

## MEMORANDUM OF DETERMINATIONS

Expropriation Claim of [REDACTED] \*  
Ukraine-Contracts of Insurance Nos. D919 and D920

### I. Claim

By letters dated November 20, 1998, with four volumes of supporting documentation, [REDACTED] (together with its wholly-owned subsidiaries, \* [REDACTED] applied for compensation under the expropriation coverage of OPIC Contracts of Insurance Nos. D919 and D920 (the "Contracts") for the maximum insured amounts, [REDACTED] respectively (the "Claim"). The investment covered under Contract D919 is the value of services rendered to the foreign enterprise, [REDACTED] whereas Contract No. D920 covered an investment in [REDACTED] \* OPIC has treated the two claims under the foregoing letters as a single claim because the related actions of the foreign governing authority were directed at the project and not the separate investments made in it.

The letters setting forth the Claim, the Executive Summary and the "Chronology of the [REDACTED] (the "Chronology") attached thereto may be \* found at Tab A and constitute a summary of the Claim presented by [REDACTED] responded to OPIC's requests for additional information by providing additional documents and explanatory material on March 11, March 24, April 14, April 26 and May 6, 1999.

OPIC's determination is that the Claim is valid. The amount of compensation shall be determined separately after further review of the supplementary information provided by [REDACTED] \*

### II. The Insurance Contracts

The Contracts (Tab B) were executed by OPIC on January 21, 1994. Under Contract No. D919, an OPIC Form 234 KGT 12-85 (Second Revision) with standard amendments for technical assistance agreements and projects in the Newly Independent States of the former Soviet Union ("NIS"), OPIC insured [REDACTED] investments in the form of [REDACTED] \* [REDACTED] pursuant to agreements with [REDACTED] dated September 17, 1993 (the "Agreements")(Tab C). Under Contract No. D920, an OPIC Form 234 KGT 5-88 CP with standard NIS and other amendments, OPIC insured [REDACTED] \* [REDACTED] The covered property was leased to [REDACTED] under an Equipment Lease and Technology Agreement, also dated September 17, 1993 (the "Lease")(Tab D).

\*Information has temporarily been redacted, including to protect the safety of implementing partners.

III. Factual Summary

In 1992, [redacted] signed preliminary agreements (Tab E/Exhs.1, 2,4 &5) with the Government of Ukraine ("GOU"), represented by the Ministry of Defense ("MOD") and the [redacted]

[redacted] for the formation of a joint venture for the [redacted]

[redacted]

In 1993, the four [redacted] agreement and charter of [redacted] (Tab G/Exh.6) were signed, and [redacted] entered into a series of agreements with [redacted] for the implementation of the project. Under these agreements, the MOD<sup>3</sup> was to [redacted]

[redacted]

[redacted]

In August, 1994, as [redacted] a negative news article was [redacted]

[redacted]

\*Information has temporarily been redacted, including to protect the safety of implementing partners.

and implicating [redacted] The article charged that [redacted] \*

[redacted]

[redacted] \*

In June 1995, [redacted]

[redacted]

Following questions raised first by the office of the Military Prosecutor, in

[redacted]

<sup>5</sup> OPIC considered providing \$15.5 million in financing for the project in 1995, but decided not to proceed in view, among other things, of uncertainties regarding [redacted] \*

\*Information has temporarily been redacted, including to protect the safety of implementing partners.

In April 1996

[REDACTED]

In June 1996

[REDACTED]

Following

[REDACTED]

On May 12, 1997, however,

[REDACTED]

[REDACTED]

*\*Information has temporarily been redacted, including to protect the safety of implementing partners.*

[Redacted]

In November 1997

[Redacted]

On February 4, 1998, presumably acting pursuant to

[Redacted]

[Redacted]

In April 1998,

[REDACTED]

\*

[REDACTED]

\*

In June, 1998,

[REDACTED]

\*

On September 8, 1998,

[REDACTED]

\*

<sup>11</sup> Similarly, during a monitoring inspection of

[REDACTED]

\*

On September 15 and 16, [REDACTED]

IV. Determinations Under the Contracts

- A. The actions taken by the Government of Ukraine in relation to [REDACTED] insured investment in [REDACTED]

The scope of expropriation coverage is determined by Article IV of Contract No. D919 and Article II of Contract No. D920. Each provides, in Section 4.01 and 2.01, respectively, that compensation is payable for total expropriation, subject to exclusions and limitations, if four requirements are satisfied:

1. The acts are attributable to a foreign governing authority that is in de facto control of the part of the country in which the project is located.

The acts on which the Claim is based were actions taken by high officials and instrumentalities of the central government of Ukraine, which controls all of Ukraine.

The documents supporting the Claim established that the acts that are the basis of the Claim constituted official acts of the foreign governing authority taken by the President, the Cabinet of Ministers, the MOD, Customs, the Ministry of Foreign Economic Affairs and Trade, Minmashprom, and various committees or commissions established by some of them.

Each Contract contains an amendment (Section 10.02 of Contract 919, Section 8.02 of Contract No. 920) that defines foreign governing authority so as to exclude any entity in which the foreign governing authority has an ownership interest if the entity performs commercial functions directly related to the project. The MOD and certain departments of the MOD did perform commercial functions directly related to the project. This exclusion does not apply to this Claim, however, because actions of the President, the Cabinet of Ministers and other ministries and instrumentalities of the GOU, including actions taken by the MOD and its departments in compliance with actions of other GOU instrumentalities, were sufficient to constitute expropriation.

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2. The acts are violations of international law (without regard to the availability of local remedies) or material breaches of local law.

The conditions on which [redacted] invested in the project were clear and agreed upon by [redacted] \*

The President, the Cabinet of Ministers, Minmashprom, and other agencies [redacted] \*

Decisions made at the Presidential, Cabinet of Ministers and ministerial level [redacted] \*

[redacted] \*

*\*Information has temporarily been redacted, including to protect the safety of implementing partners.*



The refusal to allow

[Redacted]

3. The acts directly deprive the investor of fundamental rights in the insured investment (Contract D919) and directly prevent the investor, as owner of the covered property, from exercising its right pursuant to the Agreement to take possession of and/or dispose of the covered property (Contract No. D920).

[Redacted]

[Redacted]

Section 4.01(d) of Contract No. D919 and Section 2.01(d) of Contract No. D920 require that the expropriatory effect shall have continued for six months. The Investor gave notice of a potential expropriation claim on May 15, 1998.

With respect to Contract No. D919, while the circumstances do not permit a precise determination, July 2, 1998 could well be the date on which the expropriatory

[Redacted]

With respect to Contract No. D920, the expropriatory effect certainly commenced in September 1998, when

[Redacted]

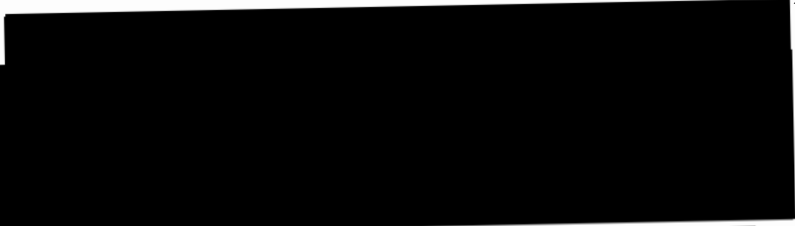
\*Information has temporarily been redacted, including to protect the safety of implementing partners.

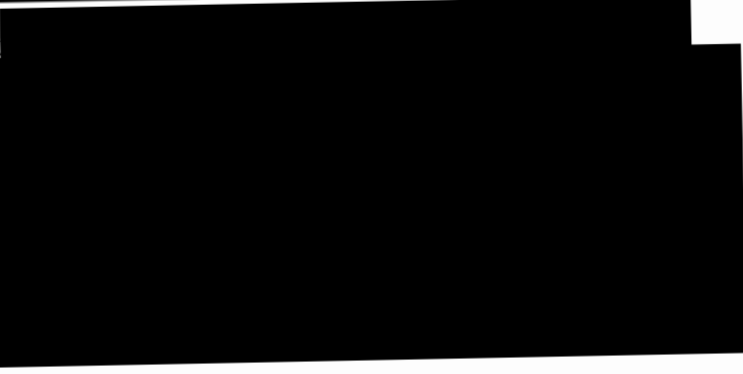
equipment for the purpose of preparing for its immediate removal. Clearly, the expropriatory effect with respect to Contract No. 919 commenced no later than this date.

B. No exclusion applies

1. A preponderant cause of the loss was not unreasonable action attributable to the Investor.

Both Contracts provide that no compensation is payable if the preponderant cause is unreasonable actions attributable to the Investor. (§4.03(a) of Contract No. D919 and §2.02 of Contract No. D920.


There is no issue here. 

The MOD's assertions that 

2. The provision of Contract No. D920 (§2.03) that neither sums payable under the lease nor the proceeds from the sale of covered property are covered is inapplicable.

The Claim is based on the loss of the covered property itself.

3. The exclusion of §4.03 of Contract No. D920 for action taken by the foreign governing authority in its capacity or through its powers as a purchaser, supplier, creditor, shareholder, director or manager of the foreign enterprise is inapplicable.



This Claim is not based primarily on the actions of the MOD as a supplier. Rather, by a series of actions the foreign governing authority undermined known pre-conditions for the success of the project, of which the foreign governing authority was aware, based on its selection of the foreign enterprise as a participant in the Utilization Program and participation in its management, and took control of the project from the Investor. The powers of the foreign governing authority as a shareholder, director or manager were limited by the terms of the foundation agreement and charter of the foreign enterprise and are also not the basis of the Claim.

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C. The Investor has complied with its duties under the Contracts.

1. The representations made in connection with the Contracts were true and complete when made and the investment was made as described.

There is no reason to believe that any representations made in connection with the Contract were not true and complete when made. The Investor will be required to so represent in the Settlement Agreement. The Claim and the supporting documents demonstrate that the Investor made the investment and attempted to implement the project as described to OPIC.

2. The Investor has remained at all times the beneficial owner of investment, eligible for OPIC insurance, and has continued to bear the loss of at least 10% of its investment.

The investor has provided a certificate as to its beneficial ownership of the investment and its continuing eligibility, and the determination of the compensation payable based on the cost data provided by the Investor assures that the Investor has borne at least 10% of the historical cost of the covered property.

3. The Investor notified OPIC promptly of the acts that gave rise to the Claim and has kept OPIC informed as to all relevant developments.

The Investor informed OPIC of the GOU tender offer for utilization of munitions in September 1995 and subsequent adverse actions taken by the GOU and of developments through the date of the Claim and thereafter. Written notice pursuant to the Contracts was provided in a letter dated May 15, 1998 (TabBB/Exh.75).

4. The Investor has not entered into any agreement with the foreign governing authority without OPIC's consent.

The Investor unsuccessfully tried to negotiate a new supply contract between [REDACTED] as part of a restructuring to overcome the project's difficulties. OPIC was kept informed of these developments, as well as [REDACTED] efforts to sell its interest in the foreign enterprise and the equipment to a third party.

5. The Investor implemented the investment and the project in all material respects in compliance with laws and procedures of the foreign governing authority.

While the interdepartmental commission report raised issues regarding violations of Ukrainian law in connection with the organization and operations of [REDACTED] no official charges of such violations have been asserted.

[REDACTED]

The interdepartmental commission's report asserted that [REDACTED]

[REDACTED]

Also [REDACTED] erroneously [REDACTED]

[REDACTED]

The Ukrainian law is unclear with respect to the above matters and it [REDACTED] The record shows that [REDACTED]

[REDACTED]

6. The Investor has observed or obtained a waiver of compliance with covenants in the Contracts regarding worker rights and the environment.

In March 1996 OPIC, based on information furnished by [REDACTED] agreed to waive the requirement in §10.15 of Contract No. D919 and §8.10 of Contract No. D920 that [REDACTED] provide a base line environmental study. No other issues regarding compliance with environmental or worker rights requirements are outstanding under the Contracts.

7. The Insured retained legal title to the equipment throughout the term of the equipment lease, and legal title remains with the insured.

Section 8.07 of Contract No. D920 requires that the Investor retain legal title to the covered property through the term of the lease and upon its termination.

[REDACTED]

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lease payments. The required lease payments were not made by [REDACTED] the\*  
transfer never occurred and, therefore, the Investor has not breached Section 8.07.

Conclusion

For the foregoing reasons, OPIC concludes that the Claim is valid. The amount of compensation to which the Investor is entitled shall be determined separately after completion of review of the supplementary information provided by the Investor.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: [Signature]  
Its: President  
Date: July 27, 1999