

**AMERICAN ARBITRATION ASSOCIATION**

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Bechtel Enterprises International  
(Bermuda) Ltd; BEn Dabhol Holdings, Ltd;  
and Capital India Power Mauritius I,

Claimants,

-against-

Overseas Private Investment Corporation,

Respondent.

AAA Case No. 50 T195 00509 02

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND AWARD**

## INTRODUCTION

During the early 1990s, India had a severe power shortage. Its per capita power generation capacity was amongst the lowest in the world. Power sector development was drastically needed. There had to be a massive development if forecast demand was to be met. Historically, the Government of India (GOI) built, owned and controlled the country's power generation. However, it became increasingly clear that foreign capital would have to be obtained in order to help build vitally needed power facilities.

National laws were passed to permit foreign investment in the power sector and the GOI sought to attract foreign investors. Various inducements such as attractive rates of return were offered to prospective project sponsors. However, these efforts were not initially successful. The GOI then negotiated terms of investment directly with individual prospective investors. In mid-1992 the GOI sent an unprecedented delegation of top GOI officials to the United States to promote investment and to negotiate with individual prospective sponsors. The project sponsors, Enron Power Corporation, Bechtel and General Electric (collectively, the "Sponsors") became interested. In mid-1992, they signed a Memorandum of Understanding to build the project and formed the Dabhol Power Company ("DPC").

The Sponsors located the project in the Indian state of Maharashtra. It was the second largest state in terms of population, had a healthy economy, favorable geography for the construction of the project and a stable government that had been controlled by the centrist Congress Party since India became independent. There was a strong demand for power in Maharashtra because of its growing power deficit. The only customer for the project was the Maharashtra State Electricity Board ("MSEB") which was "closely coordinated" by the Government of Maharashtra ("GOM").

In late 1993 after extended negotiations, the GOM formerly approved the Dabhol Project and subsequently so did various GOI entities.

The project was to be a two-phase development. In Phase I, the Sponsors would build a 695MW power-generating facility to be either run by fuel oil distillate or LNG. Phase II was to be constructed at MSEB's option and would be a larger 1,444MW gas-fired plant. A "re-gasification" facility was to be built to convert LNG to usable fuel as well as related facilities and infra structure. Both plants were to be operated as "baseload" facilities whose turbines would generate power continuously and only be shut down in cases of forced outages or scheduled maintenance. After construction commenced on the project, the Sponsors obtained political risk insurance from the Overseas Private Investment Corporation ("OPIC"), an agency of the United States Government.

As set forth below, as a result of a series of actions taken by the GOI, the GOM, the MSEB and other government entities and the changing political climate in India, the project was shut down and is in the hands of a court-appointed receiver.

Claimants brought this arbitration under the provisions of their insurance policies with OPIC effective August 1, 1999 (Section 8.05 of OPIC Policy Nos. E418 and E839 and Section 8.05 of OPIC Policy No. F153). The matter was heard before the Arbitration Panel ("Panel") on May 28, 29 and 30 and June 2, 2003. The Panel reviewed the parties' Opening Memorials (and in the case of claimants – the Reply Memorial) and the direct testimony of the witnesses, heard the cross-examination of the witnesses, received a substantial number of exhibits, heard oral argument by respective counsel, and reviewed

the post-hearing proposed Findings of Fact and Conclusions of Law submitted by the parties.

Based upon the above, and a review of the entire record in this matter, the Panel makes the following Findings of Fact, Conclusion of Law and Award.

### **FINDINGS OF FACT**

1. Capital India Power Mauritius I (“CIPM I”) Bechtel Enterprises International (Bermuda) Ltd. and BEn Dabhol Holdings, Ltd. (“Bechtel”) (“Claimants”), are equity owners of the Dabhol Power Company (“DPC”). DPC is a Company established under Indian law to develop, construct, own and operate a combined cycle power generation station, a liquid natural gas regasification facility and associated port facilities (“Project”) near the village of Dabhol in the State of Maharashtra, India.

2. Claimants insured their investment in DPC against political risks, including expropriation, by purchasing Contracts of Insurance Nos. F153, E418 and E839 (the “Policies”) from Respondent OPIC.

3. OPIC is an agency of the United States Government that was created to “mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas...” 22 U.S.C. §2191 (1994). Pursuant to this mission, OPIC provides financing and credit guarantees to qualified projects in developing countries, and also provides political risk insurance to qualified investors in such projects.

4. Although the full faith and credit of the United States stands behind OPIC’s obligations, OPIC is required by statute to conduct its operations on a self-sustaining basis, and OPIC’s financing capital and underwriting capacity are to be generated through its own operations. OPIC’s enabling statute requires it to take into account “the

economic and financial soundness of projects” and to provide political risk insurance “with due regard to principles of risk management.” 22 U.S.C. §§2191, 2197(b) (1994).

5. OPIC is also required to determine that “suitable arrangements exist for protecting [OPIC’s] interest ... in connection with any insurance.” 22 U.S.C. §2197 (1994). The “suitable arrangements” relevant to this proceeding include an agreement between the United States and India pursuant to which India agreed to “recognize the transfer to the United States of any right, title or interest of [any insurance claimant] in assets, currency, credits or other property on account of which such payment was made and the subrogation of the United States of America to any claim or cause of action, or right of such person arising in connection therewith.” This agreement does not provide OPIC with any guarantee of reimbursement from the Indian Government or any timetable under which any reimbursement will occur.

6. In the early 1990s, the Sponsors asked OPIC to support the Dabhol Project as a lender, as an insurer, and as a United States Government development agency. By 1994, GE, Bechtel, and Enron were among OPIC’s largest customers, and support of the Project appeared to be consistent with OPIC’s mission. As a result, in 1994 OPIC agreed to provide financing and political risk insurance for the Project.

7. In agreeing to provide financing, OPIC joined a large number of banks and export credit agencies supporting the Project, including both India-based financial institutions (“IFIs”) and numerous non-Indian Lenders (the “Offshore Lenders”) (collectively “the Lenders”).

8. The Lenders committee contributed approximately \$2 billion to the Project for Phase(s) I and II. The Sponsors contributed a total of over \$799 million for Phase(s) I

and II. Initially, Enron contributed 80% of the equity capital, and Bechtel and GE contributed 10% each. In addition, affiliates of General Electric and Bechtel provided important engineering, construction and procurement services for the Dabhol Project.

9. Because Project debt exceeds equity, the Lenders are the largest shareholders in the Project. The financing for the Project is “non-recourse” which means that the Lenders cannot recover against the Project’s owners in the event of a default, but instead must look to Project income and assets for repayment of their loans.

10. In 1993 and 1994, DPC entered into a series of agreements with (MSEB), the (GOM) and the (GOI) regarding the construction of the Project, and the generation, distribution and sale of electricity from the Project (“Project Agreements”).

11. The GOI and the GOM are the governing authorities in control of India and Maharashtra, respectively. MSEB is an administrative subdivision under the control of GOM. The GOM has explicitly acknowledged that it closely coordinates all of its agencies’ activities (including MSEB) with respect to the Project. At the time the Project Agreements were executed, MSEB was the power regulatory authority in Maharashtra, and by law was the sole purchaser of power from power plants located in Maharashtra.

12. An important Project Agreement was the Power Purchase Agreement between DPC and MSEB (“PPA”), originally executed in 1993. It was the principal asset of DPC. The PPA obligated DPC to generate power sufficient to meet MSEB’s demands, and MSEB to purchase power from DPC at rates specifically defined in the PPA. The PPA provided that disputes arising under it would be resolved by international arbitration. The PPA also gave Claimants the right to terminate the agreement upon MSEB’s

nonperformance of its obligations and thereby require MSEB to purchase the Project for a sum defined as the “Transfer Amount.”

13. The Transfer amount becomes due when a “Final Transfer Notice” or “Final Termination Notice” has been given by DPC, upon termination of the PPA. The transfer notice obligates MSEB to purchase the entire Project from DPC for a calculated “Transfer Amount.” The amount is that which will retire the outstanding Project debt and compensate the Sponsors for the value of the Project, including the net present value of the future income streams.

14. DPC also entered into a Guarantee and a State Support Agreement with the GOM. The Guarantee obligated the GOM to pay for any power for which MSEB failed to pay or any portion of the Transfer Amount that went unpaid. The State Support Agreement bound the GOM to take steps necessary to support and assist DPC in clearing legal hurdles in developing the Project, and to abstain from conduct or actions likely to prejudice the interests of DPC, the Sponsors or the Lenders to the Project.

15. DPC also entered into a Counter-Guarantee with the GOI (“GOI Guarantee”), which obligated the GOI to pay under the GOM Guarantee (i) for capacity and energy payments, in an annual cap of U.S. \$300 million and (ii) for the Transfer Amount, with a cap equal to the lesser of U.S. \$300 million and the outstanding principal and accrued interest balance of the Phase I off-shore lenders.

16. DPC is a “project-financed” entity. Numerous institutions loaned money to the Project, including a syndicate of non-Indian banks (“off-shore lenders”), a syndicate of banks wholly or majority-owned by the GOI (“IFIs”), the export credit agencies of the United States, Japan and Belgium, and OPIC (collectively “Lenders”). The Lenders

committed approximately U.S. \$2 billion to the Project. The equity Sponsors committed a total of approximately U.S. \$1.3 billion.

17. The GOI is in control of the IFIs and has repeatedly represented to Claimants and to OPIC that the IFIs were acting as the GOI's representatives with respect to the Project. OPIC representatives observed that "it appears [the GOI's] approach is to work through the IFIs in their dealings with the Project." The Solicitor General of the GOI, Harish Salve, has represented the IFIs in their initiatives against DPC in the Indian Courts.

18. Two agreements governing the debt financing of the Project are the Common Agreement between DPC and the Lenders and the Intercreditor Agreement among the Lenders (but not DPC). The Common Agreement governs when, how and under what conditions loan disbursements would be made and the circumstances under which the Lenders could terminate their lending obligations. It also gives the Lenders control over DPC's ability to terminate the PPA and demand payment of the Transfer Amount. The Intercreditor Agreement governs the relationship among the Lenders, in particular conditioning each lender's right to exercise its security interest in DPC upon consent from its fellow lenders. Under those agreements, OPIC has the right unilaterally to consent to the termination of the PPA.

19. The revenue stream provided to DPC under the PPA was essential to the Project Lender to pay its operating expenses and service the debt. Even a temporary interruption of payments under the PPA would jeopardize Claimants' interest in DPC, because it could render DPC unable to meet its obligations to the Lenders and cause them to exercise their security interests.

20. The insurance contracts at issue in this arbitration are OPIC Contract of Insurance No. E418 between OPIC and Bechtel Enterprises International (Bermuda) Limited, effective August 1, 1995 (Exhibit 1041), OPIC Contract of Insurance No. E839 between OPIC and BEn Dabhol Holdings, Ltd., effective February 21, 1997 (Exhibit 1051) (collectively, the “Bechtel Insurance Contracts”) and OPIC Contract of Insurance No. E376 between OPIC and Capital India Power Mauritius I, effective August 1, 1995 (Exhibit 1036), which was replaced by OPIC Contract of Insurance No. F153 between OPIC and Capital India Power Mauritius I, effective August 1, 1999 (Exhibit 1067) (the “GE Insurance Contract”). The GE and Bechtel Insurance Contracts shall be collectively referred to herein as the “Insurance Contracts.”

21. Claimants approached OPIC seeking political risk insurance coverage for their interests in the Project in May 1994. OPIC management subsequently performed an analysis of benefits and risks associated with the Project, which was set forth in a July 21, 1994 memorandum to the OPIC Board of Directors. In the memorandum, OPIC concluded that the Project would provide substantial benefits for both the United States and India. The Project was also consistent with OPIC’s mandate to facilitate the participation of U.S. capital in the economic development of developing countries. In describing the scope of expropriation insurance to be provided, OPIC management confirmed that:

a breach or abrogation of the Project Agreements by [any agency or instrumentality of the Indian government] could result in a compensable claim if the foreign enterprise were denied its lawful recourse pursuant to the agreements and if

the terms of OPIC's expropriation coverage were also satisfied.

The memorandum also notes that the attraction of foreign investment is a "central tenet of the GOI's economic reform program" and that "[o]ver India's post-colonial history, the GOI has never defaulted on or rescheduled its foreign debt." In conclusion, OPIC management recommended that the Board commit to providing insurance for the Project. The Board approved issuance of \$200 million in political risk insurance for the Project on June 21, 1994.

22. In August 1994, OPIC issued a "Commitment Letter" to the Sponsors which preserved for a six-month period up to \$200 million of OPIC's political risk insurance capacity in return for the Sponsors' payment of a \$200,000 commitment fee. Attached to the Commitment Letter was a copy of OPIC's standard policy form. The standard OPIC policy provides coverage for expropriation, political violence and currency inconvertibility. OPIC's official handbook describes the expropriation coverage it provides as protection "against the nationalization, confiscation or expropriation of an enterprise, including 'creeping' expropriation—unlawful government actions that deprive the investor of fundamental rights in a project."

23. The standard OPIC policy was the only version of the insurance contract that was provided by OPIC to the Sponsors until July 12, 1995. It provided insurance coverage if the Claimants were denied recourse to their arbitral rights under the Project Agreements.

24. The Sponsors and OPIC were focused on finalizing the financing arrangements for the Project during the end of 1994 and beginning of 1995. Substantive

policy discussions between Claimants and OPIC began in earnest the late spring of 1995, and the Policies were issued in August 1995.

25. In spring 1995, shortly after construction of the Project began, the GOM attempted to cancel the Project for political reasons, acting on the advice of a government panel known as the Munde Committee that had been appointed to review the Project.

26. During the discussions regarding the Policies, the parties focused principally on two issues: OPIC's potential liability arising out of events surrounding the Munde Committee, and revision of the standard OPIC exclusion for acts taken by the host government in its capacity as a commercial actor. OPIC recognized that any losses the Sponsors suffered as a result of actions recommended by the Munde Committee would be compensable under OPIC's standard appropriation coverage, and sought to amend the standard policy to avoid "walking into a claims situation." The Sponsors sought to amend the standard commercial actor exclusion because MSEB was the Project's sole power purchaser and its obligations had been guaranteed by the GOA and the GOI.

27. On May 22, 1995, Bechtel sent OPIC a letter requesting that OPIC provide additional insurance coverage including "loss of business income insurance."

28. The parties met on June 6, 1995 to discuss the Munde issue, the exclusion issue, and Bechtel's request for loss of business income coverage. OPIC contends that one of the forms of coverage requested by Sponsors at the June 6 meeting was what OPIC calls "disputes coverage." The evidence shows that the Sponsors never made such a request, and that "disputes coverage" was never raised by the Sponsors at the meeting. Bechtel made no mention of "disputes coverage" in the May 22, 1995 letter. There is no record of a discussion about "disputes coverage" in any party's minutes of the meeting or

in other OPIC summaries of the policy negotiations. And Messrs. XXX, XXX and XXX all testified that the risk of Indian courts enjoining DPC's international arbitration rights was never discussed, at that meeting or at any other time. The only evidence that "disputes coverage" was discussed on June 6 is a handwritten notation that Mr. XXX wrote on his copy of the May 22, 1995 letter, which appears to have been made in reference to Bechtel's request that the commercial actor exclusion be modified.

29. There was no reason for the Sponsors to request disputes coverage at the June 6 meeting. The only policy the Sponsors had reviewed at the time was OPIC's standard policy which, according to the June 21, 1994 OPIC memorandum, would provide coverage in the event DPC was "denied its lawful recourse."

30. On the evening of July 12, 1995—on the eve of the parties' scheduled meeting the following day to finalize the Policies—OPIC sent its proposed revisions to the standard insurance policy of the Sponsors. OPIC proposed two changes to deal with the two principal issues of concern: (1) a "carve-out" for expropriatory acts taken by the GOM in response to the recommendations of the Munde Committee (the "Munde Carve Out") and (2) an exception to the government act exclusion for acts by MSEB and other entities that were politically, rather than commercially, motivated.

31. OPIC's July 12, 1995 draft also included several other provisions, including § 10.05/10.07,<sup>1</sup> that had never before been discussed among the parties. According to an OPIC memorandum written contemporaneously with the execution of the Policies, the purpose of § 10.05/10.07 was to ensure that "no compensation [would] be payable under

---

<sup>1</sup> § 10.05 and 10.07 are identical, the former is on the GE policy, the earlier is in the Bechtel policy.

expropriation coverage unless DPC [had] exhausted its available remedies under the project agreements...” Messrs. XXX and XXX’s understanding of § 10.05/10.07 was consistent with OPIC’s description. The Sponsors fully intended to exercise the remedies referenced in § 10.05/10.07 in the event that MSEB were to breach the PPA.

32. The parties met on July 13 and July 15, 1995 to discuss the July 12 draft and finalize the Policies. Section 10.05/10.07 evoked little discussion during these meetings. Specifically, the Sponsors requested two minor changes to the provision. OPIC accepted both of the Sponsors’ requested changes, which Mr. XXX understood related merely to the timing of OPIC’s payment of compensable claims. The parties had no further discussions about § 10.05/10.07.

33. The Sponsors never contemplated that the only risk OPIC assumed under the policies was the risk of nonpayment of an arbitral award confirmed by an Indian court of last resort. The parties had no discussion to that effect. In addition, nowhere in Mr. XXX’s October 1995 analysis of the risks OPIC assumed under the Policies is there any mention or discussion of the risk of nonpayment of a confirmed arbitral award—the only risk OPIC alleges it undertook. Mr. XXX testified that, in part, §§ 10.05/10.07 had been inserted to assist OPIC, in the event it was required to pay claims under the policies and then proceeded to seek recovery of these amounts from the Indian government, pursuant to the Investment Incentive Agreement between the Government of the United States and the Government of India (“the IIA”). Based on a recommendation from Mr. XXX, OPIC charged the Sponsors 33% more than the base premium for their expropriation coverage. Mr. XXX and Mr. XXX would not have recommended that GE

and Bechtel purchase the OPIC policies had they understood, or had they been informed by OPIC, that the coverage was as limited as OPIC contends.

34. There is no evidence that the parties foresaw that an Indian court might enjoin DPC from exercising its contractual PPA termination and international arbitration rights. Messrs. XXX, XXX and XXX each testified that they were not aware of any instance of an Indian court enjoining a party's exercise of these rights. Mr. XXX's memorandum analyzing the Policies' risks made no mention of the possibility of an Indian court enjoining a party's exercise of its international arbitration rights. Instead, Mr. XXX noted in his memorandum that "the Indian judiciary, including the Supreme Court of India, has consistently upheld the legal basis for the project."

A memorandum to the OPIC Board of Directors dated June 21, 1994 indicates these provisions of §§ 10.05/10.07 were regarded as exhaustion of remedies mechanisms. In addition, in a later Contract of Insurance Action Memorandum dated October 4, 1995, reference is also made to §§ 10.05/10.07 as being an exhaustion of DPC's available remedies. However, at page 16 and 17 thereof the explanation of how implementation of §§ 10.05/10.07 would operate in practice, is in the Panel's view not entirely consistent with the exhaustion of remedies concept.

35. In August 1995, OPIC and the Sponsors executed final versions of the insurance contracts, with effective dates of August 1, 1995.

36. On August 4, 1995, DPC initiated arbitration proceedings in London in accordance with the arbitration provisions contained in the Project Agreements against the GOM for its politically-motivated attempt to cancel the Project. The GOM challenged the jurisdiction of the arbitral tribunal. On February 7, 1996, the arbitral

tribunal issued an interim award in which it ruled that it had exclusive authority to decide DPC's dispute with the GOM. The Tribunal's jurisdictional ruling forced the Indian government to back away from its repudiation of the project and come to the negotiation table.

37. Following extensive negotiations, the parties signed a Second Amendment to the PPA and a Supplemental State Support Agreement in late 1996, reaffirming MSEB's and the GOM's obligations under the Project Agreements. The GOM's Advocate General reaffirmed that the GOM and the GOI Guarantees were legal, valid, binding and irrevocable.

38. Further cementing the accord, the GOM entered into a consent judgment in the London arbitration reaffirming its duties. By entering into the consent judgment, the GOM accepted, without reservation, (i) that the PPA was valid, binding and enforceable in accordance with its terms and conditions; (ii) that the GOM would withdraw and abandon any allegation, contention or submission that the PPA was invalid, illegal or otherwise unenforceable; and (iii) that the arbitration clauses in the Project Agreements were valid. OPIC acknowledged, in an internal memorandum, that any allegations to the contrary by the GOM in the arbitration had been unfounded.

39. Construction of the Project resumed after the renegotiation and reaffirmation of the Project Agreements.

40. In 1997, OPIC amended the policies to delete the Munde Carve Out, effective March 15, 1997. According to OPIC, the amendment was warranted in light of "recent project developments, including the conclusion of arbitral proceedings in favor of [DPC] on December 17, 1996."

41. GE sought to clarify certain terms of its Policy upon the Policy's renewal in 1999. In a number of meetings, telephone conversations and other communications, GE's representative, XXX, inquired of OPIC whether certain events would be considered expropriatory under the policy even if they did not lead to a termination of the PPA. OPIC representatives confirmed to Mr. XXX that OPIC's Policy covered "creeping expropriation," but they never addressed Mr. XXX's particular inquiries.

42. In the course of the 1999 renewal discussions, the OPIC representatives did not tell Mr. XXX that OPIC interpreted the expropriation coverage of the Policy to mean that OPIC had assumed only the risk of nonpayment by the Indian government of a confirmed arbitration award. Mr. XXX would not have recommended that GE renew its policy in 1999 if OPIC had informed him that the Policy was so limited.

43. When GE and OPIC negotiated the 1999 renewal of GE's policy, neither GE nor OPIC foresaw the possibility that Indian regulators or courts would enjoin DPC from pursuing international arbitration under the Project Agreements. In addition, the possibility that the Indian courts would affirm an injunction issued by Indian regulatory agencies was not contemplated by OPIC and did not enter into the Parties' discussions.

44. In 1998, the GOI passed the Electricity Regulatory Commission Act ("ERC Act"), authorizing the states to create Electricity Regulatory Commissions (or "ERCs") to regulate their respective power sectors. The ERC Act did not, by its terms, give ERCs the authority to adjudicate disputes between entities that had entered into power supply contracts prior to its enactment.

45. Pursuant to the ERC Act, Maharashtra created the Maharashtra Electricity Regulatory Commission ("MERC") in 1999, more than three years after the renegotiated

Project Agreements and the Policies had been executed. MERC is an administrative subdivision of the GOM that regulates the Maharashtra power sector and sets tariffs charged to power consumers by MSEB. The GOM is in control of MERC.

46. MSEB failed to make timely payments for power from the Project beginning in October 2000 and stopped payment altogether in early 2001. DPC began the formal process of terminating the PPA because of the MSEB's untimely payments and breaches of the PPA by issuing two Preliminary Termination Notices to MSEB on May 19, 2001. The Lenders consented to the issuance of the Preliminary Termination Notices, which OPIC supported.

47. On May 23, 2001, following directions from the GOM, MSEB purported to rescind the PPA. Two days later, MSEB filed an action before MERC seeking an injunction to prevent DPC from pursuing arbitration against MSEB under the PPA for nonpayment, and to prevent DPC from exercising its rights under an Escrow Agreement with MSEB. On May 29, 2001, MSEB announced it would cease purchasing power from DPC.

48. MSEB's motivations for failing to pay for power, repudiating the PPA and petitioning MERC for an injunction were political. To the extent MSEB was experiencing financial hardship, it was caused solely and directly by political choices. In particular, the GOM and MSEB engaged in a program of politically motivated subsidies, handouts and favors to large power-consuming constituencies, and failed to check rampant power theft and other transmission and distribution losses. From the inception of the Project to present day, there was a need in Maharashtra for the Project's power. Power demand far exceeds supply in the state.

49. On May 29, 2001, two business days after MSEB filed its petition with MERC, MERC issued an order enjoining DPC from (a) exercising its right to seek redress through international arbitration pursuant to the dispute resolution clause of the PPA and (b) activating the escrow arrangements under the Escrow Agreement. The Bombay High Court and Indian Supreme Court subsequently continued the injunction. The Advocate General of the GOM, Ghoolam Vahanvati, represented MSEB before the Bombay High Court.

50. MSEB's and MERC's actions were contrary to the GOM's express recognition, in the consent arbitral award issued in 1996, that the PPA arbitration provisions were valid, binding and enforceable obligations. MSEB and MERC had also previously taken the position that MERC did not possess jurisdiction to resolve disputes under power supply contracts entered into before MERC was created.

51. DPC demanded payment from the GOM under the GOM Guarantee in February and March 2001 for power payments that MSEB had refused to make. The GOM failed to pay on its Guarantee.

52. The GOM's decision not to pay DPC was a political choice: GOM politicians wanted to "scrap" the politically unpopular PPA. The decision was not due to the GOM's lack of financial resources.

53. DPC demanded payment from the GOI under the GOI Guarantee on March 7, 2001, after the GOM had failed to pay DPC. On advice from the GOM, the GOI declined to pay as well. The GOI had the ability to honor the GOI Guarantee, but chose not to for political reasons.

54. The GOM and the GOI have the funds and/or sovereign resources necessary to generate sufficient funds to honor the Indian government's obligations under the Project Agreements, either through taxes, debt issuance, or other fiscal mechanisms available to sovereign entities. In addition, the GOM has the ability to reform its system of subsidies throughout the power sector, collect on defaulted accounts, use tax revenues to support subsidies, or use its credit capacity to raise funds.

55. On September 10, 2001, DPC issued two additional Preliminary Termination Notices after receiving the consent of the Lenders, which OPIC supported.

56. Also on September 10, 2001, DPC sought to draw on the MSEB letter of credit issued pursuant to the PPA, in satisfaction of MSEB's unpaid invoices. MSEB immediately blocked this effort by seeking—and subsequently obtaining in the Bombay High Court—an injunction against a draw on the letter of credit by DPC. This injunction remains in place.

57. DPC's issuance of two Preliminary Termination Notices on May 19, 2001, pursuant to the termination procedure set forth in the PPA, triggered a Suspension Period of "up to six months" during which the parties were to consult to try to achieve an amicable resolution. Discussions with MSEB did not materialize due to the escalating hostilities surrounding the Project. Pursuant to the termination procedures contained in the PPA, on October 15, 2001, DPC circulated a consent request letter to the Lenders, including OPIC, seeking permission to issue a Final Termination Notice. The Final Termination Notice was a necessary step to transfer the Project to the Indian government in exchange for the Transfer Amount.

58. The Lenders, including the IFIs and OPIC, refused to consent to DPC's request. OPIC had the power to grant consent unilaterally, and if OPIC had timely consented to DPC's request, DPC would have been in a position to issue a Final Termination Notice immediately. OPIC's refusal to give its consent to the issuance of the Final Termination Notice prevented DPC from taking the first step in pursuing the procedures set forth in the PPA and referenced in § 10.05/10.07 of the Policies.

59. Although some within OPIC supported the issuance of a Final Termination Notice, OPIC did not grant its consent in light of the "calculated risk" OPIC perceived. OPIC refused DPC's request for consent to issue the Final Termination Notice at least in part to avoid paying an expropriation claim under the Policies. OPIC internal documents from the period demonstrate this:

- "OPIC believes that project renegotiations offer the best chance for OPIC Finance to recover its loans, while reducing the risk of OPIC Insurance making a claim payment."
- "OPIC recognizes that the termination and transfer option has serious shortcomings. First, there is a greater risk that OPIC insurance might pay a claim."
- "From OPIC's perspective issuing the final Termination Notice is a calculated risk. While this might put pressure on the GOI to move forward on a settlement in the near term, it also moves the

project one step closer toward a potential claim payout under the OPIC's PRI policy.”

60. DPC issued a Transfer Notice on November 5, 2001, which would allow it to complete the transfer of the Project to MSEB once a Final Termination Notice was issued.

61. On November 9, 2001, the Bombay High Court, at the request of the IFIs, enjoined DPC from issuing a Final Termination Notice under the PPA. The injunction made it impossible for DPC to go forward with the termination procedures provided for in the PPA or initiate the process of complying with § 10.05/10.07 of the Policies.

62. If OPIC had given its consent to issue the Final Termination Notice when it was requested on October 15, 2001, and if DPC had ended the Suspension Period before the end of six months due to the lack of discussions with MSEB to resolve the problems, there would have been a window of opportunity to issue the Final Termination Notice before issuance of the injunction on November 9, 2001.

63. On March 21, 2002, the Bombay High Court, at the request of the IFIs, appointed a receiver for DPC's physical assets and accounts. As a result, Claimants currently do not exercise control over the Project or any of its assets. MPDCL, a subsidiary of MSEB and shareholder of DPC, has also taken steps to prevent the Project Sponsors, including Claimants, from exercising their rights as shareholders of DPC pursuant to Indian company law.

64. From its inception to the present day, the Project has been a political lightning rod. Its existence has been defined by the push and pull of Indian politics. The

expropriatory events described above were the sole and direct consequence of political decisions and competing political forces within Maharashtra and India.

65. The acts of MSEB, MERC, the GOM, the GOL, and IFIs and the Indian Courts depriving DPC of its fundamental rights under the Project Agreements have rendered the Sponsors' equity in the Project valueless. DPC has been unable to meet its debt payments and has been placed in default and receivership because of the loss of its revenue stream from the PPA, as well as the failure of the GOM and the GOI to perform their respective guarantees.

66. Notwithstanding the existence of the November injunction, Sponsors continued to request consent to issue a Final Termination Notice without success. The injunction against issuance of the Final Termination Notice is still in place today, preventing DPC from using its remedies under the PPA.

67. CIPM I and Bechtel filed notices of claim with OPIC, requesting payment under policies for expropriation, on December 10, 2001 and December, 17, 2001 respectively.

68. Beginning in January 2002, OPIC encouraged Claimants to participate in an auction sale (or bid sale) of the Project to prospective Indian buyers, despite OPIC's own analysis that the bid process was "deeply flawed" and "disingenuous." OPIC viewed participation in this process as consistent with its strategy of trying to engage the GOI to resolve the Dabhol problem. OPIC told Claimants that if significant progress was not made by March 15, 2002, OPIC was "prepared to give consent" for the issuance of a Final Termination Notice. With this understanding, and at OPIC's urging, Claimants

agreed to cooperate in the bid process notwithstanding their misgivings, which they expressed to OPIC in writing.

69. The bid process did not make progress towards an acceptable solution for Sponsors or Lenders by March 15, 2002. On March 20, 2002, Bechtel wrote to OPIC officer XXX to request OPIC's consent, in its capacity as a Lender, to the issuance of a Final Termination Notice. XXX, in March 2002, the person processing Claimants' expropriation claims under the Policies—responded to Bechtel instead, refusing to grant OPIC's consent.

70. After the IFIs successfully petitioned the Bombay High Court in March 2002 to appoint a receiver to take control DPC's assets and accounts, OPIC urged the Sponsors to affirm their support for the bid process. As requested, GE and Bechtel provided letters reaffirming their willingness to cooperate in the bid process, despite their reservations, because they wanted to cooperate with OPIC and mitigate their losses under the Policies. Enron declined to provide a similar letter. Enron's refusal to cooperate in the bid process prompted OPIC to threaten Enron with denial of Enron's expropriation claim under Enron's OPIC policy. Claimants understood that OPIC's threat would apply to them also if they declined to participate in the bid process.

71. OPIC continued to refuse to consent to the issuance of a Final Termination Notice through the summer 2002, even though it was clear by then that the bid process was not going to progress toward a solution.

72. Claimants eventually learned that OPIC had no intention of paying their insurance claims. As a result, CIPM I and Bechtel filed demands for arbitration with the International Center for Dispute Resolution of the American Arbitration Association on

October 3, 2002 and October 9, 2002, respectively, to resolve their disputes with OPIC regarding the Policy. In November 2002, Claimants consented to OPIC's request to consolidate their claims against OPIC into the present action.

73. Claimants filed their Opening Memorial on March 26, 2003. This was followed by OPIC's and the Offshore Lenders' consent to the issuance of a Final Termination Notice on April 13, 2003. OPIC and the Offshore Lenders also commenced arbitration in London against the IFIs for breach of the Intercreditor Agreement, seeking damages arising from the IFIs' injunction blocking the issuance of the Final Termination Notice. The injunction remains in place, and there has been no indication that it will be lifted.

74. OPIC could have approved the final termination notice much earlier than April 13, 2003, but did not do so because OPIC felt that there had to be a renegotiation of the entire Project. This belief, in its opinion, may yet bring the GOI to the bargaining table. All of the actions taken and decisions made by it were in pursuit of this goal. OPIC, at all times, acted in good faith and believed that the actions it took and advocated were the best way to obtain a resolution of the dispute.

75. None of the actions taken by MERC, the GOM, the GOL and the Indian courts were taken as "a supplier, creditor, lessor, shareholder, director, or manager of or purchaser from, DPC, or as a guarantor of any payment obligation to MERC."

76. The acts of all the Indian governments entities which constituted total expropriation of DPC as set forth above, were politically motivated.

77. The damages suffered by Claimants exceed the policy limits of their respective insurance notices with OPIC. The policy limits of those policies are each twenty-eight million five hundred and seventy thousand dollars (\$28,570,000).

Based upon the foregoing, the panel makes the following

### **CONCLUSIONS OF LAW**

1. **A Total Expropriation Within the Meaning of Section 4.01 of the OPIC Policies Has Taken Place**

Article IV of the Bechtel and GE policies set out four elements, subject to the exclusions provided for in Sec. 4.03 and the limitations of Sec. 5.04, that must be present for an act or series of acts to constitute a total expropriation. We recite these elements followed by our findings as to each of them:

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

Here that element is satisfied as the acts undertaken by the GOI, GOM, MSEB, MERC, the IFIs, the Indian courts, and the Solicitor General, are all either by governmental authorities in control of both the state of Maharashtra and the country of India, agencies of the government, or owned and controlled by the GOI or GOM.

- b. **The acts are violations of international law without regard to the availability of local remedies or material breaches of local law.**

The evidence makes clear that MSEB, the GOM, and the GOI violated each of (a) the PPA, (b) the GOM and GOI guarantees and (c) the State Support Agreements, for political reasons and without any legal justification. MERC, MSEB, the IFIs and the Indian courts have enjoined and otherwise taken away Claimants' international arbitration remedies under the PPA, all in violation of established principles of international law, in disregard of India's commitments under the U.N. Convention as well

as the Indian Arbitration Act. By its recent consent to DPC's Final Termination Notice and joinder in the UNCITRAL international arbitration filing against the IFIs, OPIC has publicly acknowledged that the concerted acts of the lenders with the GOM and GOI have effectively destroyed the investment of Claimants in the DPC, all in violation of international and local law.

- c. The acts directly deprive the Investor of fundamental rights in the insured investment (Rights are "fundamental" if without them the Investor is substantially deprived of the benefits of the investment);

There is no doubt that MSEB stopped paying DPC for the electricity produced by the Dabhol plant, and purported to "rescind" the PPA, that the GOM and GOI refused to honor their respective guarantees, that MSEB, MERC, and the IFIs, together with the Indian courts, enjoined Claimants from terminating the PPA in accordance with procedures that would have established a Transfer Amount for which MSEB would have been responsible, and in this process deprived DPC of its international arbitral remedies under the Project Agreements that were the essential vehicle by which Claimants might have been able to recoup their investment in the Project.

- d. The violations of law are not remedied and the expropriatory effect continues for six months.

The expropriatory acts by the GOI and its related agencies began in December 2000 when MSEB breached its payment obligations under the PPA, culminating in the appointment of a receiver for the assets and accounts of DPC, which have never been remedied, and have continued for over six months.

2. The exclusion under Section 4.03(b) does not apply here as the Indian governmental acts were not undertaken in the capacity as

“... supplier, creditor, lessor, shareholder, director or manager of or purchaser from, the foreign enterprise, or as a guarantor of any payment obligations to the foreign enterprise.”

3. All of the acts undertaken, from the cessation of payment under the PPA and the enjoining of arbitration rights through to appointment of a receiver, do not fit within any of the above capacities, and were, to the contrary, openly political, and not commercially, motivated, thus eliminating the Section 403(b) exclusion. See Section 403(b)(i). The Finance Minister of the state of Maharashtra stated that

“...we have refused to honor our contractual obligations by choice. It is our strategic decision not to pay Enron as we want to scrap the power purchase agreement the state has with the company...Our decision not to pay Enron has nothing to do with the state’s finances.”

4. It also does appear that the GOI has the funds or sovereign resources necessary to generate funds to pay its obligations to DPC.

In reply to the substantial documentation put forward by Claimants, OPIC argued that it need not address the issue as to whether a Total Expropriation under Section 4.01 of the policies has occurred until the requirements of Section 10.05/07 have been satisfactorily met. Although deprived of OPIC’s position on this subject, we find the overwhelming weight of evidence supports that Total Expropriation in accord with the requirements of Article IV of the applicable policies has taken.

##### 5. Claimants Complied With §§10.05/10.07 Of The Policies

Section 10.05/10.07 of the Policies provides for procedures which have to be followed in order for the investors to be entitled to receive compensation in respect of expropriation coverage pursuant to Articles IV and V of the Policies. The procedures set forth in §§10.05/10.07, subparagraphs a, b and c, reflect in broad terms most of the procedures required to be followed under the various agreements including the PPA, the

GOM Guarantee and the GOI Guarantee should Claimants believe that they wished to secure an arbitral award against the Indian entities.

During the negotiations leading up to the signing of the Policies, §§10.05/10.07 was submitted to Bechtel and GE. They required minor amendments which were agreed to by OPIC and incorporated therein. The evidence indicated that neither Claimants nor OPIC addressed the reasoning behind, or any significant implications to, the insertion of these clauses in any meaningful fashion.

There was evidence to suggest that they had been inserted in the agreement in order to assist OPIC, in the event it was obliged to pay a claim under the Policies and commence the procedure to recover such amounts from the Indian government, pursuant to the IIA.

However, as the evidence was far from clear as to what Claimants or OPIC understood the insertion of §§10.05/10.07 to mean, the Panel has applied certain fundamental rules of insurance contract construction to §§10.05/10.07 and its impact on the contract.

6. In the event of uncertainty or ambiguity, insurance contracts are generally interpreted and construed against the drafting party. Section 206 of the Restatement (Second) of Contracts confirms this position as does Section 83.27 of Couch on Insurance, which provides that “any ambiguity will be interpreted in favor of the insured and indemnity.”

7. The evidence indicated that neither party had anticipated that the Indian courts would grant injunctions making it impracticable to comply with the provisions in the agreements that triggered computation of the Transfer Amount as contemplated under the

contracts. Moreover, neither party at the hearing could produce any evidence which showed there was any precedent for the Indian courts issuing such an injunction.

Section 261 of the Restatement (Second) of Contracts provides, *inter alia*, that where a party's performance is made impracticable by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made, the duty on that party to render said performance is discharged.

The issuance of the injunction by the Indian courts rendered compliance with the provisions of §§10.05/10.07 by Claimants to be, at the very least, impracticable, if not impossible, without violating the terms of the court's injunction. Moreover, for the reasons set forth above, it was also clear from the evidence that at the time the contract was drafted and §§10.05/10.07 were inserted, it was a basic assumption of the contract and of both parties that the Indian government would not issue an injunction effectively preventing initiation of the procedure to trigger the Transfer Amount.

8. On May 29, 2001, two business days after MSEB filed a petition with MERC seeking an injunction against Claimants' efforts to invoke their contract rights, MERC issued an order which enjoined DPC from (i) exercising its right to seek redress through international arbitration pursuant to the dispute resolution clause of the PPA; and (ii) attempting to exercise its rights under the Escrow Agreement with MSEB. The Bombay High Court and Indian Supreme Court subsequently continued this injunction. MERC, a governmental body of the state of Maharashtra, had only been created in 1999 pursuant to the Government of India Electricity Regulation Commission Act. It was an administrative subdivision of the Government of Maharashtra charged solely with

regulating the Maharashtra power sector and the tariffs charged to power consumers by MSEB. The GOM was in control of MERC.

Section 264 of the Restatement (Second) Contracts provides that

“If the performance of a duty is made impracticable, by having to comply with a governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.”

When the parties entered into the insurance contract, MERC was not in existence and it was not anticipated that any such governmental entity or agency would issue an order enjoining DPC from exercising its right to seek redress through international arbitration pursuant to the dispute resolution clause of the PPA and thereby ultimately prevent the compliance by Claimants with the terms of §§10.05/10.07.

9. In assessing the relative positions of the parties with respect to the interpretation and implementation of §§10.05/10.07, Section 227(1) of the Restatement (Second) of Contracts provides some assistance when it states, *inter alia*, that an interpretation is preferred that will reduce the obligee’s risk of forfeiture unless the event is within the obligee’s control or the circumstances indicate that he has assumed the risk. As previously stated, neither party assumed or assessed the likelihood that the Indian courts would issue an injunction preventing compliance with the terms of §§10.05/10.07.

In the absence of clear evidence indicating consensus by the parties on the interpretation of §§10.05/10.07, the Panel is cognizant that to enforce compliance with the provisions of §§10.05/10.07 by Claimants, when the reason for noncompliance was the unforeseen action of a party beyond the control of either Claimants or OPIC, namely MERC and the Indian Courts, would result in forfeiture of Claimants’ rights under the insurance agreements.

10. For the reasons set forth above, the Panel finds that Claimants were discharged of their obligation to comply with the provisions §§10.05/10.07 as the result of the action of MERC and the Indian courts.

11. OPIC must pay Bechtel Enterprises International (Bermuda) Ltd. and BEn Dabhol Holdings, Ltd. a total of twenty-eight million five hundred and seventy thousand dollars (\$28,570,000).

12. OPIC must pay Capital India Power Mauritius I, the sum of twenty-eight million five hundred and seventy thousand dollars (\$28,570,00).

### **AWARD OF THE ARBITRATORS**

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreements entered into between the above-named parties having been duly sworn, and having duly heard the proofs and the allegations of the Parties, do hereby AWARD, as follows:

1. Within thirty (30) days from the date of transmittal of this Award to the parties, Respondent Overseas Private Investment Corporation shall pay to:

(a) Bechtel Enterprises International (Bermuda) Ltd. and BEn Dabhol Holdings, Ltd. the sum of twenty-eight million, five hundred and seventy thousand dollars (\$28,570,000);

(b) Capital India Power Mauritius I, the sum of twenty-eight million, five hundred and seventy thousand dollars (\$28,570,000).

2. The compensation and expenses of the arbitrators totaling \$348,955.95 (three hundred forty eight thousand nine hundred ninety five dollars and ninety five cents) shall be borne equally by the parties. Therefore, Bechtel Enterprises International (Bermuda) Ltd., shall pay to Overseas Private Investment Company the sum of \$24,081.35 (twenty

four thousand eighty one dollars and thirty five cents). Bechtel Enterprises International (Bermuda) Ltd., shall pay the American Arbitration Association the sum of \$22,037.60 (twenty two thousand thirty seven dollars and sixty cents)(for compensation still due the arbitrators and Capital India Power Mauritius shall pay to the American Arbitration Association the sum of \$46,118.65 (forty six thousand one hundred eighteen dollars an sixty five cents) for compensation still due the arbitrators.

3. The administrative fees and expenses of American Arbitration Association totaling \$44,000.00 (forty four thousand dollars) shall be borne equally by the parties. Therefore, Overseas Private Investment Company shall pay to Bechtel Enterprises International (Bermuda) Ltd. and Capital India Power Mauritius each the sum of \$7,333.33 for that portion of its share of administrative fees and expenses previously advanced by Bechtel Enterprises International (Bermuda) Ltd. and Capital India Power Mauritius to the Association.

4. Claimants' request for attorneys fees is denied.

5. Claimants' request for pre-award interest is granted as follows: Bechtel is awarded interest at the rate of 6% on its Claim from December 17, 2001, the date of the filing of its Notice of Claim, until payment is made; GE is awarded interest at the rate of 6% on its claim from December 10, 2001, the date of the filing of its Notice of Claim, until payment is made.

6. The award is in full settlement of all claims and counterclaims submitted to the American Arbitration Association.

We hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Washington, D.C.

State of Illinois

SS:

County of Cook

I, David N. Kay, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

/s/ \_\_\_\_\_  
David N. Kay

9/3/03  
Date

Subscribed and Sworn to Before Me this \_\_\_ day of \_\_\_\_\_, 2003.

/s/ \_\_\_\_\_  
Christine-Marie Webb  
Notary Public

My commission expires: 07/10/07

State of New York

SS:

County of New York

I, Robert Layton, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

/s/ \_\_\_\_\_  
Robert Layton

9/3/03  
Date

Subscribed and Sworn to Before Me this \_\_\_ day of \_\_\_\_\_, 2003.

/s/ \_\_\_\_\_  
Debra Arroyo  
Notary Public

My commission expires: Feb. 28, 2006

State of California

SS:

County of San Francisco

I, HON Charles B. Renfrew, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

/s/ \_\_\_\_\_  
HON Charles B. Renfrew

9/3/03  
Date

Subscribed and Sworn to Before Me this \_\_\_ day of \_\_\_\_\_, 2003.

/s/ \_\_\_\_\_  
Dinah Roberts  
Notary Public

My commission expires: June 12, 2007