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## **Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listrik Negara, Final Award, 4 May 1999**

**Final award of 4 May 1999**

### **Facts**

Two project companies, Himpurna California Energy (Himpurna) and Patuha Power Ltd. (Patuha), both indirect subsidiaries of Mid-American Energy Holding (USA), entered into contracts, most significantly an Energy Sales ● Contract (ESC), with the Indonesian state electricity corporation, PT. (Persero) Perusahaan Listrik Negara (PLN) to explore and develop geothermal resources in Indonesia. The contracts entitled the project companies to build two power plants in Indonesia and sell the power to PLN.

In the wake of the economic crisis which befell Indonesia in 1997, PLN failed to purchase the energy supplied. Relying on a clause in the ESC calling for arbitration under the UNCITRAL Rules, Himpurna submitted a request for arbitration seeking to recover US\$ 2.3 billion in damages. Concurrently, Patuha submitted a request for arbitration seeking to recover US\$ 1.4 billion in damages. The facts of the award are set out in more detail in paragraphs [1] to [31] below. As the two final awards of 4 May 1999 are identical save for the amount of damages claimed and awarded, only the "Himpurna" award is reproduced here. (1)

The Arbitral Tribunal first disposed of several preliminary issues. It held that the claimant had fulfilled the pre-conditions to arbitration. It also found that claims not mentioned in the initial notice of arbitration were not barred as Art. 20 of the UNCITRAL Rules allows the claim to be amended or supplemented and Art. 18(2)(d) defines the Statement of Claim as the place where the claimant should define the "relief or remedy sought". The Arbitral Tribunal also rejected PLN's contention that Pertamina was a required party to the arbitration, finding no contractual basis for this contention. Nor was Art. 1266(2) of the Indonesian Civil Code to be understood as providing for the exclusive jurisdiction of the Indonesian courts to the exclusion of arbitration with respect to termination of a contract due to failure of performance. In addition, the Arbitral Tribunal rejected PLN's position that it was independent of the Government of Indonesia and could not be held liable for breach where the contract had been suspended by government action, finding that PLN could not be characterised as separate from the government which had given it "legal life and under which it operated".

In conclusion, the Arbitral Tribunal found that PLN had breached the contract by failing to provide Himpurna with assurances that it would honour its contractual obligations; by preventing Himpurna from completing the development of additional units; and by failing to pay invoices and issue standby letters of credit, and declared the ESC to be terminated. The Arbitral Tribunal awarded damages for wasted costs and lost profit. In doing so it gave great weight to the changed circumstances in calculating the latter where it awarded less than 10% of the amount claimed, concluding: "the Arbitral Tribunal has sought to alleviate PLN's burden as much as possible while respecting ● the clear contractual entitlements of the claimant under an agreement which by its terms left very little to chance". Arbitrator de Fina attached a Statement in which he expressed his concern regarding the "novel proposition ... that the claimant's reliance upon its contractual rights to establish quantum amounts to be an abuse of rights leading to and permitting a substantial reduction of what might otherwise be awarded".

The claimants also commenced arbitral proceedings against the Republic of Indonesia (ROI), seeking to hold ROI responsible for PLN's performance under the ESC. After PLN's failure to pay the amount awarded against it, that case, which had been held in abeyance during the PLN arbitration, was decided in an Interim Award of 26 September 1999, reported in this volume at pp. 112-186, and a Final Award of 16 October 1999, reported in this volume at pp. 186-215. The Final Award held ROI to be in breach of a letter issued by the Ministry of Finance ensuring the performance of PLN and ordered that ROI pay the total amount of the unpaid PLN award. Similar awards were made in the case brought by Patuha.

### **Excerpt**

#### **I. Introduction**

[1] "This arbitration concerns claims brought against the respondent (hereinafter referred to as PLN), the Indonesian State electricity corporation, by Himpurna California Energy Ltd. (Bermuda), a subsidiary of CalEnergy Inc. (USA). The claims arise under a so-called Energy Sales Contract signed on 2 December 1994 (hereinafter referred to as the ESC). The

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ESC contemplated the supply of electricity from the Dieng geothermal field in Java to PLN, and provided the legal foundation for a large investment by the claimant in wells, plant and other infrastructure necessary to generate electricity from the Dieng reservoir. In particular, the ESC committed PLN to pay for electricity thus made available for a period of 30 years, and to do so in US dollars. This obligation was a crucial element in a project finance structure which, to be viable, had to satisfy a consortium of international banks. The claimant alleges that PLN has breached and repudiated the ESC, and seeks damages in the amount of some US\$ 2.3 billion.

[2] "PLN denies that there has been any breach. It contends that performance of the ESC has been suspended as a result of non-discriminatory governmental measures taken in response to unprecedented economic adversity. Moreover, or so PLN avers, the dramatic devaluation of the Indonesian rupiah which began in the second half of 1997 has made it impossible for PLN to honour its vast US-dollar denominated obligations, and constitutes a change in circumstances which, under Indonesian law, obliges the claimant to accept an abatement of the contractual terms. PLN also alleges that the claimant's own failure of performance in a number of respects precludes liability on PLN's part. ●

[3] "Pursuant to Terms of Appointment agreed among the Parties and the Arbitral Tribunal on 6 October 1998, this case was heard in parallel with the arbitration brought before the same Arbitral Tribunal against PLN by Patuha Power Ltd. (Bermuda), also a subsidiary of CalEnergy Inc., under another Energy Sales Contract signed on 2 December 1994 relating to the supply of electricity from the Patuha geothermal field, also located in Java. In that case, Patuha Power Ltd. also alleges that PLN has breached and repudiated its Energy Sales Contract, and seeks damages in the amount of some US\$ 1.4 billion.

[4] "There was a third signatory to the ESC, namely Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, referred to below by its familiar abbreviation 'Pertamina'. Pertamina's absence from these proceedings is considered in paragraphs [[63]-[67]].

[5] "As related in Sect. [III], the claimant has also commenced arbitral proceedings against the Republic of Indonesia seeking to hold the latter responsible for PLN's performance under the ESC. That case has been held in abeyance pending the outcome of the present arbitration. (2) This Award deals with the dispute between the two Parties before the Arbitral Tribunal on the basis of the evidence they have adduced. The existence and effect of the asserted legal relationship between the claimant and the Republic of Indonesia are not matters within the scope of authority of the present Arbitral Tribunal."

## II. Factual and Contractual Context

(...)

[6] "The Indonesian archipelago is situated in a zone of intense geothermal activity.... This resource has much appeal because it is to some extent renewable, it is low-polluting, and its exploitation would enable Indonesia to use substantial parts of its hydrocarbon reserves to earn foreign exchange rather than to satisfy domestic requirements.

[7] "The difficulty in the past was the financing. The first preambular paragraph of Presidential Decree No. 49 of 1991, which established a more lenient tax treatment of electricity generation from geothermal resources (reducing the rate of taxation from 46% to 34%) recites simply, in the translation provided to the Arbitral Tribunal, that 'the exploitation of geothermal resources needs huge capital with high risk, high technology and ● adequate skills'. Competing demands for funding made it difficult for the Indonesian public sector to justify the risk of ventures in this relatively new area. This difficulty was compounded by a relative dearth of specialised technology and know-how.

[8] "The solution was to turn to foreign private investment. As stated in the preambular paragraph (c) of Presidential Decree No. 49, 'it is deemed necessary to adopt a policy which can create a favourable investment climate in the exploration and exploitation of geothermal resources'.

[9] "Decree 49/1991 followed on the heels of the even more fundamental Presidential Decree 45/1991. Previously, private companies could only develop and provide steam to PLN, which built and operated the electrical generation plants. Decree 45 made it possible for private developers, working in cooperation with Pertamina, to build and operate the plants as well as to develop the steam fields.

[10] "There is no question but that the door thus opened was enticing to foreign investors and industrialists. Indonesia represented a pioneering opportunity to enter a vast new domain.

[11] "There was, moreover, 'a soaring demand for electricity in Indonesia',... Such was the context in which the claimant, PLN, and Pertamina signed the ESC on 2 December 1994. It was one of eleven contracts for 1,950 MW of geothermal power approved by the Ministry of Mines and Energy in the years 1994-1996.

[12] "Art. 1.1 of the ESC entitled the claimant to develop a maximum total capacity of 400 net MW. But since Pertamina was legally entrusted with the right to develop and exploit geothermal resources under Presidential Decrees 22 of 1981 and 45 of 1991, this entitlement was described as granted to the claimant in its capacity as 'contractor to

Pertamina'. Under Sect. 6.1 of the ESC, Pertamina assigned to the claimant – or, more precisely, to its nominated trustee – its 'rights, title and interest to all amounts payable and other performance due from PLN'. To complete the contractual framework, the claimant and Pertamina on 2 December 1994 accordingly also signed a Joint Operation Contract relating to the Dieng field (hereinafter referred to as 'the JOC').

[13] "To mobilise the funds required for its investment, the claimant obtained a large credit facility from a consortium of banks. The banks required a number of assurances, including (i) a 90% probability reservoir assessment by an independent engineer, (ii) an undertaking that Pertamina would forward invoices prepared by the claimant to PLN, (iii) an undertaking that PLN's payments would be paid into the account of a Trustee with respect to which the lenders would have rights of priority, and – perhaps most importantly of all – (iv) an undertaking that PLN would make payment in US dollars for all P 19 ● of the net capacity the claimant would develop, within the contractual maximum, whether or not PLN actually took delivery. This obligation, commonly characterised as one of take-or-pay, was to run for 30 years upon the claimant making available defined increments of electricity.

[14] "The ESC was 'approved ... on behalf of the Government of the Republic of Indonesia' by the Minister of Mines and Energy, whose signature appears on the last page of the Contract. The Minister also approved the JOC in an identical manner.

[15] "The claimant was explicitly encouraged to invest massively and rapidly. Within a few weeks of signature of the ESC, the Minister of Mines and Energy issued a National Energy Plan contemplating the development of some 8,000 MW of power, including 1,439 MW of geothermal power. As reported under the first item of the agreed minutes of the first meeting, on 11 January 1995, of the Joint Committee organised to implement the ESC (including representatives from PLN and Pertamina as well as of the claimant):

'PLN stressed the importance that private company meets the schedule target as many private power will be supplied and *PLN will buy from the first private power to meet the target.*' (Emphasis added.)

[16] "The claimant accordingly initiated a programme of drilling which resulted in five temperature coreholes and 19 full-sized wells. The claimant purchased a significant amount of equipment and carried out (or contracted for) engineering, design, and analysis. It erected substantial steam gathering systems as well as generating facilities. Moreover, it purchased rights of land use from various local owners (to which title was formally to be vested in Pertamina) and built access roads and other infrastructure. The claimant affirms that its investments to date (including interest) have exceeded the sum of US\$ 315 million.

[17] "As a result of information gathered in the course of its development work, the claimant affirms that the Dieng field has reserves of at least 245 MW, justifying investments in four generating facilities of 60 MW, 80 MW, 80 MW, and 20 MW.

[18] "By the time the present dispute arose, the claimant had completed construction of a 60 MW generating plant referred to as Dieng Unit 1, was in the process of constructing the 80 MW Dieng Unit 2, and had arranged for financing for Dieng Units 3 and 4.

[19] "Under the ESC (Arts. 2.10, 2.31, and 6.2) PLN's obligations to pay commence at a defined 'Date of First Operation'. Payments are due for all electricity 'delivered or made available'. The claimant issued its first invoice ● following what it considered the Date of P 20 First Operation for Dieng Unit 1 on 15 March 1998. PLN neither availed itself of the output, nor paid the invoice.

[20] "The reasons for this non-payment may be traced to governmental actions in the autumn of 1997 in response to the all too familiar macro-economic crisis which had befallen Indonesia.

[21] "The consequences of the crisis have been manifold and profound. For present purposes, it suffices to mention the precipitate decline in the value of the national currency, which from the second half of 1997 to early 1998 dropped to as little as one-fifth of its previous rate of exchange with the US dollar. PLN, which prices the electricity it sells on the Indonesian market in rupiah, had concluded a number of agreements like the ESC under which it had agreed to pay the so-called IPPs (independent power producers) in US dollars. (It should be noted that the claimant has repeatedly emphasised that PLN sells electricity at 'subsidised below-market rates'.... In sum, or so it alleges, PLN faced a commercial calamity.

[22] "One of PLN's experts has opined that PLN's losses under the two ESCs it signed with the claimant and with Patuha Power Ltd. will exceed US\$ 19.9 billion.

[23] "The claimant, it should be observed, does not accept that PLN's resources have been diminished to such an extent that it cannot meet its commitments. It rejects the US\$ 19 billion figure as unexplained and unsupported, noting prima facie that this estimate of future losses is not discounted to a present value, and that it does not take account of possible tariff increases, resurgence of market demand, or additional governmental subsidies (including use of the 34% tax revenues that would have been paid by IPPs). In short, the claimant insists that PLN should not be allowed to invoke general economic

conditions to justify selective avoidance of contracts...

[24] "At any rate, in September 1997, Presidential Decree 39/1997 declared that a large number of infrastructural projects would be 'continued', 'reviewed' or 'postponed'. Dieng Units 1, 2, and 3 were listed as 'continued', but Dieng Unit 4 was listed as 'postponed'. At the same time, Patuha Unit 1 was placed 'under review' and Patuha Units 2, 3, and 4 were declared 'postponed'. Subsequently, the claimant states, it learned from a Government announcement that twelve unnamed power projects had been cancelled, and was alarmed by press reports to the effect that PLN's chief executive wished to cancel all contracts with independent power producers like the claimant, and was 'ready to face a lawsuit' as a result of one such cancellation.

P 21 [25] "Although the intervening Presidential Decree 47/1997 issued on 1 November 1997 restored the Patuha Unit 1 'project' to a 'continued' status, Presidential Decree 5/1998, issued on 10 January 1998, after reciting that 'a more thorough review of the decision to continue' a number of projects led ● to the conclusion that 'they would require large amounts of funding and would make efforts to overcome the crisis more difficult', revoked Decree 47/1997 and put Patuha Unit 1 back on 'review' status.

[26] "On 16 December 1997 the claimant's chief executive officer, Mr. Donald O'Shei, wrote to PLN requesting its assurance that it would continue to perform its obligations under the ESC 'notwithstanding anything to the contrary' in the Presidential Decrees. PLN did not respond. On 11 February 1998 Mr. O'Shei wrote separate letters to the Minister of Finance and the Minister of Mines and Energy informing them of PLN's 'repeated' failure to give assurances that the ESC would be respected and requesting 'a mechanism which will allow us to meet and reach a solution that is satisfactory to all parties'. On 6 April 1998 Mr. O'Shei wrote to the Minister of State Owned Enterprises to the same effect, and on 3 June 1998 he wrote another letter to the same Minister asking him to assist in obtaining a letter of assurance from PLN which might help avert a determination of default by international lenders to the Dieng project, and noting PLN's failure to honour invoices.

[27] "There were no written responses by PLN to any of these requests. It is a fact that a number of commissions have been established to restructure PLN and its portfolio of projects, but it is also a fact that the Arbitral Tribunal has seen no evidence of any concrete proposal from PLN to the claimant at any time since the beginning of the crisis until the date of this Award.

[28] "On 5 March 1998, the President Director of PLN wrote to the claimant and Pertamina to the effect that in accordance with Presidential Decrees 39/1997 and 5/1998,

'Dieng (unit 4) Geothermal Project is categorized as project to be postponed, therefore PLN, Pertamina and Company as the contracting Parties under the Energy Sales Contract shall abide by these Presidential Decrees. As a consequence thereof, any activities initiated by you which is not contemplated under such Presidential Decrees in relation with Dieng (unit 4) Geothermal Project shall solely be at your own risks and liabilities.'

P 22 [29] "At an 'emergency meeting' on 9 July 1998 of the Joint Operating Committee for the Dieng project, comprised of representatives of the claimant, PLN, and Pertamina, it was noted that although Dieng Unit 1 had been tested on 5 July with an average gross output of 60.52 MW, PLN had 'dispatched' the Unit to 0 MW on 8 July, effectively shutting the Plant down. In the minutes signed by representatives of all three parties, it is recorded that: ●

'PLN representatives indicated that the issue of their dispatching the Unit was a political issue outside the JOC forum. They indicated that given the lack of clear direction from the Board of PLN, PLN determined that it would be unwilling to accept any power from the Unit.'

[30] "The situation remained unresolved, and the claimant initiated these proceedings on 14 August 1998 in circumstances described in greater detail below.

[31] "Until today, PLN has not paid any of the monthly invoices issued by the claimant on account of the energy made available from Dieng Unit 1. The claimant has halted all development and construction activities."

(....)

### III. Jurisdiction

[32] Both the ESC and Energy Sales contracts signed by PLN, Patuha Power Ltd., and Pertamina contained clauses which provided for consultation as a first step to dispute resolution. Disputes that could not be settled amicably within a thirty day time period were to be referred to binding arbitration under the UNCITRAL Arbitration Rules in Jakarta. Claiming non-compliance with the ESC, Himpurna formally invoked the consultation clause on 9 June 1998. Following the thirty-day period, Himpurna and Patuha Power jointly served a Notice of Demand for Arbitration and a Claim against PLN and the Republic of Indonesia on 14 August 1998. Both the Republic of Indonesia and PLN

indicated that they would not consent to a single consolidated arbitration. Consequently, during a procedural meeting in which they both participated, the parties agreed to four formally distinct arbitrations. Mr. de Fina would be the claimant's appointee in each of the arbitrations and Mr. Paulsson would preside over each arbitration. PLN and the Republic of Indonesia would appoint two different arbitrators.

[33] The two arbitrations against the Republic of Indonesia were initiated on the premise that Indonesia was liable for PLN's breach. Under the Terms of Appointment, parties agreed that if and only if Indonesia would be found liable for PLN's breach in the first two arbitrations would the second two arbitrations take place. ●

#### IV. Applicable Law

##### 1. The Substantive Law of the Contract

[34] "Art. 33 of the UNCITRAL Rules provides as follows:

'The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

[35] "Sect. 12 of the ESC, entitled 'PROPER LAW', provides as follows:

'Governing Law. This Contract shall be governed by the laws and regulations of the Republic of Indonesia.

Governing Text. This Contract is executed in Bahasa Indonesia and English; provided that if there is any conflict in the wording and interpretation between the two versions, then the wording and interpretation of the English language version shall prevail.'

[36] "The Indonesian law of contracts finds its predominant source in the Civil Code. It was promulgated by the colonial administration in 1847, and its official text is in the Dutch language. Mr. Tumbuan, PLN's expert on Indonesian law, testified that there are many competing translations of the Dutch Code, and that in case of doubt the original Dutch language, and indeed Dutch commentaries, are consulted. Most of the articles of the Indonesian Code are taken verbatim from the Dutch Civil Code of 1837, which itself was heavily inspired by the Napoleonic *Code Civil* and has long since been replaced in the Netherlands. This curious state of affairs is to be explained by the facts that independent Indonesia's Constitution maintained colonial law in order to avoid a *vacuum legis*, and that there has been no general revision of the Civil Code. Specific laws relating to the family and to real property have supplanted corresponding parts of the Civil Code, but the antiquated Book III on obligations remains. ●

[37] "This cannot, however, be the end of the enquiry, because of the presence of the following passage in Sect. 8.3 of the ESC:

'In accordance with Sect. 631 of the Indonesian Code of Civil Procedure, the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this agreement in accordance with such terms.'

[38] "The cited provision of the Indonesian Code of Civil Procedure (Sect. 631) establishes that:

'The arbitrators shall render their award in accordance with the applicable law, unless the agreement to arbitrate has authorised them to decide ex aequo et bono.'

[39] "The agreement of the parties was not, however, to give unrestricted authorization to the Arbitral Tribunal to decide ex aequo et bono. Art. 8.3 of the ESC allows the arbitrators to do so: – only 'where they consider' that the application of strict rules of law would be 'inconsistent with the spirit of this Contract and the underlying intent of the Parties'; and – provided they endeavour to decide in accordance with 'the correct interpretation of all relevant terms' of the ESC and with a view to the 'correct and just enforcement' of its terms.

[40] "The Arbitral Tribunal concludes that the parties agreed to require that 'all' the relevant terms of the ESC should be given effect when deciding a particular matter, but that the arbitrators need not apply the otherwise applicable law if it is inconsistent with



the 'spirit' of the ESC or the 'underlying intent' of the parties.

[41] "The Arbitral Tribunal will seek to give effect to this understanding, which in fact reiterates and reinforces the principle enshrined in Art. 33 of the UNCITRAL Rules. The concept of party autonomy is central to international arbitration. There is nothing unusual or improper about a contractual stipulation to the effect that a certain law shall apply only to the extent that it is consistent with the terms of the contract. To the contrary, it is a frequently recurring feature in contracts involving States and foreign investors, and has ● for a long time unfailingly been upheld in arbitral awards. One may thus recall Art. 76 of the 1925 mining concession agreement between the USSR and Lena Goldfields Ltd., which precluded the Soviet Government from altering the agreement 'by disposition, decree or other unilateral acts of the state authorities'; this provision was upheld by the well-known arbitral award between the two parties rendered in 1930. (3) Such is the effect of clauses stating that the law chosen by the parties shall be applied only in a suppletive fashion, i.e. to fill gaps or to resolve ambiguities. Such is also the effect of clauses permitting the application of only those provisions of the selected law which exist at the date of the signature of the contract shall be applied (although in this case a claim of nullity of contractual terms may still be founded on the law in question, inasmuch as grounds of nullity may be said to have existed in that law at the time the contract was concluded). This concept is in fact reflected in Sect. 9.2(f) of the ESC, the effect of which is that only the claimant may invoke future modifications of Indonesian laws, or other legal requirements, as events of force majeure. It would, incidentally, ill behove any official of the Government of Indonesia to challenge the legality of this provision, since the Minister of Mines and Energy 'approved' the Contract by his signature.

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[42] "There is no reason to doubt that this effect may also be achieved by the mechanism chosen by the parties in this case when they agreed that the Arbitral Tribunal should not be bound by rules of law insofar as their application would contradict the terms of the contract. Indeed, to refuse to give effect to the parties' agreement in this respect would be to violate the very basis of the Arbitral Tribunal's investiture.

[43] "It remains to note only that PLN's Closing Brief invokes a number of international arbitral awards, explaining ... that it is 'convenient' to refer to international practice with respect to matters 'where Indonesian law is less detailed'. The claimant has also invoked international arbitral awards. The Parties' submissions thus evidence a tacit common position as to the permissibility of such references. Considering in addition that this approach is consonant with Art. 28(3) of the UNCITRAL Rules, (4) the Arbitral Tribunal shall follow the Parties' example in connection with discrete points where international precedents appear useful." ●

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## 2. The Procedural Law of the Arbitration

[44] "With respect to matters of procedure, the Arbitral Tribunal is bound to follow the agreement of the Parties, which in this case means the UNCITRAL Arbitration Rules to which their contract refers. The Arbitral Tribunal is not required to apply any national rules of procedure unless a Party has shown that the application of such a rule is mandatory. This is the consequence of Art. 1(2) of the UNCITRAL Rules which provides:

'These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.'

[45] "Neither Party has claimed that there is an applicable provision of law which imposes a different procedure from the one agreed by the Parties, or adopted by the Arbitral Tribunal within the limits of that agreement.

[46] "It may be noted in this connection that Art. 32(7) of the UNCITRAL Rules reads as follows:

'If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.'

[47] "Art. 634 of the Indonesian Code of Civil Procedure provides that the award shall be deposited by the arbitrators at the Registry of the District Court in the District where it was rendered within 14 days. Although the applicability of this article, or indeed of the other provisions of the Code of Civil Procedure concerning arbitration, appears to be uncertain (such codifications inherited from the Netherlands are often referred to as *pedoman*, or 'guidelines', rather than as positive and binding law), the Parties have agreed that the Award shall be registered in the manner indicated....

[48] "In light of the above, it is clear that the registration of the Award is in compliance with Art. 32(7) of the UNCITRAL Rules and the agreement of the Parties. It therefore does not in and of itself constitute evidence of the general applicability of Indonesian procedural law." ●

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## V. Preliminary Issues

### 1. Preconditions to Arbitration

[49] “PLN contends that in serving a Notice of Arbitration commencing these arbitral proceedings on 14 August 1998, the claimants failed to fulfil the pre-conditions to arbitration set out at subsections 8.1 and 8.2 of the Contract. Specifically PLN argues as follows:

‘Although there is a 30-day time limit for such resolution, the requirement clearly implies an obligation on the claimant to use its best endeavours to use the resolution period to engage in good faith settlement negotiations.

The claimant has not engaged in good faith settlement negotiations either at the amicable resolution stage (from June 9 to July 15) or the “officer resolution” stage (from July 15 to August 14). In particular, the claimant made no allowance for the fact that both the President Director and the entire Board of Directors of the respondent were replaced on 31 July 1997, in the middle of the “officer resolution” phase. Instead, the claimant immediately filed an arbitration claim upon the expiration of the 30-day period.’

[50] “To assess the merits of this contention, it is useful to consider the purpose of subsections 8.1 and 8.2. The preconditions to arbitration set out in those subsections provide the parties with prior notice of an imminent reference to arbitration, and thus a final opportunity to avoid the initiation of formal proceedings. Negotiations are certainly to be encouraged. The purpose of subsections 8.1 and 8.2 cannot, however, be to obstruct either party's fundamental right to seek a remedy for a claim under the ESC, once that party has given prior notice of such an intention, by obliging it to persevere with negotiations which in its view are proving fruitless.

[51] “In this case, the dispute between the parties may be said to have arisen as early as November 1997. Communications between the parties, at senior management levels, continued sporadically until these arbitral proceedings were commenced in the summer of 1998. At the latest, the claimant formally notified the respondent of the existence of the dispute by Mr. O'Shei's letter of 9 June 1998. The chief executive officers of the Parties met on 16 June 1998 to discuss the situation. A further meeting between senior executives of the claimant and the President Director of the respondent on 8 July 1998 failed to resolve the dispute. On 15 July 1998, the claimant referred the dispute 'for officer resolution' pursuant to the terms of subsection 8.1 of the Contract. ● Thereafter, pursuant to subsection 8.2 of the Contract, the claimant waited the contractually prescribed period of 30 days before serving its Notice of Arbitration on 14 August 1998. There is no evidence that the respondent itself made any significant efforts to resolve the dispute during that 30 day period. The respondent's chief executive officer, Mr. Djiteng Marsudi, told the Arbitral Tribunal that prior to his retirement at the end of July 1998 PLN had not attempted to negotiate with the claimant; PLN presented no other evidence on this point. That internal changes of personnel took place within PLN during this period can have no bearing on the claimant's right to exercise the contractual dispute resolution mechanism at the end of the 30 day period.

[52] “Equally unworthy are PLN's arguments ... to the effect that the notices were null, and that these proceedings should be voided for want of arbitral jurisdiction at each stage because the claimant proceeded to the next step on the 30th day rather than waiting to the 31st in order to determine whether the dispute had been ‘resolved’ (subsection 8.1) or ‘settled amicably’ (subsection 8.2) *within* 30 days. From the beginning of the crisis in the second half of 1997, the claimant made a number of proposals to PLN. There has been no evidence of a single proposal from PLN. PLN can show no prejudice as a result of the claimant's alleged hastiness; lacking any evidence to that effect, it cannot credibly suggest – and indeed has not argued – that it was at the point of making constructive contacts with the claimant at the eleventh hour. Finally, the Arbitral Tribunal does not in fact find that the claimant's timing was in violation of Sect. 8; notice on the 30th day is not premature when it is predicated on the uncontradicted affirmation that the dispute was not resolved ‘within’ 30 days.

[53] “In the circumstances, the Arbitral Tribunal finds that the claimant has adequately fulfilled the preconditions to arbitration set out in Sect. 8 of the Contract.”

## 2. Scope of the Arbitration

[54] “PLN has argued that ‘the dispute’ crystallised, with respect to its ‘subject matter’, as of the claimant's initial notices under Sect. 8 of the ESC. Since those notices complained only of PLN's non-payment of one invoice, failure to provide one letter of credit, and failure to provide requested assurances of its intention to perform the ESC, PLN argues that no other matters are properly within the scope of this arbitration. In addition, PLN insists that the Arbitral Tribunal may neither consider claims ‘not matured’ by the date of the first notices in June 1998, nor uphold any claim which ‘depends in whole or in part upon events which occurred’ thereafter. ●

[55] “Since the Arbitral Tribunal finds both that the claims were mature as of the initial triggering of Sect. 8 in June 1998, and since the arbitrators base their findings on events having occurred before then, it is unnecessary even to question the last two propositions.

[56] “But if PLN means to suggest that the claimant's prayers for termination of the ESC, and damages in consequence thereof, are barred because they were not mentioned as

such in the initial notices, PLN is plainly wrong.

[57] “In the first place, Art. 20 of the UNCITRAL Rules provides that:

‘either party may amend or supplement his claim unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances’.

The only limitation is that any claim so amended must fall within the scope of the arbitration clause (n.b. not the notice of arbitration).

[58] “Secondly, in evaluating the ‘circumstances’ with regard to such amendments the Arbitral Tribunal takes account of (i) the fair and efficient administration of arbitral justice, a consideration which militates against any unduly static or formalistic rule that would require parties to recommence proceedings every time the adversarial evolution of argument and evidence suggests the need for a different legal articulation of claims; and, yet more importantly, (ii) the good principle that procedural rules should not be conceived and applied in such a fashion as to impel the parties to adopt maximalist and confrontational positions, such as demanding rescission at a time when there may still be a hope to save the contract.

[59] “In this case, the claimant should not be penalised for having omitted to ask for termination, or termination damages, in its initial notices.

[60] “Thirdly, when PLN articulates its concept of the ‘subject matter’ of the case it apparently suggests that notices must contain references to all *remedies* sought by the complainant. This is quite wrong. The claimant made it perfectly clear what it was complaining about. PLN’s chief executive had expressed the view in writing as early as 21 January 1998 that his company was ‘unable to fulfil its obligations’ with respect to dollar-denominated supply agreements. Before the Arbitral Tribunal, he said quite frankly that ‘the problem in this case we are not able, PLN is not able to fulfil the contract’ but that there had been some ‘guidance from the government’ to the effect that ‘prior to renegotiation the CEO or anybody should not make any statement about renegotiation’.

P 30 When asked: ●

‘wouldn’t you agree ... that Mr. O’Shei (the claimant’s chief executive officer) and HCE had an absolute right to be concerned about the status of the project’,

he answered

‘Yes, yes.’

[61] “In pursuing this objection, PLN overlooks the fact that it agreed to specific Terms of Appointment for this arbitration (see paragraph 55 which under section 5 explicitly called for a Statement of Claim to be filed by 16 October 1998). Art. 18(2)(d) of the UNCITRAL Rules defines the Statement of Claim as the place where a claimant should define ‘the relief or remedy sought’. The Statement of Claim in this case contained plans for termination of the ESC as well as damages flowing therefrom.

[62] “For PLN to intimate at this stage that the proceedings should be voided for lack of proper notice of the remedies sought is unacceptable.”

### 3. The Absence of Pertamina as a Party to These Proceedings

[63] “At paragraph 7.3.3 of its Statement of Defence, PLN raised a separate objection to the effect that Pertamina is a ‘required’ party in any arbitration relating to a dispute over performance, delivery or payment under the Contract.

[64] “There is no contractual basis for this contention. To the contrary, the Contract explicitly contemplates that PLN might find itself faced with an arbitration against either Pertamina or the claimant. Sect. 8.2 reads in relevant part:

‘disputes, if any, arising between PLN on the one hand, and PERTAMINA and/or [the claimant] on the other hand ... shall be referred to and finally resolved by binding arbitration...’.

[65] “Any contrary outcome would be astonishing; the claimant would hardly have accepted that it could seek enforcement of its contractual rights against a 100% Government-owned entity only if another 100% Government-owned entity cooperated. Such cooperation would have been necessary not only if one imagined Pertamina as some kind of involuntary claimant, but also if one imagined it as an indispensable respondent; Pertamina would have to agree to the same arbitrator as the one chosen by PLN.

P 31 [66] “PLN’s contention in this respect cannot succeed. ●

[67] “It remains only to be said that the Arbitral Tribunal does not purport to exercise authority over Pertamina. Such rights and obligations as may run between Pertamina and PLN, or Pertamina and the claimant, fall to be evaluated, if necessary, by the parties themselves or by duly empanelled arbitrators.”



#### 4. The Arbitral Tribunal's Authority to Rule on a Claim for Termination

[68] “In response to the claim for termination of the ESC, PLN argues that under Art. 1266(2) of the Indonesian Civil Code, quoted in paragraph [77], the termination of a contract in the event of failure of performance (or what common lawyers might refer to as discharge for breach) lies within the exclusive province of the national courts unless there is an explicit contractual waiver, and that there was no such waiver in this case. PLN's legal expert witness, Mr. Fred Tumbuan, opined that a waiver for these purposes would be ineffective unless it explicitly mentioned Art. 1266.

[69] “This argument is seriously misconceived. It would frustrate the intentions of the Parties, who agreed in Art. 8 of the ESC that ‘any disputes relating to this Contract’ shall be settled by arbitration under the UNCITRAL Rules and that:

‘no Party shall have any right to commence or maintain any suit or legal dispute hereunder until the dispute has been determined in accordance with the arbitration procedure provided herein and then only for the enforcement of the award rendered in such arbitration’.

The argument would make a mockery not only of the arbitral mechanism, as arbitrators would be entitled to decide whether breaches justifying termination have occurred, but then have to stop short of giving effect to their conclusion; but also of the national courts. Given the fact that Art. 642 of the Indonesian Code of Civil Procedure provides that:

‘Neither cassation nor re-examination of an arbitral award may be requested, even if the parties have so agreed in their agreement to arbitrate’

an Indonesian court would not be in a position to question the arbitral tribunal's decision as to the breaches, but would presumably have no other role than to rubber-stamp a declaration of termination.

P 32 [70] “It would be most surprising if such an extraordinarily perverse result were mandated by the Civil Code. Termination by reason of breach is a matter ● routinely decided by arbitral tribunals. When challenged on this point, Mr. Tumbuan could not refer to a single authority or precedent which supported his argument. It seems inconceivable that such a major impediment to arbitral authority has existed for more than a century without apparently having been noticed by countless defendants to arbitral actions not only in Indonesia, but also in the Netherlands where the identical cognate of Art. 1266 came into being (as Art. 1302) in 1837. Indeed, the same must be said for French law, because the original concept is derived from the Napoleonic *Code civil*— and where it still appears as Art. 1184: one of the most familiar elements of that great and internationally influential codification. It is safe to say that hundreds – if not thousands – of arbitral tribunals in France and the Netherlands have declared contracts to be terminated for breach; examples abound in the literature. Yet no party, no arbitrator, no judge, and no commentator – nor indeed even a litigant – in any of the three mentioned countries appears to have conceived of the meaning ascribed to Art. 1266(2) by Mr. Tumbuan.

[71] “Mr. Tumbuan stated that his position was based on ‘doctrine and case law in Holland’. He was given an opportunity to provide such authorities within 10 days of his appearance before the Arbitral Tribunal, but failed to do so. The Arbitral Tribunal is quite certain that Mr. Tumbuan in this respect is mistaken, and that the law of Holland is not as he stated it to be.

[72] “Mr. Tumbuan also affirmed that ‘as far as I can recall’ his argument has been supported by the writings of Mr. Subekti and other Indonesian legal scholars. Here again, Mr. Tumbuan was given an opportunity to provide any such authorities, but failed to do so. Here too, the Arbitral Tribunal is quite certain that Mr. Tumbuan is mistaken.

[73] “The only legal authorities submitted by PLN concerned the circumstances under which parties may neutralise Art. 1266(2) by defining circumstances in which their contract may be terminated unilaterally. It may or may not be true that such a contractual waiver of Art. 1266(2) must be explicit, but that is not the issue here. Neither Party has claimed that the ESC purported to provide for unilateral termination. The issue is simply whether an otherwise competent arbitral tribunal may, by virtue of its general mandate and without specific mention of Art. 1266(2), rule on a claim of termination.

P 33 [74] “If there is a waiver of Art. 1266(2) in toto, it does not matter if there is an arbitration clause or not; termination or discharge occurs automatically. If there is neither waiver nor arbitration clause, termination must obviously be sought from a court. But if in the absence of a waiver there is still an arbitration clause, the consequence is necessarily, on the one hand, that termination is not automatic; and, on the other hand, that the parties agreed that the decision to terminate would be for the arbitral tribunal. There is no indication that the Civil Code, which allows the greater exception of ● termination by operation of the contract, proscribes the lesser exception of termination by arbitral award.

[75] “Nor do Mr. Tumbuan's references to the Indonesian Constitution or to Art. 10 of Law 14/1970 support PLN's argument. These are fundamental legal texts concerning the organisation and authority of the courts of Indonesia, but they contain absolutely nothing

that lends support to Mr. Tumbuan's theory concerning Art. 1266. If anything, the official elucidation to Art. 3 of Law 14/1970 is in general terms supportive of the claimant's position, since it declares that 'the resolution of disputes outside the courts based on settlement or *by arbitration* is permitted'. (Emphasis added.)

[76] "Mr. Tumbuan's statement that 'most commercial bilateral contracts' contain an explicit waiver of Art. 1266 is contradicted by the commentary of Professor Subekti, who Mr. Tumbuan agrees is a 'very respected' legal figure. Professor Subekti's article on Indonesian law in the 1980 Yearbook of the International Council for Commercial Arbitration affirms that 'there are no specific requirements for the contents of the arbitral clause' and goes on to suggest a model clause which contains no reference to Art. 1266. (5)

[77] "The error in PLN's position may stem from a simple matter of imperfect translation and hasty interpretation. The translation of Art. 1266(2) proffered by Mr. Tumbuan provides:

'A default causing termination is always deemed to occur in the event that one of the parties to a reciprocal agreement does not fulfil his obligations.

In such event the agreement does not terminate by law but judicial termination must be sought.'

[78] "Mr. Tumbuan has proposed a reading to the effect that 'judicial termination' must be read to mean 'termination by a judge', and that the drafters thereby intended to exclude termination by arbitrators. Neither meaning is correct.

[79] "First, the second sentence quoted above reads, in the official Dutch, as follows:

*'In dat geval, is de overeenkomst niet van rechtswege ontbonden, maar moet de ontbinding in regten gevraagd worden.'*

P 34 ●

[80] "The key words *in regten* do not translate as 'judicial termination'. The Dutch expression is an exact rendering of the French *en justice*. (6) It conveys the meaning of 'legal proceedings', which encompasses authoritative decisions of a binding legal nature without limiting them to those pronounced by a judge.

[81] "Secondly, the *purpose* of Art. 1266 – as with its French and Dutch progenitors – is perfectly consistent with this textual analysis. The aim of the drafters of the Civil Code was to ensure that parties could not unilaterally treat their contractual relationship at an end merely by asserting that their co-contractant had failed to perform, but that they would need a legal warrant. This purpose was precisely accepted by Mr. Tumbuan. In a legal system where arbitration is allowed – like that of Indonesia – it is immaterial whether that legal title is issued by a judge or by the arbitral tribunal chosen in accordance with the parties' agreement.

[82] "The error of PLN's thinking seems particularly clear when one reads the chapter on the law of obligations in a publication of the Netherlands Comparative Law Association, submitted by Mr. Tumbuan in the apparent belief that it supports his position. It contains a reference (7) to Art. 1302 of the Dutch Civil Code (which corresponds to Art. 1266 of the Indonesian Civil Code), and points out that this provision resembles Art. 1184 of the French Civil Code. Then the following comment appears: 'As in France, dissolution [i.e. termination or discharge for breach] must be obtained from the court.' Apart from the mistake one might make when considering the English phrase 'from the court' as opposed to the true French words '*en justice*', the fact is that when the French Civil Code uses the words *justice* or *juge* it encompasses 'arbitration' and 'arbitrator' as well. For example, it has been held that the command of Art. 4 of the *Code civil*, which forbids findings of non liquet 'by the judge', also applies to arbitrators. Scholars commenting on Art. 1184 note that a request for termination (discharge) must be brought before the *juge du fond* ('judge of the merits'). (8) There is not the slightest doubt but that the expression *juge du fond* applies to whomever judges the merits of a case, be it a judge or an arbitrator. When there is an arbitration clause, the *juge du fond* of the contract must determine a claim for termination – and the *juge du fond* in that case is the arbitrator. The fact that termination clauses are per se valid is proof certain that court intervention is not mandatory; a fortiori, there is no ● reason why an agreement that 'any' dispute is to be decided by arbitration would not include a claim under Art. 1184.

P 35 ●

[83] "In light of Mr. Tumbuan's evidence to the effect that the Indonesian Civil Code is to be understood by reference to Dutch legal authority; in the absence of any textual authority that Art. 1266(2) of the Indonesian Civil Code must be read to have an opposite result from that of the original text; and given the absurd result that would emerge from a contrary interpretation, the Arbitral Tribunal considers that it manifestly has jurisdiction to rule on the claim for termination of the ESC."

##### 5. PLN's Relationship to the Government of Indonesia

[84] "PLN takes the position that it is independent of the Government of Indonesia and that it cannot be held liable for breach in circumstances where the Contract was

'suspended by government action binding upon the parties'. Mr. Rex Panambunan, an internal legal adviser of PLN, reflected this position in his oral testimony when he sought to explain why PLN did not respond to the claimant's request for assurance that the respondent would honour the Contract notwithstanding a Presidential Decree purporting to suspend operations under the Contract:

'what can PLN do ... PLN cannot do anything because we just have to follow ... the regulations'.

[85] "If PLN were right in this regard, there would be little point in examining whether PLN has failed to perform its contractual obligation; such a failure would in any event be excused because it was imposed by the Government (sometimes referred to below as GOI).

[86] "For this reason, it is useful as a preliminary matter to examine the relationship between PLN and the Government of Indonesia, de jure and de facto, and to consider the implications of the fact that the Contract itself expressly contemplated the effects of Governmental action.

[87] "PLN cites in support of its position the following passage from a well-known study by Professor Karl-Heinz Böckstiegel:

P 36 'Finally, coming to the disputed question of whether and under what circumstances state enterprises may excuse non-fulfilment of contractual obligations by claiming force majeure due to acts of public authority by their own state, here also the starting point will have to be the principle that the separation between the state enterprise and the state is respected ● and that therefore normally acts of public authority by the state have to be accepted as an excusing case of force majeure.'

(9)

[88] "But of course as the passage itself makes clear, the principle of respecting the separation between State and State enterprise is merely the *starting point* of the necessary analysis.

[89] "In the present case the Arbitral Tribunal holds that PLN cannot in fact avoid liability by invoking State action because the GOI and PLN cannot, in light of the legal framework which has given legal life to PLN and under which it operates, be characterised as separate. Even if this were not so, the result would nevertheless be the same because of the nature of the specific contractual undertakings made in this case. As Professor Böckstiegel states in the paragraph immediately succeeding the one just quoted: 'If the contract itself stipulates that the state enterprise is to be considered responsible for certain acts of state, no force majeure can be claimed if such an act of state then actually occurs.' And even if this second finding were incorrect, the result would yet again be the same because of the decisive evidence that in the particular circumstances of this case PLN entirely subordinated its will to that of the GOI. These three independently sufficient grounds for declining to excuse PLN's non-performance on the grounds of State action will be considered in sequence."

a. PLN's de jure subservience to the Government

[90] "As Mr. Marsudi testified, PLN is an instrument of government policy. Indeed, its tariffs are set by the GOI.

[91] "If there was any doubt as to PLN's statutory subservience, it was dispelled by Presidential Decree 139/1998 of 11 September 1998, which established a so-called Team for the Restructuring and Rehabilitation of PLN. This Team was formed at a particularly high level of the GOI. By the explicit terms of Art. 4 of the Decree, the Team is chaired by the Minister of State for Coordination of Development Supervision and Administrative Reform, and each of its other six members is a Minister: (i) the State Minister for Revitalisation of State-Owned Enterprises, (ii) the Minister of Mining and Energy, (iii) the Minister of Finance, (iv) the State Minister for National Development Planning, (v) the State Minister for Research and Technology, and (vi) the Minister of Industry and Trade.

P 37 [92] "The first of the 'tasks' of the Team identified in Art. 2 of the Decree is that of 'deciding and receiving strategic policies' of PLN, including 'aspects of ● exploitation and business activity'. An even more precise echo of Mr. Marsudi's testimony is to be found in Art. 3, which defines the first of the Team's 'functions' as being 'renegotiating agreements with business partners on the purchase of electric power'.

[93] "The letter addressed by His Excellency Hartarto, 'on behalf of the Government of the Republic of Indonesia', to the President of the Arbitral Tribunal (10) is a clear manifestation of the Government's direct assumption of decision-making powers over PLN's contractual relationships with independent power producers like the claimant.

[94] "The fact is that a high-ranking group of Ministers has taken over the task of 'deciding' the 'business activity' of PLN and 'renegotiating' PLN's energy purchase agreements. PLN cannot maintain that it enjoys autonomous decision-making authority."

b. The contractual allocation of the risk of Governmental action

[95] “Even if PLN had no connection whatsoever with the GOI, the fact remains that parties may contractually allocate the risks of governmental initiatives that might inhibit or prevent contractual performance.

[96] “The Parties to the ESC did just that. Under the subheading ‘Instances of Force Majeure’, subsection 9.2(e) provides as follows: ●

‘(e) *with respect to COMPANY only*, any action or failure to act without justifiable cause by any Government Instrumentality of the Republic of Indonesia (including any action or failure to act without justifiable cause by any duly authorized agent of such Governmental Instrumentality), including without limitation the denial or delay in, without justifiable cause, the granting of any Consent upon due application therefor and the diligent effort by applicant to obtain, the failure without justifiable cause of any such Consent once granted to remain in full force and effect or to be renewed on substantially similar terms, and any delay in the importation of equipment or supplies into Indonesia resulting from any action or failure to act without justifiable cause by any Governmental Instrumentality of the Republic of Indonesia.’ (Emphasis added.)

[97] “Subsection 9.2(f) provides as follows:

‘(f) *with respect to COMPANY only*, the adoption, enactment or application to COMPANY, any sub-contractor or the project of any Legal Requirement of any Governmental Instrumentality of the Republic of Indonesia (i) relating to the environment other than those in effect as of the Effective Date or (ii) not existing or not applicable to the COMPANY, such sub-contractor or the project as of the Effective Date, or any change in any such Legal requirement or the application or interpretation thereof by a Government Instrumentality of the Republic of Indonesia after the Effective Date, as described in Appendix D, but not including any such Legal Requirement or the interpretation or application thereof in existence at such date which by its terms became or will become effective and applicable to the COMPANY, such sub-contractor or the project after such date.’ (Emphasis added.)

[98] “In sum, the Parties expressly stipulated that only the claimant can claim that an act of the Government of Indonesia constitutes an event of force majeure.

[99] “No valid objection to this analysis may be found in the suggestion, made by Mr. Panambunan, that PLN's assumption of risk of Governmental action justifying claimant's non-performance related only to such actions that are ‘without justifiable cause’. The need to determine whether Governmental acts or omissions fall within the scope of Art. 9.2(e) arises only if it is invoked by a party which is entitled to do so. If not, Art. 9.2(e) does not apply at all.

[100] “It should be recalled that the Parties, by Art. 8.4 of the ESC, agreed that the Arbitral Tribunal should make a ‘final and conclusive’ award, and that ‘the Parties renounce their right to appeal from the decision of the Tribunal’. ● Exercising the authority thus conferred upon it by the Parties, the Arbitral Tribunal has no hesitation in holding that Art. 9.2(e) defines ‘instances of force majeure’ which may be invoked only by the claimant, and not by PLN. There is no other reasonable way to read the limitation expressed in the first words of this subsection, i.e. ‘with respect to COMPANY only’. Given the word ‘only’, it obviously could not have been intended to allow *both* Parties to claim that Governmental action constituted events of force majeure. And it would be utterly absurd to consider that such a defence would be open only to PLN, or to Pertamina, both emanations of the Indonesian State, and not to the claimant which has no identity of interest with the Government. Indeed, this unavoidable meaning of the words used in Art. 9.2(e) appears entirely reasonable in light of the *de jure* relationship between PLN and the Government described in paragraphs [90] et seq., as well as the *de facto* control exercised by the Government over the respondent in the circumstances of this case.

[101] “The claimant has never argued that Indonesian law should be disregarded, let alone disobeyed. The claimant is not requesting an order that the Contract should be performed. Nor would the Arbitral Tribunal presume to order a Party to disobey the law. But the claimant is putting its case quite differently: it contends that PLN has failed to perform its contractual obligations; that it had agreed in the Contract to assume the risk of Governmental action; that as a result it may not invoke Governmental action as an excuse for non-performance; and that therefore it must be held liable for the economic consequences of the failure to perform. With these propositions the Arbitral Tribunal cannot but agree.”

c. PLN's *de facto* subservience to the Government

[102] “The Arbitral Tribunal is confronted with overwhelming evidence that the Government in this case did not respect the nominal autonomy of PLN. This proof is reflected throughout the evidentiary record, but was crystallised in the authoritative and decisive testimony of Mr. Djiteng Marsudi.

[103] “Mr. Marsudi spent his entire professional life (36 years) in the service of PLN. He rose from the rank of a newly qualified electrical engineer in 1962 to the position of chief financial officer in 1993-1994 and then President Director in early 1995. He was thus the chief executive officer of the respondent for three and a half years, during the most crucial time period relevant to the present proceedings, until his retirement in July 1998. In his testimony before the Arbitral Tribunal, Mr. Marsudi was remarkably candid in describing the respondent's subjection to the will of the Government. ●

P 40

[104] “In the course of his testimony, Mr. Marsudi was shown a translated extract from an Indonesian press report from June 1998 in which he was reported to have said:

‘In every signing of the power purchase agreement, normally the Board of Directors just has to sign it. Because the negotiation process is at the upper level, we were only called to be present for the signing of the agreement.’

[105] “Mr. Marsudi confirmed that this was a correct report of his statement. The following question was then asked by the Arbitral Tribunal:

‘Q. ... does that mean that you as president of PLN signed agreements you did not believe were in the interest of the company?

A. Yeah.’

[106] “Mr. Marsudi went on to describe the first occasion he signed a contract on behalf of the respondent, having been obliged to go to Hanover for a ceremony including the President of Indonesia and the Chancellor of Germany.

‘This is the situation where I have to sign. So if I refuse to sign then, I think I will kill myself at that time.’

[107] “Mr. Marsudi went on to say that when the claimant wrote to him for clarification of PLN's posture in the first half of 1998, he did not answer because he did not have ‘guidance’ from the Government; he confirmed that he had no authority to renegotiate at the time, and indeed stated:

‘there was some guidance from the government that prior to the renegotiation the CEO or anybody should not make any statement about renegotiation...’.

[108] “In fact Mr. Marsudi denied that the contracts signed between the respondents and foreign IPPs (independent power producers) had been negotiated by the respondent at all:

P 41

‘The negotiating team is a government team, yes, but the President Director has to sign. But the negotiating team is fully a government team ... geothermal contract is all government team ... in the team there are some PLN people, but formally that team is a government team ... ●

Q. Formally the members of the PLN group that negotiated with Mr. O'Shei and the HCE group, they were all representatives of PLN?

A. Yes, yes, they are representatives of PLN.

Q. And you are saying that they really had no authority because the Government was negotiating the Contracts?

A. Yes, that team is a government team, not PLN team.’

[109] “Mr. Marsudi was referred to a letter dated 23 March 1998 from the claimant to him, noting that PLN was required to abide by the ESC but referring to an offer to make ‘significant schedule concessions’ and expressing a willingness to discuss the matter further. He was asked whether he responded to this letter:

‘A. No, because as I mentioned to you before, because renegotiating this was under the control of the Government.... I was not allowed to begin with renegotiations.

THE CHAIRMAN: Q. Sorry, so I understand. You couldn't answer these letters because you didn't have instructions from the Government, is that right?

A. Yes.

Mr. TAYLOR: Q. Who did you report to, who was your supervisor?

A. I think until beginning of March, it was Minister Sudjana.’

[110] “To the same effect:

‘Q. So you told Mr. O'Shei in June you wanted to renegotiate the Contract; correct?

A. Yes.

...



Q. And did you tell him what the terms or what ideas you had with respect to renegotiation?

A. No, at that time I mentioned to you, I was fully controlled by the Government not to talk anything about any decision at that time.'

[111] "PLN has sought to deflect the import of Mr. Marsudi's frank explanations by suggesting that PLN was to some extent required to await Governmental policy-making with respect to such crucial issues as the fixing of tariff rates, the allocation of subsidies, and the obtention of international financing before it could make its own decision. But even accepting these points as perfectly valid in and of themselves, the fact remains that a legal entity cannot be considered independent if its highest official is subject to directives that paralyse the most ordinary elements of management, such as developing and implementing a corporate response to events affecting contractual relationships, or merely communicating with co-contractants who justifiably clamour for information.

[112] "It needs only to be added that Mr. Marsudi's explanations cannot be dismissed as the reflections of an over-deferential individual who is reluctant to take responsibility; to the contrary, his remarks were perfectly consistent with the official position taken by the Government and notably reflected, as seen in paragraph [91] above, in Presidential Decree 139/1998."

## 6. PLN's Claim of Illegality

[113] PLN requested that even if the arbitral tribunal did not uphold its defenses to the claims of contractual breach, PLN would be entitled to have the ESC declared invalid due to non-compliance with mandatory provisions of Indonesian law.

[114] "PLN's arguments here are unattractive. They amount to saying that the Indonesian officials, acting with actual or at least apparent authority, entered into agreements with a foreign investor that were illegal or otherwise invalid as a matter of Indonesian law. Precedents in the field of international arbitration show that such arguments are most often raised by States or State entities in the wake of important economic or political events which have resulted in major policy changes, and indeed replacement of high officials. The fact that new directions are pursued in such a context is natural enough, and do not per se rule out arguments of illegality or other invalidity. On the other hand, they must be treated with great circumspection. 'It is contrary to all experience that a State-owned institution ..., whose director is appointed directly by the Head of State, engages in activities contrary to the mandatory laws of that country.' (11) However tempting it may be in the context of a particular case for a public-sector respondent to seek relief from liability by invoking illegality, the fact is that such a posture puts into question the reliability of undertakings of the country in question. When a country's reputation as a contractual partner suffers, the terms on which it is able to attract foreign investment and financing are impaired. Indeed, this concern goes beyond whatever cost/benefit calculations might be made by the officials of a particular country at a particular time, because an over-readiness by international arbitrators to accept illegality defences may harm an international mechanism which benefits numerous countries that rely on access to international funding, technology, and trade. The value to the international community of legal certainty in the arbitral context was expressed cogently as follows by the Secretary General of the United Nations, Mr. Kofi Annan, when he spoke of the disadvantages suffered by States who remain outside the framework of the United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards:

'... entities investing or doing business in those States lack the legal certainty afforded by the Convention, and businesses cannot be confident that commercial obligations are enforced. This increases the level of risk, meaning that additional security may be required, that negotiations are likely to be more complex and protracted, and that transaction costs will rise. Such risks can adversely affect international trade.'

(12)

[115] "The present Arbitral Tribunal operates under the mandate of the UNCITRAL Arbitration Rules, Art. 33(3) of which reflects this very concern (see paragraph [34]).

[116] "Nothing in this introductory discussion should be taken to mean that PLN's illegality or invalidity defences have not been considered. The point is simply that there is a presumption in favour of the validity of contracts; that this presumption is healthy; that it is strengthened when contracts have provided the basis upon which many persons have acted over time; and that a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof."

[117] PLN's allegations of illegality were based on four premises: the ESC was illegal because it was not competitively tendered; the ESC should have been priced in Indonesian rupiah; and under Indonesian legislation it was forbidden for non-Indonesian corporate entities to be involved in Indonesian power production. Additional grounds for illegality presented were that Himpurna had never obtained PLN's free consent to enter into the ESC; the alleged right for PLN to terminate the ESC for a non-consensual increase

in volume; and intimations of impropriety. The arbitral tribunal rejected all of the allegations of illegality finding, inter alia, that the respondent failed to prove the applicability of the legislation which it alleged had been violated. Nor was there any evidence of corruption, as alleged by respondent.

(....)

P 44 [118] The tribunal commented, “[t]he members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. The arbitrators are well aware of ● the allegations that commitments by public-sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such grave accusations must be proven. There is in fact no evidence of corruption in this case.”

(....)

[119] After commenting on the “opaque and fragmented normative environment of the parties' contractual relationship”, the arbitral tribunal noted that

“... it is curious and highly significant that notwithstanding the various charges of illegality levelled at the ESC by PLN's representatives in the course of these arbitral proceedings, the fact is that PLN has never written to the claimant to assert that any of the provisions of the ESC were invalid. To the contrary, even today PLN's representatives repeatedly insist that they do not purport to cancel the contract, but wish to adjust it. Nor has the Government of Indonesia challenged the validity of the contract.

(....)

[120] “If the economic effects of the ESC have become as deleterious as is now – not implausibly – asserted from the Indonesian side, it seems overwhelmingly likely that PLN, or the Government, would have invoked any sincerely perceived invalidity. PLN's conduct, and that of the Government, are persuasive indicators that Indonesia's highest officials share the Arbitral Tribunal's conclusions as to the validity of the ESC.”

## VI. Contractual Liability

[121] “The germ of the present dispute is to be found in Presidential Decree 39/1997, issued in September 1997. It will be recalled that this Decree declared that a large number of infrastructural projects would be ‘continued’, ‘reviewed’ or ‘postponed’. Dieng Units 1, 2, and 3 were listed as ‘continued’, but Dieng Unit 4 was listed as ‘postponed’. At the same time, Patuha Unit 1 was placed ‘under review’ and Patuha Units 2, 3, and 4 were declared ‘postponed’.

P 45 [122] “The claimant contends that in the months following the issuance of Presidential Decree 39/1997 PLN fundamentally breached and repudiated the ESC. It alleges that PLN failed to provide assurances that it would honour the ESC and prevented it from developing additional Units at Dieng up to a total generating capacity of 400 net MW. Moreover, it alleges that PLN impeded its ● efforts to bring the first of the Dieng generating facilities, Unit 1, into commercial production, and that once the claimant succeeded in doing so, and electricity was made available for delivery, PLN failed to pay for it.

[123] “More specifically, the claimant alleges the following breaches by PLN:

- (i) breach of Sect. 13.1 of the ESC in failing to provide assurances that it would honour its contractual obligations;
- (ii) breach of Sect. 1.1 of the ESC by preventing the claimant from completing the development of additional Units at Dieng up to a total generating capacity of 400 net MW;
- (iii) breach of Sects. 6.4 and 6.5 of the ESC in failing to pay invoices and issue standby letters of credit in respect of Dieng Unit 1; and
- (iv) breach of Sects. 4.2 and 13.1 of the ESC in failing to co-operate in connecting and testing Dieng Unit 1 and by impeding the claimant's efforts to bring Unit 1 into commercial production.

[124] “More generally, the claimant alleges that, in addition to breaching explicit contractual obligations, PLN breached its duty to perform in good faith by refusing to provide the assurances requested of it by the claimant, and by words and conduct which demonstrated that it did not intend to honour the ESC. PLN's conduct, or so the claimant contends, amounts to a repudiation of the ESC.

[125] “In response, PLN denies that invoices issued to it in respect of Dieng Unit 1 were payable. It denies that it failed to co-operate with the claimant's efforts to bring Unit 1 into commercial production. Moreover, it denies that it wrongfully prevented the claimant from completing the development of additional Units at Dieng. PLN maintains

that performance of the ESC has been properly suspended as a result of non-discriminatory governmental measures taken in response to unprecedented economic turmoil in Indonesia.

[126] “Furthermore, PLN contends that the claimant has, in any event, failed to demonstrate its own contractual compliance and that this failure bars it from claiming relief in these proceedings. PLN does not claim any relief in respect of the breaches it alleges, offering them only as defences to the claimant’s allegations. Accordingly, the Arbitral Tribunal addresses them only to the extent that it considers them relevant to the determination of the claimant’s claims for breach.” ●

### 1. PLN’s Failure to Confirm Its Contractual Obligations

a. Presidential Decrees 39/1997 and 5/1998 and PLN’s letter of 6 March 1998

[127] “On 6 March 1998, in the wake of Presidential Decrees 39/1997 and 5/1998, Mr. Djiteng Marsudi, the President Director of PLN, wrote to the claimant in the following terms:

‘As you are aware our country is now suffering from serious monetary turmoil which has led to the national economic crisis. In the effort of mitigating the effect of such crisis, the Government of Indonesia has taken subsequent measures among others by promulgating Presidential Decrees No. 39 Year 1997 and No. 5 Year 1998.

Pursuant to the above Presidential Decrees, Dieng (unit 4) Geothermal Project is categorized as project to be postponed, therefore PLN, Pertamina and Company as the contracting Parties under the Energy Sales Contract shall abide by these Presidential Decrees. As a consequence thereof, any activities initiated by you which is not contemplated under such Presidential Decrees in relation with Dieng (unit 4) Geothermal Project shall solely be at your own risks and liabilities.’

[128] “The claimant alleges that PLN thus effectively ruled out not only the development of Dieng Unit 4, but also any further units envisaged under the ESC. The claimant alleges that this veto:

‘breached HCE’s rights under the contract. The Dieng Project Agreements grant HCE the right to build, run, and operate as many generating Units as required fully to develop the resource up to the aggregate level of net 400 MWe Dieng ESC Sect. 1.1.’

[129] “In response, PLN does not deny the right referred to by the claimant but contends that:

‘Presidential Decree 39/1997, like any other Presidential Decree, overrides any contractual provision to the contrary as a matter of Indonesian law, the law to which the parties submitted their agreement under Sect. 12.1 of the Contract.’

[130] “The ‘contractual provision’ to which PLN makes tacit reference is Sect. 9.2 of the ESC, the relevant portions of which are quoted in paragraphs [96]-[97] While the Parties there contemplated the possibility of future government ● action obstructing the performance of the ESC, they also agreed that the claimant alone would be able to rely on such acts as events of force majeure. Pursuant to the ESC, therefore, Presidential Decrees 39/1997 and 5/1998 could not have the effect of releasing PLN from the contractual consequences of its non-performance.

[131] “Mr. Tumbuan, PLN’s expert on Indonesian law, addressed the effect of Sect. 9. In the context of considering the suspension of the Patuha project (though his arguments are applicable mutatis mutandis to Dieng as well), he expressed the following views:

‘By law, the parties to the Patuha ESC are obligated to comply with the Presidential Decrees suspending the projects and may not privately contract to avoid the Decrees. Therefore, I have concluded that it is not material that, in the Patuha ESC, the parties contemplated only a claimant force majeure event arising from an unjustified government act, but did not contemplate a government suspension of both claimant’s and respondent’s performance obligations....’

[132] “Mr. Tumbuan’s argument is misdirected. The claimant is not asserting that the Parties should disregard Presidential Decrees 39/1997 or 5/1998; it is not demanding specific performance. Its claim is simply that PLN assumed the risk of governmental intervention, and must bear the consequences.

[133] “To determine whether Presidential Decrees 39/1997 or 5/1998 ‘override’ Sect. 9 of the ESC as PLN claims, the Arbitral Tribunal cannot but have regard to the relationship between PLN and the GOI. The Arbitral Tribunal has already considered the nature of this relationship (see paragraph [84] et seq.), and does not accept that PLN can rely on an act of the GOI to avoid its contractual obligations. Even if this were not so, as just stated the Parties – with the Minister of Mines and Energy’s signature of approval – explicitly

prescribed that a governmental act could constitute an event of force majeure only for the claimant, and not for PLN, and thus ensured the same outcome by contractual stipulation.

[134] “That Sects. 9.2(e) and (f) of the ESC place conditions on the type of government acts that the claimant is entitled to consider as events of force majeure, for example the reference in Sect. 9.2(e) to acts ‘without justifiable cause’, can be of no relevance to any party other than the claimant.

[135] “Accordingly, the Arbitral Tribunal finds that Presidential Decrees 39/1997 and 5/1998 do not ‘override’ Sect. 9. PLN cannot rely on them as events of force majeure relieving PLN from the contractual obligation to bear the consequences of its resulting non-performance. ●

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[136] “In these circumstances, Mr. Marsudi’s letter to the claimant of 6 March 1998 declaring that any work undertaken by the claimant in relation to Dieng Unit 4 would be at its own risk – even if viewed in isolation – must be viewed as being of fundamental importance.

[137] “This conclusion is reinforced, as shall now be seen, when one views the letter in the context of repeated requests by the claimant for PLN’s assurance that it intended to honour the ESC.”

#### b. Failure to provide assurances

[138] “Further legislative developments in Indonesia, action by PLN, and statements made by PLN’s senior management in the course of the first half of 1998 created apprehension on the part of the claimant – in the Arbitral Tribunal’s view understandably – that PLN would not fulfil its obligations under the ESC.

[139] “GOI initiatives were at the heart of the problem. On 1 November 1997, Presidential Decree 47/1997 had changed the status of the first of the Units of the parallel Patuha Power Limited project, Patuha Unit 1, from ‘under review’, as it had been classified by Presidential Decree 39/1997, to ‘continued’. In January 1998, Presidential Decree 5/1998 shifted the status of Patuha 1 once more, returning it to the ‘under review’ category. Although this hesitation waltz did not affect the ESC directly, given the claimant’s common management with Patuha Power Limited, it could not but have had added to the uncertainty of the claimant in this arbitration as to the status of the ESC.

[140] “Concomitantly with these disorientating legislative developments, reports were published in the Indonesian press in early 1998 to the effect that PLN was refusing to pay for power it has been buying in US dollars from independent power producers at the current exchange rate, but instead was:

‘unilaterally [setting] the exchange rate at the pre-crisis level of Rp 2,450 per dollar, due to sever financial losses’. (*Jakarta Post* dated 25 February 1998)

[141] “Mr. Marsudi, the President Director of PLN, was asked in the course of his appearance before the Arbitral Tribunal about a letter from PLN to Unocal dated 21 January 1998 in which PLN informed Unocal that:

‘payments of bills for the purchase of geothermal steam and electrical energy from the Gunung Salak [plant] will be made in rupiah at an exchange rate of US\$ 1 = Rp 2,450, which is the exchange rate used in the 1997/1998 State Budget’.

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[142] “Having confirmed that this letter notified (rather than proposed to) Unocal that it would be paid at the rate of US\$ 1 to 2,450 rupiah, Mr. Marsudi was asked the following:

‘Q. Mr. Djiteng, were there more notifications of the same type made to other producers?’

A. Oh, yes, yes.’

[143] “On 8 June 1998, Mr. Marsudi was reported as having stated in the publication Kompas:

‘If possible all [the power purchase agreements] will be cancelled, because PLN could not afford to buy private power.’

[144] “A day later, on 9 June 1998, the Business Times reported PLN’s unilateral cancellation of a power purchase contract with an independent power producers, with Mr. Marsudi reported as stating:

“‘I am ready to face a lawsuit as a result of this move”, Mr. Djiteng said. He warned that he would take “similar action against other independent power producers (IPPs) who had refused to renegotiate PPAs since the rupiah collapsed last year”.’

[145] “Mr. Marsudi gave oral evidence before the Arbitral Tribunal to the effect that his statements had been widely misrepresented in the Indonesian press.

[146] “Referred to the Business Times article of 9 June 1998, he was asked as follows:

‘Q. Is the article accurate in saying that the [Cikarang Listrindo] contract was unilaterally cancelled?

A. No, no. Because I didn't cancel the contract. ...

Q. There is a quotation there that you may take similar action against other IPPs which refused to renegotiate contracts. Did you make that statement?

A. No, no, I don't make such statements. ...

Q. What was your actual statement then?

A. We wished to renegotiate with other IPPs. ...’

[147] “When further questioned on whether that contract was cancelled, Mr. Marsudi responded as follows: ●

‘Not cancelled. I just say, ‘I'm sorry, beginning 15 June, I'm not able to buy.’

[148] “Similarly, referred to his statement reported in Kompas on 8 June 1998, he was asked:

‘Q. Did you say that all the private power projects will be cancelled?

A. No, no. No. Renegotiate, yes, but not cancelled. ...’

[149] “Whether Mr. Marsudi was misquoted or not, the Arbitral Tribunal notes that the distinction between cancellation on the one hand and non-payment and/or renegotiation on the other would not have assuaged the anxiety of a contracting party in the claimant's position. Moreover, PLN made no efforts to correct these statements and placate the fears that it was foreseeably creating among IPPs like the claimant. Mr. Marsudi justifies PLN's failure to issue corrected statements to the press as follows:

‘my experience in Indonesia, the effectiveness of doing corrections to the newspapers is fairly low, so I prefer to call you, to call California Energy, and talk directly instead of making some corrections to the newspaper. Usually the effectiveness of making corrections to the newspaper is not so – not satisfying me, you know, you have been quoted.’

[150] “There is however no evidence of direct attempts to still the fears of PLN's counterparties. Instead, their anxieties were further nourished by Presidential Decree No. 139/1998, dated 11 September 1998, which established a Restructuring and Rehabilitation Team whose functions included:

‘renegotiating agreements with business partners on the purchase of electric power ....’ (See Art. 3 of Presidential Decree No. 139/1998 at O'Shei Exhibit 24.)

[151] “Unnerving legislative development, coupled with growing rumours of cancellation and renegotiation of power purchase agreements, led the claimant to seek assurances from PLN that it intended to fulfil its obligations under the ESC.

[152] “The claimant first requested assurances from both PLN and Pertamina that it would fulfil its obligations under the ESC in a letter dated 16 December 1997 in which it stated:

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‘In order to support its continued activities, investment and financing arrangements, HCE hereby requests that each of PLN and Pertamina provide assurances that, notwithstanding anything to the contrary contained in PD 39 or PD 47, it will continue to perform its obligations under the ESC and JOC, as the case may be, with respect to the entire Dieng Project including Unit 4.’

[153] “In this letter, the claimant requested a response by 1 February 1997. While Pertamina provided the requested assurances, PLN, or so the claimant affirms, did not. Indeed, the only indication that PLN provided as to its future intentions in respect of the ESC was its letter of 6 March 1998 which in the circumstances, and given its terms, could hardly have reassured the claimant that PLN intended to honour the ESC; to the contrary, if anything it added fuel to the fire.

[154] “On 29 April 1998, the claimant issued its first invoice for electricity generated at Dieng Unit 1. Pursuant to the ESC for that project, PLN was obliged to make payment under the invoice within thirty days of receipt thereof. Despite the fact that Dieng Unit 1 was classified as ‘continued’ by Presidential Decree 39/1997, the invoice remained unpaid as of early June.

[155] “In these circumstances, on 10 June 1998 the claimant sent a further letter to PLN requesting reassurances. Once more, PLN made no written response.



[156] “On its own allegations, PLN's only response was oral. Mr. Marsudi stated that he gave assurances to representatives of the claimant at a meeting that took place on 16 June 1998, when he confirmed that:

‘(i) P.T. Cikarang Listrindo was not a precedent applicable to CalEnergy projects ... (ii) PLN had not, nor did PLN intend to, unilaterally cancel any CalEnergy energy sales contracts; and (iii) PLN was in difficult financial circumstances and wished to work together with the IPPs to achieve a resolution of the difficulties posed by these circumstances.’

[157] “Mr. Marsudi was examined orally on this evidence as follows:

‘Q. On the one hand, you state that you advised Mr. O'Shei you weren't going to cancel the contracts?’

A. I don't want to cancel the contracts.

Q. Did you tell him you didn't want to or you weren't going to?

A. I don't want to cancel the contract and I want to honour the contract. I don't have any idea to cancel the contract.

P 52 Q. But did you have any idea to honour the contract? ●

A. Yes. That is why I – I emphasised to honour the contract with such a bad situation and PLN, there should be a renegotiation to honour the contract with such circumstances.

Q. With all due respect, Mr. Djiteng, if a contract has terms to it and you're going to honour a contract, then have you to comply with those terms.

A. (Witness nods.)

Q. What you were saying to Mr. O'Shei is you wanted to renegotiate the contract; correct?

A. Yes.’

[158] “An assurance that PLN wished to renegotiate the ESC is different from an assurance that it intends to honour the ESC on its existing terms. Indeed, it is to the opposite effect.

[159] “If PLN's statements were not reassuring neither were its actions, or indeed those of the GOI itself. In his Supplemental Witness Statement, Mr. Sroka gave evidence for PLN on his role in what he refers to as: ‘evaluating potential solutions to the IPP problems facing PLN since January 1998’.

[160] “Mr. Sroka referred to the fact that since January 1998 the GOI has established ‘several short-lived Committees to investigate and report on the IPP problems’. He also mentioned the request in April 1998 by the Minister of Mines and Energy of an advisory group of three investment banks (including Lazard Freres of Paris, Lehman Brothers of New York and S.G. Warburg of London) to carry out ‘an urgent review of the IPP situation’, as well as the establishment of an inter-ministerial team pursuant to Presidential Decree 139/1998 to be responsible for what he described as ‘overseeing the restructuring and rehabilitation of PLN’.

[161] “What Mr. Sroka euphemistically referred to as initiatives for ‘evaluating potential solutions’ to the problems facing the IPPs were, in reality, tentative steps to renegotiate PLN's power contracts. In the same way that an ‘assurance’ to renegotiate was unsatisfactory to the claimant, the establishment of so-called ‘renegotiation committees’ hardly could have induced the claimant to believe that it could place reliance on its contract.

[162] “In any event, Mr. Sroka conceded that these initiatives have proved singularly unsuccessful; indeed, between the issuance of Presidential Decree 139 in September 1998 and 15 March 1999 not a single renegotiation meeting has taken place.

[163] “In sum, the Arbitral Tribunal finds that, as a matter of fact, PLN failed to provide legitimately requested assurances that it would respect the ESC.

P 53 [164] “As to the legal consequences of the failure, the claimant contends that it amounts to a breach of Sect. 13.1 of the ESC, which provides as follows: ●

‘Further Assurances. Each of the Parties agrees to execute and deliver all such further instruments, and to do and perform all such further acts and things, as shall be necessary or convenient to carry out the provisions of the Contract.’

[165] “Very simply, Sect. 13.1 obliges the Parties to do all such further acts necessary to facilitate the fulfilment of the ESC. Although it is entitled ‘Further Assurances’, its terms do not expressly impose an obligation on the parties to give assurances in the future. A more natural reading of the provision would be that it constitutes a further assurance in and of itself, given at the time the ESC was concluded.

[166] “The assurances that the claimant sought – reasonably, in the Arbitral Tribunal's view – in late 1997 and during the course of 1998, could not therefore be directly sought

pursuant to Sect. 13.1. Indeed, the claimant did not suggest otherwise at the time it requested the assurances. By way of example, the claimant's letter to Pertamina and PLN dated 16 December 1997, requesting both of them to confirm that they would continue to perform their obligations under the ESC, indicates that:

[The claimant] is delivering this letter to you pursuant to Sect. 9 of the ESC, Sect. 2 of Appendix D to the ESC and Art. 16 of the JOC ...'.

[167] "No reference was made to Sect. 13.1. It does not follow, however, that PLN's failure to provide the requested assurances cannot amount to a breach of Sect. 13.1. To the extent that such assurances could be said to be 'necessary or convenient to carry out the provisions of the Contract', the failure to provide them would clearly constitute a breach of the promise to perform 'further acts and things, as shall be necessary and convenient' as envisaged by the general terms of Sect. 13.1. The claimant contends that such assurances were indeed necessary to reassure the financial institutions upon which it was dependent for the finance which would enable it to continue to develop the project. It further contends that PLN's failure to provide the requested assurances made continued development impossible, and thereby constituted a breach of Sect. 13.1 of the ESC. The claimant alleges as follows:

'Although some of PLN's statements may have been subsequently withdrawn, reversed, or modified, the messages have, at the very least, convinced investors and lenders that the risks associated with IPPs are unacceptable because PLN's public statements manifest its lack of commitment to the Project. This will make further investment in the additional Units to be developed impossible because lenders and ● investors will not invest of the party responsible for purchasing the power has renounced the contract.'

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[168] "Though no direct evidence was offered by the claimant in support of its assertion that further financing became impossible in the light of PLN's refusal to give assurances, the Arbitral Tribunal finds the allegation to be credible. This was non-recourse project financing; its principal security was constituted by the assignment of revenues from the project itself. PLN's refusal to express commitment to the project could not but have undermined the claimant's relationship with the financiers. Accordingly, the Arbitral Tribunal finds that PLN's failure to give the assurances requested of it amounted to a breach of Art. 13.1.

[169] "More fundamentally, the Arbitral Tribunal finds that, coupled with Mr. Marsudi's letter of 6 March 1998 in which he declared that any further work undertaken in relation to Dieng Unit 4 would be at the claimant's own risk, PLN's failure to provide assurances effectively ruled out not only the development of Dieng Unit 4, but any further Units at Dieng. PLN thus denied the claimant's fundamental entitlement to own and operate the necessary generating facilities to convert geothermal energy to electricity for delivery to PLN 'up to a maximum total of 400 net MW'. In so doing, PLN also fundamentally breached Sect. 1.1 of the ESC.

[170] "The claimant also alleges that, independently of whether or not there exists an express contractual obligation to provide assurances, PLN's failure to give assurances constitutes a breach of its obligation to perform contractual duties in good faith pursuant to Art. 1338 of the Indonesian Civil Code. The Arbitral Tribunal has sympathy for this position. Whatever view PLN held as to the effect of Presidential Decree 39/1997 on its contractual obligations and its future conduct, the claimant had a legitimate and compelling right to be informed. At the same time, the claimant's own good faith was manifest in its proposals (apparently ignored) to offer concessions with a view to overcoming the impasse on an amicable and commercial basis.

[171] "Mr. Marsudi himself acknowledged the claimant's right, in the circumstances, to be concerned about the status of their projects.

'Q. And based on the statements that you made publicly, which you've agreed to this afternoon, that you were going to pay certain IPPs at the rate of 2,450 rupiah to the dollar, wouldn't you agree with me that Mr. O'Shei and [the claimant] had an absolute right to be concerned about the status of their project?

Mr. Marsudi. Yes, yes.'

P 55 ●

[172] "Mr. Marsudi was not only aware of the claimant's need for information – be it reassurance or otherwise – but in a position to provide it. The fact is that on 21 January 1998 Mr. Marsudi had written to Pertamina stating that given the fall of the rupiah, PLN was 'in the position of being unable to fulfil its obligations' under US dollar-denominated contracts. He added that in general PLN's payments for electrical energy would be made 'with the proviso' that they would be computed on the basis of the pre-crisis exchange rate, to wit Rp. 2,450 to the dollar. All IPPs affected by this policy would have seen their contractual entitlements purportedly cut by a factor of 50% to 75%, depending on the period. It is unclear whether the claimant was one of the contractors on whom PLN was

preparing to offer – or to seek to impose – this treatment. The letter referred to an ‘attached list of agreements’ which has not been supplied to the Arbitral Tribunal. But the dollar payment issue was nowhere more present than with the ESC, and the conclusion of PLN’s chief executive officer as expressed in this letter could not have been different with respect to it: PLN was ‘unable to fulfil its obligations’.

[173] “For PLN to have maintained its silence, faced with request for assurances of continued respect for the ESC when PLN itself had made this determination, is not consonant with good faith, and was therefore per se a breach of PLN’s duty to the claimant. This finding is reinforced by the fact that Sect. 4.3 of the ESC makes clear that third-party financing was a potentially crucial element of the project. (It contemplates that the ESC could be suspended in the event the claimant had difficulty arranging the financing.)

[174] “In the event, PLN did not just keep silent. In fact, statements made to the press by its senior representatives significantly contributed to the claimant’s need for information. The claimant contends that the making of such statements, or at least the failure to correct them, in and of itself constitutes a breach of the duty of good faith. This contention was put to the respondent’s Indonesian legal expert, Mr. Tumbuan, in oral examination as follows:

‘Q. Would you also agree that if PLN made public statements that were intended or reasonably expected to communicate the fact that it would not honour the contract, that would also be something that was in bad faith, in breach of its obligation of good faith?

P 56 A. First of all, it all depends of course, on who made those statements. Was that the authorised representative of PLN and did it truly reflect the decision of the authorised organ of PLN to make such announcement or intention? ●

Q. I accept your qualification. Assuming that the fact-finder is satisfied that the statement can be attributable to PLN, you would agree that would be a breach of the good faith obligation?

A. Correct.’

[175] “The Arbitral Tribunal concurs with this view and finds that the statements made by senior representatives of PLN in the press, or at least PLN’s failure to correct misstatements, must be viewed as exacerbating its breach of the duty of good faith.

[176] “PLN’s failure to give the requested assurances must also be relevant to PLN’s own allegation that, in breach of Sect. 11.4 of the ESC, the claimant has failed to continue to perform the ESC during the time of this dispute concerning performance. Sect. 11.4 provides that:

‘... During the time of [any] dispute, the Parties shall continue to carry out their responsibilities pursuant to this Contract, which shall remain in full force and effect.’

[177] “At paragraph 7.1.2 of its Statement of Defence, PLN argues that in discontinuing work on the development of the Dieng field, the claimant has breached its obligations under Sect. 11.4. Were this dispute about the performance of a Contract to which all Parties remained committed, PLN’s allegation might have some force. But it is not. PLN had effectively interdicted the development of Dieng Unit 4, and indeed any further Units, and repeatedly expressed its intention not to fulfil its obligations under the ESC. In these circumstances, the claimant was not be obliged to continue its contractual performance. Indeed, for it to have done so would have aggravated its prejudice; the claimant’s actions were consonant with its duty to mitigate damages.”

## 2. PLN’s Failure to Pay Invoices and Issue Letters of Standby

[178] Himpurna alleged that PLN breached the ESC by failing to pay invoices and issue standby letters of credit. Himpurna had fulfilled its obligations to make electricity ready for delivery as of March 1998; PLN failed to pay invoices submitted from 15 March 1998 to February 1999. PLN claimed that it failed to pay and issue the standby letters of credit because the Date of First Operation had not been agreed upon.

P 57 [179] Himpurna had been expected to bring the electricity producing unit (Dieng Unit 1) into commercial operation (Date of First Operation) by 2 December 1996. In order for a unit to reach its Date of First Operation, PLN ● would have had to prepare a point of interconnection capable of receiving the electricity (the Java-Bali grid). PLN failed to have the point of interconnection ready on time. Parties met on 12 January 1998 and according to the testimony of a senior staff member of PLN, agreed under several conditions on 15 March 1998 as a Date of First Operation. Himpurna emphatically denied that such conditions were imposed.

[180] The arbitral tribunal concluded, “in the face of [the] documentary evidence, little credibility can be accorded to PLN’s present contention that, in its view, important conditions were imposed upon the agreement on 15 March 1998 which remained unfulfilled. Accordingly, the arbitral tribunal finds that the parties did agree to 15 March

1998 as the Date of First Operation for Dieng Unit 1.”

(....)

## VII. Effect of Changed Circumstances

[181] “It has been both Parties’ misfortune that soon after they entered into contractual relations Indonesia found itself in a calamitous economic crisis.

[182] “In a powerful opening statement which made a profound impression on the Arbitral Tribunal, Dr. Adnan Buyung Nasution, lead counsel for PLN, poignantly evoked the economic context in which this dispute takes place. He said:

‘The Tribunal has to address the claims which are before it against the background of the economic collapse that preceded the presidential decrees in the last quarter of 1997 and made them necessary. This collapse and its consequences are an important element of the changed circumstances affecting these contracts.

I do not wish to burden you with statistics, but some are quite interesting. In 1998 to 1999, the Indonesian economy contracted by 15 per cent, resulting in more than 5 million workers losing their jobs. The rupiah, although it has been more stable in recent months or weeks, has lost more than 80 per cent of its value since the crisis first erupted.

Out of a population of 200 million, the number of seriously poor people in the Indonesia is projected to reach 130 million in 1999 as a result of the impact of the decline in job opportunities and an inflation rate that exceeded 75 per cent last year.’

P 58 [183] “Against this backdrop, while denying that PLN was guilty of any breach, Dr. Nasution criticised the claimant for what he referred to as the ● ‘unseemly haste’ with which it resorted to arbitration, and above all, for its unwillingness to enter into what he described as:

‘negotiations in good faith to reform the contract in a manner that reflects the change in circumstances that have occurred’.

[184] “Given these changed circumstances, Dr. Nasution argued that the role of the Arbitral Tribunal was limited to:

‘leaving the parties to renegotiate the contracts in accordance with the principles that apply when there has been such a fundamental change of circumstances’.

[185] “Dr. Nasution’s plea reiterated the contentions, at paragraph 6.2 of PLN’s Statement of Defence, that Indonesian law ‘does not permit’ the claimant to claim damages for breach of the ESC in changed circumstances, and that the claimant’s ‘duty of good faith as recognised by international legal principles obliges the claimant to renegotiate the terms of the Contract to reflect these changed circumstances’. In its Closing Brief, PLN retreated to some extent from this position, conceding that the obligation to negotiate was debatable but maintaining nonetheless that the ESC must be deemed unenforceable and, without taking a position or explaining the relevant criteria, leaving it ‘for the Tribunal to decide whether such unenforceability would be temporary or permanent’.

[186] “Mr. Tumbuan, PLN’s expert on Indonesian law, testified that the doctrine of *rebus sic stantibus* is recognised in Indonesian law as a corollary of the duty of good faith which appears at Art. 1338 of the Indonesian Civil Code. He opined that:

‘Indonesian courts ... may find that, in light of the new facts, conditions, or circumstances, a party’s obligation to perform contracts in good faith either suspends or extinguishes that party’s right to demand performance from the contract counterparty.’

[187] “Mr. Tumbuan also invoked Arts. 1244 and 1245 of the Civil Code, which contain the basic principles pertaining to *force majeure*.

P 59 [188] “The Arbitral Tribunal is willing to accept that under Dutch as well as Indonesian law, there are situations in which the rule of good faith may operate to dissolve or transform contractual rights and obligations. On the other hand, it is quite clear that such a remedy is reserved for extreme cases. The fundamental principle of *pacta sunt servanda* forms the bedrock of the ● civil law of obligations everywhere. Given Mr. Tumbuan’s expressed preference for Dutch authorities that antedate Indonesian independence, it is pertinent to consider that the Dutch Supreme Court was unwilling in 1926 to find that the duty of good faith could operate to excuse a party which failed to go through with a contract of sale because a fortuitous event had caused the price to rise by 75%, (13) and that in 1931 the same Court gave no relief to a plaintiff who had made a loan of 125,000 German marks only to find that its nominal value in Dutch guilder had become practically worthless as a result of German hyperinflation. (14)

[189] “A number of defects in PLN’s thesis compel the conclusion that it does not come close to justifying the application of *rebus sic stantibus*.”

[190] “In the first place, *pace* Nasution, the record of this case does not show that the claimant refused to negotiate. To the contrary, the claimant repeatedly wrote not only to PLN, but also to various Ministers of the GOI, to indicate that it was prepared to discuss ‘concessions’, such as a declaration of the project schedule, to alleviate PLN’s plight. Indeed, if anyone refused to negotiate it was PLN, which has never responded to the claimant’s offer, and never made a proposal of its own beyond unhelpfully asking the claimant to wait. The claimant had no duty to accept a suspension *sine die* of the ESC; indeed, it had a right to treat PLN’s unresponsive muteness as a breach. PLN is in no position to assail the claimant’s good faith.

[191] “Secondly and more fundamentally yet, in making its argument PLN does not practice what it preaches. The doctrine of changed circumstances, it says, requires that one take account of the weight of calamitous events on *both* parties.... But in truth PLN’s analysis is utterly heedless to the consequence of its proposed solution for the claimant. As a single-purpose vehicle, the claimant would soon go bankrupt if the ESC remained in limbo as in fact it has since September 1997. By its count, the claimant invested some US\$ 289 million in the project. To argue that PLN may simply walk away from its contractual obligations, without any regard to these investments, and to say that this argument is based on considerations of good faith, is certainly unacceptable. PLN has never explained why the full brunt of the financial crisis should be deflected on to an innocent party which, moreover, is simply seeking to rely on a contract as it is written. ●

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[192] “Although the national policy of *Pancasila* which favours consensus and conciliation and is enshrined in the Constitution of Indonesia, may appear too amorphous to serve as a factor in deciding technical legal issues, here is certainly a situation where its application suffers no doubt. Under the fourth of the five principles, that of consensualism, it is wrong for one party to ignore the interests of the other.

[193] “Thirdly and perhaps most significantly of all, Mr. Tumbuan’s references to force majeure are in fact damaging to PLN, because the Parties to the ESC did not rely on the Civil Code, but chose – as they had every right to do – to fashion a contractual allocation of risk which is inconsistent with PLN’s present argument.

[194] “In the ESC, the Parties did just that. By pricing in US dollars rather than in Indonesian rupiah, the Parties unambiguously allocated the risk of a depreciation of the local currency to PLN. (Equally, PLN would have benefited from a strengthening of the rupiah.) Moreover, under the force majeure clause, Sect. 9 of the ESC, the Parties ensured that the risk stayed with PLN. The Arbitral Tribunal has already considered subsections 9.2(e) and (f) (see paragraph [95] et seq.) and their stipulation that only the claimant may claim that an act of the GOI constitutes an event of force majeure. Thus, the Parties rejected the possibility that PLN could rely on a governmental act – even in response to an economic crisis, as with Presidential Decree 39/1997 – to undo its contractual obligations. Subsection 9.3(c) goes on to provide that to the extent that an event of force majeure affects PLN’s ‘ability or willingness to take delivery of or utilize the electricity’, PLN ‘shall continue to be obligated to make 95% of the payments due’. Finally, subsection 9.4 provides that ‘[n]otwithstanding that an Event of Force Majeure otherwise exists, the provisions of this Sect. 9 shall not excuse ... late payment of money’.

[195] “When stipulations like these appear in a long term agreement like the ESC, with respect to which it is obvious that the surrounding circumstances may change dramatically during the life of the contract, one can only conclude that the allocation of risk is intentional, indeed emphatic.

[196] “PLN has failed to distinguish the ambit of Arts. 1244 and 1245 of the Indonesian Civil Code from that of the force majeure provisions explicitly agreed by the Parties at Sect. 9 of their ESC. In the Arbitral Tribunal’s view they in fact deal with the same eventualities. PLN has never argued that Arts. 1244 and 1245 are mandatory. The Arbitral Tribunal finds that, pursuant to Sect. 9 of the ESC, the change in circumstances neither releases PLN from its obligation to pay damages, nor obliges the claimant to renegotiate the ESC. Indeed, even if Arts. 1244 and 1245, or Art. 1338 itself, were somehow deemed to override the terms of Sect. 9 of the ESC, quod non, the Arbitral Tribunal observes that PLN, having

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been found to have breached its own duty to ● perform in good faith (see paragraph [173]), cannot rely on the principle of good faith to escape obligations under the ESC.

[197] “Nor is it in fact conclusively proven that the Parties find themselves faced with an event of force majeure. According to one of the most familiar tenets of the Napoleonic Codes, there is no force majeure if the relevant event is not *insurmountable*. The Arbitral Tribunal observes that while PLN has made reference to the general consequences of the economic crisis on Indonesia, it has not demonstrated its inability to honour the ESC in particular. Indeed, its claim that it is simply incapable of performing the ESC loses much credibility in light of Mr. Marsudi’s admission that in August 1998 PLN was able to open a 500 MW power project despite the general economic crisis.

[198] “It is noteworthy that Mr. Marsudi referred in his oral testimony to renegotiation as a commercial solution, rather than legal obligation:



'... we like to renegotiate to find a solution such that PLN can honour the contract, you know. At the moment PLN pay with 2450. That is a temporary solution. Frankly speaking, this is not honouring the contract because in the contract, it is in US Dollars ....'

[199] "While having the greatest respect for Mr. Marsudi's sincere desire to find a commercial solution to the dispute, the Arbitral Tribunal is nevertheless acutely conscious of the inherent limitations of its role. The arbitrators cannot presume to decide what is in the best interest of PLN, nor indeed what is the best interest of the claimant. The Arbitral Tribunal must respect each Party's freedom of action, and acknowledge its correlative responsibility for its actions. PLN has adopted a certain posture vis-à-vis the claimant, and will have to live with the consequences. Similarly, the claimant has decided to initiate these arbitral proceedings rather than to abide by the outcome of negotiations, and having made that decision, to prosecute its claims with uncompromising vehemence. Other IPPs have taken a more conciliatory or temporising position – but they have different contracts, and perhaps a different view of their long-term interests.

[200] "It is not for the Arbitral Tribunal to question the motives or judgment of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties' agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism.

[201] "PLN suggests that the recognition by this Arbitral Tribunal of a vast contractual debt in accordance with a rigorous reading of the relevant agreements might exacerbate the crisis, raising the spectre of incalculable debts ● that simply cannot be met – and greatly impede the daunting task that lies ahead for the Government of Indonesia as it seeks to alleviate the crisis and stem the tide of suffering.

[202] "These entreaties fall on the entirely sympathetic ears of the Arbitral Tribunal, and so they must be perceived by people of good will everywhere. But such considerations cannot deter the Arbitral Tribunal from carrying out its task in accordance with the mandate it has been given by the Parties. The arbitrators cannot usurp the role of government officials or business leaders. They have no political authority, and no right to presume to impose their personal view of what might be an appropriate negotiated solution. Whatever the purity of their intent, arbitrators who acted in such a fashion would be derelict in their duties, and would create more mischief than good. The focus of the Arbitral Tribunal's inquiry has been to ascertain the rights and obligations of the parties to the particular contractual arrangements from which its authority is derived. The Arbitral Tribunal cannot be influenced by speculation about the effect of its award on other contractual situations about which it is uninformed. The arbitrators do not know whether there are other instances of contractual arrangements with investors where PLN (or other emanations of the Indonesian public sector) have made contractual undertakings congruent with those which it has seen in this case. Indeed, the Arbitral Tribunal does not see how anyone could affirm with confidence that other claims are legally identical to those raised here until their textual and contextual foundations have been tested in the crucible of adversarial proceedings before the relevant fora.

[203] "Counsel for PLN have implied that the difficulties facing their client are 'unprecedented'. This may well be the first time that PLN has faced such difficulties, but it is certainly not the first time that Indonesia has found itself in economic crisis. The end of the Sukarno era in the mid-1960s, for example, was marked by an economic crisis of enormous proportions. In the twelve months to June 1966 alone, inflation reached the level of 1,500 per cent. On entering into a long term contract such as the ESC, there was no reason for the Parties to have assumed that Indonesia would be insulated from a repetition of history. Moreover, the issue of the effect of economic disruptions – or indeed turmoil, to use the more emotive expression often used with respect to recent events in Indonesia – on international contractual undertakings more generally is hardly unprecedented.

[204] "One may, for example, recall the situation in Greece in the 1920s. In the beginning of the decade – 1922 and 1923, to be precise – some 1.4 million ethnic Greek refugees, mostly from Turkey, were absorbed by Greece. The net population inflow, overwhelmingly destitute, amounted to about 20% of the previous population in Greece. Costly development projects to assist in accommodating ● these masses were undertaken with international assistance. Among these projects was a contract for new railway lines entered into between the Greek Government and the Société Commerciale de Belgique (Socobelge). Under this contract, Socobelge provided a substantial loan (US\$ 21 million) which the Government undertook to pay off progressively as Socobelge completed successive phases of the work. In the late 1920s, the world economy collapsed. The inflow of foreign capital to Greece was reduced. The country's foreign reserves evaporated. In 1932, Greece abandoned the gold standard and defaulted on its debt service. Greece asked for the intervention of the Financial Committee of the League of Nations to assess the crisis. (One commentator has written of this as 'a striking anticipation of structural adjustment programmes of the International Monetary Fund a half century later'. (15) ) In short order, Greece negotiated elaborate repayment schedules for various international lenders. Socobelge, however, refused to accept that it was part of a general class of

international creditors. The company therefore instituted arbitral proceedings pursuant to a contractual clause. The Greek Government answered that the terms of the Socobelge contract, concluded by a since-defunct dictatorial regime, had been onerous and that the project was 'disastrous'. It sought to avoid legal liability by arguing that its impecuniosity constituted a case of force majeure which had been recognised by the League of Nations.

[205] "The arbitral tribunal found that it could not accept this defence; Greece's lack of finances, even if acknowledged by the League of Nations, could not neutralise Socobelge's rights under the contract. Accordingly, the tribunal granted Socobelge's claim for termination of the contract and ordered Greece to make repayment calculated on the basis of US gold dollars and by reference to the interest rate provided for in the contract. The award led to further proceedings, before the Permanent Court of International Justice, which concluded that there was no basis upon which it could affect the outcome of arbitral proceedings which the parties had agreed would be 'final and without appeal', (16) and also to an enforcement action in Belgium which is familiar to scholars and practitioners who deal with issues of sovereign immunity from execution.

P 64 (17) ●

[206] "The *Socobelge* case illustrates that issues relating to the effect of macro-economic events on contractual obligations, far from being 'unprecedented', have a long history. Closer to our times, one may recall numerous cases involving Nigeria, in the 1970s, and Zaire, in the 1980s; there are many other examples.

[207] "Parties entering into international contracts cannot claim unawareness of the risks of macro-economic adversities. Their effects may be extreme, but are nonetheless within the contemplation of the signatories. Moreover they are in the contemplation of financiers who evaluate the reliability of borrowers on the strength of contractual undertakings; and as they are in the contemplation of insurers who assess their willingness to provide cover to investors who also rely on such undertakings.

[208] "Extreme instances test the very fabric of the myriad of contracts which are part of the foundation of international economic exchanges. It is precisely at the extremes that the test is meaningful. An international tribunal cannot disregard legitimate contractual expectations without risking harm to this fabric. Arbitrators have no more business sacrificing legal principle to perceived factual realism than a national court can disregard contractual entitlements because it has the impression that the debtor cannot factually meet its obligations.

[209] "The fact that the Indonesian currency has suffered a painfully acute depreciation cannot be accepted as a basis for concluding that somehow PLN's dollar-denominated obligations must be renegotiated on some undefined but overriding basis. The immediate answer to such a contention is that the reason for the dollar-denominated payment obligations was *precisely* to allocate the risk of major currency movements. A contract is made up of a complex of possibly countervailing risks; one party may accept the currency risk while the other accepts the industrial risk of resource availability. Indeed, one party may take on the full range of perceived risks in return for more advantageous terms of payment. This is a matter of party autonomy, subject only to fraud or other exceptional forms of abuse of the contractual mechanism which have neither been alleged by PLN nor observed in this case by the Arbitral Tribunal.

[210] "PLN cannot say that its acceptance of the currency risk, or the risk of end-user demand, should be implicitly understood as applying only to ordinary fluctuations as opposed to extraordinary ones. It is precisely the prospect of extraordinary events which gives value to the allocation of risk, as that value is perceived by contractors, lenders, and insurers. (If the risk allocation covered only ordinary fluctuations, they would not represent fundamental advantages to contracting parties who might arrange for third-party currency cover themselves, or simply absorb the commercial risk.) To interfere with valid contractual arrangements is to contribute to international uncertainty, which ● in itself would inhibit international trade and investment. Thus, the temptation of eliminating immediate problems by ignoring the effects of contractual obligations is likely to cause longterm damage. At any rate, for this Arbitral Tribunal to decide on the basis of expediency would be contrary to the mandate given to it by the parties under Art. 8.3 of the ESC.

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[211] "PLN has never argued – let alone demonstrated – that it could not make the payments called for under the ESC. Rather, PLN suggests that it could no longer shoulder the burden of the ESC given the fact that it is faced with more than a score of other similar contracts with IPPs. The Arbitral Tribunal knows little about such contracts (apart from the one relating to the Patuha project). It sees no basis on which such suppositions or apprehensions – well-founded or not – can provide a defence to the claims made here. The Arbitral Tribunal has been told that the grave macro-economic crisis blighting Indonesia has affected numerous investment projects, and that the actors involved in such projects are intensely aware of the pendency of these first major arbitral proceedings arising out of this crisis. In response to PLN's invitation ... that the Award be drafted with regard to the watchful eyes of 'at least the other 25 IPPs' and 'also the wider investment community', and to the prospect that the arbitrators' decision may serve either as a 'precedent to open the floodgates for further claims' or 'a powerful tool' to

promote negotiations involving governmental authorities, investors, banks, and international institutions, the Arbitral Tribunal repeats that its function is to resolve this particular case, and not to make general prescriptions. It has the *duty* to do the former, and no *right* to do the latter.

[212] “There are situations where the practical enforcement of a right may be illusory, as when a large commercial claim, no matter how well founded, is prosecuted against a debtor who is already distressed beyond redemption. The law in such circumstances may be a blunt instrument. But absent proof of abuse by the creditor, that is no reason why parties who have contracted for the right to use that instrument should be deprived of the opportunity of doing so. To the contrary, the legal security of international transactions depends on the acknowledgement that contracts create rights, not a mere framework for negotiation.

[213] “Accordingly, the Arbitral Tribunal must reject PLN's pleas that the claimant be precluded from claiming damages for breach, and that the Parties should be directed to renegotiate the ESC.

P 66 [214] “It remains for the Arbitral Tribunal to consider the consequences of PLN's breaches of the ESC.” ●

### VIII. Termination for Breach

[215] “The claimant seeks termination of the ESC on the basis that:

‘PLN materially breached and repeatedly and unambiguously repudiated its obligations under the [ESC].’

[216] “The Arbitral Tribunal has found PLN guilty of the following breaches of the ESC:

- (i) breach of Sect. 13.1 of the ESC, and its duty to perform its contractual obligations in good faith, in failing to provide the claimant with assurances that it would honour its contractual obligations;
- (ii) breach of Sect. 1.1 of the ESC by preventing the claimant from completing the development of additional Units at Dieng up to a total generating capacity of 400 net MW; and
- (iii) breach of Sects. 6.4 and 6.5 of the ESC in failing to pay invoices and issue standby letters of credit in respect of Dieng Unit 1.

[217] “The Arbitral Tribunal has already held (see paragraph [83]) that it has jurisdiction to determine the claimant's request for termination, and indeed, the power to terminate the ESC.

[218] “PLN's defence to the claimant's plea for termination is primarily grounded in the evidence of its Indonesian law expert, Mr. Fred Tumbuan. At paragraph 5 of his written statement, he argues as follows:

‘I have considered claimants' claims that failure to provide assurances, and other alleged acts of respondent, are a repudiation of ESC by respondent. I have concluded that, as a matter of Indonesian law, no such repudiation could have occurred.’

[219] “Mr. Tumbuan justifies this conclusion concisely:

‘I have reviewed the Indonesian Civil Code and considered other Indonesian laws and regulations generally, and I have concluded that Indonesian law does not recognize a doctrine of anticipatory repudiation or anticipatory breach of ESC.’

P 67 [220] “In evaluating this conclusion, the Arbitral Tribunal turns, as it has been encouraged to do by Mr. Tumbuan himself, to Dutch law and doctrine. Art. ● 80, Book 6, of the New Dutch Civil Code provides that: ‘The consequences of non-performance take effect even before the claim is exigible....’

[221] “Although this provision does not have a direct equivalent in the old Dutch Civil Code, the Arbitral Tribunal considers it of some relevance in considering whether a doctrine of repudiation exists under Indonesian law. Mr. Tumbuan himself relied upon the New Dutch Civil Code in support of his position on the role of a duty of good faith in Indonesian law.

[222] “Even if references to the New Dutch Civil Code were deemed to be impermissible as a general matter, Dutch commentators have suggested that the origins of Art. 80 predate the New Dutch Civil Code:

‘The provision [Art. 80, Book 6] is new vis-à-vis old law, but its seed was planted in the Supreme Court judgment of 17 February 1961, N.J. 1961, 937 and in the advisory opinion of the Solicitor General Langemeijer preceding that decision.’ (18)

[223] “In considering the effect, or in his view the non-effect, of repudiatory conduct, Mr.

Tumbuan neglected completely to consider the duty of good faith. This failure is egregious, given the emphasis Mr. Tumbuan placed on the 'central' role of the duty of good faith in Indonesian contract law 'both at the stage of formation of the contract and during performance'. He would apparently have the Arbitral Tribunal believe that under Indonesian law, a party may renounce a contract without breaching its duty of good faith; indeed without any legal consequence.

[224] "The Arbitral Tribunal is unconvinced. In its view, the expression of an intention no longer to be bound by a contract must constitute breach of a duty of good faith which, depending on the circumstances, may justify the termination of a contract. In this regard, the Arbitral Tribunal has regard to Mr. Tumbuan's translation of Art. 1266 of the Indonesian Civil Code which begins as follows:

'A default causing termination is always deemed to occur in the event that one of the parties to a reciprocal agreement does not fulfil his obligations.'  
(Emphasis added.)

[225] "Under this article, the ESC could be terminated on the basis of the existing breaches that the Arbitral Tribunal has already determined to have occurred, including a breach of PLN's duty of good faith. While Art. 1266 does not, on its face, distinguish between breaches of varying degrees of magnitude it is obviously of great importance, in the interests of contractual certainty, that only breaches of a fundamental nature should justify relief as severe as termination of a contract.

[226] "The Arbitral Tribunal therefore now turns to examine whether the breaches it has already found PLN to be guilty of are sufficiently fundamental to justify termination.

[227] "It is at this juncture that the Arbitral Tribunal must return to Mr. Marsudi's extraordinary letter to the claimant of 6 March 1998. By this letter, PLN unilaterally declared that any further work undertaken by the claimant in respect of Dieng Unit 4 would be entirely at the claimant's own 'risks and liabilities [sic]'. Coming as it did in the midst of disorienting legislative developments, worrying reports and rumours about PLN's willingness to honour its contracts with power producers and the claimant's unanswered requests for assurances, this letter, in itself, effectively proscribed the development of Dieng Unit 4 and any further Units at Dieng. PLN's letter therefore constituted a fundamental breach of Sects. 13.1 and 1.1 of the ESC and of PLN's duty of good faith. As such, the Arbitral Tribunal has no hesitation in finding this letter to be a repudiatory breach of the ESC which immediately entitled the claimant to seek its termination.

[228] "In the event, the claimant did not seek termination immediately. On the contrary, in the months that followed its receipt of the letter, the claimant continued to seek to keep the ESC alive. Dieng Unit 1 was brought into commercial operation shortly after the claimant's receipt of Mr. Marsudi's letter. Invoices in respect of Dieng Unit 1 were issued by the claimant from April 1998. However, in breach of Sects. 6.4 and 6.5 of the ESC, PLN failed to pay these invoices or to issue standby letters of credit. Against this background of multiple breach, the claimant continued to seek assurances of PLN – in the event unsuccessfully – that it would honour the ESC. The Arbitral Tribunal finds that PLN's failure to give such assurances, culminating with the meeting that took place between the claimant and senior representatives of PLN on 16 June 1998 at which Mr. Marsudi expressed his wish to renegotiate the ESC, and with the dispatching of the fully operative Dieng Unit 1 to zero MW on 5 July 1998, compounded PLN's repudiatory breach of the ESC.

[229] "... PLN contends that, even if the Arbitral Tribunal finds that PLN has committed breaches of the ESC which justify termination, the Parties must, under Sect. 11.3 of the ESC, agree on a reasonable period for the respondent to correct any such breach before termination can take place.

P 69 [230] "Sect. 11.3 of the ESC provides as follows: ●

'*Remedies on Default.* Subject to the provisions of Sect. 8 above concerning arbitration, in the event that any Party is found pursuant to a final arbitral award to be in default in the performance of any material provision of this ESC, either of the other Parties as one of its remedies under this ESC shall give the defaulting Party written notice thereof (which notice must state that it is pursuant to this Section) and such Party shall have a reasonable period to correct such default as may be mutually agreed. In the event the defaulting Party corrects such default within such period, this ESC shall remain in full force and effect. In the event the defaulting Party does not correct such default within such period, the other Parties may terminate this ESC by notice effective immediately upon delivery to the defaulting Party.'

[231] "The Arbitral Tribunal cannot accept PLN's interpretation of this provision. It would lead to the result that even in the event of a breach which the Arbitral Tribunal determines to be fundamental and irremediable, it could not declare the ESC to be terminated; there must first be an opportunity to 'correct the default'. It seems absurd to contemplate that a default could be cured when an Arbitral Tribunal had determined – with binding effect – that it is fundamental and irremediable. Moreover, the notion of a 'reasonable period ... as may be mutually agreed' is a potestative (illusory) term, since it is in the power of the defaulting party not to agree. Last but not least, the notion of a

unilateral termination at the end of the period, if one imagines that it was agreed, appears not to cater for the entirely plausible scenario that there would be a dispute as to whether the default has been cured. Any of these difficulties would presumably lead the parties straight back into arbitration, where the Arbitral Tribunal could do no more than reiterate and give effect to its prior conclusion.

[232] “Only if there were no other way of reading Sect. 11.3 would the Arbitral Tribunal accept that the Parties had intended such an aberrant outcome. In fact the Arbitral Tribunal has no difficulty in reaching a different understanding of this provision: it allows the victim of a *non-terminating* breach – i.e. one which is not fundamental or irremediable – as one of its remedies’ to convert the breach into a terminating one by insisting on a cure. This mechanism is inapposite in the present case, where the Arbitral Tribunal finds that PLN’s default is fundamental and definitive. Sect. 11.3 is conditioned both by the express reservation of the actions of the Arbitral Tribunal (‘subject to the provisions of Sect. 8 above concerning arbitration’) and by the express mention that the mechanism of a curing period is *only one* of the complainant’s remedies. ●

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[233] “The Arbitral Tribunal has no hesitation in concluding that the Parties’ relationship is at this stage beyond repair, due to PLN’s fundamental breach. Accordingly, by this Award the Arbitral Tribunal declares the ESC to be terminated with immediate effect as between the Parties to this arbitration. As to whether any residual rights and obligations continue to exist under the ESC as between either of the Parties to this arbitration, on the one hand, and Pertamina, on the other hand, such questions are beyond the scope of this arbitration.”

## IX. Quantum

### 1. Introduction

[234] “In addition to asking for an award in the amount of unpaid invoices, the claimant proceeds conventionally to quantify its damages under two headings, reflecting wasted costs and lost profits, respectively. The former, traditionally referred to as *damnum emergens*, represents the aggregate of what the claimant lists as ‘capital invested and expended’; to this amount, the claimant seeks to add interest. The latter, traditionally spoken of as *lucrum cessans*, assigns a present value to the expected future revenue stream; the nominal amounts are thus decreased by applying two discount rates: one reflecting the time value of money (i.e. the notion that a dollar to be received in the future is worth less than a dollar received today), the other a risk premium.

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[235] “The conceptual approach is unremarkable and has been followed in countless international arbitrations. (19) It is moreover consistent with the Indonesian Civil Code, which provides in Art. 1246 that damages may include ‘the loss which the creditor has suffered and the profit he has been made to ● forego’. PLN’s Indonesian legal expert, Mr. Tumbuan, has expressly confirmed that these two notions of recovery signify *damnum emergens* and *lucrum cessans*. The difficulty lies in their application.

[236] “An initial general enquiry relates to the standard by which the Arbitral Tribunal should judge whether the amounts put forward are sufficiently reliable. In this respect, the Arbitral Tribunal turns to *Asser’s Handbook*, the same Dutch authority on which Mr. Tumbuan, PLN’s expert on Indonesian law, was content to rely:

‘The creditor who demands compensation must claim, and if necessary prove, that the debtor is responsible for the damages caused by his non-performance.... If the debtor denies that damages have occurred due to his non-performance, the creditor has to prove them unless the judge, as is often the case, assumes that damages will naturally arise in the context of such non-fulfilment; it is then up to the debtor to rebut this assumption and to show that no damages have occurred. Similarly, if the amount of the damages claimed is disputed, the creditor must prove the amount. In determining the amount of damages the judge is not bound by the rules of evidence.’ (20)

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[237] “In this case as in so many others, it is impossible to establish damages as a matter of scientific certainty. This does not, however, impede the course of justice. ‘It is well settled that the fact that damages cannot be settled with certainty is no reason not to award damages when a loss has been incurred.’ (21) Approximations are inevitable. Moreover, considerations of fairness enter into the picture, to be assessed – inevitably – by reference to particular circumstances. The fact that the Arbitral Tribunal is influenced in this respect by equitable factors does not mean that it shirks the discipline of deciding on the basis of legal obligations. The *Sapphire* award was based on ‘general principles of law’ but nevertheless decided *ex aequo et bono* when assessing damages. (22) And as the *Aminoil* award held: ‘It is well known that any estimate in purely monetary terms of amounts intended to express the value of an asset, of an ● undertaking, of a contract, or of services rendered, must take equitable principles into account.’ (23)

[238] “The *Sapphire* and *Aminoil* awards were on the firm footing of significant international precedents. The International Court of Justice in 1956 upheld a complaint against the judgment of an administrative tribunal which had awarded damages *ex aequo et bono*, finding no intent ‘to depart from principles of law’ but rather the



consequence of the fact that ‘the precise determination of the actual amount to be awarded could not be based on any specific rule of law’. (24) The ICJ made the point even more limpidly in its judgment in the *North Sea Continental Shelf* case in 1969:

‘... in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles’. (25)

[239] “With respect to the evaluation of financial data, some introductory observations of a general nature may serve to clarify the Arbitral Tribunal’s approach.

[240] “When a DCF method for evaluating damages in the context of a contractual breach is followed, any comparisons with precedents involving the evaluation of expropriated business ventures must be made with great care. In the latter situation, there is generally no basis to apply the *contractual* reliance damages (*damnum emergens*), but only the expectancy damages (*lucrum cessans*). An undertaking has been expropriated; the prejudice suffered by its former owner is simply the worth of the venture as a going concern. That worth is crystallised in an analysis which discounts the future revenue stream of the enterprise to establish its present value. Leaving aside special considerations justifying higher recovery in the case of *wrongful* expropriation, (26) there is no separate evaluation of sunk costs, whether or not represented by ● physical assets. P 73 That the claimant has been dispossessed of the walls and machinery of a factory does not lead to a separate recovery on that account. Had there been no expropriation, past investments would have been recovered through subsequent revenues. Since those revenues are fully accounted for in the DCF going-concern evaluation, an award of lost investment as well would be an unacceptable double recovery.

[241] “In contractual cases such as this, it is usual that claimants seek recoupment of their entire investment as a discrete element of compensation. Claimants are on solid ground when they ask to be reimbursed monies they have actually spent in reliance on the contract; recovery of lost future profits is less certain. The value of the asset taken in an expropriation case may be higher or lower than the amounts the claimant expended in developing the asset. (Positive subsequent developments such as improved market conditions, or successful exploration campaigns, may have resulted in a higher value; negative developments such as failed exploration campaigns, or a fall in price, may have had the opposite effect.) In the case of a breach of contract, the wasted cost is what the claimant has spent in reliance on the agreement, without reference to how judicious or providential those expenditures turned out to be. No further explanation is necessary to understand why victims of contractual breaches tend first and foremost to articulate a plea for *damnum emergens*.

[242] “On this footing, however, the quantification of lost profits must result in a lower amount to avoid double counting. This is so because future net cash flow generally includes all the amortisation of investment there will ever be. To ask for the full amount of the future revenue stream when also claiming recoupment of all investments is wanting to have your cake and eat it too. If the DCF method is applied in a contractual scenario to measure nothing but net cash flows (thus excluding the accrual accounting notion of ‘income’ which may cover non-cash items such as depreciation), there is no room for recovery of wasted costs. In other words, when the victim of a breach of contract seeks recovery of sunken costs, confident that it is entitled to its *damnum*, it may go on to seek lost profits only with the proviso that its computations reduce future net cash flows by allowing a proper measure of amortisation.

[243] “The Rebuttal Statement of the claimant’s chief financial officer ... reflects a proper understanding of this principle. The Arbitral Tribunal is satisfied that what the claimant presents as the ‘initial project value’ reflects the alleged value of future cash flows, discounted to 31 December 1998, which indeed deducts the alleged value, at the same date, of past investments.

P 74 [244] “PLN’s submission ... to the effect that: ●

‘the element of the claims in respect of which the claimants rely upon the testimony of Mr. Hammett’s [sic] certainly does result in double counting, in claiming for sunk costs as a separate item of damage, on the basis that these costs are the necessary [sic] in order to earn the profits which claimants seek to recover’

misses the point that performance of the ESC by PLN would, on the basis of the calculation of lost profits proposed by the claimant, have enabled the claimant to earn these lost profits *in addition* to obtaining the reimbursement of its wasted costs over the term of the project.

[245] “Other difficulties of application will be dealt with under each of the two main divisions of the claimant’s quantification. But first the Arbitral Tribunal must deal with the discrete issue of unpaid invoices.”

## 2. Unpaid Invoices

[246] “The claimant has issued 12 monthly invoices. They all remain unpaid, in the

aggregate amount, including interest, of US\$ 64,282,592.

[247] “An immediate issue of principle arises from the fact that the claimant, believing – correctly, as this Award holds – that PLN had committed breaches justifying the termination of the ESC, has shut down its operations and thus put itself in a position where it could not possibly make electricity available to PLN. The problem is that the claimant, having thus put itself in a termination mode, nevertheless continues to issue invoices as though it were in a performance mode.

[248] “There is, however, a more fundamental issue which affects all twelve invoices and makes it unnecessary to reserve special treatment to invoices issued after shutdown. It arises from the fact that the claimant has requested termination of the ESC, and that the Arbitral Tribunal upholds this plea. The task of the Arbitral Tribunal is therefore to assess the consequences of *termination* on account of PLN's breach – not to enforce its *performance*.

[249] “To order PLN to pay past invoices in addition to reliance damages is to commingle contradictory premises of recovery. The reason is as follows. If the ESC had been performed, the claimant would have been paid, with respect to each Unit, under 360 monthly invoices. Assuming that each invoice was in the amount of \$ 100 and that there was a current profit margin of 30% (assuming no time value of money), the claimant would have recovered its past investment – whatever it may have been – out of the consequent stream of \$ 30 profit slices. At no time would PLN, or anyone else, have had  
P 75 any obligation to offer PLN a special payment on account of its capital investments. ●

[250] “In a termination scenario, PLN legitimately seeks its lost investment, i.e. its reliance damages, as well as its expectancy damages. The latter, however, does not mean the full amount of invoices; what should be measured is the *lost benefit* to the claimant, and this means, broadly, invoices minus both operating or variable costs and amortisation of past investment. To pursue the simplified assumptions just made, if one is satisfied that 50% of the \$ 30 profit slices would suffice to amortise capital investment over the life of the contract, the proper recovery on account of expectancy damages in a termination scenario should include only \$ 15 of each invoice.

[251] “The Arbitral Tribunal's analysis is consonant with an objection raised by PLN's financial expert witness, Mr. Chin Hon Ch'ng, to the effect that the claimant's lost-profit calculations fail to effect a necessary deduction on account of the invoices although the latter are simultaneously being claimed under a separate head. The explanations just given should suffice to demonstrate that there is merit in Mr. Ch'ng's contention.

[252] “In the Arbitral Tribunal's view, the legally correct solution is simply to disregard the unpaid invoices in light of the termination of the ESC. The overall economic result will not differ from the analysis just made, because the Arbitral Tribunal will allow *lucrum cessans* over the life of the ESC on the basis of its conviction, in light of the evidence, as to the amount of discounted future revenues, diminished to account for operating cost and the amortisation of capital investment which inheres in the recovery of *damnum emergens*.”

### 3. Damnum Emergens

#### a. General comments

[253] “Under this head, the claimant puts forward the amount of US\$ 315,046,166, including interest to 30 April 1999.

[254] “There is no question but that the claimant has made significant investments. Plant and infrastructure have been built; costly wells have been drilled; sophisticated and expensive studies have been conducted. As Mr. Djiteng Marsudi, the respondent's chief executive officer from January 1995 to July 1998, told the Arbitral Tribunal:

‘I appreciate very much that the investor has invested a lot here in Indonesia. As an engineer I saw by myself the power plant in Dieng. It is a pity if we don't utilise this investment.’

[255] “Nor is there any question but that these damages were foreseeable; they plainly  
P 76 arose in reliance upon the ESC, under which the claimant had the right ● to build, own and operate the generating plant; PLN was bound to purchase the output from Pertamina; and the payments were assigned – irrevocably during the life of the ESC – to the claimant (or, more precisely, its nominated trustee).

[256] “Two particular features of this case should be noted before examining *damnum emergens*, or, as they have been referred to throughout the oral phase of these proceedings, the ‘sunken costs’.

[257] “First, it must be borne in mind that as a result of the speed with which these proceedings had to be conducted, there were practical constraints on the examination of proof. While the claimant disclosed to PLN some 4,000 pages, encompassing over 18,000 entries, from the General Ledgers of accounts for the claimant and Patuha Power Ltd., and PLN was thus in a position to ask questions and request backup information about individual entries – and indeed did so with respect to 638 line items – it is fair to say that

such an exercise in a case of this magnitude might have justified several months of verification and of inevitable debate about the adequateness of answers and backup information. Instead, only a few weeks were available under the schedule imposed by the Parties in their agreement to arbitrate (as amended by the Terms of Appointment). But who could say that a full year's review would have led to certainty; nor is there a basis on which to invalidate the Parties' commitment to a fast track. That choice has consequences. The Arbitral Tribunal considers that the claimant is entitled to all of the sunken costs it is able to prove, and the arbitrators must decide on a preponderance of the evidence put before them. The claimant may believe that it could have shown a greater quantum if more time had been available; PLN may believe that it would have been able to disprove a larger portion of the claimed costs; yet each would have only itself to blame for having made speed a predominant feature of the arbitration agreement.

[258] "Secondly, while it has full entitlement to question the *reality* of the claimant's alleged costs, there is little scope for PLN to question their *reasonableness*. As long as the expenditures were made in rational pursuit of the objectives of the Contract, there is no room to question their cost-effectiveness *ex post facto*. For example, PLN cannot seek to invalidate the payment of fees of third-party consultants on the basis that they were unnecessary, or more expensive, than other consultants alleged to be equally proficient.

[259] "If PLN and the claimant had been engaged in a joint venture on behalf of which the claimant was incurring costs, or if there had been an agreement that the claimant had some right to recover costs from future earnings (e.g. by higher prices paid by PLN or lower royalties paid to Pertamina), one would reasonably expect that there would have been an agreed system of approval and verification of costs. ●

P 77

[260] "In this case, the claimant's investment was made at its entire risk; it could incur costs in accordance with its own assessment of its obligations, of efficient operations, and of the prospects of recovering costs through future earnings. In other words, the claimant made its expenditures in reliance on the Contract. It had every incentive to keep those costs low, because all savings would be to its own undiluted benefit. There is no basis for allowing PLN today to seek to impose retrospective spending controls.

[261] "A third and related observation is that the claimant was a single-purpose project vehicle having no other mission than the Dieng field project. The claimant's chief financial officer did not fail to seize on this fact to argue that 'all costs and investments' made by the claimant must by definition be 'directly related' to the development of its field. The fact that this argument is convenient for the claimant does not make it untrue. In an off-hand fashion that suggests wishful thinking, PLN rejects the point as 'specious', but can offer no other retort than to say that 'all kinds of expenses *could* be incurred by the claimants that have nothing to do with the projects' and that 'subsidiaries are not *necessarily* designed to make or maximise profits'— citing Dr. Leininger to the effect that multinationals sometimes seek tax-efficiency through transfer pricing. The problem for PLN is that it is seeking to counter something which is entirely *plausible* (namely that the claimant was spending money exclusively on its Indonesian steamfield and generating plant) by something which is *speculative* (namely that the claimant was cooking its books). The Arbitral Tribunal opts for the former, and repeats that it is not for PLN at this stage to challenge cost-efficiency; the only criterion is that of a rational relationship with the project, it being recalled that the trier of fact is not bound by 'rules of evidence' in assessing damages and may 'assume'— e.g. in the case of a special-purpose vehicle — that damages will eventuate (see paragraph [236]). It is to be noted that PLN's expert, Mr. Ch'ng, who had conducted a verification of the backup information for several hundred sample line items from the General Ledger, conceded that expenditures were visibly allocated to one or the other of the Dieng and Patuha project.

[262] "PLN uses conclusory or emotive rhetoric in challenging the claimant's figures; on page 21 of its Closing Brief alone, it assails the data provided as 'cynically corrupted', the 'so-called' supporting information as 'adulterated', the claimant's attitude as one of 'amazing behaviour' and as 'obstructive', and the claimant's whole presentation as failing to 'provide a complete picture even as to the timing of payments let alone justification for them or any causal connection to the breaches which the claimants seek to claim'.

[263] "Indeed, PLN goes so far as to criticise the claimant for not claiming certain costs, inviting the Arbitral Tribunal to speculate that this reticence ● bespeaks a reluctance to discuss payments that would turn out to have been illicit.

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[264] "Before exhausting this vein, PLN castigates the claimant's case as having an 'underlying bankrupt nature'; an assertion which falls flat when contrasted with Mr. Marsudi's frank admissions (see paragraph [254]).

[265] "True enough, the adversarial process is calculated to induce criticism of one's neighbour, not charitable understanding. Nor has the claimant been notably restrained in its characterisation of PLN's conduct. But rhetoric is ineffectual if it is rooted in litigious zeal rather than the evidence.

[266] "The inescapable fact is that the claimant made very substantial investments. It is natural that the claimant has sought to maximise the amounts it could hope to recover; litigants have been doing that for as long as there have been judges. It is equally natural

for PLN to question the claimant's presentation. This is the right of the respondent and the duty of the tribunal. But to try to argue away the plain fact that a substantial capital investment has taken place – precisely in response to legislation designed to attract foreign capital into a high-risk industry that requires 'huge capital'; see paragraph [7]– is neither credible nor helpful.

[267] “PLN did not request any proof of the claimant's sunken costs until 11 February 1999, several months into the arbitral proceedings – and indeed with some prompting from the Arbitral Tribunal. Within two weeks of that request, which related to supporting documentation for 800 line items in the claimant's General Ledger, freely selected by PLN, the claimant provided invoices, entries, or other proof relating to some US\$ 250 million of expenditures. Only US\$ 38,768 were left undocumented; while PLN has questioned the probative value of some of this documentation – with some justification, as shall be seen – it has not challenged that the material was produced as just described.

[268] “Annex 3 to PLN's Closing Brief, entitled ‘Financial Matters’, contains a comprehensive critique of the quality of the evidence produced by the claimant in support of its claims of sunken costs. Not surprisingly, PLN deems that with regard to most of the expenditures with respect to which PLN requested supporting documentation, ‘adequate information’ was *not* provided. The tacit emphasis is of course on the word *adequate*, which refers to PLN's perception of what is justified. Quite naturally the party to whom payment is demanded is reluctant to accept the bona fides of the demand.

[269] “If PLN were in the position of a joint venture partner, or if it were entitled to royalties computed by reference to net income, there would be much merit in many of its criticisms. More importantly, there would be a contractual standard by which to evaluate the adequacy of the proof of cost, and moreover its appropriateness. In the present case, P 79 the claimant needs to ● show only that it has made expenditures; it is for PLN to show that they have no reasonable connection with the pursuit of contractual objectives. With the important exceptions noted below (see [271] et seq.) this PLN has broadly failed to do.

[270] “The claimant is part of a US-based corporate group and as such is subjected to comprehensive reporting requirements. The Arbitral Tribunal has heard evidence of the way in which CalEnergy causes its subsidiaries to maintain and rely upon accounting practices in accordance with the US GAAP, and is satisfied that they reflect the thorough and systematic practices of a large, modern, publicly traded corporation. While one might imagine that there could be an interest in exaggerating expenditures recorded in corporate accounts for tax shifting purposes, it is undeniable that (a) such a suspicion is purely speculative, and as such equally plausibly neutralised by the consideration that there is also a temptation to show positive returns rather than large costs, (b) false recording exposes corporate officers to severe potential sanctions under US law, not to mention damage to their careers, and (c) at any rate the recordkeeping that took place at the early stages of the project could hardly have been conceived on the footing that costs would be claimed from PLN (or anyone else), and there is no evidence of a systematic change in accounting practices once the ESC entered the season of its decline and fall. In addition, Mr. Hammett has testified, not unsurprisingly, that the project lenders approved budgets and reviewed variations with the assistance of a specially retained and well-known engineering firm (Stone & Webster). Although Mr. Ch'ng complained about a number of deficiencies in the information provided by the claimant, the Arbitral Tribunal concluded after his cross-examination that many of his objections were trivial. (For example, he conceded that his complaint about ‘redacted’ invoices affected less than one-half per cent of the total.)”

#### b. Adjustment of the claim

[271] “More pertinently, PLN argues that the recovery of sunken costs must exclude the following elements: (i) costs relating to reservoir development beyond proven reserves, (ii) payment for non-recourse financing, (iii) escalation between the time of outlay and the date of the award, (iv) costs prior to the date of signature of the contract, (v) excessive land acquisition costs for which supporting documentation is inadequate, (vi) VAT charges representing a deferred liability which the claimant has never paid, (vii) unpaid debts to drilling contractors or other suppliers which, or so PLN suggests, may never be paid by the claimant, (viii) head office charges and management services fees P 80 ● paid to CalEnergy, (ix) rig costs, and (x) an allegedly unexplained contingency allowance of US\$ 10 million.

[272] “As to (i), PLN argues that the claimant must bear the risk that the reservoir may not contain volumes of energy required for the claimant's investment programme. This argument, which would imply a disallowance of some US\$ 30 million, is without merit. The investment programme was well within reasonable parameters, and the claimants were entitled to pursue those objectives in reliance on the Contract. The fact that the Arbitral Tribunal gives PLN the benefit of its own most conservative estimations of reservoir capacity for computing lost profits (see paragraph [301]) is immaterial in this respect.

[273] “As to (ii), PLN argues that sunk costs refers only to ‘amounts spent by claimant’ and must therefore exclude ‘non-recourse financing which was a risk that was accepted by the lenders when they agreed to finance the project’. This argument too is without merit. It is

based on the false premise that the financing was 'non-recourse'. While as a commercial matter it is usual to focus on the fact that a project vehicle's *shareholders* are not liable to repay lenders, the facts are that (a) the lenders' direct debtor is the claimant and (b) PLN's contractual obligations are owed to the claimant. The temptation to use this argument may be understandable in view of the amount it seeks to avoid – nearly US\$ 137 million.... It borders, however, on the irresponsible. The investment that deserves protection includes not only the equity contribution of project promoters, but also the providers of credit. To ignore those amounts would be to strike at levers which are essential for the international mobilisation of capital.

[274] "As to (iii), PLN argues that to make the claimant whole means to return no more than actual amounts expended, without 'escalation'. Here again, the argument is vain. Just as lost profits must be discounted because the nominal amount of revenues earned in the future have a lesser present value, so it would be untrue to say that the claimant is made whole by awarding amounts today which are nominally identical to those it spent in the past. This is not a matter of 'escalation' in any other sense of the word than pure value maintenance. (27)

P 81 [275] "As to (iv), on the other hand, PLN's argument is valid; pre-Contract expenditures were made in reliance not upon promises yet to be given, but on ● unilateral expectations of commercial success. Those costs are to be amortised, if at all, in the only way the claimant could have expected: out of future profits. As it was put in the *Sapphire* award, where 'general principles of law' were applied, claimants should be put 'in the same pecuniary position as they would have been in if the contract had been performed. But the payment of the expenses incurred in concluding the contract would tend to put them in the position they would have been in if the contract had never been concluded.' (28) Moreover, the direct reimbursement of such expenses to the claimant would put it in a *more favourable* position than that in which it would have found itself if the ESC had been performed by PLN.

[276] "In principle, since these pre-contract expenditures were to have been recovered from future net revenues, the claimant had no reason to deduct them when making its DCF-based claim for lost profits. Instead, the claimant impermissibly included them as sunken costs, and they accordingly feature as an undifferentiated charge against those profits. But the Arbitral Tribunal has not been given the data necessary to make the adjustments that would in principle be justified. The penalty for this mistake is admittedly severe, but here too the Arbitral Tribunal exercises its discretion to be lenient with PLN and rigorous with the claimant, knowing that in the final analysis it is PLN – which does not have the claimant's contractual protection – which is, by far, the most exposed to the crisis.

[277] "While Dr. Leininger stated that pre-signature expenses are 'not determinable from the information available', the fact is that the amount was disclosed by the claimant's chief financial officer as US\$ 1,814,404.

[278] "As to (v), Mr. Ch'ng suggested to the Arbitral Tribunal that land transactions are a good place to dissimulate improper payments. The Arbitral Tribunal restates its disinclination to believe that the claimant was seeking to waste money; and it has already made clear that it will pay no heed to murmurs about impropriety. As for the less-than-perfect state of records of land purchases from uneducated villagers, it comes as no surprise to the Arbitral Tribunal, which has no difficulty in rejecting this complaint.

[279] "As to (vi), absent proof of the fact – as opposed to the apprehension – of liability for VAT, the Arbitral Tribunal is satisfied to rely on the representations on page 178 of PLN's Closing Brief to the effect that the VAT amounts indicated by the claimant will not be levied on account of this Award. PLN's objection is therefore upheld, in the amount of US\$ 12,652,266.

P 82 [280] "As to (vii), the claimant's position is that it has no defences to the third-party claims in question, and will satisfy them from the proceeds of this award. According to Mr. Hammett, third-party claims had by March 1999 been ● reduced by settlements from a total amount of some US\$ 3.5 million to some US\$ 1.85 million. Mr. Hammett states that all vendor claims, even if unpaid, have been properly recorded, in accordance with GAAP, on the claimant's Ledger, and adds: 'these obligations were incurred as part of [the claimant's] performance of the ESC and remain obligations which [it] must pay'. The Arbitral Tribunal deems this posture to be justified, and rejects PLN's argument.

[281] "As to (viii), PLN attacks payments to CalEnergy as self-serving, inflated, and possibly replete with double counting. The Arbitral Tribunal accepts that it may to some extent be cost-effective for a project vehicle subsidiary to turn to its parent company for assistance, and moreover that abuse of this relationship is likely to have been policed to some extent by the lenders. But equally, this is an issue with respect to which the presumption that the claimant has every incentive to keep costs low obviously breaks down; in this respect, Dr. Leininger's suspicion is legitimate. Depending on what CalEnergy's profit margin may have been on the original payment, it will in the final analysis stand to be paid twice in some unknown proportion, upon recovery of this Award. The Arbitral Tribunal deems it fair that the claimant suffer the consequences of this lack of clear indications as to the content of CalEnergy's contribution. Exercising its sense of fairness, the Arbitral Tribunal disallows the claim to 'recover' these payments, in the



amount of US\$ 20,179,761.

[282] “As to (ix), based on Mr. Ch'ng's assertion from a position of no relevant expertise that they ‘appear high’, it is rejected without hesitation; the Arbitral Tribunal will not entertain unsupported speculation to the effect that the claimant might have done better.

[283] “As to (x), the contingency allowance identified and challenged by Dr. Leininger ... is in fact derived from a CS First Boston model; prepared well before project implementation for the purposes of determining the soundness of the financial projections at that time. It was not relied upon by Mr. Hammett as proof of actual expenditures, and is not a part of the claim.

[284] “In addition to its consideration of these questioned items of cost, the Arbitral Tribunal has been somewhat puzzled by the debate between the Parties with respect to dividends to the claimant's minority shareholder, PT. Himpurna Enersido Abadi. Such dividends are not and cannot be a part of the claims made here; what the claimant does with its recovery is a matter of corporate governance of no present concern.

P 83 [285] “Finally, suffice it to say that the Arbitral Tribunal prefers not to burden the Award with discussions of incidental allegations which were not substantiated by PLN and firmly rejected by the claimant, such as the suggestion ● that the claimant was paying interest to CalEnergy on the amount of the latter's capital contribution.

[286] “The sum of the amounts thus disallowed, as stated in paragraphs [277], and [281], is US\$ 34,646,431. The historical claimed costs therefore are accepted in the adjusted amount of US\$ 254,502,586.

[287] “To establish the present value of these sunken costs, the Arbitral Tribunal adopts the multiplier used by PLN's financial expert, Dr. Leininger, namely 0.929665. The Arbitral Tribunal recognises that this number is unlikely to be rigorously accurate, since it does not make adjustments for specific times at which disallowed costs were actually expended, but treats them, according to a simple scaling exercise, as though they were timed to coincide in perfect synchronisation with the claimed costs taken as a whole. Moreover, since Dr. Leininger did not recalculate his figure to the date of the claimant's final computation, the claimant also loses the benefit of a full update. But on both of these counts, since the claimant has not given the Arbitral Tribunal the information necessary to make a recomputation, it must accept that the Arbitral Tribunal uses the figure given by PLN's expert.

[288] “The fact that Dr. Leininger applies this ‘escalation factor’ on a simple pro rata basis, without attempting to recompute it with respect to individual cost items by reference to the precise time they were expended, is obvious by reference to the explanatory notes to Table 1A, Option 1A-3,... where he derives a figure to represent sunken costs associated with Himpurna Units 2-4 by using the same multiplier notwithstanding the intuitive obviousness that costs associated with Unit 1 arose in an earlier sequence.

[289] “Applying Dr. Leininger's multiplier, the recoverable *damnum emergens* is therefore US\$ 273,757,306.”

#### 4. *Lucrum Cessans*

##### a. General comments

[290] “The claimant puts forward a figure of US\$ 1,946,574,970.

P 84 [291] “Here the claimant seeks the benefit of its bargain. This is a fundamental aspect of the law of contracts; if recovery were limited to what a claimant has spent in reliance on a contract which has been breached, an incentive would be created which is contrary to contractual morality: obligors would generally find it in their interest to breach contracts which turn out to be valuable to their co-contractant. Parties do not enter into contracts involving risk in order to be repaid their costs. To limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially ● intolerable when that party was at full risk for the amount of investments made on the strength of the contract.

[292] “As seen above, Art. 1246 of the Indonesian Civil Code – echoing its precursor, Art. 1149 of the French *Code civil*– provides for the recovery of lost profit. The Arbitral Tribunal has been directed to Indonesian court decisions which have indeed granted such relief. (29) But the Code goes on to set out limiting factors which, again, are quite familiar. Art. 1247 (congruent with Art. 1152 of the *Code civil*) restricts recovery to damages foreseeable at the time of contracting; and Art. 1248 (congruent with Art. 1284 of the *Code civil*) requires that damages be the ‘immediate and direct result of the breach’.

[293] “In the numerous legal systems where these – or similar – rules prevail, the effect of the limiting factors is often seen in the choice of words. When they disallow claims, judges and arbitrators use pejorative and conclusory terms like ‘remote’ or ‘indirect’– i.e. the opposite of immediate and direct. To some extent the appositeness of such labelling is in the eye of the beholder, and Mr. Tumbuan may therefore be both wise and realistic when he opines that: ‘The test to be applied is one of reasonableness and equity’. Indeed, Mr.

Tumbuan could have invoked the familiar *Sapphire* precedent, where the arbitral tribunal used precisely the words 'reasonable and equitable' to award lost profits where no sum could be determined with exactitude. (30) Mr. Tumbuan's evidence is however less persuasive when he immediately goes on to conclude that to show that claims of 'very large sums of damages ... are not absurd ... will be a heavy burden when the sum claimed is totally out of proportion to the capital invested'.

[294] "The trouble with this conclusion is that it applies to circumstances when the value of a contract is subject to the vagaries of all forms of risk, including the commercial risks of market share and price fluctuations, currency and inflation risks, and the risks of governmental interference. When these risks are extant, the notion of some form of proportionality – i.e. a sense of a 'normal' return on invested capital – may make sense. But the ESC in this case explicitly excluded each of these risks. That left only the far less troublesome risks of production, which on the evidence have to a large extent been resolved: the claimant was able to mobilise the capital necessary to conduct operations and to build the physical plant; the claimant had the know-how to generate electricity from the field; and the reservoir contained substantial energy resources – albeit  
P 85 debatable as to their volume – capable of ● sustaining production over the 30-year life of the purchase obligation. Indeed, these conclusions are conceded by PLN and its expert witnesses.

[295] "The well-known *Aminoil* award is sometimes invoked as support for the proposition that the proper measure of recovery is that of 'a reasonable rate of return' as opposed to the demonstrable profit stream from the particular venture that has been interrupted. Such reliance is misplaced. For while it is true that the *Aminoil* award applied such a standard (and on that basis rejected the claim based on a 30-year projection of profits under the relevant concession agreement), this was the consequence of the Arbitral Tribunal's having found that the parties had in fact 'adopted' the standard of a reasonable rate of return in seeking to adjust the terms of their agreement in order to conform with an accord reached in 1974 between the Gulf States to harmonise their tax and royalty rates. (31) The Arbitral Tribunal was careful not to be seen as making general pronouncements: '... the determination of the amount of an award of "appropriate" compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion'. (32)

[296] "The 'relevant circumstances' in the *Aminoil* case – apart from the parties' mutual adoption of the reasonable-rate-of-return standard – included the fact that the concession agreement had been in force since 1948; by the date of the award 34 years later, the factors of risk, and reward for risk, were to a large degree played out.

[297] "The significant controversies with respect to lost profits therefore relate to the quantities that should be deemed to be covered by PLN's take-or-pay obligations, and the discount rate that should be applied to the future income stream. To the extent that the claim is based on production volumes that appear certain, the issue of proportionality to invested capital does not arise; the lost profits flow directly from the contractual allocation of risk."

#### b. The reservoir

[298] "The plain meaning of the ESC is that the claimant was entitled to develop the Dieng field up to a capacity of 400 MW. But the claimant would have been paid only for the quantities of energy it was in a position to generate, and these were obviously limited by the size of the reservoir.

[299] "The claimant's lost-profit projections are based on its contention that the 'proven' reserves of the Dieng field amounted to 240 MW; PLN's expert ● disagrees, and puts forward the figure of 130 MW as proven reserves for the field.  
P 86

[300] "It should be immediately apparent that the stakes of this debate are prodigious.

[301] "The Arbitral Tribunal has decided to resolve the reservoir controversy entirely in favour of PLN. It does so even though it takes as *probable* that the true volume of the reservoir is indeed as large as the claimant contends, and although it could thus have justified the higher figure – and a fortiori some figure between the two. Before explaining the Arbitral Tribunal's reasoning on this crucial matter, it is necessary to consider the evidence adduced with regard to estimation of the reservoir.

[302] "Before putting forward numbers representing anticipated sales and profit margins, the claimant naturally must prove that the underlying asset (the energy resource) indeed exists, and that the claimant would in all likelihood have been able to turn it into deliverable electricity.

[303] "The evidence for these two propositions was notably put forward by the expert testimony of Dr. Subir K. Sanyal, a highly experienced engineer and President of GeothermEx, Inc., of California....

[304] "On the basis of resource information generated by the claimant's activities to date, Dr. Sanyal concluded that: – The 13 productive full-size wells in the Dieng field have total tested capacities of 162.3 MW.–Volumetric estimation of reserves indicates that energy

reserves are adequate to support a 245 MW plant for 30 years with a confidence level of 90%.’ – However, the ‘most likely’ estimate – i.e. one that is less conservative than the 90% ‘confidence level’ required by lenders to projects of this type – is in the range of 280 MW to 340 MW.

[305] “The damages sought by the claimant are in fact based on the assumption of a sustainable capacity of 245 MW for a period of 30 years. Relying on its right under the ESC to develop geothermal plants of up to 400 MW of electric generating capacity, and asserting that it is ‘highly likely’ that it would have developed additional resources beyond the 245 MW capacity, the claimant contends that its calculations are ‘very conservative’. Indeed, the claimant’s projections are further reduced by assuming an operating 240 MW capacity due to the configuration of the turbine Units: to the existing 60 MW Dieng Unit 1 would be added two 80 MW Units (assumed operational in March and October 1999, respectively) and one 20 MW Unit (assumed operational in January 2001). ●

[306] “Not surprisingly, in view of the stakes, PLN also selected an outstanding specialist to provide the Arbitral Tribunal with expert evidence, in the person of Dr. Malcolm Alister Grant of New Zealand....

[307] “Dr. Grant’s testimony was not that Dr. Sanyal was wrong, but that his method of volumetric estimation, focusing on a stored heat calculation, was not optimally reliable, since it contains:

‘a large element of subjectivity ... due to the many judgments that must be made about what to include or exclude. In the early days of geothermal exploration there have been a number of gross overestimates of reserves, based usually on this method.’

[308] “Dr. Grant described his preferred method as being that of ‘power density’: taking the known productive area of the reservoir and multiplying its dimensions by a notional MW density per planned unit which is derived from ‘the observed actual generation achieved and sustained over years by geothermal stations’. This method:

‘is calibrated against actual generation achieved in actual projects, rather than being purely theoretical. The use of productive area, rather than field area defined by geophysics or isotherms, means that areas of hot but unproductive rock are always excluded.’

[309] “This approach thus uses available data from the Dieng field, compares it with the output of numerous developed fields that present similar temperature distributions, and calculates the productive capacity of the field on that basis.

[310] “That Dr. Grant’s method has some apparent advantages seems clear; unlike Dr. Sanyal’s approach, perforce yielding a gross estimate from which must be deducted an unknown ‘parasitic load’ caused by physical features such as gas deposits, it promises a net figure. But it is not without its problems; as Mr. Beckett was able to show through his cogent cross-examination, the selection of assumed comparable fields is itself a controversial matter which reveals the numerical outcome as less of a hard figure than what it appears to be. Even the first step, i.e. the plotting of Dr. Grant’s ‘known productive area’, is a matter where different analysts might come up with different configurations depending on their view of the relevant distribution and results of relevant wells.

[311] “Needless to say, these elements of the debate are illustrative rather than exhaustive, and do not begin to give justice to the high quality of the contributions of the two experts. In addition, each was tested by probing and ● well-prepared cross-examination, which exposed the inherent difficulties of geothermal field assessment without in the least detracting from the credibility of both experts, without whose participation the Arbitral Tribunal would have been at sea – and on an unfamiliar one at that. Geothermal fields are dynamic; fluids pass in and out of the system continuously. Their lithology does not appear in well-ordered sediments – not intuitively surprising when one considers formations of a volcanic origin – and is therefore unpredictable. And their output is necessarily tied to a given plant capacity; additional quantities of steam cannot be transformed into electricity. Hence the natural comparison with the assessment of hydrocarbon resources is of limited value.

[312] “It is fortunately quite possible to accept the evidence of both experts even though their conclusions diverge. This is because the exercise is one of *estimation*; each analysis may be plausible and well founded in its own terms, and the Arbitral Tribunal does not have the divinatory powers that would be necessary to determine who would have been right if operations had continued.

[313] “In short, based on this reasoning the Arbitral Tribunal will accept Dr. Grant’s figures without rejecting those of Dr. Sanyal. Indeed, if the test were one of *probability* the Arbitral Tribunal would likely *prefer* Dr. Sanyal’s figures. But given all the circumstances of this case, recalling the impressive statements of Dr. Nasution (see [182]) which have persuaded the Arbitral Tribunal to be as lenient with PLN as one possibly could while still respecting the imperatives of contractual reliability, and accepting Mr. Tumbuan’s evidence that evaluations of quantum should have an equitable component, the Arbitral Tribunal prefers the *certainty* that comes from taking not Dr. Sanyal’s numbers, nor one

between the two that would factor in the more or less convincing parts of the evidence from each side, but the lowest figures of all: those put forward by PLN's expert. Thus, while declining to disregard or amend the Contract on the grounds of changed circumstances (see [213]), the Arbitral Tribunal as a matter of equity nevertheless gives great weight to those circumstances when making the allowance for lost profits.

[314] "But there is another, even more compelling reason why the Arbitral Tribunal adopts Dr. Grant's figures."

c. Hypothetical profits on investments not yet made

[315] "The claimant's use of Dr. Sanyal's reservoir estimate would lead to recovery *beyond a return on investments actually made*. It would justify hundreds of millions of dollars in damages because PLN thwarted a contractual right to make future investments which PLN was bound to remunerate at prices ensuring substantial profits. ●

[316] "The parameters of the discussion may readily be resumed as follows:

Contractual entitlement	400 MW
Proven reserves (Sanyal)	245 MW
Proven reserves (Grant)	130 MW

Anticipated capacity used as the basis of the claim:

Dieng Unit 1 (completed)	60 MW
Dieng Unit 2 (March 1999)	80 MW
Dieng Unit 3 (October 1999)	80 MW
Dieng Unit 4 (January 2001)	20 MW
Total	240 MW

Capacity reflected in investments already made:

Dieng Unit 1 completed	60 MW
Dieng Unit 2 only 30% complete, (33) so notionally	24 MW
Total	84 MW

In other words, having already accepted PLN's reduction from 240 MW to 130 MW, the Arbitral Tribunal now questions whether the number should not be further reduced to 84 MW. The importance of this issue is evident; what is at stake is a preponderance of the entire claim.

[317] "True enough, damages for the loss of a bargain may in principle be granted even when the victim of a breach has not yet incurred significant costs. The *Sapphire* award provides an illustration. It arose from an oil concession agreement which had entered into effect in July 1958 but was held to have been breached by the National Iranian Oil Company within a matter of months, i.e. during an early stage of exploration and before any drilling, let alone extraction or sale. An expert called by the claimant gave his opinion that at most *Sapphire* might have made profits of US\$ 46 million, but that if there were no commercial quantities it might have lost US\$ 8 million. In addition to compensation for its limited costs during the short life of the contract, the sole arbitrator, fixing the quantum 'ex aequo et bono by considering all the circumstances', (34) awarded the claimant a lump sum of US\$ 2 million for its loss of chance, reducing the claimed amount of US\$ 5 million because of uncertainties concerning the magnitude of oil reserves as well as the economic risks over the 25-year life of the concession. ●

[318] "But there are fundamental differences between the *Sapphire* agreement and the ESC. First of all, one can hardly overlook the fact that the claimant seeks to be made whole for all of its expenditures, and to recoup a return thereon calculated over 30 years, before even getting to the issue of loss of bargain on investments not yet made at the date of the breach. In *Sapphire*, if the sole arbitrator had not allowed the latter head of recovery he would in fact have tolerated a breach with impunity; i.e. he would have allowed the defendant to put itself in the claimant's shoes merely by paying off its actual costs. And even more fundamentally, whereas in *Sapphire* the foreign investor had entered into the agreement on the basis of producing oil for export on the world markets, in the present case it was explicitly understood that the only purchaser for the energy produced would be PLN. In such circumstances, it strikes the Arbitral Tribunal as unacceptable to assess lost profits as though the claimant had an unfettered right to create ever-increasing losses for the State of Indonesia (and its people) by generating energy without any regard to whether or not PLN had any use for it. Even if such a right may be said to derive from explicit contractual terms, the Arbitral Tribunal cannot fail to be struck by the fact that the claimant is seeking to turn the ESC into an astonishing bargain in circumstances when performance of the Contract would be ruinous to the respondent. (A US\$ 2.3 billion return – including the unpaid invoices – would represent a 630% profit on a US\$ 315 million investment.) What troubles the Arbitral Tribunal is less the level of profitability in and of itself than its contrast with the losses facing PLN. To

extract the full benefit of the hard terms of the ESC with respect to investments *not yet made*, in a situation where that benefit will clearly exacerbate the already great losses of the cocontractant, strikes the Arbitral Tribunal as likely to constitute an abuse of right inconsistent with the duty of good faith which is fundamental to the Indonesian law of obligations.

[319] “The harshness of the claimant’s position was reflected in the testimony of its chief executive officer. When asked whether his view was that ‘no regard needed to be had to PLN’s energy requirements over the entire period of the contract’, Mr. O’Shei answered bluntly:

‘I believe PLN was the only one in a position to forecast their energy requirements and that they should take that into account as they decide what contracts to enter into and what contracts not to enter into.’

While understandable in the mouth of a corporate officer charged with generating profits for shareholders, this comment represents an extreme view of *pacta sunt servanda* which, in the view of the Arbitral Tribunal, finds its limits in this case. These limits emerge in the concept of abuse of right. ●

[320] “PLN cited the command of Art. 1338 of the Civil Code that all contracts should be performed in good faith, and that this principle justifies a revision of the terms of the Contract.

[321] “More specifically, PLN relies on the expert evidence of Mr. Tumbuan to the effect that changed circumstances may entitle a party to obtain a declaration of suspension or even extinguishment of the contract. Indeed, he expressed the view that an Indonesian court could

‘elect to intervene to reform the contract terms in a manner it determines would permit performance in good faith to implement the intent of the parties’.

[322] “Mr. Tumbuan also invoked Art. 2(1) of the Usury Act of 1938 to the effect that a ‘disproportion’ of obligations may entitle a judge to mitigate the obligations or even to declare the contract void.

[323] “The claimant objects that (i) the Usury Act applies only to contracts which reflect an intolerable difference of value *from their inception*, whereas the present case involves supervening events and at any rate (ii) the Parties have, by the wording of Art. 8.3 of the ESC, precluded the applicability of Indonesian law to mitigate the effect of contractual terms.

[324] “The Arbitral Tribunal does not find it necessary to rule on either of these objections, because in this matter it will apply the doctrine of abuse of right as an element of overriding substantive law proper to the international arbitral process. This is not an elaborate body of law. It has been applied notably when arbitral tribunals have upheld the principle of the autonomy of the arbitration clause (35) or refused to accept that a State invoke its internal law as an impediment to its consent to arbitration. (36) In *Benteler v. Belgium*, the arbitral tribunal considered that the rule had acquired the status of ‘a substantive rule of private international law the observance of which is obligatory in international arbitration’. (37) Professor Böckstiegel has put it thus: ‘where the state or one of its public entities has accepted an arbitration clause, it is considered as *part of international public policy* that they cannot later claim that they could not submit to arbitration due to their own national law’. (38) The fact that such universal rules are few in number does not detract from ● their value when used to ensure the legitimacy of the international arbitral process.

[325] “In support of its inclusion in this limited corpus, it may be confidently said that the principle of abuse of rights (*abus de droit*, *Rechtsmissbrauch*) is universal. In his familiar study of general principles, (39) Bin Cheng devoted the entire Chapter 4 to this rule, which he also formulated in the obverse: ‘good faith in the exercise of rights’. In the area of present interest, the doctrine has occasionally been applied to defeat the abuse of legal forms: *ex re sed non ex nomine*. Prof. Böckstiegel writes that manipulation of the regime applicable to legal entities controlled by a State should not be effective to evade that State’s obligations. (40)

[326] “If the general principle may be invoked *in favour* of the foreign investor so as to avoid the result that its legitimate expectations are frustrated by unworthy manoeuvres, so too, in the Arbitral Tribunal’s view, may it be invoked in certain circumstances *against* claims for profits which would tend to impoverish the host State.

[327] “The principle is old; one need only recall Cicero’s *summum jus, summa injuria*. To say that the blind application of a rule may lead to iniquitous results is to recognise that the search for justice would fail if the law could do no more than validate relative positions of strength, or consolidate the status quo indefinitely. Thus, the exercise of a particular right may be inhibited if it would abase the law.

[328] “The objection to the effect that this doctrine opens the door to subjective decisionmaking is to be taken seriously, but is not decisive. The Arbitral Tribunal notes



that the claimant has anticipated a risk of a finding of abuse of right, and argued vehemently against it, relying in particular on a treatise co-authored by a member of the Arbitral Tribunal. The Arbitral Tribunal does not believe that either Party has committed an abuse of right; rather, it wants to ensure that none occurs. It appreciates the difficulties of application to which the claimant alludes, but believes they are surmounted in the particular facts of this case.

P 93 [329] “In the first place, the legal process necessarily depends, to some extent, on the personal convictions of the decisionmaker. If this were not so, the common law could hardly accommodate the notion of implied terms, nor could the civil law give effect to the fundamental rule – reflected in Art. 1338(3) of the Indonesian Civil Code – that contracts must be performed in good faith. Secondly, the principle must be applied with great prudence: only when necessary to correct obvious excess. In the present case, the advent of ● economic turmoil does not prevent the claimant from seeking its *damnum emergens*; it is blameless, and entitled on a contractual basis to be made whole. Nor does this turmoil disentitle the claimant from seeking damages reflecting the benefit of its bargain; as already affirmed, contractual morality demands that disincentives to non-performance be maintained (see paragraph [291]).

[330] “The Arbitral Tribunal believes that this is a case where the doctrine of abuse of right must be applied in favour of PLN to prevent the claimant’s undoubtedly legitimate rights from being extended beyond tolerable norms, on the grounds that it would be intolerable in the present case to uphold claims for lost profits from investment not yet incurred.

[331] “In reaching this conclusion, the Arbitral Tribunal is mindful of the status of PLN as an arm of governmental policy acting in pursuit of the public welfare. The ESC itself was not directed to the narrow ends of profitable trading but must be seen, in the words of the *Aminoil* award, as ‘one of the essential instruments in the economic and social progress of a national community in full process of development’. (41) As noted above in distinguishing this case from *Sapphire*, the energy supplied under the ESC was not exportable; the only purchaser was PLN. To oblige PLN to foot the bill for massive future investments, in circumstances where 100% of the additional capacity supplied as a result thereof, at the contractual dollar prices, would not only have been useless but have caused direct injury, would be perverse.

[332] “Another consideration concerns the nature of the breach. The respondent did not seek actively to dispossess the claimant of valuable contractual rights; it has suffered helplessly from a precipitate deterioration in the macroeconomic value of a project with respect to which it had accepted the entire market risk. In this regard, this case stands in stark contrast with a number of illustrious arbitral precedents.

P 94 [333] “It is instructive to consider the precise words of the *Lena Goldfields* award of 1930. (42) The amount of the award, UK£ 13 million (plus interest), has been estimated as having a current equivalent of UK£ 350 million. The case arose out of the much-publicised confiscation by the USSR of a concession under which *Lena Goldfields Ltd.* controlled 30 per cent of the gold, 80 per cent of the silver, and 50 per cent of the copper, lead, and zinc production of the Soviet Union. In assessing the compensation to be made, the arbitral tribunal measured ‘the present value, if paid in cash now, of future profits which the company would have made *and which the [Soviet] Government now can make*’. (43) ●

[334] “The words in italics reflected the arbitral tribunal’s determination to repair an *unjust enrichment*. It is important to note that it did not apply this norm as part of a national law, but as a ‘general principle of law’ recognised under Art. 38(1)(c) of the Statute of the Permanent Court of International Justice (replicated today in the Statute of the International Court of Justice, an instrument of the United Nations to which Indonesia is, of course, a party).

[335] “It may be that these words have not been given the attention they merit in the abundant literature dealing with arbitration and State contracts because the issue of *lucrum cessans* has so often come up in the context of cases where the defending State entity has acted to evict the foreign investor from a healthy ongoing profitable venture. Thus the notion of the victim’s lost profits has gone hand in glove with that of the breaching party’s gain.

[336] “In the present case, the lost profit claim is the numerical representation of contractual stipulations. It is not the expectation of what will happen in real life. There is no realistic prospect of PLN intervening in the immediate wake of this Award to implement the investment programme envisaged under the ESC.

[337] “Viewed in this light, the present case does not resemble the situation faced in the *Lena Goldfields* case, or in a number of more recent cases also relating to the nationalisation of ventures involved in the extraction of natural resources.

[338] “It bears a much greater resemblance to cases where the respondent could not be accused of having sought to usurp a revenue stream. Three illustrations may be useful.

[339] “The *SPP v. Egypt* dispute gave rise to numerous arbitral and judicial decisions during the 14 years between its inception and resolution. For present purposes the relevant decision is the final award rendered on 20 May 1992 and dealing with quantum.

(44) The case involved an investment project to construct a large destination resort. The Government cancelled the project in 1978 – reversing prior approvals – at a time when the project vehicle had spent some US\$ 9.5 million on development costs. The arbitral tribunal recognised the lawfulness of the cancellation, justified by the purpose of protecting antiquities on the proposed site, but held that it gave rise to a right to compensation. The claimant put forward an evaluation of its investment in the project vehicle computed, by the DCF method, at US\$ 41 million. The arbitral tribunal rejected this basis for recovery on the grounds that the project was ‘in its infancy and there is very little history on which to base projected revenues’. (45) While allowing recovery of capital investments, loans, and development costs, ● the arbitral tribunal accordingly limited compensation for the ‘loss of commercial opportunity’– which it determined by evaluating profit margins on sales of ‘villas and multi-family sites’ already concluded at the time of cancellation – to US\$ 3,098,000.

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[340] “In *SOABI v. Republic of Senegal*, a claimant which succeeded in establishing that the respondent State had breached a contract for the construction of 15,000 units of low-income housing had sought an award of lost profits in the amount of FCFA 3,410 million. (At the time, the conversion rate was fixed at FCFA 50 to the French franc.) This represented approximately a 7% margin on the projected sales price for each unit. Referring to the ‘impossibility of establishing the profits which would have been earned if the parties’ relations had not been broken off, in connection with a 10-year programme of construction and sales, the arbitral tribunal granted only FCFA 150 million for the claimant’s ‘loss of a chance’. (46) On the other hand, the tribunal granted some FCFA 808 million in damages on account of wasted costs and past interest thereon. It should be noted that for a number of reasons (e.g., lack of financing and failure to attribute a building site connected to utilities) not a single housing unit was ever built.

[341] “A third and final illustration, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, (47) involved a claim for the destruction of the claimant’s shrimp farm by security forces, in violation of undertakings to provide ‘full protection and security’ contained in a UK/Sri Lanka investment treaty. While the arbitral tribunal granted compensation based on an evaluation of tangible assets, it rejected all claims for intangible assets and loss of future profits, finding that the enterprise did not have ‘proven future profitability’.

[342] “The immediate purpose of recalling these precedents is not to put into question the plausibility of the claimant’s projections. In all material respects, the contractual certainty with respect to the generation of revenues under the ESC puts the claimant’s demonstration on far more solid ground in the present case than in any of the cases just cited. Rather, the point is to observe that the recovery is moderate where the purpose and consequence of the acts that led to liability were not to replace the claimant in its enjoyment of the benefits of an existing or prospective revenue stream. The Government of Egypt had no intention of carrying on the Pyramids Oasis project; the Government of Senegal did not take over the housing development; the security forces of the

P 96 Government of Sri Lanka had no commercial motive when they shelled and ● overran the shrimp farm. Although it is certainly true that the primary goal of monetary compensation in international arbitration is to make the victim whole rather than to prevent unjust enrichment, it seems justified to conclude that the prospect of unjust enrichment buttresses a claim for lost profits – as in *Lena Goldfields*– whereas its absence has a moderating effect.

[343] “To seek to apply the ESC so as to permit the claimant to reap pure profit by reference to hypothetical *future initiatives* in pursuit of an agreement which has become an instrument of oppression would be like stepping on the shoulders of a drowning man. The Arbitral Tribunal finds that it would be insufferable, and therefore an abuse of right.

[344] “And just as Indonesia’s pro-consensual national policy of *Pancasila* may be invoked against PLN for having failed to take account of the interests of the claimant (see paragraph [192]), so too it may be invoked against the claimant to preclude that part of its claim which contemplates future initiatives that are entirely favourable to its interests and entirely noxious to those of its contracting partner.

[345] “If one thus rejects all lost profits claimed as the anticipated fruit of investment not yet effected by the claimant, what would be the result?

[346] “There cannot be an inevitable and arithmetically correct answer, because the calculations depend on a series of projections. They could reasonably be adjusted by a large number of variables such as construction delays and cost overruns, not to mention differently perceived discount rates reflecting risk.

[347] “The Arbitral Tribunal considers it appropriate to compare the present value of the costs it accepts have been incurred by the claimant (i.e. US\$ 273,757,306) with the amount the claimant itself has put forward as the present value of its projected costs over the life of the Contract if it had been performed (i.e. US\$ 748,564,000), and to limit recoverable profits to that proportion – i.e. 36% of the total claim of lost profits. The Arbitral Tribunal appreciates that this comparison favours PLN in the sense that the claimant might reasonably argue that the latter figure should be reduced given the Arbitral Tribunal’s disallowance of part of the claimed past costs, in order to create a more exact comparison. This advantage given to the debtor is intentional.”

d. Present value of net future income

P 97 [348] “Having sought to prove: – that it had the operational ability to achieve a given output of electricity, – that this output was well within reservoir estimates, and finally ● – that the output fell even more comfortably within the contractual limits of PLN’s purchase obligations, the claimant affirms that total projected revenues until the year 2030, discounted at 8.5% to achieve their claimed present value, would be in the amount of some US\$ 4.048 billion.

[349] “Projections are naturally also made of costs associated with these revenues, including not only capital and operating costs but also taxes and royalties. The claimant uses the same discount rate of 8.5% to calculate the present value of these charges. The net value thus derived is deducted from the total revenues to yield the claimed *lucrum cessans* of US\$ 1,946,574,970.

[350] “Limiting this amount under the analysis carried out above, the Arbitral Tribunal would thus, without questioning the claimant’s methodology, derive *lucrum cessans* in the amount of US\$ 710,499,864.

[351] “But of course the claimant’s methodology must be questioned.

[352] “To defend the use of its 8.5% rate, the claimant relied on the expert testimony of Professor Richard Ruback of the Harvard Business School, who with consummate proficiency demonstrated his DCF calculations before the Arbitral Tribunal.

[353] “Results vary greatly depending on the discount rates used, especially when the time frame is as long as in the present case. For example, as Professor Ruback showed, if a 16.5% discount rate were used instead of 8.5%, the present value of the claimant’s future revenue stream would be reduced by some 70%. The fact that less than a doubling of the discount rate produces more than a two-thirds reduction of the present value is to be explained by the familiar effect of compounding.

[354] “On the [respondent’s] side, Mr. Ch’ng Chin Hon of Ernst & Young defended the application of a 33.7% discount rate, which of course yielded sharply lower results. Instead of a present value of future net cash flow of US\$ 1.961 billion under Professor Ruback’s approach (penultimate update), Mr. Ch’ng obtained a value of US\$ 255 million if he accepted the claimant’s projections of revenue and costs; or one of US\$ 199.5 million under his proposed adjustments of those projections, or yet again US\$ 144 million on the basis that revenues were not generated until January 1999.

[355] “There was an air of unreality with respect to both Parties’ arguments with respect to the DCF method. Each appeared determined to deny the undeniable; the claimant seemed to ignore studiously that it had embarked on a venture in Indonesia, and PLN that it had signed a firm undertaking to pay in US dollars.

P 98 [356] “Thus, although one can hardly fault Professor Ruback’s evidence as a matter of abstract financial analysis it was of limited value in this case. ●

[357] “His opinion was rightly offered on a hypothesis excluding breach. It would be improper for PLN to obtain a reduction of its debt by invoking a risk that it would violate its own contractual undertakings. Those undertakings include a provision to compensate for the effect upon the claimant of any Governmental action to alter ‘taxes or other exactions’ (Sect. 5.5 of the Contract), and a force majeure clause which maintains PLN’s obligations notwithstanding acts of Government. The Parties thus find themselves in a situation similar to that examined by the Iran-US Claims Tribunal in the *Phillips Petroleum* award, which accepted a DCF analysis and stated that there should be no reduction in the value placed on the venture on account of ‘threats of expropriation or from other actions by the respondents related thereto’. (48)

[358] “But the principle that PLN cannot reduce the amount of its liability by affirming the likelihood that it would not perform the contract goes only so far. Nor is it conclusive to say, as the claimant justifiably does, that it negotiated a rigorous contract which protects the ESC revenue stream unconditionally. The fact remains that it is riskier to enter into a 30-year venture in Indonesia than in more mature economies. And it is no answer to say that the contract has allocated 99% of the risk to the Indonesian side. After all, there are documents which by their terms allot 100% of the risk to the debtor: bonds. Although they may be denominated in US dollars, although they may stipulate absolute obligations to pay, it still makes a difference whether the issuer is Switzerland or Swaziland.

[359] “Mr. Ch’ng, on the other extreme, justified his high (47.8%) ‘risk-free rate’ for investments in Indonesia by reference to a number of factors specific to his notion of the relevant country risk. (It should be understood that a risk-free rate is one which needs to be offered if one is to purge a capital placement of the perception of risk. Mr. Ch’ng was very insistent on the point that the risk-free rate is not to be equated with the discount rate, which he ultimately believes should be 33.7%, because it derives from what he called a Weighted Average Cost of Capital calculation.... In any event, risk factors clearly affect either figure.) His computations were unfortunately not only complex, but also obscure, as were his oral explanations. The Arbitral Tribunal concedes that it struggled unsuccessfully with his evidence, but has the impression that the same may also be true for the authors of both Parties’ post-hearing briefs. Given the obvious competence with which Mr. Ch’ng addressed other topics, the explanation for his impenetrable testimony

P 99 with regard to the DCF issue may be that he had determined to seek to defend an indefensible thesis. The simple fact is that a dollar-denominated debt, even if it is owed by an Indonesian party, is not burdened with the full macula of the country risk; the factor of currency depreciation is removed.

[360] “To put it in a nutshell, PLN has failed to convince the Arbitral Tribunal that a US dollar paid from Indonesia is worth less than a US dollar paid in New York.

[361] “Nor does it avail PLN to stress repeatedly, as it does, the ‘probabilistic’ nature of the estimates of the steam field reserves, as well as the risk of premature exhaustion or depletion through drilling. Given the fact that the Arbitral Tribunal has adopted reservoir estimates substantially inferior to the ones proposed by PLN’s own expert, these risks must be put out of mind as amply covered by a generous margin of error. The Arbitral Tribunal is persuaded that the reservoir is more than twice as voluminous as what is necessary to justify its award.

[362] “On the other hand, PLN has raised a series of valid doubts to the effect that revenues could be diminished by, inter alia: – a disruption, for technical or other reasons, of the rate of installation of Units;– volcanic or hydrothermal eruptions;– technical disputes as to the application of the price formula (for example, reference to a Unit Rate Capacity test in the absence of an operational Mechanical Gas Extractor could exaggerate the URC and thus the price); and costs could be increased by, inter alia: – unanticipated expenditures on account of such problems as scaling due to the chemical composition of brine affecting the state of pipes, wells and turbine blades; or the need to drill more so-called make-up wells than anticipated in order to maintain the steamfield pressure;– insufficient clarity in the claimant’s computations as to the breakdown of costs in rupiah as opposed to US dollars.

[363] “Yet these are not the factors that weigh the heaviest in the minds of the arbitrators.

[364] “First there is the risk of default, not by intentional breach which is excluded in principle (see paragraph [357]), but by default due to larger forces – political, social, and in any event macroeconomic – which de facto paralyses contractual performance in a manner which makes it fatuous to imagine that the creditor is protected by paper entitlements. This is the fundamental issue of country risk, obvious to the least sophisticated businessman. ●

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[365] “Secondly, the Arbitral Tribunal considers that the claimant’s purported perception of the ESC, no matter how correct in a literal sense, is too good to be true; this is indeed one of the reasons the 3% risk component of the claimant’s proposed 8.5% discount rate seems absurd. Indeed, in a different context (i.e. when explaining the need for irreversible purchase commitments to serve as security for financing) the claimant itself has stated that there were significant risks: *steamfield risks*, including futile drilling and reservoir damage; *construction and operating risks*, including

‘shortages or increases in the price of equipment, materials and labour, delays in delivery of equipment and material, labour disputes, adverse weather conditions, and unforeseen engineering, design, environmental, or geological problems’,

as well as other ‘substantial *performance risk*’ associated with geothermal development. Moreover, the risks must be considered exacerbated when assessing the hypothetical value of the loss of a bargain over a 30-year period, especially in the context of an agreement which had been in existence for less than two years, and had resulted in no deliveries, at the time it became endangered. Finally, one can hardly ignore that PLN is not a purely commercial enterprise engaged in venture capitalism for the sole benefit of its shareholders, but an instrument of State policy in the interest of public welfare. To view the terms of a contract of this duration as establishing immutable quantities and prices seems quite unrealistic.

[366] “Thirdly, the arbitrators have considered the fact that recovery of its capital investment at this point puts the claimant in a position of being able to put those amounts to beneficial use. In cases of breach of long-term contracts, the prospect of reinvestment of recovered funds in profitable activities elsewhere is an obviously realistic possibility. A claimant may in theory be better off in the end because it was able to cash in early. Especially when the contract breached had an intended duration of decades, the prospect of double recovery arises. Or, less controversially, the Arbitral Tribunal perceives the relevance here of the traditional rule that the judge or arbitrator should take account of possible benefits in the wake of a breach.

[367] “It scarcely needs to be pointed out, *en passant*, that this reflection reinforces the Arbitral Tribunal’s refusal to offer compensation on account of profits on investments not yet made; the claimant have other opportunities.

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[368] “Assuming that PLN had never breached the ESC nor ever threatened to do so, the Arbitral Tribunal considers with no fear of serious contradiction that the claimant would have continued to be exposed to a number of substantial risks throughout the productive life of the industrial Units. As ● matters stand, after PLN has satisfied the present Award, the recovery received by the claimant will no longer be exposed to these risks. This unexpected and unbargained-for early security is an advantage to the claimant for which

due credit must be also allowed in calculating the amount of the damages payable by PLN.

[369] “The Arbitral Tribunal's opinion in this respect is supported by the fact that the claimant's projected internal rate of return for the project, as calculated by the Arbitral Tribunal ... is approximately equal to 26%. The significant disparity between this figure and the discount rate of 8.5% proposed by Professor Ruback reinforces the Arbitral Tribunal's view that the risk premium of 3% included in the latter figure is unrealistically low. Although the internal rate of return relates to the entire term of the project and therefore takes account of risks which have already been successfully overcome by the claimant, the Arbitral Tribunal is nevertheless of the opinion that a significant part of the projected internal rate of return reflects continuing risks, to which the claimant would, assuming performance of the Contract by PLN, have been exposed over the entire remaining duration of the Contract.

[370] “Moreover, the fact that the claimant has been able to set up the present project with such a projected internal rate of return suggests to the Arbitral Tribunal that there is at least a possibility that the claimant may be able to use its recovery under the present Award to fund one or more new projects with a similar projected internal rate of return, and a similar level of risk, to those of the present project. But if the ESC had been performed by PLN, and if the claimant, following completion of construction, had wished to sell its future revenue stream on a non-recourse basis in return for an immediate cash payment, it is in the Arbitral Tribunal's opinion likely that the claimant would have been obliged to allow a discount rate considerably in excess of 8.5% in order to find a willing purchaser. In these circumstances, to grant the claimant an immediate payment corresponding to the net present value of the project discounted at a rate of 8.5% would in the Arbitral Tribunal's view place the claimant in a distinctly more favourable position than that in which the claimant would have found itself if the Contract had been performed by PLN.

[371] “Weighing the factors discussed in [362]-[370] as well as the consideration – favourable to the claimant – of the relative maturity and promise of the Dieng project, the Arbitral Tribunal holds that the most appropriate discount rate is 19%. The arbitrators make no pretence that this is the result of precise weighings of the discrete considerations that have influenced the arbitrators; nor do they wish to create the illusion that they have engaged in econometric modelling, or even calibrated costs and revenues with a time line that establishes hypotheses for the commissioning of  
P 102 generating Units, contingencies of ● reservoir evolution, and the like. Both the rate and its application reflect a series of adjustments made by the arbitrators in their equitable assessment of the evidence, and, in the circumstances of this case, resolving all doubts in favour of PLN, the debtor.

[372] “The Arbitral Tribunal is not aware of any instances of international arbitral tribunals carrying out their own DCF computations to replace those presented by one of the parties. Indeed, in the case of *Phillips Petroleum*, although the award clearly accepted the DCF methodology and contained a sophisticated discussion of its application in the context of a ‘careful and realistic appraisal of the revenue-producing potential of the asset’ including levels of production, costs, taxes, other charges, prices, and risks, (49) Chamber Two of the Iran-US Claims Tribunal explicitly stated that it ‘does not intend to make its own DCF analysis with revised components, but rather to determine and identify the extent to which it agrees or disagrees with the estimates of both Parties and their experts concerning all these elements of valuation’, (50) and that in particular it would not ‘substitute the claimant's discount rate with its own’. (51)

[373] “It may be objected that this approach exposes the ostensible adoption of the DCF method as something of a fig leaf. Indeed, it is difficult to connect the criticisms raised by the tribunal in the *Phillips Petroleum* case against the claimant's computations with the lump sum announced as the result of that Chamber's having taken account, in the traditional formulation, of ‘all relevant circumstances’. (52) True enough, the tribunal identified two kinds of factor that affected its view of the DCF calculation, namely general ‘equitable considerations’ (53) and ‘verification’ by means of an alternative valuation method (54) which looked to tangible investments and historic earnings. Nevertheless, it is legitimate to ask whether the result, in that case and often elsewhere, is not to create an illusion of scientific analysis to mask the reality of subjective approximations.

[374] “To be fair, there is nothing new under the sun. *Lucrum cessans* has always been an  
P 103 inexact science. As the arbitral tribunal put it in the *Delagoa ● Bay* case almost exactly one century ago, ‘such a computation made in advance on the basis of purely theoretical data cannot hope to be absolutely accurate but only comparatively likely’. (55)

[375] “The present Arbitral Tribunal wishes to be transparent in both its reasoning and its computations, fully recognising the limitations of an exercise where risks, costs, and revenues are conjectural, controversial, and imperfectly synchronised. The Arbitral Tribunal has followed three lodestars: (i) the DCF method is adopted in accordance with the understanding articulated above in paragraphs [234]-[244]; (ii) the claimant must bear the burden of demonstrating the validity of its hypotheses; (iii) the infirmities perceived by the Arbitral Tribunal with respect to those hypotheses have resulted in a recomputation which the arbitrators fully realise is imprecise, but which seeks to avoid



arbitrariness by compelling a thorough consideration of all relevant factors, all the while being conscious of erring, whenever imprecision is inevitable, in favour of PLN. Thus doubts have been resolved equitably in favour of the debtor.

[376] “There is no reason to apologise for the fact that this approach involves approximations; they are inherent and inevitable. Nor can it be criticised as unrealistic or unbusinesslike; it is precisely how business executives must, and do, proceed when they evaluate a going concern. The fact that they use ranges and estimates does not imply abandonment of the discipline of economic analysis; nor, when adopted by the arbitrators, does this method imply abandonment of the discipline of assessing the evidence before them.

[377] “Applying its chosen discount rate to the after-tax net cash flow projections provided by Professor Ruback, the Arbitral Tribunal accordingly hereby awards *lucrum cessans* in the amount of US\$ 117,244,000.

[378] “It will be observed that the amount awarded by the Arbitral Tribunal is nearly US\$ 17 million *less than the lowest* of the three alternative presentations of PLN's own expert, Mr. Ch'ng (see paragraph [354]). This result has one predominant explanation, namely the Arbitral Tribunal's refusal to grant lost profits on investments not yet made.”

## 5. Ramifications of the Overall Recovery

P 104 [379] “Given the premise that the value to the claimant of its entire investment and expectation has been destroyed, in light of the irremediable breakdown of its relationship with a monopsonistic purchaser, it would be impermissible for ● the claimant, once it has made its recovery, to claim any residual assets or other proprietary rights in the Dieng project.

[380] “The Permanent Court of International Justice confronted a similar issue in the *Chorzów Factory* case. After noting the impossibility of returning the physical asset in Poland to its wrongfully dispossessed German owners, the Court declared that compensation should be paid to the latter in lieu of *restitutio in integrum*. On behalf of its nationals, Germany asked that Poland be prohibited from producing nitrates at the factory to complete with the output of the former owners. The Court denied this request, noting that the compensation was intended to reflect ‘the present value of the undertaking’ and to ‘cover future prospects’. Once the compensation had been paid:

‘the Polish Government will have acquired the right to continue working the undertaking as valued’. (56)

In this case too, the Arbitral Tribunal holds that the physical assets *in situ*, as well as other proprietary interests developed in connection with the project, are lost to the claimant, but once PLN has paid the compensation determined by this Award the full residual benefit of all such assets – which in the hands of PLN may be considerable – will perforce have been redeemed by PLN, and thus to belong to it.

[381] “Accordingly, this Award obliges the claimant, upon payment in full of the amount awarded, to relinquish any such assets or rights to PLN, or to whomever PLN may see fit to designate. This obligation prevents the claimant from keeping the thing once it has received the price of the thing. This rule covers items large and small, such as the pipe casing inventory which Dr. Leininger posits ... as having a ‘salvage’ value. The Arbitral Tribunal considers that it is far better to give PLN the opportunity to extract the fullest possible benefit from the investment rather than treating the assets as scrap belonging to the claimant. The latter approach would reduce PLN's liability by only marginal amounts. The obligation of relinquishment shall apply to any assets or rights which the claimant may enjoy by virtue of either the ESC or the JOC. It should be noted that the Arbitral Tribunal purports to assert no jurisdiction with respect to the JOC, holding only that payment of this Award, which holds that the claimant's expenditures pursuant to the JOC were made in reliance on the ESC, shall trigger a duty to relinquish assets or rights the claimant may have under the JOC, whatever they may be.

P 105 [382] “Since the relief accorded to the claimant is computed with the intention of rendering a net comprehensive award, the Arbitral Tribunal establishes as ● a condition of its Award an ongoing obligation on the part of PLN to make the claimant whole, so that PLN shall to that effect assume (by reimbursement or direct payment in its stead) any Indonesian tax liability which may be assessed against the claimant as a result of this Award.

[383] “The Arbitral Tribunal believes it had no choice but to grant the claimant all of the reliance damages (sunken costs, or *damnum emergens*) that it could prove, but adopted a rigorously critical approach in evaluating the claimant's evidence. As for its lost profit claim (expectancy damages, or *lucrum cessans*), the claimant recovers less than 10% of the amounts it put forward.

[384] “As a result, in satisfying this Award PLN will disengage the claimant and be in a position to profit from the latter's costly investments. If PLN husbands the resources well, if the Indonesian economy and demand for energy are resurgent, and if the reservoir projections put forward by the claimant are revealed to be correct, the outcome of these proceedings may have been favourable to PLN notwithstanding its breach. As Mr. Marsudi

said: 'we have to appreciate this investment'. Indeed, Mr. Marsudi testified that he had visited the physical facilities at Dieng, which he described as an 'excellent power plant' from an 'engineering viewpoint'. Or, to quote PLN's financial expert, Dr. Leininger: 'In my mind, [the asset] still has a great deal of value because the economy is not going to be forever down'.

[385] "Anyone who agrees with Mr. Sroka that all IPPs took unconscionable advantage of PLN should not forget that the same ESC which incites acrid resentment today might just as well have been a source of great satisfaction for PLN – if electricity demand had remained high, and if the rupiah had strengthened instead of collapsed. In 1994, that was not only plausible, but the common premise of many financiers.

[386] "But the premise succumbed to a bitter wind. Having to deal with the circumstances as it has found them, the Arbitral Tribunal has sought to alleviate PLN's burden as much as possible while respecting the clear contractual entitlements of the claimant under an agreement which by its terms left very little to chance."

## X. Costs

[387] "In accordance with the fee basis discussed with the Parties on the occasion of the first procedural meeting in Jakarta on 6 and 7 October 1998, confirmed by a letter of the President of the Arbitral Tribunal dated 13 October 1998, as well as the final statement of disbursements contained in the President's letter dated 3 May 1999, the costs of arbitration as defined in Art. ● 38 of the UNCITRAL Rules, with the exception of 'cost for legal representation and assistance', amount to US\$ 722,846.

[388] "Under Art. 40(1) of the UNCITRAL Rules, the costs of arbitration 'shall in principle be borne by the unsuccessful party'. Although the same article goes on to specify that the Arbitral Tribunal has discretion to apportion the costs, the arbitrators see no reason to do so in this case. PLN's management of its contractual relationship with the claimant was poor. No matter the gravity of PLN's overall financial plight, there is no excuse for its failure to articulate its position clearly to the claimant, which was kept in a state of uncertainty and did not even receive responses to its requests for meetings and its offers of substantive concessions to alleviate PLN's plight. It is unacceptable for PLN, a large State utility, to plead that it was too confused or overwhelmed to inform the claimant whether or when it was prepared to pay a certain proportion of the price, or a price reflecting a certain rate of currency conversion, or even to give some concrete indication of the time when it would be making a proposal for an adjustment of contractual terms it was no longer fulfilling. (This was of course a contract which on any analysis is of great magnitude, and should have been given the fullest attention.) To recover its claim, even in the limited amount upheld by the Arbitral Tribunal, the claimant had no choice but to bring these proceedings. There is no reason to deviate from the general principle that the unsuccessful party should bear the costs.

[389] "Under Art. 40(2) of the UNCITRAL Rules, however, this general principle does not apply to 'the costs of legal representation and assistance'. With respect to such costs, there is no presumption that the unsuccessful party shall pay its opponent's costs; the Arbitral Tribunal is simply given discretion to 'apportion' these costs between the parties 'if it determines that apportionment is reasonable'.

[390] "The claimant seeks recovery of the sum of US\$ 2,440,363 on account of its costs of representation and assistance in this case; PLN seeks the amount of US\$ 2,251,559 as its legal costs. The Arbitral Tribunal, however, does not 'determine that apportionment is reasonable'. In this connection, the Arbitral Tribunal has in mind:

- that recovery of significant legal costs is foreign to the legal system of Indonesia, where the parties chose to hold the arbitration;
- that both parties come from countries where litigants broadly bear their own costs;
- that the claimant is awarded only a fraction of its total monetary claim, and, most of all, ●
- that PLN's failure to fulfil its obligations under the ESC was not the fruit of self-interested calculations, but of its powerlessness in the face of macroeconomic and political developments.

[391] "PLN declined to pay its share of the deposit called for by the Arbitral Tribunal, which was therefore entirely funded by the claimant. Accordingly PLN is ordered to reimburse the claimant for the costs mentioned in [387] above, i.e. the sum of US\$ 722,846. The amount of US\$ 12,500, i.e. one-half of the US\$ 25,000 which PLN unnecessarily advanced on account of Dr. Sanyal's second appearance (which did not eventuate), is deducted from this sum, yielding a total amount of US\$ 710,346. Each side is left to bear its own costs of legal representation and assistance."

## XI. Award

[392] "For the reasons stated above, the Arbitral Tribunal issues the following award, rejecting all contentions to the contrary:

- (i) The Arbitral Tribunal rules that PLN has breached the ESC and that its breach is of a

magnitude that justifies the termination of the relationship between PLN and the claimant under the ESC; that termination is hereby declared to be effective.

- (ii) In consequence of its breach, PLN is ordered immediately to pay to the claimant the sum of three hundred ninety-one million seven hundred eleven thousand six hundred fifty two United States dollars (US\$ 391,711,652) as damages and as costs of the arbitration, being the aggregate of the amounts held payable as stated in paragraphs [289], [377] and [387].
- (iii) It is a condition of this Award that PLN shall retain an ongoing obligation to assume, whether by reimbursement or by direct payment in its stead, any Indonesian tax liability which may be assessed against the claimant as a result of this Award.
- (iv) Upon payment in full of the amount so awarded, the claimant shall at PLN's request relinquish to PLN (or to a party nominated by PLN) such assets or other proprietary rights as the claimant may have in the Dieng project, by virtue of either the ESC or the JOC."

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## XII. Deposit of the Award

(....)

[393] "In the course of the hearings on the merits, the Parties agreed that the Arbitral Tribunal would authorise counsel to one of them, in place of the Arbitral Tribunal, to deposit the Final Award at the office of the Registrar of the District Court of Jakarta, pursuant to Art. 32(7) of the UNCITRAL Rules and for the purposes of satisfying such formalities of Arts. 634 and 635 of the Indonesian Code of Civil Procedure as may apply. The Parties also agreed that the particular person so authorised should be counsel to the Party which is awarded a net monetary recovery. In accordance with this agreement, authorisation to deposit the Final Award is given by a letter from the President dated this day."

### Statement of Arbitrator de Fina

[394] "The Award made on 4 May 1999 is unanimous on the issue of liability, but as permitted under the governing rules, is a majority Award made by President Paulsson and Arbitrator Setiawan on damages.

[395] "For my part, I am particularly troubled by the novel proposition adopted by my colleagues that the claimant's reliance upon its contractual rights to establish quantum amounts to an abuse of rights thus leading to and permitting a substantial reduction of what might otherwise be awarded.

[396] "My concern is that such a questionable proposition and the manner of its application in this Award prejudices notions of legal security and basic principles of private law.

[397] "I note that every doubt in respect of *lucrum cessans* has been determined favourably for the respondent.

[398] "The imposition of a concept described as 'abuse of rights' in the absence of findings of malicious intent or lack of good faith on the part of the claimant to further reduce the entitlement to damages is in my opinion an inappropriate and unwarranted penalising of the claimant.

[399] "It is not necessary or relevant for me in the context of this statement to express any opinion of what I consider to be the appropriate quantum, save to observe that the damages that would flow from my reasoning would be significantly greater than those awarded by my colleagues." ●

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## References

- 1) The text of the final award in *Patuha v. PLN* is reproduced in 14 Mealey's International Arbitration Report (December 1999) pp. B-1 – B-49.
- 2) Subsequent to this Award, an Interim Award of 26 September 1999 and a Final Award of 16 October 1999 were made. These Awards are published in this volume at pp. 112-186 and 186-215, respectively.
- 3) "Award of 2 September 1930; substantially reproduced in the *London Times*, 3 September 1930 and in 1950-1951 *Cornell Law Quarterly* 31, 42 (appendix); see para. 18(i)."

- 4) Art. 28(3) of the UNCITRAL Arbitration Rules reads:
 

“If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.”
- 5) “Yearbook V (1980) p. 85.”
- 6) “Art. 1184 of the French Civil Code provides in the relevant phrase that ‘*la résolution doit être demandée en justice*’”
- 7) “*Introduction to Dutch Law for Foreign Lawyers*, D.C. Fokkema, J.M.J. Chorus, E.H. Hondius and E.Ch. Lisser, eds., at 121 (1978).”
- 8) “See, e.g., Christian Larroumet, *Droit Civil: Les Obligations – Le Contrat* 763 (1998).”
- 9) “*Arbitration and State Enterprises*, at 46 (1984).”
- 10) The letter from the Coordinating Minister for Development Supervision and Administrative Reforms of the Republic of Indonesia, Mr. Hartarto, was worded as follows.
 

“I understand that there may have been an attempt today to raise before the arbitral tribunal in the above matters, questions regarding the scope, policy and strategy of the proposed and imminent negotiations with IPPs [independent power producers].

I am writing to state, on behalf of the Government of the Republic Indonesia, that these matters are not considered admissible and that to discuss them would be extremely prejudicial to the national interest. I am informed by government lawyers that on this basis, these matters are barred from being considered and that the same is true by virtue of such matters being the subject of legal privilege because all discussions have been with the Government lawyers.

In the circumstances, I shall be pleased to seek to provide such further clarification of the above as may reasonably be sought by the arbitral tribunal. In addition, it may be that by the time of the hearing which I understand will take place in March, we shall be able to provide further information, perhaps in the form of written statement which will state as fully as we then can, the position.

I confirm that this letter may on a confidential basis be disclosed to the arbitral tribunal, the parties and their counsel.”
- 11) “Award in ICC Case 7047 (1994), XXI Yearbook Commercial Arbitration 79 at 85 (1996).”
- 12) “Opening address, New York Convention Day, United Nations Headquarters, New York, 10 June 1998, document available from UNCITRAL.”
- 13) “Judgments of 8 January and 19 March 1926 (W. 11464 and W. 11488), cited in L. Rutten, *C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*, Derde Deel, Verbintenissenrecht, Eerste Stuk, De Verbintenis (C. Asser's Handbook on the Study of Dutch Civil Law, Part Three, Patrimonial Law, [First Part], The Obligation), (Zwolle (Tjeenk Willink) 1958) at p. 243 (free translation).”
- 14) “Judgment of 2 January 1931 (W. 2259), *id.*”
- 15) “Michael Reisman, in *The Supervisory Jurisdiction of the International Court of Justice*, Vol. 258, Collected Essays of the Hague Academy of International Law, at p. 237.”

- 16) “*Société commerciale de Belgique* 1939 PCIJ, Series A/B, No. 78, at p. 174; the pleadings published by the PCIJ contain the factual record of the dispute.”
- 17) “*Socobelge v. State of Greece*, Trib. Civ. Bruxelles, 30 April 1951, *Journal du Droit International* (1952) p. 245.”
- 18) “*Asser’s Handbook*, op. cit. [fn. 13], at pp. 291-292 (free translation).”
- 19) “Nearly a century ago, the three Swiss arbitrators who rendered the award in *Delagoa Bay and East African Railway Co. (US and Great Britain v. Portugal, 1900)*, extracts in English translation in M. Whiteman, *Damages in International Law* (1943) pp. 1694-1703, determined damages for the premature cancellation of a 35-year railroad concession ‘according to universally accepted rules of law, the *damnum emergens* and the *lucrum cessans*,’ id. at p. 1698. After appointing experts to review financial performance and prospects, the arbitral tribunal projected the railroad’s income over nearly 20 years, discounted it to a value at the date of the annulment (apparently using a discount rate of 6%) and granting compensation on that basis. For a recent award containing a concise and pellucid exposition of this approach, see *Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia*, ICSID award of 31 March 1986, 26 *International Legal Materials* (1987) p. 647 [reported in *Yearbook XIII* (1988) pp. 35-52].”
- 20) “*Asser’s Handbook*, op. cit. [fn. 13], at pp. 231-232 (free translation).”
- 21) “*SPP v. Arab Republic of Egypt*, ICSID award of 20 May 1992, *Yearbook XIX* (1994) p. 84.”
- 22) “*Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, ad hoc award of 15 March 1963, 35 *International Law Reports* (1967) p. 136.”
- 23) “*Government of Kuwait v. American Independent Oil Company (AMINOIL)*, ad hoc award of 24 March 1982, 66 *International Law Reports* (1984) p. 518, at p. 581 [reported in *Yearbook IX* (1984) pp. 71-96]. Accord, *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, award of 10 June 1989, 4 *Mealey’s International Arbitration Reports* No. 11(C), at para. 112 [reported in *Yearbook XVI* (1991) pp. 298-321].”
- 24) “*Administrative Tribunal* case (ILO and UNESCO), advisory opinion, 23 *International Law Reports* p. 517, at p. 537.”
- 25) “41 *International Law Reports* p. 29, at p. 76.”
- 26) “See *Factory at Chorzów (Germany v. Poland) (Indemnity)*, 1928 PCIJ (Ser. A) No. 17. The distinction established by the Permanent Court of International Justice between lawful and unlawful takings was explored by Chamber Two of the Iran-US Claims Tribunal in the *Phillips Petroleum* case, op. cit. [fn. 23], at paras. 109-110.”
- 27) “Accord, *LETCO* award, op. cit. [fn. 19], 26 *International Legal Materials* 672 (1987). As the Permanent Court of International Justice observed in the *Chorzów Factory* case, the usual standard applicable under international law even in the case of *lawful* expropriations would be ‘the value of the undertaking at the moment of dispossession, plus interest to the day of payment’, op. cit. [fn. 26], at 47. It is impossible to see why the victim of a contractual breach should not be similarly compensated for having been deprived of the use of the funds it wasted.”
- 28) “Op. cit. [fn. 22], 35 *International Law Reports* (1967) at p. 186.”



- 29) “*Christian Hutapea v. Nan Djuara br. Simanjuntak*, Supreme Court, Reg. No. 521 K/Sip/ 1973; *Said Wachdin v. Aniem Inc.*, Pamekasan District Court (Madura), No. 94/1952 (4 June 1953).”
- 30) “Op. cit. [fn. 22], 35 International Law Reports at p. 190.”
- 31) “Op. cit. [fn. 23], 66 International Law Reports (1984) at p. 605.”
- 32) “Id. at p. 602.”
- 33) “So conceded by the Claimant's CFO, Hammet Statement, p. 26, fn. 14.”
- 34) “Op. cit. [fn. 22], 35 International Law Reports (1967) p. 136, at p. 189.”
- 35) “See Stephen M. Schwebel, *International Arbitration: Three Salient Problems* (1987) at p. 60.”
- 36) “See, e.g., *Benteler v. Belgium*, preliminary award of 18 November 1983, *Journaux des Tribunaux (Bruxelles)* No. 5289, 31 March 1984; extracts in English in [1985] *European Commercial Cases* p. 101 [reported in *Yearbook X* (1985) pp. 37-38].”
- 37) “Passage quoted in 2 *Arbitration International* (1986) at p. 95.”
- 38) “Böckstiegel, op. cit. [fn. 9], at 25.”
- 39) “*General Principles of Law as Applied by International Courts and Tribunals* (1953).”
- 40) “Böckstiegel, op. cit. [fn. 9], at 45.”
- 41) “Op. cit. [fn. 23], 66 International Law Reports at p. 590.”
- 42) “Op. cit. [fn. 3].”
- 43) “Id. para. 26.”
- 44) “Op. cit. [fn. 21].”
- 45) “Id. at 79.”
- 46) “ICSID Award of 25 February 1988, 6 *ICSID Review – Foreign Investment Law Journal* (1991) p. 125, at paras. 7.13, 7.19.”
- 47) “Award of 27 June 1990, ICSID Case ARB/87/3, 6 *ICSID Review – Foreign Investment Law Journal* (1991) p. 526 [reported in *Yearbook XVII* (1992) pp. 106-152].”
- 48) “Op. cit. [fn. 23], at para. 111.”
- 49) “Op. cit. [fn. 19], at para. 111.”
- 50) “Id. para. 114.”
- 51) “Id. para. 138.”

- 52) “Id. para. 154. The same comment may be made with respect to the undifferentiated ‘overall determination of a global amount’ used by Chamber One of the Iran-US Claims Tribunal to reduce another DCF evaluation, by the round figure of 350 million rial, in *Starrett Housing Corp. v. Iran*, Award No. 32-24-1, 1983, para. 342 [reported in Yearbook X (1985) pp. 231-244].”
- 53) “Id. para. 112.”
- 54) “Id. para. 115.”
- 55) “Op. cit. [fn. 23], at 1699. In the *Starrett Housing* case, op. cit. [fn. 52], Chamber One of the Iran-US Claims Tribunal referred, at para. 338, to ‘the exercise of judgmental factors that are better expressed in approximations or ranges’.”
- 56) “Op. cit. [fn. 26], at 59.”

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