MEMORANDUM OF DETERMINATIONS

Expropriation Claim of MidAmerican Energy Holdings Company (formerly CalEnergy Company, Inc.), Contracts of Insurance Nos. E374, E453, E527, and E759

On May 28, 1999, MidAmerican Energy Holdings Company (formerly CalEnergy Company, Inc.) (the "Insured") filed an application for compensation (referred to herein as the "Original Claim" (a copy of which is attached as Exhibit A)) for expropriation under four Contracts of Insurance (Nos. E374, E453, E527, and E759 (the "Contracts") (copies of which are attached as Exhibits B through E, inclusive)) relating to two geothermal power projects (referred to as the "Dieng Project" and the "Patuha Project" or collectively as the "Projects" and each as a "Project") in Indonesia. The insured has since filed three amendments to the Original Claim dated June 8, 1999, June 22, 1999, and September 27, 1999, respectively (copies of which are attached as Exhibits F through H). The Original Claim, as amended, requests compensation in the amount of $211,710,971.91.

On October 1, 1999, the Insured filed a separate application for compensation (referred to herein as the "Second Claim" (a copy of which is attached as Exhibit I)) for expropriation under the Contracts. The Insured has not withdrawn the Original Claim, as amended, and the two claims assert distinct but not mutually exclusive grounds for compensation. The Second Claim was amended on October 22, 1999 and on November 12, 1999 (copies of these amendments are attached as Exhibits J and K). The Second Claim, as amended, requests compensation in the amount of the $217,500,000. This amount is the sum of the active amounts of coverage under all of the Contracts.

The Contracts provide two alternative bases for an expropriation claim, the first dependent on acts of the government of Indonesia (the "GOI") that are not breaches of contracts between the Insured or the Foreign Enterprises (as defined below) and the GOI, PLN (as defined below), or Pertamina (as defined below). The Original Claim requests compensation under this basis for coverage. (The provisions of the Contracts relevant to the Original Claim are Sections 4.01(a) and 4.01(i). For ease of reference only, these provisions will be referred to as "4.01(a)" and a claim under them as an "A Claim.")

The second basis for an expropriation claim is that the Foreign Enterprises have received arbitral awards against PLN or Pertamina under the project agreements (as defined below), as well as against the GOI based on the GOI Support Letters (as defined below). The Second Claim requests compensation under this second basis for coverage. (The provisions of the Contracts relevant to the Second Claim are Sections 4.01(b) and 4.01(ii). For ease of reference only, these provisions will be referred to as "4.01(b)" and a claim under them as a "B Claim.")

Acting through its majority-owned subsidiaries Himpurna California Energy Ltd. ("HCE") in connection with the Dieng Project and Patuha Power Ltd. ("PPL") in connection with the Patuha Project, the Insured had entered into contractual arrangements (discussed below) with P.T. Perusahaan Umum Listrik Negara ("PLN"), the wholly state owned Indonesian electricity company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), the wholly state owned natural resources company, and the GOI for the development of two separate geothermal fields, the construction of generation facilities thereon, and the long-term sale of the electricity to be generated. (Himpurna California Energy Ltd. and Patuha Power Ltd. are referred to herein as the "Foreign Enterprises" and each a "Foreign Enterprise").

The Original Claim (as amended) asserts that the GOI took a number of actions, including directing PLN to breach its contracts in respect of the Projects, that meet the requirements for compensation under 4.01(a). The Second Claim asserts that the Foreign Enterprises have received arbitral awards as required by 4.01(b) and otherwise met the requirements of the Contracts. On October 19, 1999, OPIC received copies of those awards dated October 16, 1999, which awards have remained unpaid through the date of this determination.

SUMMARY OF EVENTS

The Foreign Enterprises each entered into several agreements with PLN, Pertamina, and the GOI relating to the Projects. Pursuant to separate Joint Operating Contracts (each a "JOC") between each Foreign Enterprise and Pertamina, the Foreign Enterprises were to develop and operate their respective geothermal fields for a period of forty-two (42) years. Although Pertamina continued to have an interest in the fields as required under Indonesian law, each Foreign Enterprise, acting as contractor for Pertamina, had the exclusive right to develop the field and to build generation facilities thereon.

Each Foreign Enterprise, PLN, and Pertamina then entered into an Energy Sales Contract ("ESC") providing that PLN would purchase electricity generated from the field or, in the event it did not purchase the electricity, it would nevertheless be obligated to pay a fixed amount for the unused capacity. PLN's purchase obligation ran directly to Pertamina, as the owner of the field, but the payment obligations were assigned to the Foreign Enterprises irrevocably. The term of the ESCs coincided with the term of the related JOCs. The two insured Projects were each to be developed in four staged units. It is unclear whether this structure was agreed upon because of the engineering requirements of the Projects or due to economic or other reasons, but each Foreign Enterprise had the discretion to vary the timing and other aspects of each unit's development.

Each of the Projects also received a letter signed on behalf of the Government of Indonesia by the then Minister of Finance that provided that the GOI "would cause" Pertamina and PLN "to honor their obligations" under the relevant JOC and ESC (collectively, the "GOI Support Letters" and each a "GOI Support Letter"). The GOI Support Letters, the JOCs, and the ESCs are referred to herein as the "Project Agreements".

The development of geothermal and other forms of power generation capacity requires long-term investment. The Insured undertook to make this investment using a combination of equity and debt raised through limited recourse project financing of the Foreign Enterprises. In order to attract the necessary levels of investment, power developers and their lenders require commensurate commitments from the proposed purchasers of the power to be generated, including take-or-pay purchase arrangements. Furthermore, to keep interest costs down, the construction of generation capacity is designed to minimize the period of construction before commercial production commences and income accrues to the project from sales of power. The structure of these contractual arrangements, including the payment obligations and the construction schedule, as well as the dispute resolution mechanism built into the Project Agreements, were all standard in the industry, and essential elements of the Insured's decision to invest in the Projects.

Upon the applications of the Insured and Kiewit Energy Company, Inc. ("Kiewit"), which at that time owned a fifty percent (50%) equity interest in each of the Foreign Enterprises, OPIC issued two contracts of insurance (E374 and E527) in connection with the Dieng project in April of 1996 and, upon subsequent application of the same two companies, issued two contracts of insurance (E453 and E759) in connection with the Patuha Project in August and September of 1997. The contracts of Kiewit were assigned, with OPIC's consent, to the Insured in connection with the Insured's subsequent acquisition of Kiewit's interests in the Foreign Enterprises.

On September 20, 1997, Presidential Decree 39/1997 ("PD39") was issued by the GOI. This presidential decree had the force of law and affected the rights of all parties, including the state-owned enterprises, Pertamina and PLN, in connection with independent power projects (IPPs) being developed at that time in Indonesia. This decree divided Indonesia's various independent power projects into three categories: those that were to be "continued," those that were to be "reviewed," and those that were to be "postponed." PD39 classified the Dieng project as continued in part (units 1, 2, and 3) and postponed in part (unit 4) and the Patuha project as reviewed in part (unit 1) and postponed in part (units 2, 3, and 4).

PD39 set out the criteria on the basis of which the IPPs had been classified into the three categories.[1] Under those criteria, each of the Projects should have been placed in the "continued" category since both Foreign Enterprises had begun construction or development. In fact, Dieng unit 1, the furthest developed, was near completion.

In addition to this inconsistency in classification of the Projects under PD39, a second inconsistency was reflected in the division of the projects into their separate units for purposes of application of PD39. No basis for treating the units as separate projects exists under the Project Agreements or PD39's stated criteria. The Project Agreements allowed the Foreign Enterprises to develop the Projects in stages or units, and provided that PLN was to be kept informed of the development schedule. However, financing and development were managed on a Project-wide basis, and these were the aspects of project status on which by its terms PD39 classification depended.

The Insured attempted without success to have the misclassification corrected. The Insured believed that the projects would be reclassified as "continued" and did not stop its development activities at that time. Although neither PLN nor the Insured ceased to perform under the Project Agreements as a result of the decree, from the time PD39 was promulgated, the ability of the Foreign Enterprises to retain commitments for project financing became increasingly doubtful, and the further development of the Projects became increasingly uncertain. The lenders refused to permit disbursement of loan funds for the purpose of constructing additional units unless clarification of the status of the Projects, including the units that were "continued," could be obtained from the GOI or PLN. Such clarification was not forthcoming, and no units other than Dieng unit 1 were ever completed.

The stated intent of PD39 was to establish a transparent process for quickly determining which of the reviewed and postponed IPPs should be continued, based on factors to be developed during the course of the review process. A high level committee was to be created. However, on November 1, 1997, a new presidential decree (Presidential Decree 41/1997) was issued modifying PD39. This decree reclassified certain of the IPPs without any reference to the committee. Patuha unit 1 was reclassified as "continued." While this further decree did not purport to change the plan to put in place a committee to oversee the review process, the effect of the decree was to make the role of any PD39 committee uncertain. Indeed, at that time no review committee had been established. On December 16, 1997 the Foreign Enterprises each asked PLN to confirm its intention to carry out its obligations under the ESCs, but no response has ever been received.

On January 10, 1998, Presidential Decree 41/1997 was itself rescinded by the terms of Presidential Decree 5/1998. The status of the Projects reverted to that announced in PD39, but a further four months had passed and no committee had been established. Also, if the Projects' original classification under PD39 had been in error, that error remained uncorrected. PD39 used the terms "postponed" and "reviewed" concerning part of the Dieng project and all of the Patuha project. The GOI has even now (more than two years later) failed to commence any meaningful steps to address the possibility of any continuation of the projects so classified.

During the spring of 1998, the Insured attempted to obtain assurances, as required by its lenders, from the GOI and PLN that they would comply with the Project Agreements, both in connection with the continued parts of the Dieng project and in connection with the parts of the Projects classified as postponed or reviewed. The Foreign Enterprises wrote a series of letters to PLN, to the Minister of Finance, to the Minister of Mines, and to the Minister of State-Owned Enterprises seeking assurances that the ESCs would be respected. They received no response to their repeated requests from either the GOI or from PLN. The then President-Director of PLN subsequently admitted in testimony that he failed to respond because he required direction from the GOI, which was withheld.[2]

On March 3, 1998, however, a memo from the legal bureau of the Ministry of Mines and Energy of the GOI stated that it did not intend to require the cancellation of all "power agreements." Indeed the Original Claim acknowledges that during this period the Insured was "repeatedly assured by U.S. and GOI officials that the Joint Review Process would focus on the PD39 criteria and a review of whether the Project was the product of 'KKN' (corruption, collusion [sic], or nepotism). If the Project Agreements met the PD39 criteria and had been negotiated in a transparent process, [the Insured] was assured they would be continued."[3]

In June of 1998, PLN (through its President-Director) made several public statements implying that the Project Agreements of both of the Projects would be repudiated. These statements were followed by clear breaches of the Project Agreements of the Dieng Project. On June 4, 1998, PLN failed to make the first payment due under the ESC relating to that Project, even though the first unit had been "continued" under PD39. PLN's breach of its payment obligations was followed by an instruction from PLN to the Foreign Enterprise on July 8, 1998, "to dispatch Dieng Unit 1 to 0 MW," which had the effect of shutting the plant down.[4] Under the ESC, however, PLN's payment obligations continued whether it took power from the Dieng plant or not. PLN has made no payments since then on these obligations.

During the period since the promulgation of PD39, no compensation has been paid to the Insured or the Foreign Enterprises under the Project Agreements or otherwise. Additionally, the GOI and its wholly-owned enterprise, PLN, have made it clear (both publicly and in direct conversations with OPIC) that, in their view, the Dieng and Patuha projects are not needed. PLN has begun a program (referred to as "rationalization") of selectively renegotiating similar arrangements for other IPPs affected by PD39 and has indicated that none of the reviewed or postponed projects will receive payments in accordance with their original project documents. PLN has indicated that the "continued" projects (those in the same category as units 1 through 3 of the Dieng Project) will be considered on a case-by-case basis and paid if the relevant project is needed (apparently, at significantly reduced levels).

PLN has informed OPIC directly that its basis for "rationalization" discussions has been that the GOI and PLN are not bound by their prior agreements.[5] Given the delay and the approach of the GOI and PLN to the IPPs, the categories under PD39 are not meaningful in practice and the classification of Dieng units 1 through 3 as "continued" is of no significance. The GOI has treated all IPPs as postponed or cancelled.

The Insured has attempted to discuss compensation with the GOI but has been unsuccessful. The Foreign Enterprises have pursued their right under the Project Agreements to arbitrate disputes with PLN and the GOI and, in August of 1998, jointly commenced arbitration under the terms of the Project Agreements.

At the insistence of the GOI and PLN, the arbitration proceedings were split into two separate proceedings, the first against PLN and, after a determination of that action, the second against the GOI. Both Foreign Enterprises received awards against PLN in May 1999 (the "PLN Awards"), and against the GOI in October 1999 (the "GOI Awards"). However, no payment has been made with respect to any of the awards.

During the arbitration against PLN, PLN argued, inter alia, that the Foreign Enterprises had breached the Project Agreements and that therefore performance and payment by PLN was excused. The final PLN Awards issued in favor of each of the Foreign Enterprises determined that no such breach existed.[6]

Having obtained unsatisfied awards against PLN, the Foreign Enterprises proceeded with their arbitration against the GOI. However, in June of 1999 Pertamina sought to enjoin both the second arbitration and the enforcement of the PLN Awards, and PLN separately sought to enjoin the enforcement of the PLN Awards. On July 23, 1999 Pertamina obtained from an Indonesian court an order enjoining the Insured from attempting to collect on the PLN Awards and from pursuing other remedies under the Project Agreements. (OPIC has received no information concerning the disposition of the separate action regarding enforcement of the PLN Awards, and apparently there have been no hearings on that action.) In addition, the GOI has threatened to use its police

powers to fine and imprison any person attempting to take any action under the remedies sections of the Project Agreements or otherwise participate in violation of the terms of the injunction.[7]

Notwithstanding the injunction, the duly constituted arbitral panel for the second arbitration unanimously determined that it could proceed outside of Indonesia and scheduled hearings during the week of September 21, 1999 in The Hague, The Netherlands.[8] The GOI declined to participate in these hearings, presenting no case on the merits, and failing to appear for the hearings. In addition, the GOI made an unsuccessful attempt to obtain an injunction against the proceedings from a court in The Netherlands. The Dutch court ruled on September 21 against enjoining the proceedings.

At the same time, according to affidavits of one of the arbitrators and other witnesses, copies of which are attached at Exhibit L, the GOI instructed the arbitrator whom it had appointed pursuant to the Project Agreements not to participate in the scheduled hearings. According to the affidavits of these witnesses, the arbitrator reported that when he arrived in The Netherlands, he was met by a number of persons who informed him that they were to escort him back to Jakarta and would not permit him to participate in the scheduled hearings. The arbitrator has since confirmed that he was met by officials of the GOI who delivered a letter purportedly from persons acting on behalf of the Indonesian courts informing him that the injunction was outstanding and that his participation in the procedure would be contrary to that injunction. He was escorted to Jakarta before the start of the hearings and was therefore not able to participate in them or to take part in further deliberations of the arbitral tribunal.[9]

The arbitral tribunal nevertheless issued interim awards with respect to its jurisdiction in favor of each of the Foreign Enterprises on September 26, 1999, determining that the GOI was in default under the terms of appointment due to its failure, without sufficient cause, to submit documentary evidence for the hearing, and that the tribunal had the jurisdiction to decide the case on the evidence before it. On October 16, 1999, the tribunal issued final awards without the participation of the Indonesian arbitrator. Those awards found that the GOI was responsible under the terms of the GOI Support Letters for causing PLN to honor and perform its obligations to the Foreign Enterprises, including the obligation to make payment on the PLN Awards, and that the GOI was therefore liable for damages to the Foreign Enterprises in the aggregate amount of $577,000,000.

DETERMINATIONS UNDER THE CONTRACTS

As noted above, the Contracts contain alternative methods of covering events of expropriation. Section 4.01(a), which contains the provisions governing A Claims, provides that compensation is payable if acts (other than acts that constitute breaches of contracts) attributable to the GOI (i) deprive the Insured of its fundamental rights in its investments, (ii) violate international law, and (iii) continue for a period of six months. Section 4.01(b), which contains the provisions governing B Claims, provides that compensation is payable if valid, final arbitral awards have been obtained against PLN or Pertamina pursuant to the Project Agreements as a result of acts not covered by section 4.01(a) , such awards have also been obtained against the GOI pursuant to the GOI Support Letters, such awards have not been paid for a period of 90 days, the nonpayment constitutes a violation of international law and deprives the investor of its fundamental rights in the insured investment, and the Foreign Enterprises were not in breach of the Project Agreements.

THE A CLAIM

I. Acts attributable to the GOI.

The first step in evaluating the elements of an A Claim is to determine if the alleged expropriatory "act or series of acts, excluding (I) any breach or alleged breach of any provision of any Project Agreement,"[11] is "attributable to a foreign governing authority."[12]

There have been a number of acts attributable to the GOI that have directly affected the rights of the Insured in its investments in the Foreign Enterprises:

(i) Then-President Soeharto issued PD39, which interrupted the development of the Investor's projects.

(ii) The GOI refused to respond to requests for explicit assurances that the Projects would be permitted to continue. The result of this failure was a withdrawal of financing and the Foreign Enterprises' inability to continue development and to complete construction of the Projects.

(iii) The GOI failed to establish an effective review process under PD39 or to offer compensation for the deprivation of the value of the Insured's investments.

(iv) The courts of Indonesia interfered in the exercise of the dispute resolution provisions of the Project Agreements and the enforcement of a properly issued arbitral award.[13]

(v) The GOI further interfered in the arbitral process by using its personnel in an attempt to disrupt and cause a postponement (or even cancellation) of the tribunal's sessions.

While other direct or indirect actions of the GOI may also have deprived the Insured of fundamental rights in its investments, it is not necessary to consider such actions here to the extent that they relate to breaches of the Project Agreements (which are excluded from consideration in connection with an A Claim) rather than to government actions separate from breaches of those Project Agreements.[14]

II. The acts of the GOI are violations of international law.

The Draft Convention on the International Responsibility of States for Injuries to Aliens (1961)[15] defines a taking as "unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy, or dispose of the property within a reasonable time after the inception of such interference." This definition would include an act or series of acts that deprived an investor of the benefit of its investment without compensation from the state or a third party. The Iran-U.S. Claims Tribunal found takings in Iran's deprivation of fundamental property or contract rights of several American companies notwithstanding the lack of a formal decree of nationalization.[16] Additionally, arbitral tribunals have recognized that rights under contracts are property subject to expropriation.[17]

The deprivation of property is a violation of international law if prompt, adequate, and effective compensation is not paid. The GOI has failed to pay or offer to pay any compensation and has interfered with the Insured's attempts to use contractual and judicial means to obtain compensation. The acts of the Indonesian courts (which are attributable to the GOI) and acts of the GOI in connection with the tribunal hearings in The Hague were intended to deny the Foreign Enterprises their rights under the Project Agreements, and under the terms of appointment agreed to by the GOI, to arbitration as a form of dispute resolution. As a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, the GOI additionally had an international law obligation to assure that entities investing in Indonesia were afforded appropriate protection for the rights to arbitration contained in the Project Agreements. The GOI has failed to comply with this obligation and has instead taken steps to prevent the exercise of those rights.

While there could be debate over whether the acts described could also be viewed as breaches of the Project Agreements, it is not necessary to resolve that question definitively here, and this determination does not do so, because of the existence of an alternative basis on which compensation is payable under the Contracts, as described below. What is clear is that the acts of the GOI directly and adversely affected the rights of the Insured in its investments, that no compensation has been provided therefor, and that the GOI has taken extraordinary measures to frustrate the Insured's attempts to obtain compensation through the arbitration process to which the GOI had agreed, all in violation of international law.

III. The acts attributable to the GOI have deprived the Insured of its fundamental rights in the investments.

The terms of PD39 interfered with the carefully constructed contractual arrangements established under the Project Agreements. Even if the Projects were eventually permitted to continue, the two years of delay to date caused by PD39 and the failure to implement the review process, without any indication by the GOI of an intent or willingness to perform or to attempt to perform its obligations under the Project Agreements, have deprived the Insured of important rights in the Projects. The effective abrogation of the Project Agreements has deprived the Insured of any possibility of recouping its investment other than through compensation from the GOI. Although the Dieng Project was continued in part, the refusal of the GOI to give reasonable assurances of its and PLN's compliance with their respective agreements caused the withdrawal of financing for the remainder of the Project, depriving the Insured of an important element of its fundamental rights in its investment.

By permitting Pertamina to seek and to obtain an injunction against the enforcement of the PLN Awards, which had been rendered by a tribunal constituted in accordance with the terms of the Project Agreements and terms of appointment agreed to by the GOI, and by issuing that injunction, the GOI has interfered with the right of the Foreign Enterprises to enforce the awards against PLN. The PLN Awards probably have no value outside of Indonesia, since it is unlikely that PLN has assets outside of Indonesia. The dispute resolution mechanisms established in the Project Agreements and the rights to independent arbitration are vital to development of any large-scale project with substantial government involvement. These provisions are customary in international power project financing and necessary both to attract financing and to assure prompt and fair resolution of controversies with a foreign counter-party. The rights established by such provisions are an essential element of the Project Agreements. By interfering with these rights, therefore, the GOI has deprived the Insured of an important element of its fundamental rights in the insured investment, and has additionally deprived the Insured and the Foreign Enterprises of the value of the PLN Awards.

Under the laws of Indonesia, the only permitted purchaser of power for transmission or distribution is PLN, and the development of independent power generation capacity is prohibited except in connection with contractual arrangements providing for the purchase of that power by PLN. Since no separate market for electricity exists, or is permitted to exist, the Insured has no prospect of operating its project outside of the scope of its agreements with the GOI and its wholly owned companies, PLN and Pertamina. Thus, by depriving the Insured and the Foreign Enterprises of the benefits of the Project Agreements, the GOI has deprived the Insured of its fundamental rights in its investments.

The Insured and the Foreign Enterprises have been deprived of fundamental rights in the insured investments both because the Insured has been deprived of its ability to develop the Projects and because the right to arbitration and to enforce the PLN Awards has been interfered with and effectively denied.

IV. The expropriatory effect has continued for a period of six months.

The Insured's rights in its investments were first affected by PD39 in September of 1997. However, at that time, there remained the possibility that the review process would proceed and that the Projects could (perhaps after a delay) be completed in accordance with the provisions of the Project Agreements. When completion no longer seemed possible after the events of June and July of 1998, the Foreign Enterprises pursued arbitration, first against PLN and subsequently against the GOI pursuant to the GOI Support Letters. During the period since PD39 was issued, the Investor has been deprived of its rights in its investment manifested in the ability to sell electricity, to continue development, and, ultimately, to obtain compensation following arbitration. However, while it may not be necessary for all of these effects to have occurred in order to meet the requirements of the Contracts, the precise time at which the those requirements were met does not need to be decided here because of the existence of an alternative basis on which compensation is payable under the Contracts. The effects of the acts of the GOI have not been mitigated and continue. The date on which the Insured was deprived of its fundamental rights in the Projects as required by 4.01(a) is not decided here.

THE B CLAIM

As noted above, the second alternative basis for a claim for expropriation provided under the Contracts requires that the Foreign Enterprises obtain "a valid final arbitral award against . . . PLN . . . pursuant to . . . the [ESC] as a result of events not constituting total expropriation under subparagraph (a) above, and a valid final arbitral award [against the GOI] under the [GOI Support Letter]"; the GOI fails for a period of 90 days to pay such award in violation of international law, depriving the Insured of fundamental rights; and the Foreign Enterprise is not in material breach of the Project Agreements.

I. The Foreign Enterprises have obtained Arbitral Awards against PLN and the GOI.

The Foreign Enterprises each obtained final arbitral awards against PLN on May 4, 1999 which were based on breaches of the Project Agreements The tribunal was constituted pursuant to terms of appointment executed by PLN and each of the Foreign Enterprises. Hearings in the two proceedings were held jointly in Jakarta. Both PLN and the Foreign Enterprises were represented and heard.

On October 16, 1999, a second tribunal, also constituted in accordance with the terms of appointment executed by the GOI and the Foreign Enterprises, issued final awards against the GOI. These awards were issued following a determination, in interim awards dated September 26, 1999, that the GOI was in default under the terms of appointment of the arbitral panel because it had failed, without showing sufficient cause for such failure, to present either its case in chief or to appear at the scheduled hearing. In making the final awards, the tribunal evaluated the evidence presented on the issues and concluded that the GOI was responsible under the GOI Support Letters for the nonperformance by PLN as determined in the proceedings against PLN. The tribunal awarded damages to the Foreign Enterprises in an amount in excess of the amounts in the PLN Awards.

Due to the absence (for the reasons detailed at page 9 above) of the GOI-appointed arbitrator, the tribunal deliberated with only two of three members present. In deciding to proceed on this basis the tribunal took into account the cause of the third arbitrator's absence, the role played by the courts and possibly other instrumentalities of the GOI in causing such absence, and the stage of the proceedings. The decision to proceed with a truncated tribunal is consistent with international arbitral practice in situations involving the absence or other withdrawal of an arbitrator without valid excuse. The awards state that the tribunal would have reached the same result even if the GOI had not been directly involved in causing the absence of the GOI-appointed arbitrator.

In reaching this conclusion, the tribunal stated that in determining whether a withdrawing member of the tribunal should be replaced or whether the tribunal should proceed as a truncated tribunal, the remaining members may exercise their discretion, taking into consideration the stage of the proceedings at which the withdrawal occurs. The tribunal evaluated this matter and determined that the circumstances of this arbitration were such that the proceedings should continue with only two arbitrators. Fully deliberated interim awards had been issued, which determined that the GOI was in default of the terms of appointment and that the tribunal was to proceed on the evidence before it at that time. In these circumstances, the appointment of a replacement arbitrator would have resulted in a delay that would have benefited the GOI; the remaining members of the tribunal determined that the GOI should not so benefit and

exercised their discretion to continue accordingly.

Given in these circumstances and all other factors relevant to the issuance of the final awards, such awards are valid as required by the Contracts.

Although the arbitral awards against the GOI were issued on October 16, 1999 and have not remained unpaid for ninety days, OPIC is justified in making its determination at this time and waiving the remainder of the time period. The Insured and the Foreign Enterprises are under an injunction issued by an Indonesian court prohibiting them from making any attempt to enforce the award. Any such attempt would make the Insured, the Foreign Enterprises, and any persons acting on their behalf subject to criminal sanctions and fines of $1,000,000. Additionally, the PLN Awards have been outstanding, unpaid, for six months. While failure to pay the PLN Awards is not sufficient to establish OPIC's liability under the Contracts, the GOI's efforts to avoid their enforcement and its refusal to acknowledge its obligations under the GOI Awards indicate that the GOI will not honor the GOI Awards within the full 90-day period. The Insured should not be expected to incur the sanctions threatened against it by attempting to enforce the awards, and a delay in making a payment to the Insured would serve no purpose.

II. Non-payment of the arbitral award is a violation of international law.

The Restatement (Third) of Foreign Relations Law states that ". . . a state may be responsible . . . if, having committed itself to a special forum for dispute settlement, such as arbitration, it fails to honor such commitment; or if it fails to carry out a judgment or award rendered by such domestic or special forum." Article II of the New York Convention recognizes the importance of these provisions and each signatory (including Indonesia) undertakes to support and enforce agreements to arbitrate (whether such proceeding is otherwise subject to the Convention, or not).

The economic crisis that continues to affect Indonesia does not afford a defense to Indonesia's obligation to pay the amount of the awards. The GOI has stated that it is not able to pay the amount of the GOI Awards and will not do so. Similar arguments have been raised and rejected in other contexts. According to the notes explaining the Harvard Draft Convention,

The poverty of a country or its asserted inability to pay may not be set up as a defense to international responsibility. As in connection with the taking of property, a State can easily allege that it did not have enough funds for its own governmental purposes and therefore would not be in a position to discharge its obligations to aliens. The acknowledgement of any such defense would involve an international court in . . . inquiries into the internal affairs of States.

Therefore the failure of the GOI to make payment constitutes a violation of international law.

III. The nonpayment has deprived the Insured of its fundamental rights in the insured investment.

As discussed in connection with the A Claim, the Insured's ability to develop the Projects and to sell electricity generated has been effectively denied pursuant to PD39 and its implementation. The sole remaining source of recovery of its investment is through the arbitration process set out in the Project Agreements. By failing to pay the awards the GOI has deprived the Insured of all of its remaining rights in the Projects.

IV. The Foreign Enterprises are not in material breach of the Project Agreements.

The Foreign Enterprises have been unable to develop the Projects in accordance with the Project Agreements. However, it was established in the arbitration proceedings between the Foreign Enterprises and PLN that the Foreign Enterprises had complied with their undertakings to the extent not otherwise excused by the actions of PLN and that the Foreign Enterprises were not in default under the Project Agreements.

NO EXCLUSION APPLIES TO THE PAYMENT OF COMPENSATION

Section 4.03(a) of the Contracts provides for an exclusion from coverage if "the preponderant cause [of the expropriation] is unreasonable actions attributable to the Investor, including corrupt practices." This exclusion is not applicable here. The GOI has acted on several different levels in connection with the Projects, including actions of the then president of Indonesia in issuing presidential decrees broadly applicable across the power sector. Those actions can not be considered as having been taken in reaction to acts of the Insured.

The GOI and PLN have asserted that the Insured was involved in "KKN" (corruption, cronyism, and nepotism) and have alleged that the Projects were awarded to the Insured due to corruption. When specific allegations of corruption have been requested, however, no response has been forthcoming. It should be noted that the identical allegations, without specifics, have been made in connection with all IPPs in Indonesia. OPIC has received no evidence of any corrupt practices in this case. The tribunal in the proceedings of the Foreign Enterprises against the GOI confronted this issue. In the course of pointing out that no evidence of corruption had been presented to it the tribunal found

". . . unsupported allegations are not enough to demonstrate corruption. Not only is it not illegal to have local partners; it is in many situations intelligent and indeed commendable business practice. . . . Much more is needed; the criticised conduct must be proved . . . [and] shown [to have run] afoul of defined legal structures. . . . But to punish parties who are apparently doing no more than to seek to enforce contractual claims, and to pretend to justify such punishment by unsupported allegations, is no part of this struggle [against corruption]".

Section 4.03(b)of the Contracts, as amended by section 10.03, provides an exclusion if the expropriatory action covered by section 4.01(a) is "taken by the foreign governing authority in its capacity or through its powers as a purchaser from, or supplier, creditor, shareholder, director[,] or manager of, the foreign enterprise." The actions on which determination of the A Claim would be based were not taken by the GOI in these capacities. Although PLN was a purchaser from and Pertamina a supplier to the Foreign Enterprises, any determination of the A Claim would have to rely on the acts of the GOI itself, not on the acts of Pertamina or PLN. The GOI was not a purchaser from, supplier to, or creditor, shareholder, director, or manager of any of the Foreign Enterprises. Although the Original Claim asserted actions of the GOI in directing PLN's failure to perform under the ESCs and to pay the PLN Awards, such acts did not form the basis for this determination.

The B Claim is not subject to the exclusion contained in section 4.03(b).

AMOUNT OF COMPENSATION

Pursuant to section 5.01 of the Contracts, as amended, compensation for expropriation is based on the book value of the insured investment, subject to certain adjustments and limitations. The book value of the insured investment is determined by reference to the unaudited, but management certified, financial statements for the Foreign Enterprises dated as of October 16, 1999. The Insured will certify to OPIC that the amounts reflected in these financial statements as due to affiliates reflect amounts actually advanced by the Insured to the Foreign Enterprises and that the Foreign Enterprises received such funds. Section

10.14 of each of the Contracts provides that amounts invested as Secondary Investments (as defined in the Contracts) shall be evidenced in a form acceptable to OPIC. The Secondary Investments were made as book entries only and are reflected as such on the records of the Insured and the Foreign Enterprises. This form is determined to be acceptable since it is the norm in connection with inter-affiliate loans of this kind. After consultation with accounting experts, OPIC has determined that the book value of the insured investment throughout the relevant period exceeded the applicable limitation set out below.

The amount of compensation is not subject to any of the adjustments contained in section 5.03, as amended.

Pursuant to section 5.04, as amended, the amount of compensation is limited to the active amount as of the date the expropriatory effect commenced, and cannot exceed the Investor's share of the award against the GOI. The active amount at all relevant times was $217,500,000, which is less than the Investor's share of the such award, and less than the book value of the insured investment, and thus constitutes the amount of compensation payable under the Contracts.

Further details regarding the calculation of book value are contained in Schedule A hereto.

Procedures relevant to the Claims

Section 8.01(b) provides that an application for compensation must be filed within six months after the Insured has reason to believe the requirements of Article IV have been met. The Insured filed the Original Claim eleven months after the date on which it asserts in the Original Claim that the expropriatory effect commenced. However, it is not necessary to determine whether the requirements of Article IV had been met more than six months before the Original Claim was filed, because it is clear that the period has not elapsed with respect to the Second Claim. The Insured has kept OPIC fully apprised of developments in connection with the Projects.

As a condition to payment, the Insured will assign to OPIC, in a form and in substance satisfactory to OPIC, all of the shares related to the insured investment as required by Section 8.02 and by Section 10.12 of Contracts E374 and E527 and by Section 10.13 of Contracts E453 and E759.

DUTIES OF THE INSURED

The Foreign Enterprises are majority owned and are controlled by the Insured, which acquired the interests that originally belonged to Kiewit. The Insured has certified that the eligibility requirements of all the Contracts have been satisfied.

The Insured was assigned the interests of Kiewit with the consent of OPIC.

The Insured has continued to bear the risk of loss of at least 10% of the book value of its interest in the Foreign Enterprises. The Insured has maintained private insurance as well as the coverage under the Contracts. The aggregate amount of all coverages has not exceeded 90% of the book value of the insured investment.

Pursuant to section 9.01.9 of the Contracts, the Insured is required to preserve the Projects, to pursue available judicial and administrative remedies, and to negotiate in good faith with the GOI. The Insured refused in December 1998 and in January 1999 to attend meetings among PLN, OPIC, and itself to discuss the Projects, which, if pursued, might have resulted in a resolution of the dispute and mitigated its losses. Since the Insured was at that time involved in arbitration with PLN and since other IPPs who were engaged in ongoing discussions have not been successful in resolving their contract disputes with PLN, this refusal should not be treated as a violation of this provision of the Contracts. It will be a condition of payment that the Insured provide OPIC with a certificate in connection with the provisions of this section with regard to preservation of the property of the Foreign Enterprises.

Additionally, the Insured will, as a condition to payment, transfer its interests in the Foreign Enterprises in accordance with the provisions of the section of 8.02 and make appropriate arrangements for the transfer of the insured investments to OPIC.

It will be a condition of payment that the Insured and the Foreign Enterprises each provide to OPIC a certificate confirming that they have complied with the environmental and worker rights requirements of Sections 9.01.12 and 9.01.13 as amended by Section 10.08 and of Section 10.10 of Contracts E374 and E527 and of Section 10.11 of Contracts E453 and E759.

CONCLUSION

For the foregoing reasons OPIC concludes that compensation in the amount of $217,500,000 should be paid to the Insured.

OVERSEAS PRIVATE INVESTMENT CORPORATION

signed______________________
By: George Muñoz
Its: President
Date: 11/1999

Footnotes:

[1] PD39 provided that projects were postponed if they were "not yet in progress" and continued if "the construction process are [sic] underway." Reviewed projects were to be evaluated by a committee and then assigned to one of the other classifications. Presidential Decree 39/1997 8 (Sept. 20, 1997).

[2] Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 164; Patuha Power Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 164.

[3] Original Claim p. 5 (May 28, 1999).

[4] Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 33; Patuha Power Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 33.

[5] These statements have been made frequently in conversations between representatives of PLN and OPIC. Among these meetings are those held on July 15, 1999 with PLN director of planning Dr. Hardiv H. Situmeang and representatives of OPIC, EID/MITI, and the Export-Import Bank of Japan, and meetings on October 11, 1999 with the President-Director of PLN, Adhi Satriya, and representatives of the same organizations and of the World Bank and the ADB.

[6] Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 296-297, 350-369; Patuha Power Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listruik Negara (Indonesia), Final Award 297-298.

[7] Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 74 (Sept. 26, 1999); Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 74 (Sept. 26, 1999).

[8] "Procedural Order of 11 August 1999," quoted in Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 105, at 49-50; see also Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 105, at 49-50.

[9] Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 140-146; Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 140-146.

[10] Such acts are those that are breaches of the Project Agreements or otherwise excluded by 4.03(b). (See infra p. 21 for a discussion of § 4.03(b).)

[11] Contract of Insurance E374 § 4.01(i); Contract of Insurance E527 § 4.01(i). The language of the corresponding provision, §4.01(a), in Contracts of Insurance E453 and E759, reads: "except for (x) any breach or alleged breach of any provision of any Project Agreement. . . ."

[12] Contract E374 § 4.01(i)(a); Contract E527 § 4.01(i)(a); Contract E453 § 4.01(a)(i); Contract E759 § 4.01(a)(i) .

[13] Under applicable principles of international law, the acts of the judiciary are attributable to the state. If the courts take actions that result in interference with a property right, the state may be held responsible for compensation, just as it would had the action been taken by the legislative or executive arm of the state. Islamic Republic of Iran v. U.S., Award No. 586-A27-FT (Iran-U.S. Cl. Trib. Jun. 5, 1998).

[14] The contractual exclusion from OPIC coverage under the A Claim does not imply that the GOI is not responsible for such actions, however.

[15] Although this document is a draft and has not been accepted by any state, it reflects the opinions of experts on customary international law in this area. "Although . . . in the form of conventions requiring ratification or accession, they have been widely accepted as generally declaratory of existing law and therefore actually given legal effect even prior to their formal entry into force." Oscar Schachter, International Law in Theory and Practice 71 (1991).

[16] See, e.g., Starrett Housing v. Islamic Republic of Iran, 23 I.L.M. 1090 (Iran-U.S. Cl. Trib. 1993).

[17] Libyan Am. Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 60 (I.C.J. 1977); see also O'Connell, 2 International Law 763-68 (2d. ed. 1970).

[18] See O'Connell, 2 International Law 776-77 (2d. ed. 1970).

[19] This conclusion would be true even if the acts of the GOI are characterized as having merely been to inform one of the members of the tribunal of the injunction.

[20] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, art. II, 9 U.S.C. § 201 (1999) [hereinafter "New York Convention"].

[21]

[22] See Stephen Schwebel, "International Arbitration: Three Salient Problems" 71-72, 87-89 (1987).

[23] Therefore, in deciding that the awards are valid it is not necessary to determine whether the GOI acted in any way improperly in connection with the arbitrator's nonattendance at the hearings in The Netherlands. However the statements of the GOI and its counsel acknowledge that the GOI contacted the arbitrator and sought his absence, that the injunction issued by the courts of Indonesia was a basis for his absence, and that the courts (perhaps together with other agencies of the GOI) communicated with the arbitrator to persuade him not to attend. The purpose of these efforts was apparently to delay or prevent the continuation of the tribunal's deliberations.

[24] Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Final Award 69-70 (Oct. 16, 1999); Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Final Award 69-70 (Oct. 16, 1999).

[25] The awards state that all three arbitrators were involved in the discussions and had agreed on the findings as set forth in the awards (conditionally, since the discussions preceded the GOI's nonattendance at the hearing in The Hague). The Indonesian arbitrator did not sign the interim award. Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 145-147; Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Interim Award 145-147.

[26] Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Final Award 78; Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Final Award 78.

[27] Restatement (Third) of Foreign Relations Law § 712 cmt. h (1999).

[28] New York Convention, supra note 19, art. II, 1.

[29] See e.g., Société Commercial de Belgique (Socobel) Case, P.C.I.J., Ser. C, No. 87, pp. 101; see also Harvard Draft Convention on the International

Responsibility of States for Injuries to Aliens, art. 17(2), reprinted in Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545, 576 (1961).

[30] Sohn & Baxter at 572-73.

[31] Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, Final Award 99-100; Patuha Power Ltd. (Bermuda) v. Republic of Indonesia, Final Award 99-100.

[32] Contracts at § 4.03(b).

[33] See Second Claim Exhibit 21 (Oct. 1, 1999).