CONCLUSIONS OF LAW

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

   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.

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

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

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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."

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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."

[...]

Referring Principles:

IV.5.4 - Interpretation against the party that supplied the term