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PROJECT FINANCE INVESTORS: SOLUTION TO POPULISMO

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I. INTRODUCTION

"I saw other people wrapped in flames jump from the plane. I was in seat number 21, a window seat at wing level. The doors would not open, so I jumped through a hole in the plane amid the flames from a height of about two yards. ... I don't know how I survived."[1] This vivid description came from a witness's account of the 1998 Cuban airplane crash in Quito, Ecuador.[2] After takeoff, the airplane's engines stalled due to the high elevation, making the airplane unable to receive enough lift to clear the surrounding mountains and volcanoes.[3] The plane spiraled downwards and eventually crashed into a nearby soccer field where young children were playing.[4] The plane exploded leaving few survivors.[5]

This crash and many others occurred at the old Mariscal Sucre airport in Quito, Ecuador.[6] The severely dangerous conditions of that airport compelled the city to relocate the airport.[7] The new Mariscal Sucre airport began operating in February of 2013,[8] providing the city and the nation with hopes beyond avoiding safety problems. Indeed, they also hoped it would solve the country's crippling poverty[9] and moribund economy.[10] While Ecuador has a vast amount of natural resources, forty percent of the country's population suffers from poverty to the point that they are barely surviving. This high level of poverty shows that a nation's potential has little value without a supporting infrastructure.[11]

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[*] J.D. Boston University School of Law, 2013.

[1] *Dozens Dead in Ecuador Crash*, BBC (Aug. 30, 1998), http://news.bbc.co.uk/2/hi/americas/161030.stm.

[2] *Id.*

[3] *77 Die in Crash of Cuban Jet in Ecuador*, N.Y. TIMES (Aug. 30, 1998), http://www.nytimes.com/1998/08/30/world/77-die-in-crash-of-cuban-jet-in-ecuador.html.

[4] *Dozens Dead in Ecuador Crash*, *supra* note 1.

[5] *Id.*

[6] Gonzalo Solano, *Mariscal Sucre, Quito's Airport, to be Moved Feb. 19 (Photos)*, HUFFINGTON POST (Jan. 30, 2013, 2:50 PM), http://www.huffingtonpost.com/2013/01/30/mariscal-sucre-quitos-air_n_2582582.html.

[7] *See* Joe Bates, *New Era for Quito: $700 Million Airport Set to Open*, AIRPORT WORLD (Oct. 25, 2012, 5:00 AM), http://www.airport-world.com/item/2006-new-era-for-quito.

[8] *See id.*

[9] *See* Mercedes Alvaro, *Ecuador's Poverty Rate Fell to 28.6% in 2011 vs. 32.8% in 2010*, WALL ST. J. (Jan. 17, 2012, 1:38 PM), http://online.wsj.com/article/BT-CO-20120117-712857.html.

[10] Nathan Gill, *Ecuador Economic Growth Stagnates as Oil Drop Cuts Spending*, BLOOMBERG (Jan. 9, 2013, 3:49 PM), http://www.bloomberg.com/news/2013-01-09/ecuador-economic-growth-stagnates-as-oil-drop-cuts-spending-1-.html.

[11] *See generally Ecuador es un imán para las inversiones también*, TELÉGRAFO (Apr. 1, 2013), http://www.telegrafo.com.ec/economia/item/ecuador-es-un-iman-para-las-inversiones-tambien.html.

The new airport became the first step towards addressing the gap between Ecuador's potential and its struggling infrastructure.[12] The airport seeks to connect Ecuador to world markets and provide a catalyst for further investment in domestic infrastructure.[13] Nonetheless, the vast resources, new airport, and other supporting infrastructure are not fully utilized because foreign investors perceive the risk of Ecuador's populism as outweighing any potential gains.[14]

Populism is a significant political risk for entrepreneurs in Ecuador. However, entrepreneurs can mitigate the risks of populism through project finance, learning from the experiences of the new airport in Quito (Quiport), and adopting a strong stabilization clause.[15] This paper first describes the largely unexploited opportunity for investment in Ecuador.[16] These unexploited opportunities include the abundant natural resources extending from the coast of Esmeraldas to the interior Amazon.[17] Although the government provides incentives for developing these resources, many investors have not heeded the call.[18]

Investor neglect of Ecuador, as Part III will explain, derives from a fear of populism.[19] Populism is a growing trend under the leadership of the President of Ecuador, Rafael Correa, who has shown a commitment to redistributing wealth, enacting laws that exploit foreign companies, and challenging a perceived global power imbalance.[20] Correa's actions, such as his 2010 decree that foreign oil companies must promote state policies and submit at least seventy percent of their revenues to the state,[21] have become a calculated risk for investors in Ecuador.[22]

Investors, however, should not allow such risk to entirely deter them.[23] They can reconcile the potential benefits of investment with the risks associated with populism by using project finance.[24] Part IV describes how use of project finance can allocate risk and utilize

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[12] *See* discussion *infra* Part V.A.

[13] *See* discussion *infra* Part V.A.

[14] *See generally* Andres Oppenheimer, *Latin America's Fastest-Growing Economies of 2013*, MIAMI HERALD (Apr. 24, 2013), http://www.miamiherald.com/2013/04/24/3362939/andres-oppenheimer-latin-americas.html; *see also* James McKeigue, *Ecuador: Is it Nuts to Invest Here?*, MONEYWEEK (Mar. 4, 2013), http://www.moneyweek.com/investments/stock-markets/emerging-markets/new-world-why-you-should-be-getting-excited-about-ecuador-62904.

[15] *See* discussion *infra* Parts III–VI.

[16] *See* discussion *infra* Part II.

[17] *See* discussion *infra* Part II.

[18] *See* discussion *infra* Part II.

[19] *See* discussion *infra* Part III.

[20] *See* discussion *infra* Part III.

[21] *See* Jason Pierce, Note, *A South American Energy Treaty: How the Region Might Attract Foreign Investment in a Wake of Resource Nationalism,* 44 CORNELL INT'L L.J. 417, 431 (2011); *see also Ecuador: Correa's Play for Greater Influence in the Oil Sector*, FORBES (Apr. 21, 2010, 4:20 PM), http://www.forbes.com/sites/energysource/2010/04/21/ecuador-correas-play-for-greater-influence-in-the-oil-sector/.

[22] *See* Sara Schaefer Muňoz & Mercedes Alvaro, *Ecuador's Correa Poised to Broaden his Sway*, WALL ST. J. (Feb. 15, 2013, 6:40 PM),http://online.wsj.com/article/SB100014241278873244 32004578304611096042632.html; *but see* Sara Miller Llana, *Ecuador's Populist Leader Still Strong*, CHRISTIAN SCI. MONITOR (Apr. 26, 2009), http://www.csmonitor.com/World/Americas/ 2009/0426/p06s07-woam.html (explaining that "Correa is more difficult to categorize").

[23] *See generally* discussion *infra* Part IV.

[24] *See* discussion *infra* Part IV.

expected cash flows to fund a venture, which allows the project to sustain itself on its merits.[25] Part V demonstrates the merits of project finance in Ecuador by exemplifying the Quiport project.[26] The project addressed a need, furthered the nation's goals, and overcame a manifestation of populism through a constitutional challenge.[27] Finally, Part VI offers the specific recommendation, based on the Quiport project, that project financiers should employ stabilization clauses.[28]

II. OPPORTUNITY FOR INVESTMENT: ECUADOR'S RESOURCES

Ecuador is located at the equator and boasts a beautiful coastline, mountains, and a sliver of the Amazon rainforest. The country possesses a myriad of resources, some of which the world has not yet even discovered and many that have not reached their full potential.[29] For instance, Ecuador's cloud forests possess trees that bleed when cut.[30] This blood-like sap can heal wounds, and possibly even prevent the growth of cancer.[31] The first investor to capitalize on Ecuador's incredible resources stands to gain large financial benefits from such an investment.[32] For Ecuador, the resources present an opportunity to evolve in a globalized economy.[33] Nonetheless, Ecuador lacks the ability to make this kind of economic progression because neither the government nor foreign investors have made the needed investment in the country's infrastructure.[34]

To support a resource driven economy in the future, Ecuador must have sustainability and diversification of its resources.[35] First, Ecuador must sustain its economy by preserving its primary export—oil.[36] The nation currently produces only a small portion of its oil,[37] even though it has the "third-largest oil reserves in South America after Venezuela and

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[25] *See* discussion *infra* Part IV.

[26] *See* discussion *infra* Part V.

[27] *See* discussion *infra* Part V.

[28] *See* discussion *infra* Part VI.

[29] *See generally* U.S. DEP'T OF STATE, 2012 INVESTMENT CLIMATE STATEMENT- ECUADOR (2012).

[30] Chris Kilham, *Dragon's Blood for Skin Issues*, FOX NEWS LATINO (May 1, 2011), http://latino.foxnews.mobi/quickPage.html?page=30422&content=51372751&pageNum=-1; *see generally* Manuel Sandoval et al., *Sangre de Grado Croton Palanostigma Induces Apoptosis in Human Gastrointestinal Cancer Cells*, 80 J. ETHNO-PHARMACOLOGY 121 (2002).

[31] Kilham, *supra* note 30; *see generally* Sandoval, *supra* note 30.

[32] *See* Clive Cookson, *How to Make the Most of 'Wild Wealth'*, FT MAG. (Mar. 29, 2013, 6:21 PM), http://www.ft.com/intl/cms/s/2/168acd56-967a-11e2-9ab200144feabdc0.html#axzz2RiwUe7IU.

[33] *See generally* Pierce, *supra* note 21, at 417–18.

[34] *See supra* notes 56–11 and accompanying text.

[35] Fander Falconi, *Ecuador Begins to Roar*, GUARDIAN (Apr. 7, 2013, 1:15 PM), http://www.guardian.co.uk/commentisfree/2013/apr/07/ecuador-begins-to-roar; *see also* John Vidal, *Oil: Can Ecuador See Past the Black Stuff?*, GUARDIAN (Sept. 28, 2010, 6:18 AM), http://www.guardian.co.uk/global-development/poverty-matters/2010/sep/28/ecuador-oil-extraction-amazon-yasuni; *see generally* Analia Murias, *First Concession Granted for Mariculture*, FIS (Apr. 9, 2013, 11:40 PM), http://www.fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=60014&ndb=1&df=0.

[36] *See generally* Vidal, *supra* note 35.

[37] U.S. ENERGY INFO. ADMIN., ECUADOR: BACKGROUND (2012); *see also* Vidal, *supra* note 35.

Brazil."[38] While oil is an important resource to Ecuador's economy,[39] it has become Ecuador's "resource curse," impairing the rest of the economy as a result of Ecuador's over reliance on it.[40] To regenerate the economy, Ecuador joined with the United Nations to begin the Yasuní-ITT development initiative in 2007 to reduce its oil exploitation, especially in biologically diverse areas like the Amazon.[41] As of March 2013, participants have contributed USD $64 million and pledged USD $187 million.[42]

Second, besides rationing its oil, Ecuador must continue to focus on its other industries.[43] For instance, Ecuador has marketed its traditional exports of coffee, chocolate, and bananas, for which it became synonymous with the label of "banana republic" for so many years.[44] In addition, according to a March 2012 draft document, Ecuador estimated that agriculture would continue to economically provide for its rural population.[45] Agricultural exports are particularly significant to Ecuador because of the nation's geostrategic location near major markets like the United States.[46] With such proximity, Ecuador is highly competitive against other exporters because even if other nations can match its cheap labor, Ecuador's transportation costs are often lower.[47]

Finally, Ecuador must develop new marketable resources to sustain its economy.[48] In characterizing this prong of its development, Ecuador's National Secretary of Planning and Development declared that they planned to reduce their reliance on "neoliberal recipes of privatisation" in favor of their "innovative financial models to overcome the threat of crises; and in new conceptions of good living, based on social and environmental sustainability."[49] The Secretary remains vague, however,

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[38] *Update 1-Ecuador Oil Output Up 0.8 Percent in 2012, Under Target*, REUTERS (Jan. 11, 2013, 12:34 PM), http://www.reuters.com/article/2013/01/11/ecuador-oil-idUSL1E9CB49M20130111; *Ecuador Facts and Figures*, ORG. OF THE PETROLEUM EXP. COUNTRIES, http://www.opec.org/opec_web/en/about_us/148.htm (last visited Apr. 19, 2013); U.S. ENERGY INFO. ADMIN., *supra* note 37.

[39] U.S. DEP'T OF STATE, *supra* note 29 (describing oil as one of Ecuador's "strategic sectors").

[40] Vidal, *supra* note 35.

[41] John Vidal, *Project to Leave Oil in Ground Under Yasuní Park Reaches $300M,* GUARDIAN (Nov. 23, 2012, 5:37 AM), http://www.theguardian.com/environment/2012/nov/23/yasuni-oil-ground-project.

[42] *Id.*

[43] *See generally* Oficina de Evaluación Independiente, República del Ecuador: Evaluación del Programa en el País 4 (June 10, 2013) (unpublished manuscript) (on file with Fondo Internacional de Desarrollo Agrícola).

[44] *Id.*; *but see* John SanBrailo, *Ecuador: Never a Banana Republic*, LATIN BUS. CHRON. (May 29, 2012), http://www.latinbusinesschronicle.com/app/article.aspx?id=5689.

[45] Oficina de Evaluación Independiente, *supra* note 43.

[46] Carlos E. Ludena & Sara Wong, Presentation at the Ninth Annual Conference on Global Economic Analysis, Domestic Support Policies for Agriculture in Ecuador and the U.S.-Andean Countries Free Trade Agreement: An Applied General Equilibrium Assessment 4 (June 2006), *available at* https://www.gtap.agecon.purdue.edu/resources/download/2580.pdf.

[47] *See generally* MICHAEL REID, FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL 301 (2007).

[48] *Diversificar la economía de Ecuador es el nuevo desafío del reelecto de Ecuador*, AMÉRICA ECONOMIA (Feb. 18, 2013, 6:47 PM), http://www.americaeconomia.com/economia-mercados/finanzas/diversificar-la-economia-el-nuevo-desafio-del-reelecto-correa.

[49] Falconi, *supra* note 35.

as to the nature of other financial models.[50] While the approach attempts to further pursue wealth redistribution strategies,[51] Ecuador has at least shown some signs that it would like to attract foreign investment to cultivate other industries.[52] For example, in March 2013, Ecuador promulgated a four-year plan to attract foreign direct investment with the hope of increasing foreign investment by fifteen to twenty percent.[53] In the plan, Ecuador identifies the main sectors for investment as tourism, metal fabrication, petroleum, pharmacy, renewable energy, applied software, and agriculture.[54] As a result of the plan and other conditions, the United States Department of State has reported that Ecuador is "relatively open to foreign investment in most sectors."[55]

Despite the competitive resources and intent to diversify, Ecuador and other Latin American nations generally lack the infrastructure they need to exploit and market these resources.[56] While Latin America hosts about twenty bids for USD $31.6 billion in infrastructure projects,[57] the International Project Finance Association estimates that the region still needs USD $800 billion worth of investment within five years to foster its infrastructure.[58] Due to this, neither the governments nor private parties have invested in the infrastructure necessary to support resource development.[59]

This problem is common amongst many Latin American governments.[60] While Ecuador and other Latin governments provide enticing investments, private investors have generally failed to contribute to the Latin American infrastructure.[61] The world has focused on development in other regions like Africa and it has largely overlooked Latin America, despite its copious resources.[62] At a Council on Foreign Relations discussion in November 2012, panelists lamented the world's

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[50] *See id.*

[51] *Ecuador's President Rafael Correa Says Citizens Will be in Charge, Not Money*, GUARDIAN (Feb. 18, 2013, 6:10 AM), http://www.theguardian.com/world/2013/feb/18/ecuador-president-heralds-citizen-revolution.

[52] *See generally Ecuador es un imán para las inversiones también*, *supra* note 11.

[53] *Id.*

[54] *Id.*

[55] U.S. DEP'T OF STATE, *supra* note 29.

[56] U.N. ECON. COMMISSION FOR LATIN AM. AND THE CARIBBEAN, *The Economic Infrastructure Gap in Latin America and the Caribbean,* 293 BULLETIN FAL 1 (2011), *available at* http://www.cepal.org/usi/noticias/bolfall/6/42926/FAL-293-WEB-ENG-2.pdf; *see also* Pierce, *supra* note 21, at 418.

[57] *Infrastructure Bids in Latin America*, LATIN BUS. CHRON. (Oct. 18, 2012), http://www.latinbusinesschronicle.com/app/article.aspx?id=5786.

[58] *IPFA UK: London: The Latin America Infrastructure Market*, INT'L PROJECT FIN. ASS'N, http://www.ipfa.org/events/6792/ipfa-uk-london-the-latin-america-infrastructure-market (last visited Mar. 4, 2013); *see also* Bates, *supra* note 7.

[59] *See* Pierce, *supra* note 21, at 418.

[60] *See* Krista Hughes & Lomi Kriel, *Latin America Taps Private Sector for Infrastructure Needs*, CHI. TRIB. (Mar. 17, 2013), http://articles.chicagotribune.com/2013-03-17/news/sns-rt-iadbinfrastructurel1n0c9003-20130317_1_private-sector-infrastructure-iadb.

[61] Gillian White, *Booming Latin America Being Ignored, Experts Say*, MARKET WATCH (Nov. 19, 2012), http://articles.marketwatch.com/2012-11-19/investing/35250233_1_van-agtmael-economic-outlook-latin-america.

[62] REID, *supra* note 47, at 1 ("Scarcely a month goes by without some political leader or aging rock star urging the citizens of the world's richer countries to do something to aid Africa .... But what of Latin America, the other great region of the developing world?").

"benign neglect" of market opportunities in Latin America.[63] Recognizing this "neglect," the World Bank stated that Latin America has slower development than other comparable areas.[64] Moreover, foreign direct investment in Latin America is significantly less than foreign direct investment in Asia.[65] In fact, in 2012, foreign direct investment in Ecuador actually decreased.[66] The scarcity of investment has required Ecuador to stray from its strategic economic goals and entertain its only potential suitor, China, with its demands for oil.[67] Thus, like many other Latin American countries, Ecuador only has the resources to support its economy if it can attract investors to develop the needed infrastructure.

III. CHALLENGES WITH INVESTING IN ECUADOR: POPULISM

Although Ecuador's rich resources are appealing, investors fear that the appeal is nothing but a siren's call because of the populism risks that could potentially negate any benefit.[68] Recognizing such risks, *Moneyweek* reporter, James McKeigue, claims that investors "would have to be nuts to invest in Ecuador."[69] He states that the resulting populism from Correa's "citizens' revolution" is a major reason to forego investment.[70] His concern, shared by others, is that populism can lead to the nationalization of businesses and industries as well as changes in national laws that adversely affect businesses.[71] The basis for his fear is the growing trend of populism in South America.[72] In Ecuador, Correa has embarked on a citizens' revolution that is similar to other populist nations in the region, adjusted the domestic power balance, and attempted to threaten the global status quo.[73]

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[63] White, *supra* note 61; *see also* REID, *supra* note 47, at 4.

[64] *Infrastructure in Latin America & the Caribbean: Recent Developments and Key Challenges*, WORLD BANK (Aug. 31, 2005), http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20631899~pagePK:146736~piPK:146830~theSitePK:258554,00.html.

[65] *World Investment Report 2012: Towards a Generation of Investment Policies*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (June 2012), http://unctad.org/en/PublicationsLibrary/wir2012overview_en.pdf.

[66] *La inversión extranjera en Ecuador baja 36,4%*, EL UNIVERSO (July 25, 2012), http://www.eluniverso.com/2012/07/25/1/1356/inversion-extranjera-ecuador-baja-364.html.

[67] Eduardo Garcia & Charlie Zhu, *China's CNP in Talks with Ecuador Over $12.5 Billion Refinery*, REUTERS (July 20, 2012, 12:41 PM), http://in.reuters.com/article/2012/07/20/us-ecuador-refinery-cnpc-idINBRE86J08C20120720; s*ee* Jonathan Kaiman, *Ecuador Auctions Off Amazon to Chinese Oil Firms*, GUARDIAN (Mar. 26, 2013, 1:16 PM), http://www.theguardian.com/world/2013/mar/26/ecuador-chinese-oil-bids-amazon.

[68] *See* LaKindra Mohr, *Of Note: Is the Populist Left in Latin America Bad for Business in the Region?*, 27 SAIS REV. 17, 17–19 (2007); *see also* Robert Looney, *Morales Walks the Populist High Wire*, FOREIGN POLICY (Feb. 26, 2013), http://www.foreignpolicy.com/articles/2013/02/26/morales_walks_the_populist_high_wire; *see also* Pierce, *supra* note 21, at 423.

[69] McKeigue, *supra* note 14.

[70] *Id.*

[71] *Id.*; *see also* Pierce, *supra* note 21, at 431.

[72] *See The Return of Populism*, ECONOMIST (Apr. 12, 2006), http://www.economist.com/node/6802448.

[73] *See generally* Pierce, *supra* note 21, at 424; Gabriela Molina & Gonzalo Solano, *Ecuador's Triumphant Correa Vows to Deepen 'Citizen's Revolution' Following Landslide*, NBC NEWS (Feb.

Ecuador's citizens' revolution is only one instance of populism festering in Latin America.[74] Latin America's vision of populism, first articulated by former Venezuelan President Hugo Chavez,[75] revives an 1800s dream of South American nations joining together to restore the global power balance.[76] Chavez, in particular, envisioned a return to Gran Colombia to empower the South American peoples to challenge the world elite.[77] The nation of Gran Colombia consisted of what is now Ecuador, Venezuela, Panama, Colombia, and parts of Brazil and Peru. Gran Colombia was a nation that lasted only a few years, but continues to endure in the hearts of its disciples.[78] This vision is a form of populism. Generally, populism is manifested as the will of the people against a state government.[79] In South America, populism is manifested as the will of the people against world powers.[80] More recently this has become known as Chavismo[81] and is part of the Bolivarian Revolution.[82]

Ecuador has become a cosponsor of Chavez's vision.[83] In 2006, the people of Ecuador elected Correa as president and have reelected him twice since.[84] His prior role as a finance minister and reputation as an economist contributed to the people's perception that he was an outsider to political corruption.[85] Moreover, his promises of "participatory democracy" enamored the people of Ecuador.[86] His ascent brought stability to Ecuador, after more than a decade in which every elected president had succumbed to political challenges and prematurely

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18, 2013, 9:33 AM), http://worldnews.nbcnews.com/_news/2013/02/18/17002500-ecuadors-triumphant-correa-vows-to-deepen-citizens-revolution-following-landslide?lit.

[74] Molina & Solano, *supra* note 73; *see generally The Return of Populism*, *supra* note 72.

[75] Doug Bandow, *With Hugo Chavez Dead, Will Chavismo Also Die?*, FORBES (Mar. 7, 2013, 8:19 AM), http://www.forbes.com/sites/dougbandow/2013/03/07/with-hugo-chavez-dead-will-chavismo-also-die/.

[76] *See* Franklin Foer, *The Talented Mr. Chávez*, ATLANTIC (May 1, 2006, 12:00 PM), http://www.theatlantic.com/magazine/archive/2006/05/the-talented-mr-ch-vez/304809/?single_page=true.

[77] *Id.*

[78] *See generally* Matthew Brown, *Not Forging Nations, but Foraging for them: Uncertain Collective Identities in Gran Colombia*, 12 NATIONS & NATIONALISM 223, 226 (2006); *see also* REID, *supra* note 47, at 64.

[79] *See The Return of Populism*, *supra* note 72; *see also* REID, *supra* note 47, at 160, 279.

[80] *See* REID, *supra* note 47, at 160, 279 ("Chavez himself claims that his 'Bolivarian revolution' is continental in scope.").

[81] *See Hugo Chavez's Rotten Legacy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573106-appeal-populist-autocracy-has-been-weakened-not-extinguished-hugo-ch%C3%A1vezs-rotten.

[82] Frank M. Walsh, *The Legal Death of the Latin American Democracy: Bolivarian Populism's Model for Centralizing Power, Eliminating Political Opposition, and Undermining the Rule of Law*, 16 L. & BUS. REV. AM. 241, 244 (2010) ("Hugo Chávez refers to his political philosophy as the Bolivarian Revolution. The movement repackages populism."); *see also* Walter Molano, *Latin America, Its Emerging Markets and the Global*, 6 J. INT'L. BUS. & L. 51, 53 (2007).

[83] CARLOS DE LA TORRE, POPULIST SEDUCTION IN LATIN AMERICA: THE ECUADORIAN EXPERIENCE 175 (2010) (describing President Correa as "the embodiment of the citizens' revolution.").

[84] *Id.* at 174.

[85] *Id.* at 177–79.

[86] *Id.* at 174; *see also* William Neuman, *President Correa Handily Wins Re-election in Ecuador*, N.Y. TIMES (Feb. 17, 2013), http://www.nytimes.com/2013/02/18/world/americas/rafael-correa-wins-re-election-in-ecuador.html.

terminated their tenure.[87] Prior to Correa, Ecuador had a reputation as a rather unstable nation with "the average life of Ecuador's constitution ... [being] just ten years ... [and] the average president [lasting] in office no more than two years."[88] Correa has reinvented Ecuador's reputation in a new light as a stable nation that embraces populism.[89]

Correa has done a number of things to establish populism in Ecuador. In a nation where much of the population (roughly forty percent) lives in poverty, Correa's policies of public spending have empowered him.[90] He has reduced the poverty level by about five percent since 2007 by taking a larger share of the wealthiest ten percent's income.[91] Correa also employed a prototypical populist tool by enacting a law that appropriated seventy percent of the nation's oil income in 2010 for government use.[92] By the end of the discussions between the government and the companies, Ecuador's government had laid claim to nearly eighty percent of the oil revenues.[93] The law also allowed the government to fully nationalize the oil industry if any private company violated Ecuador's domestic laws.[94] For example, the government recently enacted a law that requires all companies to promote Ecuador's governmental policies.[95] Correa enacted this law without legislative review, thereby demonstrating a disregard for domestic opposition.[96] To justify his actions, Correa's government claimed that investors had breached their contracts.[97] Similarly, Correa has targeted landholders with the promise to redistribute "idle" land to the poor.[98] Such policies will likely adversely affect the very banana industry that has been a pillar to Ecuador's economy.[99]

Emboldened by his domestic experience, Correa further developed populism in Ecuador when he signaled his capacity to directly confront

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[87] *In depth Ecuador: A Recent History of Ecuador*, CBC NEWS (Apr. 22, 2005) (on file with author); *see also* Arthur Brice, *Ecuador's Correa Claims Re-election Win*, CNN (Apr. 27, 2009), 9:08 AM), http://www.cnn.com/2009/WORLD/americas/04/26/ecuador.election/; DE LA TORRE, *supra* note 83, at 177 ("Ecuador has become synonymous with political instability.").

[88] REID, *supra* note 47, at 24.

[89] Pierce, *supra* note 21, at 430 ("Furthermore, the Ecuadorian climate for foreign investment has been increasingly unattractive since President Rafael Correa took office.").

[90] Brice, *supra* note 87.

[91] *See* Daniel Wagner & Giorgio Cafiero, *Will Rafael Correa Inherit the Leadership of Latin American Socialism?*, INT'L POL'Y DIG. (Mar. 2, 2013), http://www.internationalpolicydigest.org/2013/03/02/will-rafael-correa-inherit-the-leadership-of-latin-american-socialism.

[92] Pierce, *supra* note 21, at 431.

[93] *Id.*

[94] *Ecuador President Imposes Oil Nationalization Law*, BUSINESS WEEK (July 24, 2010, 5:48 PM), http://www.businessweek.com/ap/financialnews/D9H5LVA00.htm.

[95] *Id.*

[96] *Id.*

[97] *See* Pierce, *supra* note 21, at 431.

[98] *Correa Pledges Land Distribution, Media Clamp but Also Mining Law to Attract Investors*, MERCOPRESS (Feb. 19, 2013, 5:34 AM), http://en.mercopress.com/2013/02/19/correa-pledges-land-distribution-media-clamp-but-also-mining-law-to-attract-investors; Eduardo Garcia & Brian Ellsworth, *Ecuador's Correa Enjoys Re-election, Seeks Investment*, REUTERS (Feb. 18, 2013, 9:47 AM), http://www.reuters.com/article/2013/02/18/us-ecuador-election-idUSBRE91G01K20130218.

[99] Garcia & Ellsworth, *supra* note 98.

world powers.[100] In 2012, he demonstrated his willingness to challenge the status quo at a global level.[101] The opportunity arose when WikiLeak creator, Julian Assange, absconded from Sweden after receiving charges of rape and sexual assault.[102] Assange also faced potential prosecution in the United States for conspiracy to release classified information.[103] In England, Assange would have faced extradition to Sweden, but Ecuador offered him asylum in its embassy.[104] This asylum may not signify any real shift in the global political balance, but it does reveal Ecuador's willingness to confront other governments even on petty matters.[105]

Correa has also demonstrated populism by distancing Ecuador and its resources from traditional international investment enforcement mechanisms.[106] Correa blames much of Ecuador's dismal economy on the trade and development policies of international financial institutions and has begun to eschew the World Bank and the International Monetary Fund.[107] His efforts to liberate Ecuador include withdrawal from the International Center for the Settlement of Investment Disputes (ICSID) and from bilateral investment treaties (BIT).[108] Ecuador acted upon a breadth of criticism that the international frameworks for resolving disputes disproportionately favor investors over the emerging nations.[109] Even if the criticism is valid, Ecuador did a disservice to itself and its people. At a time when Ecuador hopes to diversify its economy, its actions are likely to alienate the very investors it needs.[110]

Correa's actions only serve to magnify investors' fears of expropriation, nationalization, and other ex-post contractual

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[100] DE LA TORRE, *supra* note 83, at 196 ("[H]e not only presents himself as the inheritor of revolutionary movements, but he also conveys to his followers the notion that they are all embarked on a radical struggle against imperialism and its national cronies.").

[101] *See generally* Ben Child, *Oliver Stone Meets Julian Assange and Criticizes New Wikileaks Films*, GUARDIAN (Apr. 11, 2013, 6:25 AM), http://www.theguardian.com/film/2013/apr/11/oliver-stone-julian-assange-wikileaks.

[102] *Id.*

[103] Mark Hosenball, *Despite Assange Claims U.S. Has no Current Case Against Him*, REUTERS (Aug. 22, 2012, 5:34 PM), http://www.reuters.com/article/2012/08/22/us-wikileaks-assange-usa-idUSBRE87L12W20120822.

[104] Max Fisher, *Why Ecuador's Embassy Stand-off with the U.K. Might Not Actually be About Protecting Julian Assange*, ATLANTIC (Aug. 16, 2012, 12:42 PM), http://www.theatlantic.com/international/archive/2012/08/why-ecuadors-embassy-stand-off-with-the-uk-might-not-actually-be-about-protecting-julian-assange/261221/.

[105] *See id.*

[106] *See* Wagner & Cafiero, *supra* note 91.

[107] *Id.*

[108] Press Release, Int'l Ctr. For Settlement of Inv. Dispute, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20; Mercedes Alvaro, *Ecuador Expects to End All Investment Treaties by May*, EUROINVESTOR (Mar. 15, 2013, 9:40 PM), http://www.euroinvestor.com/news/2013/03/15/ecuador-expects-to-end-all-investment-treaties-by-may/12251406.

[109] Pierce, *supra* note 21, at 439; Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 DENV. J. INT'L L. & POL'Y 483, 491–92 (2011); *see also* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 474–75 (2009).

[110] *See* Rachel A. Nathanson, Note, *The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis*, 98 IOWA L. REV. 863, 878 (2013).

renegotiations that often occur in populist nations.[111] Investors worry that they will spend their money to develop a resource only to be told by Ecuador that they cannot benefit from their investment.[112] Investors have witnessed such tactics[113] across Latin America.[114] Without the traditional international investment protections,[115] investors may find the risks of populism surpass any potential benefits of investing in Ecuador.[116]

IV. INVESTORS' SOLUTION TO POPULISM: PROJECT FINANCE

Despite the disappointing political reality for investors in Ecuador, individuals can still make profitable investments by using project finance.[117] Project finance can help investors mitigate political risks, realize the benefits of investment, and align their interests with Ecuador's long-term goals.[118] Because project finance is dependent on the projects' cash flow without recourse to financial contributors, investors can pursue projects based on the projects' merits without the risks of populism overshadowing the benefits.[119]

Although project finance has existed since the early days of the Roman Empire, it has become a significant financial model for major, long-term infrastructure projects.[120] A recent example of project financing was the construction of the Eurotunnel connecting London and Paris.[121] The Eurotunnel, also known as the Chunnel, is a railway under the English Channel that innovators imagined in the 1800s, long before the necessary technology existed.[122] The sponsors adopted project financing with a concession agreement and a set of contracts.[123] Despite problems such as underestimated costs and the need to restructure the concession agreement because of delays, the project was a success.[124]

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[111] *See* Pierce, *supra* note 21, at 423–24.

[112] *See* Frederik Erixon, *Repsol Expropriation: So Who is Eating Argentina's Lunch Now?*, EUROACTIV (Apr. 23, 2013), http://www.euractiv.com/energy/repsol-expropriation-eating-arge-analysis-519304; *see also* DE LA TORRE, *supra* note 83, at 197 (another reason populism is such a threat to investors is that populist leaders "appropriate the will of the people" as justification for government actions, removing many, if not all, governmental safeguards).

[113] *See generally* Zachary Petroni, *What the West Missed: Insights Into Expropriation*, COUNCIL ON HEMISPHERIC AFFAIRS (May 16, 2012), http://www.coha.org/insights-on-expropriation/ (each time a country has seized foreign companies' operations the country has sacrificed its long-term interests to appease popular demand).

[114] *See generally* Pierce, *supra* note 21, at 417; *see also* Petroni, *supra* note 113 (explaining Argentina's seizure of an oil subsidiary from a Spanish company).

[115] DE LA TORRE, *supra* note 83, at 197.

[116] *See* Pierce, *supra* note 21, at 417.

[117] *Compare* discussion *supra* Part III *with* discussion *infra* Parts IV–VI.

[118] *See The Return of Populism*, *supra* note 72.

[119] *See* BENJAMIN C. ESTY, MODERN PROJECT FINANCE 25, 55 (John Wiley & Sons, Inc., 2004); *see also* Thomas J. McCormack & Alan I. Raylesberg, *Strategy, Objectives and Preliminary Considerations*, 11 BUS. & COM. LITIG. FED. CTS. § 124:3 (3d ed. 2012).

[120] *See* STEFANO GATTI, PROJECT FINANCE IN THEORY AND PRACTICE: DESIGNING, STRUCTURING, AND FINANCING PRIVATE AND PUBLIC PROJECTS 27 (2012).

[121] *See* Michael Grant, *Financing Eurotunnel*, 11 JAPAN RAILWAY & TRANSP. REV. 46, 46–47 (1997), *available at* http://www.adacte.com/documents/financingeurotunnel98.pdf.

[122] *Id.*

[123] *Id.* at 47.

[124] *Id.*

The Eurotunnel project demonstrates how investors can capitalize on their dreams using project finance.[125]

The two major benefits of project finance are the use of cash flows and the distribution of risk.[126] Project finance allows various sponsors to advance a project based on the expected cash flows of the project as the return on the investment.[127] In other words, "project financing is lending based 'on the merits of a project rather than the credit of the project sponsor.'"[128] Structurally, project finance involves an independent company, or special project vehicle, that exists for only the term of the project.[129] Through this vehicle, sponsors arrange for contributions of equity and borrow money with the promise of cash flows from the project.[130] Lenders generally have no recourse against any particular company because, as explained above, their return is based on the expected cash flow of the project, not a particular company.[131] Sponsors that contribute a large portion of the equity will see a return on their investment when the project begins to realize profits.[132] In contrast, when using corporate finance, usually the original company is entirely responsible for funding the project.[133]

Using cash flows from the project benefits the financiers in various ways.[134] For instance, cash flows incentivize management to behave efficiently in order to seize profits from the project.[135] Moreover, project finance's use of cash flows as the return on investment reduces the risk that the borrower might default strategically because the cash flows are "verifiable" and all creditors can monitor them.[136] In contrast, should the borrower attempt to default on the money it owes lenders under a corporate finance model, the lenders' primary option is typically to foreclose on any security interest it may have.[137] Simply put, project finance lenders do not depend on the borrower for the money, but rather, they depend on the project and its success.[138]

Project financing distributes the risks among the participants.[139] Most infrastructure projects carry substantial risks given the duration of the

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[125] *Id.*

[126] *See* ESTY, *supra* note 119, at 25, 55; *see also* McCormack & Raylesberg, *supra* note 119.

[127] Peter H. Huang & Michael S. Knoll, *Corporate Finance, Corporate Law, and Financial Theory*, 74 S. CAL. L. REV. 175, 182 (2000).

[128] Christopher J. Sozzi, Comment, *Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrialized Countries*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 435, 446 (1996).

[129] Frederick Tung & Krishnamurthy Subramanian, Law and Project Finance 2 (May 22, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=972415.

[130] *See* ESTY, *supra* note 119, at 3, 24.

[131] *Id.*

[132] *See id.*

[133] *See* William M. Stelwagon, *Financing Private Energy Projects in the Third World*, 37 CATH. LAW. 45, 47–48 (1996).

[134] *See generally* Huang & Knoll, *supra* note 127, at 183–84; Tung & Subramanian, *supra* note 129, at 9.

[135] Huang & Knoll, *supra* note 127, at 183–84.

[136] Tung & Subramanian, *supra* note 129.

[137] *Id.*

[138] *See id.*

[139] *See* Sozzi, *supra* note 128, at 448.

project, the need to collaborate with host governments, and the accompanying political environments.[140] Project finance contracts allow parties to determine which party will cover certain risks and creates assurances just in case one or more parties fail to complete specific aspects of the project.[141] For example, many project finance contracts contain *force majeure* clauses to mitigate the costs of unforeseen disasters.[142] Accordingly, the incentives of expected cash flows and the risk shifting mechanism of project financing would be particularly valuable for handling a project in Ecuador where risks are amplified by populism.[143]

V. EXAMPLE OF PROJECT FINANCE IN ECUADOR: QUIPORT

The Quiport project demonstrates how project finance can resolve investment difficulties in populist nations like Ecuador. Quiport involved construction of a new airport and the infrastructure to alleviate safety and business concerns caused by the old airport in Quito, Ecuador.[144]

A. Benefits & Goals

A new airport was not just another infrastructure project for Quito, but rather, it was a response to a dangerous situation and an opportunity to open up the country to world markets.[145] By accepting the need for a new airport, the nation also dared to dream, envisioning the new airport as part of its greater development ambitions.[146] With access to more locations and better infrastructure, Ecuador could support global cargo and become a regional hub.[147]

Part of Ecuador's vision for a new airport was to fix the defects of the old airport, including its safety and business issues.[148] The old airport's location was dangerous.[149] The airport was built at a high elevation and

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140 *Id.*

141 *See* ESTY, *supra* note 119, at 3, 27.

142 SCOTT L. HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE 167 (3d. ed. 2008).

143 *See* discussion *supra* notes 74–93 and accompanying text.

144 *See* discussion *supra* notes 101–19 and accompanying text.

145 *Id.*

146 *See* Gonzalo Solano, *Mariscal Sucre, Quito's Airport, To be Moved*, HUFFINGTON POST (Jan. 30, 2013, 2:50 PM), http://www.huffingtonpost.com/2013/01/30/mariscal-sucre-quitos-air_n_2582582.html; Steven Thompson, *Ecuador: Quito's New Mariscal Sucre International Airport Opens*, AIRPORT WORLD (Feb. 20, 2013, 12:39 PM), http://www.airport-world.com/component/k2/item/2346-ecuador-quito-s-new-mariscal-sucre-international-airport-opens.

147 Philippe Baril et al., *Developing the New Quito International Airport into a Regional Hub*, http://www.airport-evolution-latam.com/upload/pages/Day10945_Philippe_Baril.pdf; *see also* Bates, *supra* note 7.

148 *See* Andrew O'Brian, Letter to the Editor, ECONOMIST (Apr. 11, 2013), http://www.economist.com/news/21576168-letter-quiport-company-built-and-runs-quitos-airport-quitos-new-airport.

149 *See* Emily Payne, *Enormous Volcanoes, High Altitude and an Ever Expanding Population on its Doorstep: Is this the World's Scariest Airport?*, DAILY MAIL (Feb. 4, 2013 7:01 AM), http://www.dailymail.co.uk/travel/article-2273172/Worlds-scariest-airport-Quito-moves-major-air-hub-close-shaves.html.

had a short landing strip situated between mountains and volcanoes.[150] If an airplane missed the precariously placed runway, the pilot would have to then quickly maneuver to avoid the mountains. [151] At such a high elevation, the thin air could cause the engines to stall and the wings to receive minimal lift.[152] To make matters worse, Quito's buildings were just a few feet away from the airport's runway.[153] As a result of these issues, the airport suffered at least ten "serious accidents" since its opening in 1960.[154] Additionally, these issues made travel to or from Quito cumbersome and inconvenient.[155] For instance, many airlines had to fly through Guayaquil, Ecuador to refuel, which created additional costs and delays in travel.[156]

The new airport not only addressed safety concerns, but it also supported Ecuador's ambitions to become a "regional hub" by enabling access to more destinations.[157] For example, with the new airport built at an elevation of 7,000 feet instead of 9,000 feet, airplanes can now carry enough fuel to travel greater distances.[158] The new runway is more expansive than the last, which allows larger cargo aircrafts to land and in turn provides Ecuadorian goods greater access to world markets.[159]

Quiport also supports the goal of transforming Quito into a South American commerce center,[160] including plans of routing cargo between Quito and Chicago.[161] In 2012, the World Bank reported that Latin America had a very small market share of global air traffic,[162] with only four airports in the top one hundred, and that the new Mariscal Sucre was the only international airport being built in South America at the time.[163] To capitalize on the dearth of competitors, however, the new airport had

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[150] *See id.*

[151] *See* Frank Bajak, *Quito's Nerve-Trying Urban Airport Shuts Down*, FOX NEWS (Jan. 30, 2013), http://www.foxnews.com/world/2013/01/30/quito-nerve-trying-urban-airport-shuts-down/.

[152] *See* Jonathan Watts, *No Volcanos, Fewer Tower Blocks - Ecuador Lands a 'Safer' Airport for Quito*, GUARDIAN (Feb. 7, 2013), http://www.guardian.co.uk/world/2013/feb/07/volcanos-ecuador-airport-quito.

[153] Bajak, *supra* note 151.

[154] *Id.*

[155] *See* Watts, *supra* note 152.

[156] *See* Bates, *supra* note 7.

[157] Baril, *supra* note 147; *see generally* Watts, *supra* note 152.

[158] Bates, *supra* note 7.

[159] *Id.*; Press Release, Louis Berger Grp., The Louis Berger Group Celebrates the First Flight at the New Mariscal Sucre International Airport (Feb. 28, 2013), http://www.prweb.com/releases/2013/2/prweb10482754.htm; *see also* Press Release, República del Ecuador: Ministerio de Relaciones Exteriores, Comercio e Integración, Gateway Americas Air Cargo busca establecer vuelos directos entre Ecuador y Estados Unidos (Mar. 6, 2013), http://www.mmrree.gob.ec/2013/bol0162.asp.

[160] *See* Press Release, Embassy of the Republic of Ecuador, Mayor of Ecuadorian Capital Signs Agreement for State of the Art Global Airport (Feb. 1, 2011), http://www.prnewswire.com/news-releases/mayor-of-ecuadorian-capital-signs-agreement-for-state-of-the-art-global-airport-115042649.html

[161] Press Release, República del Ecuador: Ministerio de Relaciones Exteriores, Comercio e Integración *supra* note 159.

[162] *Quiport Signs on as Concessionaire for Quito's New International Airport*, ROUTES (Feb. 15, 2011, 2:10 PM), http://www.routesonline.com/news/37/momberger-airport-information/100507/quiport-signs-on-as-concessionaire-for-quitoas-new-international-airport/.

[163] TOMÁS SEREBRISKY, AIRPORT ECONOMICS IN LATIN AMERICA AND THE CARIBBEAN: BENCHMARKING, REGULATION, AND PRICING 4 (2012).

to be able to facilitate traffic and cargo from other areas in South America.[164] To accommodate such a large project, designers had to develop supporting infrastructure, including a new six-lane highway.[165] Additional plans have been made to develop the infrastructure connecting the different airports around the country.[166] The new airport project evolved beyond its original safety focus and became a gateway to Ecuador's economic development and South America's connection to the global economy.[167]

B. Project & Financial Structure

Quiport is a joint venture with Canada's Aecon Construction Group and Brazil's Andrade Gutierrez as some of the main sponsors.[168] These companies joined together to develop the airport and supporting infrastructure, which cost roughly USD $700 million after the initial estimate of USD $586 million.[169] Quiport employed many different avenues to pay for the project including debt, equity, and net cash flows from the operation.[170] The lenders include Corporación Aeropuerto y Zona Franca del Distrito Metropolitano de Quito ("CORPAQ"), Overseas Private Investment Corporation ("OPIC"), Export-Import Bank of the United States of America ("EXIM"), the InterAmerican Development Bank ("IADB"), and Canada's Export Development Corporation (EDC).[171] OPIC alone committed to provide up to USD $200 million in financing.[172]

In conformity with the project finance model, the set of contracts divided the responsibilities, expectations, and rewards into a concession agreement for thirty-five years.[173] Quiport had a finance agreement with OPIC, a credit agreement with EXIM, loan agreements with IDB and EDC, and a master security accounts agreement.[174] The currency control

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[164] *See* Press Release, Mayor of Ecuadorian, *supra* note 160.

[165] Bates, *supra* note 7.

[166] *Quito, desde Tababela al mundo*, UNIVERSO (Feb. 20, 2013), http://www.eluniverso.com/2013/02/20/1/1447/desde-tababela-mundo.html.

[167] *See* Press Release, Banco Interamericano de Desarrollo, BID aprueba US$200 millones para apoyar el transporte urbano en Quito, (Dec. 5, 2012), http://www.iadb.org/es/noticias/comunicados-de-prensa/2012-12-05/sistema-de-transporte-urbano-en-ecuador,10242.html.

[168] *New Quito Airport, Ecuador*, AIRPORT TECHNOLOGY, http://www.airport-technology.com/projects/quitoairport/ (last visited Mar. 4, 2013).

[169] *See* Financial Plan, Corporación Quiport S.A. (Sept. 28, 2005), http://www.corpaq.com/docs/PF12.pdf; *compare* LEGAL MEDIA GROUP, IFLR 1000: THE GUIDE TO THE WORLD'S LEADING FINANCIAL LAW FIRMS 264 (2005), http://www.iflr1000.com/pdfs/Directories/5/Ecuador%20(263-265)%20i.qxd.pdf; *see also New Quito Airport, Ecuador*, *supra* note 168.

[170] *See* Financial Plan, Corporación Quiport S.A., *supra* note 169; *see also New Quito Airport, Ecuador*, *supra* note 168.

[171] *New Quito Airport, Ecuador*, *supra* note 168; Press Release, Aecon, Aecon Announces Successful Finalization of Quito Airport Project Restructuring (Feb. 9, 2011), http://www.aecon.com/Media_Room?articleView=individual&articleID=634.

[172] *Ecuador - OPIC approves Quiport*, PROJECT FIN. INT'L (May 14, 2003), *available at* http://pfie.reutersmedia.net/ecuador-opic-approves-quiport/340331.article.

[173] Bates, *supra* note 7; *see* ESTY, *supra* note 119, at 2–3; *see generally* Financial Plan, Corporación Quiport S.A., *supra* note 169.

[174] *See* Financial Plan, Corporación Quiport S.A., *supra* note 169.

is an example of Quiport sponsors thoroughly addressing as many foreseeable risks as possible, especially considering that the sponsors already had a protection against inflation with Ecuador currently using the U.S. dollar as its currency.[175]

As the project progressed, the most significant provisions became those associated with expected cash flows.[176] The expected cash flows derived from projections about the traffic, all fees (both commercial and regulated), and other operating costs.[177] Quiport contracted to manage the airport and pay the city of Quito eleven percent of the regulated revenues, which include airline landing fees and passenger departure fees.[178] These fees later became the basis for dispute.[179]

C. Risks Defined & Realized

Although Quiport sponsors pursued strong organizational and financial structures through contracts, the project still faced the risks of political protests and delays.[180] These risks materialized in 2010 when an armed group, protesting salary issues, took control of the airport and compelled it to shut down.[181] In addition to the risk of delays and protest, Quiport investors also had to overcome a populist constitutional challenge to the distribution of income from airport fees, which emerged after the project was underway.[182]

Ecuador demanded that the investors comply with the country's new constitution regardless of their contract's express provisions.[183] The General Comptroller classified the airport's service fees as taxes and claimed that they were not subject to a private entity's control.[184] In agreement, the Ecuadorian Constitutional Court declared the Quiport concession agreement unconstitutional.[185] In its holding, the court

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[175] *See* MYRIAM QUISPE-AGNOLI & ELENA WHISLER, FED. RESERVE BANK OF ATLANTA, OFFICIAL DOLLARIZATION AND THE BANKING SYSTEM IN ECUADOR AND EL SALVADOR 55 (2006), *available at* https://www.frbatlanta.org/filelegacydocs/erq306_quispe.pdf; DELOITTE, ECUADOR: INTERNATIONAL TAX AND BUSINESS GUIDE 2 (2009), http://www.deloitte.com/assets/Dcom-Ecuador/Local%20Assets/Documents/Nuevos%20estudios/Doing%20Business%20in%20Ecuador%202009.pdf.

[176] *See* Press Release, Aecon, *supra* note 171.

[177] Financial Plan, Corporación Quiport S.A., *supra* note 169.

[178] Press Release, Aecon, *supra* note 171.

[179] Fernando Cabrera Diaz, *Consortium Building New Quito Airport Takes Ecuador to ICSID*, INV. TREATY NEWS (Feb. 10, 2010), http://www.iisd.org/itn/2010/02/10/consortium-building-new-quito-airport-takes-ecuador-to-icsid-3/.

[180] *See* Eva Medalla, *Quito Airport Closed "Until Further Notice" - Quiport*, BNAMERICAS (Sept. 30, 2010), http://www.bnamericas.com/news/infrastructure/Quito_airport_closed_*until_further_notice*_-_Quiport1#close.

[181] *Id.*

[182] *See* Diaz, *supra* note 179.

[183] *See id.*

[184] Gabriela Valdivieso Ortega, *Análisis de la sentencia No. 003-09-SIN-CC de la Corte Constitucional para el Período de Transición referente a los emolumentos cobrados por la prestación del servicio del Aeropuerto Mariscal Sucre*, 11 REVISTA DE DERECHO 185, 185 (2009), *available at* http://repositorio.uasb.edu.ec/bitstream/10644/2118/1/RF-11-Jurisprudencia.pdf; *see also* Xavier Rosales, *Ecuador: The Quito Airport Case, an Uncertain Future*, CORRAL & ROSALES ABOGADOS (2009), *available at* http://www.alta.aero/aviationlaw/2009/upload/presentations/XavierRosales-Corral&Rosales.pdf.

[185] Diaz, *supra* note 179; *see also* Rosales, *supra* note 184.

evaluated the lending arrangement[186] and determined that the fees were in fact taxes and therefore could not be the responsibility of a private entity, like Quiport, to administer.[187]

The constitutional challenge appeared to be a political maneuver to exact greater profit for the government by renegotiating the contract after the deal had already closed.[188] The government argued that the new Constitution, which was not in effect at the time Quiport entered into the contracts or began the project, could alter the agreement.[189] The Constitutional Court further held that Quiport violated Article CCLXXXVII of the 2008 Constitution, which requires that only public bodies can receive and utilize funds from public resources.[190] Under the concession agreement, regulated revenues (i.e., airline landing fees, passenger departure fees, etc.) were to be distributed between parties; the city of Quito would receive eleven percent and Quiport would keep the remaining eighty-nine percent.[191] These fees could be substantial if Ecuador were to achieve its goal of becoming a regional hub for South America.[192] Rather than adhering to the contract or even engaging Quiport in a discussion on the distribution of these revenues, the new government simply declared that that these fees were public resources that only the state could administer.[193] The Constitutional Court agreed, declaring that the fees were a public resource because they were the type of funds that only a public institution could administer.[194]

The Constitutional Court attempted to legitimize its decision, not through reason, but through enumerating procedural constitutional provisions.[195] A large portion of the opinion was a justification of the court's authority to find Quiport in violation of the Constitution.[196] The procedural provisions cited by the Court created a gloss of authority for

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[186] Diaz, *supra* note 179.

[187] Rosales, *supra* note 184; *see also* Diaz, *supra* note 179.

[188] *See White & Case Recognized for Latin American Dispute of the Year*, WHITE & CASE LLP (Sept. 4, 2012), http://www.whitecase.com/articles-09042012/#.UYL9ubX_mSo.

[189] Diaz, *supra* note 179.

[190] CONSTITUTICIÓN DEL ECUADOR [CONSTITUTION] art. 287, http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf [hereinafter CONSTITUTION].

[191] Bates, *supra* note 7.

[192] *See generally* discussion *supra* Part V.A; *see also* Financial Plan, Corporación Quiport S.A., *supra* note 169.

[193] *See* Diaz, *supra* note 179.

[194] *Id.*

[195] Ortega, *supra* note 184.

[196] *See id.*; *see also* Corte Constitucional [C.C.] [Constitutional Court], Sala Adm. Julio 23, 2009, Roberto Bhrunis Lemarie, Sentencia N. 003-09-SIN—CC, Caso No. 0021-2009-IA, *available at* http://www.derechoecuador.com/productos/producto/catalogo/registros-oficiales/2009/julio/code/19334/registro-oficial-no-644---miercoles-29-de-julio-de-2009-suplemento#No00309SINCC. The Constitutional Court relied on at least three constitutional articles to indicate that they had a proper mandate to enforce the new Constitution and that its decision would be effective. This posturing included two provisions, Article CCXLII and Article CDXXXVI, Section 4, both of which authorize the court to determine constitutionality. Specifically, Article CDXXXVI, Section 4 explicitly charges the Constitutional Court with determining whether an act violates the administrative and public authority. Finally, acting as a catchall provision, Article CCXXVI states that governmental agencies and officials can only exercise the authority granted to them by the Constitution.

what was otherwise a retroactive attempt to extort more money, estimated to be at least USD $200 million, out of the project.[197]

D. Resolution of Risks

Despite the added expenses and costly eighteen-month delay caused by the government's attempt to alter the airport deal,[198] Quiport sponsors archetypically resolved the dispute.[199] This resolution occurred,[200] in large part, because the stabilization clause in the contract provided for arbitration at the World Bank and an option for recourse through BITs between Canada and Ecuador.[201] Based on the stabilization clause, the parties reached a settlement in 2011.[202]

While Quiport resolved some of the largest risks, the success of the project remains in debate.[203] Only a few months after its inauguration, people criticized the airport for its distance from the city, quirks in the flight schedules, lack of accommodations for travelers, and the surrounding mountain roads to which many foreigners were unaccustomed.[204] *The Economist* criticized the new airport for having simply shifted the problems of the old airport, rather than solving them, by saying, "[n]ow, the discomfort is on the ground."[205] The criticism may have been due to the fact that the airport's roads were still under construction during the opening.[206] Furthermore, a few months of observation likely does not provide much insight into the long-term success of the project.[207] Regardless of the initial complaints, however, Quiport demonstrates the types of risks investors in Ecuador may expect to encounter and how to resolve those risks using project finance and stabilization clauses.[208]

VI. RECOMMENDATIONS FOR FUTURE PROJECT FINANCERS: STRONG STABILIZATION CLAUSES

Ecuador's populist trend poses a significant risk to all investors in the region, but project financiers are in a position to minimize the risk by

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[197] *See Quiport no se Pronuncia sobre el Fallo de la Corte*, EL COMERCIO (July 31, 2009), http://www.elcomercio.com/noticias/Quiport-pronuncia-fallo-Corte_0_89391160.html.

[198] *New Quito Airport, Ecuador*, *supra* note 168.

[199] *See* Diaz, *supra* note 179.

[200] *Press Releases: White & Case Advises on Successful Renegotiation of Quito International Airport Concession*, WHITE & CASE LLP (Feb. 17, 2011), http://www.whitecase.com/press-02172011/#.UWG6kpP_mSo.

[201] Diaz, *supra* note 179.

[202] *Press Releases: White & Case*, *supra* note 200.

[203] S.K., *Quito's New Airport*: *A Tight Fit*, THE ECONOMIST (Apr. 4, 2013, 1:29 PM), http://www.economist.com/blogs/americasview/2013/04/quitos-new-airport.

[204] *Id.* For a virtual video tour of the journey from downtown Quito to the new airport, *see Ride to Quito Ecuador's New Airport from Downtown*, YOUTUBE (Mar. 27, 2013), http://www.youtube.com/watch?v=nEbFZ8CgiLE.

[205] S.K., *supra* note 203.

[206] Gay Nagle Myers, *New Airport Opens in Quito*, TRAVEL WKLY. (Feb. 20, 2013), http://www.travelweekly.com/South-America-Travel/New-airport-opens-in-Quito/.

[207] *Contra* S.K., *supra* note 203.

[208] *See* discussion *supra* Part V.

negotiating for strong contracts that include a stabilization clause like the one in Quiport's agreement.[209] Stabilization clauses protect investors because the clauses allow investors "to control the future."[210] Stabilization clauses do this by shielding investors through international and domestic enforcement as well as by providing a basis for insurance recovery.[211] Quiport's stabilization clause was a significant reason why the settlement and renegotiation of the airport was so successful.[212]

Stabilization clauses come in a variety of flavors: "freezing," "economic equilibrium," and "hybrid."[213] Freezing clauses prevent any changes in the laws that were not in place at the time of contracting from affecting the project.[214] Equilibrium clauses simply provide for the host nation to compensate the investors for any costs resulting from the application of changes in the law.[215] A hybrid clause combines the freezing and equilibrium approaches.[216] The clauses can be narrow, such as controlling specific taxes, or broader, such as covering all laws.[217] These clauses alleviate the tension between a sovereign's desire to govern without foreign influence and an investors' need for protection.[218]

Ecuador's opting out of ICSID and BITs has limited the traditional enforcement of stabilization clauses;[219] however, these limitations do not entirely negate stabilization clauses as a significant protection.[220] Stabilization clauses can also be effective if the concession agreement somehow "internationalize[s]" itself.[221] For example, investors may still conceivably enforce their contracts under international law through a United Nations Commission on International Trade Law (UNCITRAL) arbitration or through the Arbitration Institute of the Stockholm Chamber of Commerce.[222]

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[209] *See* discussion *supra* Part V.

[210] Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 221 (1996).

[211] *See* discussion *supra* notes 176–90 and accompanying text.

[212] *See generally* discussion *supra* Part V.

[213] J. Nna Emeka, *Anchoring Stabilization Clauses in International Petroleum Contracts*, 42 INT'L LAW. 1317, 1321 (2008); Perry E. Wallace, *International Investment Law and Arbitration, Sustainable Development, and Rio +20: Improving Corporate Institutional and State Governance*, 12 SUSTAINABLE DEV. L. & POL'Y 22, 27 (2012).

[214] Wallace, *supra* note 213.

[215] *Id.*

[216] *Id.*

[217] Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 347 (1988); *see also* Mark N. Sills, *Mega Projects: Protecting Foreign Investment*, 55 RMMLF-INST 20-1 § 20.03.1 (2009).

[218] *See* Emeka, *supra* note 213, at 1320–21; *see also* Nathanson, *supra* note 110, at 879.

[219] *See generally* Brower & Schill, *supra* note 109, at 480 ("The investor's options for the enforcement of host-state promises are not any better under the framework established by customary international law. Here, investors are denied standing to initiate proceedings in international courts and tribunals. Instead, only the home state of an investor is able to espouse its claim and exercise diplomatic protection."); *see also* Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 25 (1994).

[220] *See* Emeka, *supra* note 213, at 1324; *see generally* Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 222 (2002).

[221] Emeka, *supra* note 213, at 1318.

[222] Pierce, *supra* note 21, at 437; *see* Mercedes Alvaro, *Ecuador Says UNASUR Dispute-Settlement Center Could Operate This Year*, WALL ST. J. (Apr. 16, 2013, 4:52 PM),

In addition to international enforcement mechanisms, parties also have the option to enforce stabilization clauses domestically.[223] Domestic law, however, is most often used as a compliment to other protections in a contract.[224]

Should international and domestic enforcement of stabilization clauses fail to protect the investor, the stabilization clause could support an insurance claim for damages.[225] Project insurance can cover both the risks from expropriation of property as well as breaches of contractual provisions.[226] Insurance protection is important because if the host country breaches a stabilization clause, the insurance company may cover the investor's losses depending upon the terms of the insurance provisions.[227] While insurance raises the aggregate transaction costs,[228] savvy investors can structure the deal to pass insurance costs on to the contracting nation and its agencies.[229]

In summary, stabilization clauses, such as the one that Quiport employed, are still strong protection for investors. In populist nations stabilization clauses provide the investor with predictable laws or compensation that is enforceable through limited international and domestic frameworks.[230] Moreover, even if those frameworks fail, investors can recover their damages through insurance with the support of a stabilization clause.[231]

VII. CONCLUSION

Quiport revealed that investing in Ecuador and other populist nations is feasible, even in light of the challenges populism poses.[232] When the Quiport sponsors encountered a constitutional challenge to its fee distribution arrangement, they successfully relied on strong contractual

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http://online.wsj.com/article/BT-CO-20130416-713325.html?mod=googlenews_wsj; *see also* Pierce, *supra* note 21, at 439. Recognizing that investors need a dispute resolution body, Ecuador expects the Union of South American Nations (UNASUR) to be the primary mechanism for resolving investor disputes once its arbitration center is complete. In the meantime, investors might be able to fashion their agreements to resolve disputes through the creation of a Latin American dispute resolution body.

[223] Emeka, *supra* note 213, at 1338.

[224] *See generally id.* ("The problem with most state courts is that they are not—or at least they are perceived to be—sufficiently neutral in resolving disputes between foreign investors and host states. In many developing and transitioning countries, independent courts that decide cases in accordance with pre-established rules of law in a timely fashion are missing altogether. Corruption in the judiciary is a sad but daily business in the courts of many countries. Additionally, lengthy and inefficient court proceedings dragging on over years, if not decades, remain too commonplace."); *see also* Brower & Schill, *supra* note 109, at 479 (domestic enforcement especially compliments the risk distribution provisions negotiated in advance of the project).

[225] *See* Comeaux & Kinsella, *supra* note 219, at 45.

[226] *Id.* at 46.

[227] *See id.*

[228] *See id.* at 46–47; *see also* Ian R. Coles, *The Julietta Gold Mining Project: Lessons for Project Finance in the Emerging Markets*, 24 FORDHAM INT'L L.J. 1052, 1058 (2001).

[229] *See* Comeaux & Kinsella, *supra* note 219, at 45.

[230] *See* discussion *supra* notes 167–186.

[231] *See* discussion *supra* notes 187–190.

[232] *See* discussion *supra* Part V.

provisions including a stabilization clause.[233] The stabilization clause enabled the Quiport sponsors to arbitrate the dispute at ICSID and reach a settlement with the government of Ecuador.[234] Although ICSID will no longer be available, stabilization clauses remain a valuable protection for future investors in Ecuador because other international and domestic enforcement mechanisms are still available.[235] Even if those features prove unreliable, a stabilization clause, coupled with the purchase of insurance, could establish damages for an insurance payment in the case of any change in law or constitution.[236]

As a result of a stabilization clause, Quiport investors made a potentially successful investment in Ecuador. Although foreign investors face an even more populist government in Ecuador now, project finance can still avoid the risks of populism.[237] Through the use of a stabilization clause, investors can approach safer investment opportunities in populist countries, like Ecuador, just as pilots can now approach safer landings at the new Quito airport.[238]

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[233] *See* discussion *supra* Part V.
[234] *See* discussion *supra* Part V.
[235] *See* discussion *supra* Parts III–VI.
[236] *See* discussion *supra* Part VI.
[237] *See* discussion *supra* Parts II–III.
[238] *See* discussion *supra* Part IV–V.