Contracts and have remained corporations created under the laws of a state of the U.S. and substantially beneficially owned by U.S. citizens.

Tea Importers and C & W Trading represented upon the execution of the Contracts and have certified that they were organized as and remain corporations organized under the laws of the state of Connecticut and that they are more than 50 percent owned by U.S. Citizens (Tab 12).

7. Section 23.02. That Tea Importers and C & W Trading will assign to OPIC any claims, causes of action or rights which they may have for compensation from any other source based on the Damage.

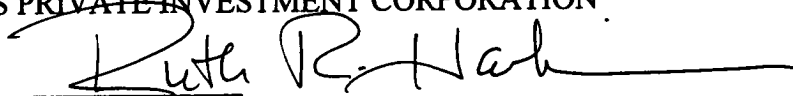
Prior to payment of the claim, Tea Importers and C & W Trading will assign, transfer and convey to OPIC any claims, causes of action or rights which they have for compensation from any other source based on the Damage. They will execute all documents and take any necessary actions to complete such assignments, transfers and conveyances (Tab 13 & 14).

#### V. CONCLUSION

Based on the foregoing determinations and subject to the execution of the Certificate, Assignment, and Receipt and Release prior to the claim payment, we find that the political violence claim of Tea Importers and C & W Trading is valid and that OPIC is liable for \$9,878.57.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By

  
 Ruth R. Harkin  
 President and Chief Executive Officer

Date

7/30/96