

MEMORANDUM OF DETERMINATIONS

Expropriation Claim of Gary Sigel and Southern Energy Partners, LLC
Annex G-036 to Master Contract of Insurance No. X-077
for Wind Turbines in Maharashtra State, India
DFC Project No. 9000024948 / DFC Contract No. 195

INTRODUCTION

1. Gary Sigel and Southern Energy Partners, LLC (jointly, the “*Investors*”) submitted an expropriation claim as of 20 October 2020 for up to ten wind turbines that are owned and operated by SEP Energy Pvt. Ltd., the Investors’ wholly-owned subsidiary (the “*Foreign Enterprise*”) located in the city of Ahmedabad, Gujarat State, India (the “*Project*”).

2. The expropriation claim is compensable up to the insured percentage of the reduction in book value attributed to the loss of generating capacity for certain wind turbines operated in the State of Maharashtra pursuant to Annex G-036 of Master Contract of Insurance No. X-077 (together, the “*Insurance Contract Documents*”). This determination considers certain circumstances surrounding a request that had been made by the Investors to amend the Insurance Contract Documents in 2016 to cover more than the number of turbines originally mentioned under the Insurance Contract Documents. The original terms included only four, 300kW turbines (bearing identification nos. 1A, 2A, 3A and 8A) located on the “Shiriam EPC” wind farm in Satara, Maharashtra State. A fifth turbine was contemplated for coverage under the Insurance Contract Documents, subject to the Foreign Enterprise conclusion of contractual arrangements with the state’s distribution company, Maharashtra State Electricity Distribution Co. Ltd. (“*MSEDCL*”).

3. The Investors’ claim included ten turbines not initially specified under the Insurance Contract Documents. Upon review of the 2016 amendment process originally proposed to place these units under coverage, and notwithstanding attempts made by DFC to clarify to the Investor as late as 2020 that such amendment had *not* been concluded, the DFC concludes that doubts arising from the clarity of communications to the Investors about the status of the then-pending amendment warrant the constructive incorporation of these additional turbines under the terms of the Insurance Contract Documents. Therefore, “*Covered Property*” for purposes of this Memorandum refers to the five turbines originally identified under Insurance Contract Documents, *as well as* the ten additional units submitted for consideration under an amendment. According to the Investors’ expropriation claim, premiums were paid with the intent of applying such payments to cover all fifteen turbines as Covered Property.¹

4. A series of actions carried out by the Government of the State of Maharashtra, acting through the Maharashtra Electricity Regulatory Commission (“*MERC*”), substantially deprived the Foreign Enterprise of its right to sell power produced by the Covered Property under an electricity “bank” arrangement administered by MSEDCL. Previous regulations allowed independent power producers to store or “bank” renewable electricity during the monsoon months, with the electricity to be withdrawn during less windy times of the year. MERC effectively closed access to MSEDCL’s “bank” to private-sector generators like the Foreign Enterprise, leaving the “bank” open only for purchases of electricity from state-owned electricity generators.

5. The State of Maharashtra did not provide the Foreign Enterprise with prompt, adequate, and effective compensation following MERC’s actions. First, amounts owed to the Foreign Enterprise by MSEDCL

¹ See the discussion at paragraphs 20 through 23, below.

for electricity previously “banked” with MSEDCL - and subsequently sold by MSEDCL to end-users - were never compensated to the Foreign Enterprise in accordance with originally-agreed contractual terms between the Foreign Enterprise and MSEDCL. Second, MERC did not provide the Foreign Enterprise with a reasonable time to seek direct-customer sales to compensate for the income lost from no longer benefiting from the MSEDCL’s electricity “bank.”

6. For the reasons stated, below, the DFC determines that the Investors are jointly entitled to compensation in the amount of US\$125,871.65, which is based on 90% of the payments due from MSEDCL for services provided by the Foreign Enterprise. This amount reflects a diminution of the book value attributed to the Covered Property, determined as of the date that the Foreign Enterprise was deprived of access to the “banking” program from June 2019 through September 2019.

CLAIM

7. The Investors claim that the State of Maharashtra, acting through MERC in concert with MSEDCL, used its regulatory authority to benefit state-owned electricity generators utilizing MSEDCL’s energy “bank” by intentionally discriminating against private-sector electricity providers, thereby, substantially depriving the Foreign Enterprise of existing rights under MSEDCL regulations for energy “banking.” The scheme to deprive the Foreign Enterprise of access to the MSEDCL’s “bank” was implemented through changes to “open access” regulations that did not account for the seasonal nature of the electricity market in Maharashtra, and were carried out over a two-day period such that the Foreign Enterprise was deprived of any reasonable opportunity to seek direct-sale customers to replace losses arising from no longer having access to MSEDCL’s “bank.” The schedule for MERC to approve *continuing* access by private-sector electrical generating companies to MSEDCL’s “bank” called for final determinations to be made *at the beginning of the monsoon season* in Maharashtra – thereby precluding any opportunity by the Foreign Enterprise to seek direct-sale customers to mitigate the immediate economic effect of these determinations. Additionally, the transition period specified by MERC, from the pre-existing regulation to operation under the replacement regulation occurred within a *two-day* period. Further, MSEDCL did not even compensate the Foreign Enterprise for the value of electrical energy already “on deposit” with the “bank” prior to the transition.

8. When the Investors sought relief in Maharashtra state courts in response to these actions, the judiciary substantially acknowledged that the determinations made by MERC effectively discriminated against the Foreign Enterprise and similarly situated, privately-owned generating companies.

9. The Investors’ final claim application includes a narrative and supporting documents. The package, as supplemented by the Investors, is attached as ***Exhibit A*** to this Memorandum.²

FACTUAL BACKGROUND

A. FACTS

10. The availability of electrical power from wind-power and other renewable sources of electricity is sensitive to weather and climate conditions. Much of India experiences a dry season between January and June, with *two* regional monsoon seasons (Southwest monsoon between June and October, and a Northeast monsoon between November and December). Maharashtra’s monsoon season extends from

² Each page of the application has been Bates-stamped for ease of reference. Unless stated otherwise, references in this Memorandum to “*Ex. Page(s) X*” are to Bates-stamped page numbers.

June through September. During the dry season, generating companies produce more electricity than the market can absorb, with electricity generating companies eager to sell excess generation to direct-sale customers willing to buy power at favorable prices. However, monsoon rains significantly reduce output – and in the case of wind-power generators like the Foreign Enterprise, all but preclude generation – to the point that electrical power becomes relatively scarce, and expensive in the marketplace. The market for sales of electrical power stands still during these months.

11. In 2003, the State of Maharashtra restructured the electricity market to separate state regulatory and electricity-distribution functions under the Electricity Act, 2003. Two key State entities, MERC and the MSEDCL, emerged from these changes. MERC was authorized to issue generating and operating licenses to qualified entities (both state-owned and privately-owned), regulate competition through rate reviews, and set rules for “open access” in the sale of electricity. Open access to the electricity market has permitted both direct sales by generators to end-users as well as the “banking” of electrical power through another state entity, the MSEDCL.

12. To balance the availability and pricing of electrical power throughout the year – especially during the monsoon season - MSEDCL operated a “banking” dispatch and compensation scheme in support of annual, renewable agreements (known as “wheeling” agreements) between electricity generators and their customers. Under such “wheeling” agreements, electricity generators contracted with generating companies for power to be delivered through the grid administered by MSEDCL. Pursuant to regulations renewed or updated on an annual basis, electricity generators would register their respective generation units with MSEDCL for dispatch purposes and register contract prices with MERC for purposes of determining how much would be dispatched and paid directly, and how much owed by each end-user for dispatched energy would be “credited” by MSEDCL in the “bank” for the benefit of the applicable generating company for later payment from the “bank.” MSEDCL would dispatch renewable-energy generators and leave fossil-fueled generators relatively quiet during the dry season, “crediting” the contracted value of a portion to the “bank” for dispatched electricity by renewable-energy generators. During the monsoon season, MSEDCL in effect would reverse the dispatch order (dispatch fossil-fueled generators and leave renewable-energy generators relatively quiet, “crediting” into the “bank” a portion of the contracted value of dispatched electricity by fossil-fueled generators). In return for this approach to dispatch, pursuant to the regulations, the state-owned distribution company would use “bank” proceeds under “wheeling” agreements to pay fossil-fueled generators for the electricity these entities had provided during the previous monsoon season. Then, during the next *monsoon season*, MSEDCL would pay renewable generators out of the “bank” for the electricity provided during dry season under “wheeling” agreements during that monsoon season. So long as the difference in tariffs payable to fossil-fueled and renewable electricity providers was relatively manageable for MSEDCL’s overall balance sheet, with MERC monitoring tariff levels under each “wheeling” agreement to ensure a relative equivalence of tariff rates between renewable providers and fossil-fueled electricity providers, the “banking” scheme functioned without any need by the State of Maharashtra to supplement MSEDCL shortfalls should “bank” balances exceed MSEDCL’s collections.

13. In June 2007, the Investors extended a shareholder loan to the Foreign Enterprise to acquire four, 300kW wind turbines to generate electricity for sale to MSEDCL under the “banking” scheme. By August 2012, the Foreign Enterprise had entered into “wheeling” agreements with two hotel chains (the Investors provided the latest versions of the agreements for each of the Fleur Hotel and Meringue Hotel chains at *Ex. Pages 315-346*) to sell power generated and scaled up the enterprise to fifteen turbines by 2016 (*Ex. Pages 012-017*), registering these units with MSEDCL (*Ex. Pages 005-011*).

14. In 2018-19, the cost of generating electricity using fossil-fueled generators dropped substantially in comparison with renewable energy generators, like the Foreign Enterprise. As tariffs charged by fossil-fueled generators dropped in line with the worldwide decline in fossil-fuel input prices, the disparity in

pricing between fossil-fueled electricity providers and renewable electricity providers brought about a MSEDCL balance-sheet deficit during the monsoon season – as amounts payable from the “bank” to renewable electricity providers for power provided during the prior dry season exceeded collections from end-users under fossil-fueled electricity providers’ “wheeling” agreements. As a result, the State of Maharashtra faced the prospect of having to subsidize MSEDCL to make up the shortfall.

15. Consequently, MERC initiated a series of actions effectively designed to exclude renewable electricity providers from the “bank” before the 2019 dry season. On 11 March 2019, MERC published a proposed revision to the “banking” regulations that effectively would require renewable electricity providers to substantially lower tariff rates or face being excluded from the “bank.” The Investors provided a summary of these regulatory changes, between the 2016 regulations and the then-proposed 2019 regulations (*Ex. Page 347*). By 8 June 2019, the revised regulation was published and became effective by the next day. Renewable electricity providers had only *two* calendar days in which to entirely renegotiate pricing with existing customers or find new customers. The Foreign Enterprise was not afforded a transition period to re-balance its customer mix or negotiate prices under “wheeling” agreements to cope with the new regulatory scheme. Besides, prospective new customers favored lower tariffs offered by fossil-fueled electricity providers at the start of the monsoon season (June), and contracted for electricity with fossil-fueled providers. The timing of the new regulatory scheme left renewable providers – who typically would have been better-positioned to attract new customers at the start of a dry season (October) – starving for business.

16. For the period June through September 2019, the Foreign Enterprise did not receive any payments to which it was entitled from the “bank” for electricity provided during the prior dry season. MSEDCL withheld such payments, which – in addition to the substantial deprivation of rights against the Foreign Enterprise occasioned by MERC’s new regulations – has given rise to the amounts claimed by the Foreign Enterprise as compensable under the Insurance Contract Documents.

17. By October 2019, wind-power producers (including the Foreign Enterprise) filed several suits, questioning whether MERC afforded these entities a reasonable opportunity to respond to the proposed regulation, as well as provide reasonable time to adapt to the new “bank” regulations. By December 2019, MERC regulations had been upheld by lower courts, prompting appeals that have been pending since February 2020. To date, no hearings or rulings have been concluded – partially on account of the COVID-19 pandemic.

18. In effect, the combined effect of MERC’s two-day regulatory process and MSEDCL “slow-pay/no-pay” approach to the Foreign Enterprise, constitute expropriatory acts for which no prompt, adequate and effective compensation was provided by the State of Maharashtra.

B. PROCEDURAL FACTS

19. On 10 December 2019, the Investors notified the DFC of a potential expropriation claim, followed as of 17 April 2020 by a partial, initial claim application. The Investors supplemented the application as of 21 May 2020 to submit a completed, initial claim application. After preliminary review of the papers, the DFC requested as of 28 July 2020 that the Investors provide supplementary or clarifying information to show how the claim submission aligned with the Insurance Contract Documents’ requirements for a compensable claim. The Investor provided supplementary information as of 20 October 2020, finalizing the claim submission.

20. As early as October 2016 and as late as 23 September 2020, the Investors claimed that all units operated by the Foreign Enterprise in Maharashtra State had been covered under the Insurance Contract Documents. The Investors attached the following chart, listing *fifteen* turbines as Covered Property under

Annex G036 (the annex to the Master Insurance Contract for Covered Property in Maharashtra), to their election of coverage for the period 30 September 2020 through 30 March 2021:

Existing Policy	State	Machine Number	Manufacturer	Capacity	Year Commissioned
G036	Maharashtra	1A	Elecon	300 kW	2012
G036	Maharashtra	2A	Elecon	300 kW	2012
G036	Maharashtra	3A	Elecon	300 kW	2012
G036	Maharashtra	8A	Elecon	300 kW	2012
G036	Maharashtra	S1	Vestas RRB	225 kW	1999
G036	Maharashtra	S2	Vestas RRB	225 kW	1999
G036	Maharashtra	S3	Vestas RRB	225 kW	2000
G036	Maharashtra	S4	Vestas RRB	225 kW	2000
G036	Maharashtra	S5	Elecon	300 kW	2012
G036	Maharashtra	S8	Vestas RRB	500 kW	2001
G036	Maharashtra	M1	Vestas RRB	225 kW	1999
G036	Maharashtra	M2	Vestas RRB	225 kW	1999
G036	Maharashtra	T1	Vestas RRB	225 kW	1998
G036	Maharashtra	T4	Vestas RRB	225 kW	1998
G036	Maharashtra	T5	Vestas RRB	225 kW	1998

21. In response to the attached chart, DFC indicated to the Investors as of 25 September 2020 that only the *Elecon manufactured* turbines (*see*, Machine Nos. 1A, 2A, 3A, 8A and S5) were covered under the Insurance Contract Documents:

The list of machines you sent in advance of submitting the EOCs in your email to DFC dated September 30, 2020 is comprised of a mix of machines, some that are covered by [the Master Contract] and Annex [G036] terms and others that are NOT covered. Please refer to the definition of “Insured Investment” in the [the Master Contract] (§1.01.1). Therefore, DFC does not consider the EOCs list to be accurate representations of the Investment covered by the [the Master Contract] and Annexes.

We addressed this same issue by correspondence exchanged during late 2019 and early 2020. For reference, I draw your attention to copies of the correspondence attached hereto as “Email-1” (December 11, 2019), “Email-2” (December 17, 2019), and “Email-3” (February 18, 2020). Having confirmed at that time that certain investments were not insured under the [the Master Contract] and Annexes, and that issuance of new coverage under the [the Master Contract] requires the Investor to apply to DFC and enter into an amendment to evidence coverage for such investments under coverage (§1.11), DFC understands that no such amendment for new coverage has been issued since our exchange of the correspondence, referenced above.

We ask that you ensure that the premium being paid for the current coverage period due, and all subsequent coverage periods, coincide with the actual Insured Investment, as defined in the [the Master Contract] (§1.01).

Under the strict terms of the Insurance Contract Documents, the Investors had not concluded:

- (i) the power purchase agreement originally contemplated to fulfill a condition of coverage for *one* of five originally designated wind turbines (Machine No. “S5” in the chart, above); and,
- (ii) an amendment with DFC to expressly include up to *ten* additional wind turbines under the Insurance Contract Documents beyond the originally-designated turbines, which were subject to review of applicable environmental and social conditions by the predecessor to the DFC’s Office of Development Policy.

While the Investors submitted a claim for *fifteen* turbines as Covered Property, the Insurance Contract Documents expressly covered only *four* wind turbines under the Insurance Contract Documents. Nevertheless, the claim application includes communications of intent *by DFC* to include all fifteen turbines, and reliance by the Investors on such statement of intent without further DFC clarification. This reliance by the Investors is evidenced by a succession of elections of coverage, and premium payments consistent with such coverage elections, having been made between 2016 and 2020 without contemporaneous correction by DFC.

22. On 27 May 2016, the DFC responded to the Investors’ request to add the new turbines, as follows, “We are going to amend the previous annex to include the new turbines. Our Office of Investment Policy is ok with this, I am working with them to transmit the 248 info to them you have completed thus far. *They will still need to review it.* I will keep you posted.” (*Ex. Page 027.*) As of at least July 2016 (*Ex. Pages 033-034*), the Investors consistently indicated their understanding that all fifteen turbines were within coverage. In October 2016, the Investors indicated in its election of coverage information that all fifteen turbines were included in the calculation of premium due at the time (*Ex. Pages 028-029*). All self-monitoring questionnaires submitted between 2016 and 2020 reflected *all* fifteen turbines in the Maharashtra operation of the Foreign Enterprise. Not until 2019-20 did DFC attempt to clarify between an intent to cover the additional turbines and concluding an amendment establishing such coverage. DFC’s acceptance of coverage elections, as submitted by the Investors, coupled with the inclusion of all fifteen turbines in successive self-monitoring questionnaires provided between 2016 and 2019 – all without response or clarification by DFC during that time – operates effectively as the *constructive* inclusion of such ten additional turbines under coverage for purposes of the Insurance Contract Documents.

23. Given the above, DFC determines that sufficient evidence exists to show coverage for all fifteen turbines, even if an amendment executed according to the Insurance Contract Documents’ provisions was not concluded. DFC considers that, at the very least, a discernible constructive amendment of the Insurance Contract Documents is reflected by the claim submission documents.

DETERMINATIONS UNDER THE CONTRACT

A. SCOPE OF COVERAGE; ELEMENTS OF CLAIM

24. The Master Contract (X-077), executed and delivered 28 September 2010, provides 90% coverage against inconvertibility, expropriation, political violence for assets, and political violence for business income loss in respect of shareholder loans made by the Investors to “foreign enterprises.” The remaining 10% of such losses are retained by the Investors as self-insurance. Annexes attached to the Master Contract described investments made by the Investors in such “foreign enterprises” to be insured by DFC

for the coverages specified under such annexes.³ Annex G036, issued by DFC on 30 September 2012, provided for DFC insurance of the Investors' \$2,150,000 investment in the Foreign Enterprise, up to a maximum aggregate compensation of \$1,935,000, originally covering four turbines (with a fifth subject to completion of contract) rated at 300kW, identified as turbine sites 1A, 2A, 3A, 8A and 8B. The amount of "active" coverage and "standby" coverage was elected by the Investors on a semi-annual basis. Premium for such semi-annual period was based on the "active" coverage elected. For the period under the Investors' claim, "active" coverage was elected at \$890,000. Coverages specified under Annex G036 included inconvertibility, expropriation, political violence (assets) and political violence (business income). Annex G036 identified the Investor only as Southern Energy Partners, LLC, as the sole direct owner of the Foreign Enterprise.

25. The Investors' claim, completed as of 20 October 2020, was for expropriation of covered property, viz., the turbines constituting the operations of the Foreign Enterprise in Maharashtra. The Insurance Contract Documents include coverage for "expropriation," including the "Covered Property" characterized by the Investors as "all of the Maharashtra assets" (*Ex. Page 039*; see also, *Ex. Pages – 003, 019-021, 027, 034-036, 037*).

26. The Investors' claim application explicitly seeks compensation for "expropriation-covered property" under Section 4.02 of the Master Insurance Contract. (*Ex. Page 039*). Section 4.02 lists the elements of coverage for expropriation under the Insurance Contract Documents:

- (1) The [act(s) or series of act(s) of a Foreign Governing Authority]:
 - (i) constitute an outright taking of all or part of the Covered Property; or
 - (ii) have the effect of taking all or part of the Covered Property in that the act(s)
 - (A) deprive the Investor of its fundamental rights, or prevent, unreasonably interfere with, or
 - (B) unduly delay effective enjoyment of the Investor's fundamental rights, in all or part of the Covered Property (rights are "fundamental" if without them the insured is substantially deprived of the benefits of all or part of the Covered Property);
- (2) the taking is not accompanied by prompt, adequate, and effective compensation; and,
- (3) the act(s) and/or the expropriatory effect thereof continue (§9.01.9) for six consecutive months.

Compensation under Section 4.02 is subject to exclusions (Section 4.06), limitations (Section 5.06), and the Investors' compliance with duties specified under Section 9.01 of the Master Insurance Contract.

27. *Foreign Governing Authority* - The Master Insurance Contract defines "Foreign Governing Authority" under Section 1.01.3:

Foreign governing authority means any of ... (b) the government of any political subdivision of the Project Country; (c) any organ, agency, official, employee or other

³ The Master Contract replaced Contract of Insurance No. F662, executed and delivered 18 June 2007, with Annex G037 and Annex G067 attached to the Master Contract for the Foreign Enterprise's operations in the State of Tamil Nadu.

agent or instrumentality of ... (b), acting within the scope of its authority or under color of such authority...

The State of Maharashtra is a political subdivision of India, satisfying part (b) of the definition. Each of MERC and MSEDCL are organs of the State of Maharashtra, satisfying part (c) of the definition. As such, actions by each of MERC and MSEDCL are attributable to the State of Maharashtra because of their structural incorporation into the apparatus of state regulation. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12/Award of 14 July 2006, ¶ 50. The attributive connection between state organs and the central government is well-established under customary international law, as recognized under Article 4 of the International Law Commission's "Articles on Responsibility of States for Internationally Wrongful Acts" (the "*ILC Draft Articles*"). The Commission's official comments to Article 4 state, with regard to the actions of an political sub-division's organ being attributed -ultimately - to the central government, "Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. *It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.*" *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, YBILC, ii. 2001, Vol. II, Part Two (2001), Comments on Article 4 at ¶ 6 (*emphasis added*).

28. *State action* - In addition to their structural incorporation within the apparatus of the State of Maharashtra, actions taken by both MERC and MSEDCL are authorized pursuant to statute, the Electricity Act, 2003, expressly to regulate the generation and distribution of electricity for the State of Maharashtra. The regulations implementing the Act, updated on a periodic basis of one to two years, identifies MERC as the "*Commission*" authorized to administer generation and distribution, as well as the approval of pricing to meet demand. (See, e.g., *Ex. Page 099*; the published fee schedule is payable "in accordance with the Schedule of Charges *approved by the Commission* from time to time." *Emphasis added*.) Section 31 of the Act establishes the MSEDCL. Under the regulations, the functions for the "state load despatch centre" in Maharashtra fall within the ambit of authorities assigned to MSEDCL, among other functions. (*Ex. Page 207*; see also, approvals issued by MSEDCL for ownership changes in turbines, explicitly identifying itself as "*competent authority*," at *Ex. Pages 014, 107*.) These attributes are consistent with authorities recognized under customary international law as "*acta iure imperii*" in carrying out regulatory functions exclusively reserved to the state. *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Decision on Objection to Jurisdiction of 25 Jan. 2000) ¶ 79 (looking to the "functions of or role to be performed by" an entity to determine if such entity was empowered to perform typically *sovereign* functions, as in the case of regulation). Actions by both MERC and MSEDCL in the publication and adoption of new regulations in 2019 that effectively discriminated against the Foreign Enterprise were taken in their respective capacities as the electricity regulator and electricity distribution company, respectively. As noted in Article 5 of the ILC Draft Articles, "[A]rticle 5 refers to the true common feature [without regard for whether the entity is public or private in its composition], namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority." *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, YBILC, ii. 2001, Vol. II, Part Two (2001), Comments on Article 5 at ¶ 3.

29. *Taking of all or part of the Covered Property* – The failure of MSEDCL to remit to the Foreign Enterprise amounts on "deposit" at the electricity "bank" for energy generated during the prior "dry" season constituted a taking in part of the Covered Property's generating capacity (resulting in diminished generating income for the Foreign Enterprise). Further, the implementation at the beginning of the "monsoon" season of replacement regulations by MERC without affording renewable energy providers – including the Foreign Enterprise – sufficient time to seek direct-sale contracts with end users to replace

revenues to become lost as a result of the new regulations constitutes a further taking by the State of Maharashtra. Implementing the new regulations at precisely the time in which potential end-user customers would be *least* attracted to renewable electricity sources – the beginning of monsoon season – effectively deprived the Foreign Enterprise of the customer base it would have been able to attract if the implementation were to occur at practically any other time during the year.

30. *Unduly delay effective enjoyment of the Investor’s fundamental rights* – The Master Insurance Contract defines a “fundamental” right in terms of substantial deprivation of the benefits of all or part of the Covered Property. Master Insurance Contract at Section 4.02(1). Under the terms of the “banking” regulations in effect during the dry season beginning in June 2019, the Foreign Enterprise enjoyed the right to generate electric power to its end-users under contracts that had been approved for inclusion by the MSEDCL under the “banking” scheme. The failure by MSEDCL to provide timely payment from the “bank” effectively for such generated electric power substantially deprived the Foreign Enterprise from the operation of the wind turbines generating electricity through the “banking” scheme. The uncompensated taking of that generated electric power is recognized under the customary international law of expropriation to the extent that there is a “substantial reduction” in the value of the enterprise caused thereby. *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016). This standard applies to MSEDCL’s failure to pay amounts owed to the Foreign Enterprise for the electric power generated by the wind turbines. The deprivation is aided by the regulatory actions undertaken by MERC, in support of MSEDCL’s shift toward cheaper, fossil-fueled electricity providers at a time when the State of Maharashtra faced potential budgetary shortfalls in MSEDCL – all to the detriment of renewable providers, including the Foreign Enterprise. Such support by MERC results in a *discriminatory* exercise of police powers that is not condoned under customary international law. See American Law Institute, *THIRD RESTATEMENT OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES* (1987), vol. 1, ¶ 712, comment (g).

31. The three-month delay suffered by the Foreign Enterprise might not be considered sufficient in duration to constitute a “*substantial*” deprivation of benefits of the Investors’ investment. However, the *additional* six months of inactivity at the Foreign Enterprise directly caused by MERC’s decision to change the regulatory scheme right at the beginning of the monsoon season, combined with MSEDCL’s refusal to afford the Foreign Enterprise any reasonable time to mitigate the effects of such new regulations, is recognized as patently compensable under customary international law (*Bechtel Enterprises Int’l v. Overseas Private Investment Corporation*, AAA Case No. 50 T195 0059 02 (Determination, 25 Sep. 2003) at 25).

32. *Prompt, Adequate and Effective Compensation* – Failure by the MSEDCL to make payments to the Foreign Enterprise owed from the “bank”, coupled with the effective exclusion of the Foreign Enterprise from the “bank” scheme orchestrated by MERC under new regulations without the means afforded to at least mitigate the impact of these changes, left the Investors without any prompt, adequate and effective compensation. At the very least, the Foreign Enterprise should have received reparation for the damage caused by the acts of MERC and MSEDCL. The ILC Draft Articles note that the “responsible state [for a wrongful act] is under obligation to make *full* reparation for the injury caused by the intentionally wrongful act.” (*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, UN Doc. A/56/10 (2001), article 31(1). Emphasis added.) The circumstances in this situation resemble the case of *Marion Unglaube et al. v. Republic of Costa Rica* (ICSID Case No. ARB/08/1 (Award of 16 May 2012)). As in the present situation, no provision was made by the Costa Rican authorities for the payment of timely and adequate compensation when the State exercised eminent domain rights over the resort property of the claimant.

33. *act(s) and/or the expropriatory effect thereof continue for six consecutive months* – The Master Insurance Contract requires a waiting period of at least six consecutive months before a claim is filed

under the Insurance Contract Documents. During that waiting period, the expropriatory effect of the underlying acts giving rise to the claim must be continuous. As described above (paragraphs 15-16), an excess of six months had transpired between the effectiveness of the MERC's new regulations and the end of the monsoon season, at which time the Foreign Enterprise could begin to compete again for direct contracts with end-users.

B. EXCLUSIONS AND LIMITATIONS

34. Section 4.06 of the Master Insurance Contract lists several exclusions that, if present under the Investors' expropriation claim, preclude coverage and deny compensation. A review of these exclusions in the context of the Investors' claim does not give rise to a right by DFC to deny compensation.

35. Section 4.06(a) of the Master Insurance Contract excludes coverage if the "preponderant cause" of a claim expropriation is either:

- (i) actions, other than actions taken in the ordinary course of business, attributable to the Investors, the Foreign Enterprise, or the controlling equity holder of the Foreign Enterprise, provided such actions are in any way related to the Foreign Enterprise's Maharashtra operations; or
- (ii) violations of Corrupt Practices Laws by the Investor, the Foreign Enterprise, or such controlling equity holder.

As noted under paragraphs 14-16, above, none of the Investors, the Foreign Enterprise or equity holders of the Foreign Enterprise took any actions that provoked the regulatory changes implemented by MERC and the MSEDCL's withholding of payments owed to the Foreign Enterprise from the electricity "bank." There have been no allegations of corrupt practices attributed to any of the Investors, the Foreign Enterprise or equity holders of the Foreign Enterprise.

36. Section 4.06(b) of the Master Insurance Contract excludes coverage for Foreign Governing Authority actions under commercial (as distinguished from governmental) functions in respect of the Maharashtra operations of the Foreign Enterprise. As noted under the analysis in paragraph 28, above, the discriminatory actions by both MERC and MSEDCL against the Foreign Enterprise were taken under their respective capacities as the electricity regulator and electricity distribution company, respectively. Both functions are governmental in nature, constituting *acta jure imperii* rather than commercial functions.

37. Section 4.06(c) of the Master Insurance Contract excludes coverage for Foreign Governing Authority actions taken pursuant to *lawful* authority under "licenses, permits, or concessions" between the Foreign Governing Authority, on the one hand, and either the Investors or the Foreign Enterprise, on the other hand, in connection to the Foreign Enterprise's operations in Maharashtra. The Foreign Enterprise's right to operate an electricity generation business in Maharashtra was based on MSEDCL's issuance of permits accepting generation from each turbine through the electricity "bank" for delivery to end-users under "wheeling" contracts, and the Foreign Enterprise's compliance with MERC's regulations in effect. MERC's revision of regulations on a discriminatory basis (see discussion at paragraphs 30-31, above), coupled with the MSEDCL's failure to remit amounts on "deposit" in the electricity "bank" owing to the Foreign Enterprise were not actions taken under *lawful* authority such as to raise the exclusion against coverage under the Master Insurance Contract.

38. Sections 4.06(d) and 4.06(e) specify exclusions in respect of the use and maintenance of real property rights, and the exercise of termination rights by a Governmental Entity (as defined under the Insurance

Contract Documents) under a power purchase agreement. None of these exclusions apply to the Investors' claim.

C. COMPLIANCE WITH CONTRACTUAL REQUIREMENTS

39. To maintain coverage under the Insurance Contract Documents, the Investors must show compliance with all duties under Section 9.01 of the Master Insurance Contract. Sanctions for material breaches of these duties by the Investors includes, pursuant to Section 9.02 of the Master Insurance Contract, a right by DFC to refuse to pay compensation for otherwise compensable claims.

40. The Investors represented as to having “complied with all of the Duties mentioned in the SEP Master Contract with all the points mentioned therein.” (*Ex. Page 77.*) The Investors also submitted a Certificate for Expropriation Claim (*Ex. Page 384*) with the claim submission to certify Master Contract compliance. Without limiting DFC’s reliance on the certifications made by the Investors regarding such Investors’ compliance with all Investor Duties under the Master Contract, below is a summary of the duties, with references to the Investors’ claim application or other source of information:

#	Duties	Synopsis	Ex. Page(s); other source
1	Representations and Warranties	All statements true and correct; Project carried out per terms of Annex	77; 384
2	Ownership and Eligibility	Beneficial owners fulfill US eligibility requirements	384
3	Resumption of Operations	All reasonable actions to resume project operations without undue expense	384
4	Assignment	No assignment of Master Insurance Contract by Investors	77; 384
5	Premium	Timely payment; late payments subject to interest	[confirmed by Office of Portfolio and Financial Management]
6	Accounting Records	Maintenance of Foreign Enterprise accounting records, including annual financial statements; US-GAAP compliant	348-378
7	Reports and Access to Information	Timely and complete provision of Project-related information, including site visits and personnel interviews; record retention policy compliance	77
8	Compulsory Notice	Prompt notice of acts that may come within scope of coverages	[notice of potential claim, dated 7 April 2020]
9	Preservation, Transfer and Continuing Cooperation	Reasonable measures to preserve properties and claims to facilitate post-claim assignments to DFC	77; 384
10	Other Agreements	No arrangements with Foreign Governing Authority not otherwise disclosed to DFC	24-36; 384
11	Worker Rights	Compliance with ODP social requirements	[Office of Development Policy confirmed compliance]
12	Other Insurance	No other insurance coverage	384
13	Information Disclosure	If coinsured, consent to sharing of information with other DFC co-insurers	77
14	English language translations	If documents in language other than English, provision of translations on which DFC may rely	77

15	Legality	Maintenance of all project permits and licenses; compliance with local laws; no incipient disputes; general compliance with master insurance contract terms	77
16	Environmental Compliance	Compliance with ODP environmental requirements	[<i>Office of Development Policy confirmed compliance</i>]
17	Corrupt Practices	Compliance with US and India corrupt practices laws	77
18	Compliance with Law	General and project-specific legal compliance	77

D. COMPENSATION

41. The Investors requested compensation in the amount of \$139,875.39, which is equivalent to 9,573,238 *Indian Rupees*, determined at the official Reserve Bank of India spot exchange rate (68.45 Indian Rupees-to-1.00 US Dollar) applied as of the date that expropriation by the Foreign Governing Authority commenced. This amount has been verified by statements of account submitted with the claim application (*Ex. Pages 348-378*).

42. The amount requested for compensation must be adjusted for the self-insured retention requirement under Section 1.03 of the Master Insurance Contract, “The Investor shall continue to bear the risk of loss of at least 10% of the book value of the Investor’s Interest in the Foreign Enterprise and shall bear at least 10% of the lost business income compensable under Article VI hereof, each on a per claim basis.” Application of the self-insured retention requirement against the Investors’ requested compensation amount results in a compensation amount of \$125,871.65 payable by DFC.

43. The statements of account did not require any of the adjustments set forth under Section 5.05 of the Master Insurance Contract, and the financial statements have been prepared in accordance with GAAP. The amounts claimed reflect book value as defined by the Insurance Contract Documents for all Maharashtra-related turbines operated by the Foreign Enterprise.

CONCLUSIONS

44. Based on the analysis presented, above, the Investors are entitled to compensation in the amount of \$125,871.65, for expropriation of Covered Property by the State of Maharashtra (India) during June 2019 through September 2019.