

Annex 3

DEFINITION OF POLITICAL RISKS

NAMELY NON-TRANSFER OF CURRENCY, EXPROPRIATION, WAR OR CIVIL DISTURBANCE AND DENIAL OF JUSTICE UPON BREACH OF CONTRACT

1. NON-TRANSFER OF CURRENCY

means:

any action by the Host Government which, directly or indirectly, prevents a Guaranteed Debtor from converting funds in local currency into the currency of the Loan Agreement or into a freely convertible currency or into another currency deemed acceptable by the Bank, or from transferring outside the Host Country the local currency concerned or the currency into which the local currency has been converted, for the purpose of (i) paying any Guaranteed Sum, (ii) receiving any Guaranteed Sum in the currency and in accordance with the terms and conditions agreed, or (iii) recovering any Guaranteed Sum which has been duly paid; and

any failure by the Host Government to take action with a view to effecting or allowing such conversion or such transfer by or on behalf of the Bank, or a Guaranteed Debtor;

with the proviso that:

(a) the Guaranteed Debtor is able freely and lawfully to avail itself within the Host Country of the local currency or other currency into which the local currency has been converted; and

(b) the Guaranteed Debtor concerned or, as the case may be, the Bank has without success for a period of 30 days endeavoured by all reasonable means to complete the necessary legal formalities to effect the transfer or conversion.

2. EXPROPRIATION

means:

any measure taken, directed, authorised, ratified, or approved by the Host Government, which is an administrative action or a legislative action and constitutes expropriation within the meaning of this Section 2.

A measure constitutes an act of expropriation within the meaning of this Section 2 if the measure:

prevents the Guaranteed Debtor from paying a Guaranteed Sum and results in a default that continues for a period of 90 days; or

deprives for a period of 90 days a Third-Party Guarantor or the Bank of its rights as a creditor against collateral security or commercial guarantees of repayment in respect of scheduled payments that have fallen due for other reasons than as a consequence of one of the risks defined in this Annex; or

deprives a Third-Party Guarantor or the Bank, for a 90-day period, of the use of funds deposited either in local currency or in foreign currency, with a financial institution in the Host Country, by him or for his account for the purposes of recovery under scheduled payments.

No measure on the part of the Host Government shall be deemed to constitute an expropriation if it constitutes a bona fide non-discriminatory measure of general application of a kind that governments normally take in the public interest for such purposes as ensuring public safety, raising tax revenue, protecting the environment or regulating economic activities, unless the measure is designed by the Host Government to have a confiscatory effect.

Breach by the Host Government of a contractual obligation owed to a Guaranteed Debtor shall not of itself constitute an expropriatory measure.

3. WAR OR CIVIL DISTURBANCE

means:

any act of war (declared or otherwise), revolution, insurrection, civil war, riot or social strife, terrorism or sabotage having the direct and immediate effect of

(i) preventing a Guaranteed Debtor for a period of 90 days from paying a Guaranteed Sum or

(ii) preventing a Third-Party Guarantor or the Bank for a period of 90 days from effecting recovery in respect of Guaranteed Sums which have been duly paid or from receiving a Guaranteed Sum in the due currency and in the manner contractually provided for.

In all cases, to constitute an act of war or civil disturbance, the act must have been undertaken with the primary intent of pursuing a political objective. Acts undertaken principally in order to support labour, employment, students' interests or other non-political objectives shall not be covered under this Section 3.

The time periods of 30 or 90 days referred to in Sections 1, 2 and 3 of this Annex shall not apply if the payment default, deprivation of entitlement or non-recovery results from the extension of an event, as defined in this Annex, the existence of which has been duly established during a prior payment default for which the time periods referred to above have already been applied.

4. DENIAL OF JUSTICE UPON BREACH OF CONTRACT

means:

the repudiation or breach by a Host Government of a Project Agreement (as defined below), where the repudiation or breach either:

(i) prevents, or materially contributes to preventing, the Guaranteed Debtor from performing its obligations towards the Bank; or

(ii) prevents the Bank or a Third-Party Guarantor from realising the full value of security taken over the revenues or other benefits derived from any security interest in the Project Agreement.

Cover shall be limited to cases where an arbitral tribunal renders a final, binding and enforceable award providing for damages in respect of the Relevant Party's claim for damages for breach or repudiation; provided that:

(a) the award is for a specified monetary amount, and is rendered for breach of a contractual obligation under, or for repudiation of, a Project Agreement by the Host Government;

(b) the Relevant Party has made reasonable efforts to exhaust all legal remedies to enforce the award against the Host Government for a period of 180 consecutive days from the date of the award. A precautionary demand upon the Bank can be made by a Third-Party Guarantor in cases where this period has not yet expired within the 2 years preclusion period set out in Article 2.03 (ii) of this Guarantee. Such precautionary demand does not entitle the Bank to make a demand for payment under this Guarantee, but merely serves as a means to suspend the preclusion set out in article 2.03 (ii) of this Guarantee. Any remaining part of the preclusion period shall start to run again upon expiration of the enforcement period. The Bank shall inform the Guarantors of any precautionary demands made by a Third-Party Guarantor;

(c) the Host Government's refusal to enforce the award is arbitrary and/or discriminatory.

For this purpose:

(a) An "**arbitral tribunal**" means any arbitral tribunal or panel, wherever it is established, which is independent from the Host Government, and which is entrusted under the terms of the Project Agreement to make a final, binding and enforceable award on a claim by a Relevant Party there under and whose award is capable of enforcement in the Host Country under the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards;

(b) An award is deemed to be "**binding**", if it creates legal rights for the parties in relation to the subject matter of the dispute between them;

(c) An award is deemed to be “**enforceable**” unless the arbitral tribunal that renders the award, or any other competent body, suspends or denies the enforcement of the award;

(d) An award of an arbitral tribunal is deemed “**final**”, if the time for appeal or challenge to the award has expired without an admissible challenge or appeal having been made;

(e) “**Project**” means a project within the scope of the Cottonou Framework and described by a Project Credit Report;

(f) “**Project Agreement**” means an agreement, contract or binding commitment between a Relevant Party and a Host Government which is directly related to a Project and is, in the reasonable opinion of the Bank, critical to the financial or technical viability of the Project, and includes, by way of illustration, any of the following types of agreement or commitment, namely supply agreements, off-take agreements, subsidy agreements, user agreements, concessions, licences to exploit, or price setting mechanisms;

(g) “**Relevant Party**” means a Borrower or a parent company or a subsidiary of the Borrower situated in the same country than the Borrower.

The Relevant Party or the Third-Party Guarantor shall be obliged to take all reasonable efforts to exhaust available remedies to enforce the award against the Host Government or to use reasonable efforts to ensure that the Relevant Party or the Third-Party Guarantor which is able to exercise those remedies does so.

Each agreement with a Guaranteed Debtor shall reserve for the Bank the right to specify the measures that the Relevant Party or the Third-Party Guarantor shall take, or shall ensure be taken, to enforce an arbitral award on a claim for breach or repudiation of contract. The Bank is not obliged to require any party to take measures that are, in the judgement of the Bank, disproportionate to their likely benefit.

The Bank may agree to reimburse any Guaranteed Debtor for the reasonable cost of enforcement proceedings. The Guarantors shall reimburse the Bank for any cost it thereby incurs.

5. GENERAL EXCLUSION

None of the following acts or risks shall warrant the calling of the Guarantee:

– any act of the Host Country to which the Guaranteed Debtor or, in the case of Section 4 of this Annex, the Relevant Party, has freely consented or where the preponderant cause lies in the illegal and unreasonable conduct of the Guaranteed Debtor or the Relevant Party;

– any Political Risk, as defined above, clearly prevailing at the date on which the Bank signed the relevant Loan Agreement or security agreement and producing the effects referred to in this Annex at such date.