

MEMORANDUM OF DETERMINATIONS

Political Violence Claim of Seaboard Overseas Limited (the “Investor”)

Zambia – Contract of Insurance No. F123

I. CLAIM

By an e-mail dated October 18, 2011, the Investor gave notice to OPIC that the Investor had suffered losses of tangible property on September 22, 2011, as a result of political violence in Zambia. Through a number of subsequent e-mails, the Investor provided an application for compensation, which consisted of an account of the lost tangible property and additional information regarding the circumstances of the losses.¹

The losses occurred during riots in the Copperbelt administrative province of Zambia, which began due to the delay in the publication of the results of the presidential election on September 20, 2011. According to information supplied by the Investor, the Copperbelt province generally is very supportive of the opposition party. As a result of the delay in publishing the presidential election results, a large number of opposition supporters began to protest by rioting violently in the streets, clashing with police, and looting shops. OPIC finds the claim is valid and that the Investor is entitled to compensation in the amount of \$38,027.37.

II. FACTUAL BACKGROUND²

Zambia achieved independence from the United Kingdom of Great Britain in 1964. Kenneth Kaunda dominated Zambian politics from independence until 1991, and he ruled Zambia during that time through his political party, the United National Independence Party. For much of that time, Zambia was a one-party state and all political parties, other than the United National Independence Party, were banned. In 1991, Zambia established a new constitution based upon a multi-party democracy, resulting in the formation of new political parties, including the Movement for Multiparty Democracy (“MMD”) and the Patriotic Front (“PF”). The MMD’s candidates for president won the presidential elections in 1991, 1996, 2001, and 2006.

The most recent presidential elections were held on September 20, 2011, between the incumbent President Banda of the MMD and the opposition PF’s candidate, Michael Sata, who had run for president three times previously and narrowly lost a special election in 2008. The Zambian media was banned from announcing the results of the September 20, 2011 election until the results had been verified by the electoral commission, which resulted in a delay in announcing the winner of the election.³ The BBC reported that the secretary general of the PF believed the results were being deliberately delayed because the MMD knew it had lost the election.⁴ This delay angered PF supporters and ultimately led to violent rioting in the Copperbelt province, where PF supporters have a strong presence.⁵ The BBC reported that

¹ The notice, application for compensation, and related documents are attached hereto as Exhibit 1.

² Unless otherwise noted, the factual description is based upon the State Department background notes, *available at*: <http://www.state.gov/r/pa/ei/bgn/2359.htm>.

³ *ZambiaPoll: Riots in Kitwe and Ndola over Slow Results*, BBC News, September 22, 2011, *available at*: <http://www.bbc.co.uk/news/world-africa-15019198>.

⁴ *Id.*

⁵ *Id.*; Chris Mfula, *Poll Riots Hit Zambia, Opposition Leads Tight Race*, Reuters, September 22, 2011, *available at*: <http://www.reuters.com/article/2011/09/22/us-zambia-election-idUSTRE78L1IG20110922>.

the rioters set a market on fire in Kitwe and police set up barricades in the city's township of Wusaikile,⁶ which is the location of one of the Investor's looted depots. According to the Investor, the depots that were looted during the riots are located in Wusaikile, Masala, and Chifubu, all of which are towns in the Copperbelt province. In addition to looting the inventory and cash at the depots, the rioters damaged the depot buildings by setting them on fire, smashing windows, and ripping out doors.

III. THE CONTRACT

A. Scope of Coverage

Contract of Insurance No. F123, dated as of September 30, 1999, between the Investor and OPIC (the "Contract") provides insurance against inconvertibility, expropriation, and political violence in connection with the Investor's equity and debt investments in National Milling Company Limited, a Zambian company that produces and sells wheat and maize products to the Zambian market (the "Foreign Enterprise"), for the acquisition, ownership, and operation of the Foreign Enterprise (the "Project"). As of September 22, 2011, the active amount of coverage for political violence was \$1,294,362.

Article VI of the Contract provides that 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 used for the Project. "Political violence" is defined in Section 6.01 of the Contract to mean "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."

Section 6.02 sets forth the exclusions that apply to compensation for a political violence claim, which include (a) excluded property (precious metals, gems, works of art, money, or documents), (b) minimum loss (if the amount of compensation would be less than \$5,000), (c) if the loss results from the failure to take reasonable measures to protect or preserve the property, and (d) if the preponderant cause of the loss is unreasonable action attributable to the Investor.

B. Compensation

Section 7.01 of the Contract provides that, if the requirements of Article VI of the Contract are satisfied, and subject to certain limitations, OPIC shall pay compensation for a loss in United States dollars in the amount of either (a) the adjusted cost of the lost property, which is the Investor's share of the lowest of (i) the original cost; (ii) fair market value; or (iii) the reasonable cost of repair; in each case less anything of value received by the Investor on account of the property lost and less then Investor's share of any such receipts by the Foreign Enterprise, or (b) if the Investor so elects, the replacement cost of the lost property with equivalent new property, provided that the replacement cost does not exceed 200% of the original cost of the property.

IV. DETERMINATIONS UNDER THE CONTRACT

A determination under an OPIC insurance contract addresses three categories of issues: (a) whether the acts of which the insured party has complained satisfy all of the elements required to bring them within the scope of coverage; (b) the amount of compensation payable; and (c) whether the insured party has fulfilled its duties under the insurance contract.

⁶ *Id.*

A. Political violence was the direct and immediate cause of the permanent loss of tangible property of the foreign enterprise used for the project

According to the Investor, three depots located in the Copperbelt province were looted on the morning of September 22, 2011, during the riots that occurred after the delay in announcing the results of the September 20, 2011 presidential election. As noted above, the violent riots were instigated by PF supporters who were angered by the delay in the announcement of the election results by the media, and the extent of the violence and its cause have been documented by accounts in the international press and confirmed by the U.S. Embassy in Lusaka, Zambia. Therefore, the rioting that occurred on September 22, 2011, in the Copperbelt province of Zambia constitutes political violence, as defined under the Contract.

In its application for compensation the Investor described the damage to the tangible property of the Foreign Enterprise. The damage included damage to the depots to enable the rioters to gain entry to the depots, such as breaking windows, tearing down locked doors, and destroying roofs, as well as the looting of products for sale in the Wusaikile and Masala depots, such as maize flour products, wheat flour products, rice, salt, and sugar. In the Chifubu depot, the rioters damaged the building but did not actually loot the store. However, all of the stock of the depot was contaminated by tear gas fired by the police to deter the rioters and thus the stock is no longer fit for human consumption. Therefore, the political violence was the direct and immediate cause of the permanent loss of the tangible property (stocks and inventory) of the Foreign Enterprise at its depots.

Of all the exclusions that apply to political violence claims, only one applies to the Investor's application for compensation. Pursuant to Section 6.02 of the Contract, no compensation for political violence shall be payable for excluded property, which includes money. The Investor has stated in its application that cash from the prior day's sales was among the property stolen from the Wusaikile and Masala depots during the riots. Since money is an excluded property under the Contract, no compensation will be payable for the looted cash. None of the other exclusions applies to the Investor's application for compensation, as the amount of compensation payable is not less than \$5,000, there are no other measures the Investor or the Foreign Enterprise could have taken to protect or preserve the property, and there is no question of provocation by the Investor.

B. Compensation is payable in an amount of \$38,027.37 on the basis of the adjusted cost of the lost property

Section 7.01 of the Contract provides two options for compensation in the event of property loss: adjusted cost and replacement cost. The Investor did not elect replacement cost as the basis of compensation for the lost property; therefore, the basis of compensation is the adjusted cost of the lost property. Considering the nature of the property lost (perishable products sold for human consumption) and the fact that the lost property was intended for sale, the original cost of the property is the most appropriate measure of compensation. The Investor provided a spreadsheet listing all of the stock that was stolen or destroyed from each depot during the riots of September 22, 2011, and the original purchase price that the Foreign Enterprise paid for such stock. The aggregate purchase price of the stolen or destroyed stock is \$38,027.37. The "Investor's share" of the Foreign Enterprise (as such term is defined under the Contract) is 100%, and thus the amount of compensation payable, prior to taking into account any possible limitations and adjustments, is \$38,027.37.

Section 7.02 of the Contract includes three possible limitations for compensation for a loss. None of these limitations applies to the Investor's application for compensation. The Active Amount for political violence as of the date of property loss was \$1,294,362, well above the value of the looted stock. The Investor still retains the risk of loss of at least 10% of the book value of its interest in the Foreign Enterprise, as required under Section 9.01.3 of the Contract. Finally, the aggregate compensation for

property compensated at adjusted cost does not exceed the book value of the insured investment at the time of the property loss. OPIC has not paid any other compensation to the Investor for political violence claims, and based on the balance sheets of the Foreign Enterprise for 2011, OPIC has confirmed that the amount of compensation payable under this claim does not exceed the book value of the insured investment as of the date of the property loss.

In addition, none of the adjustments described in Section 7.04(b) of the Contract is required in this instance.


C. The Investor has complied with all of its duties under the Contract

The Investor filed an application for this political violence claim, together with proof of the amount of compensation due, within six months of its occurrence. The Investor has certified that it remains the beneficial owner of the Foreign Enterprise and remains eligible for OPIC insurance in accordance with Section 9.01.2 of the Contract. In addition, the Investor has complied with its duties under the Contract in all material respects and has provided a certificate to that effect that is satisfactory to OPIC.

V. CONCLUSION

For the foregoing reasons, OPIC concludes that the claim of the Investor is valid. The aggregate amount of compensation to be paid for the property loss on September 22, 2011, due to political violence is determined to be \$38,027.37.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: 

Name: Don S. De Amicis

Title: Vice President and General Counsel

Date: April 2, 2012