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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 12913/MS

**1. CAPITAL INDIA POWER MAURITIUS I
(Mauritius)**

**2. ENERGY ENTERPRISES (MAURITIUS) COMPANY
(Mauritius)**

vs/

**1. MAHARASHTRA POWER DEVELOPMENT CORPORATION LIMITED
(India)**

**2. MAHARASHTRA STATE ELECTRICITY BOARD
(India)**

**3. THE STATE OF MAHARASHTRA
(India)**

This document is an original of the Final Award rendered in conformity with the Rules of the ICC International Court of Arbitration.

**INTERNATIONAL COURT OF ARBITRATION
OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

Case No. 12913/MS

**CAPITAL INDIA POWER MAURITIUS I and ENERGY
ENTERPRISES (MAURITIUS) COMPANY,**

Claimants,

-against-

**MAHARASHTRA POWER DEVELOPMENT
CORPORATION LIMITED, MAHARASHTRA STATE
ELECTRICITY BOARD and THE STATE OF
MAHARASHTRA,**

Respondents.

FINAL AWARD

This arbitration proceeding was brought by certain original investors and shareholders of the Dabhol Power Company (“DPC”), a closely held Indian corporation established to own and operate the Dabhol Power Project (the “Project”) in the State of Maharashtra, India. They sought to recover on the ground that the Respondents’ alleged course of conduct has totally extinguished the value of their investment in the Project. Ultimately, only one of the three investors, Energy Enterprises (Mauritius) Company (“EEMC”), has persevered in the proceeding. All the Indian Respondents administratively challenged the jurisdiction of the International Court of Arbitration of the International Chamber of Commerce (“ICC Court”) and the Arbitral Tribunal, over both the claims and the Respondents. After the ICC Court referred the jurisdictional issues to the Arbitral Tribunal, the Respondents declined to participate further.

The Arbitral Tribunal, aware of these unusual circumstances, has conducted the proceedings before it with a rigorous attention to the rights of the absent Respondents. It has notified them of every procedural and substantive step of the proceedings and repeatedly invited and directed their participation. Having received no substantive response to these notifications, the Arbitral Tribunal has taken note of, and carefully studied and considered, the submissions made by Respondents to both the Secretariat of the ICC Court and various Indian courts. In addition, it has subjected the submissions of EEMC to a degree of heightened scrutiny that was required, in its view, because of the failure of the Respondents to appear and controvert them. Based on the results of its analysis of the evidence adduced before it, the pertinent authorities, and for the reasons summarized below, the Arbitral Tribunal holds that it has jurisdiction of the cause and of the Respondents, and makes the Final Award in favor of EEMC set forth herein.

I. THE PARTIES

Claimant EEMC is an affiliate of Bechtel Enterprises Holdings and is a corporation established under the laws of the Republic of Mauritius. It is a party to the DPC Shareholders Agreement described more fully below (“Shareholders Agreement”), and is the corporate instrument by which Bechtel undertook to fulfill its role as a sponsor of the Project. Its address is c/o Bechtel Enterprises, Inc. Attn: President, 50 Beale Street; Room 50-22B43; San Francisco, CA 94105; U.S.A. Its counsel is Simpson Thacher & Bartlett, John J. Kerr and Robert H. Smit; 425 Lexington Avenue; New York, NY 10017-3954; U.S.A.

Claimant Capital India Power Mauritius I (“CIPM I”) is an affiliate of General Electric Corporation and is a corporation established under the laws of the Republic of Mauritius. It is a party to the Shareholders Agreement and is the corporate instrument by which General Electric undertook to fulfill its role as a sponsor of the Project. Its address is c/o General Electric Capital Corporation, Attn: Legal Department; 1600 Summer Street; Stamford, CT 06905; U.S.A. Its counsel is also Simpson Thacher & Bartlett, whose particulars are set forth above. Though it joined in filing the Request for Arbitration, it announced through counsel at the first hearing that, while reserving its right to do so, it would not take any further steps in this arbitration so long as injunctions against its doing so were outstanding in India. This Award, accordingly, will address only the claims and rights of EEMC, without prejudice to any claims or rights CIPM I may have with respect to the Shareholders Agreement or the Project. All references to “Claimant” in this Award are to be construed as referring solely to EEMC and not to CIPM I.

For the sake of completeness and ease of subsequent reference, we note here that the third original party to the DPC Shareholders Agreement was Enron Mauritius Company

("EMC"), also a corporation formed under the laws of the Republic of Mauritius. It is an affiliate of Enron Power Corporation and was that corporation's instrument in carrying out its role as a sponsor of the Project. While, as will be seen, it figured in the events leading up to the present dispute, it is not a party to this arbitration.

Respondent Maharashtra Power Development Corporation Limited ("MPDCL") is also a party to the DPC Shareholders Agreement. It is a special purpose entity, having been created under circumstances that will be later discussed for the sole purpose of holding shares in DPC on behalf, it is alleged, of the Maharashtra State Electricity Board ("MSEB"). Its address is Hongkong Bank Building, 3rd Floor; M.G. Road; Hutatma Chowk, Fort; 400 023 Mumbai; India. Its counsel is Shaukat H. Merchant; Merchant Legal Venture; Law House, 1st Floor; 8, Pitha Street; Off. P.M. Road; Fort; 400 001 Mumbai; India.

Respondent MSEB is not a party to the DPC Shareholders Agreement, but, as noted, is alleged to have acted in respect of DPC through MPDCL. MSEB is a state electricity board, created pursuant to the Indian State Electricity Supply Act of 1948 (as amended through 1991), and, in accordance with the terms of that Act, is controlled by the State of Maharashtra ("SOM"). MSEB is designated by Indian law to be the exclusive purchaser of power from the Project. Its address is Prakashgad, Plot G-9; Bandra (East); 400 051 Mumbai; India. Its counsel is A.M. Khatlawala; Little & co.; Central Bank Building; Mahatma Gandhi Road; 400 023 Mumbai; India.

Respondent SOM is a state of India. It is alleged to control MSEB, and, through it, MPDCL, and to have exercised that control to implement policies that had the effect of destroying the investment of Claimant EEMC. Its address is Government of Maharashtra;

Principal Secretary's Office; Finance Department; Mantralaya; 400 032 Bombay; India. Its counsel is Anand S. Bhatt; Wadia Ghandy & Co.; N.M. Wadia Buildings; 123 Mahatma Gandhi Road; 400 001 Mumbai; India.

II. THE DPC SHAREHOLDERS AGREEMENT

Arbitral jurisdiction in this case is based on the arbitration clause contained in the Shareholders Agreement, and the claims asserted are based on alleged violations of its terms either committed or caused to be committed by Respondents.

The Shareholders Agreement was originally entered into among EMC, CIPM I and EEMC as of December 22, 1994. Later, under circumstances discussed below, MPDCL became a shareholder and adhered to the Shareholders Agreement. The Shareholders Agreement establishes the rights and duties of the shareholders of DPC *inter sese*. Each of those shareholders was the vehicle created by entities that had other roles in the Project to establish the framework of their relationships through the Shareholder's Agreement.

As an integral part of this framework, the parties provided in the Shareholders Agreement that they would vote for each other's nominees for the board of directors. Article 10 of the DPC Articles of Association specified the entitlement of each shareholder to nominate candidates for election to the board in proportion to the voting power of the shareholder and its Affiliates, and further expressed the agreement of each shareholder to vote in favor of such nominees. The Shareholders Agreement in turn obliged the shareholders to vote their shares as required to elect to the board candidates nominated in accordance with that article.

Because each of the shareholders was affiliated with an entity assigned a separate major role in the undertaking that could put that Affiliate into conflict with the interests of DPC as an entity, and to reinforce the cooperative nature of the endeavor, the parties

included in the Shareholders Agreement a broad indemnity clause. This clause, among other things, engaged each shareholder to indemnify the other shareholders and their respective “Affiliates” from “any and all costs, losses, claims, damages and liabilities arising out of the fraud, gross negligence, or willful misconduct of the indemnifying Shareholder, its Affiliates,...relating to the Project....”(Section 7.2)

For similar reasons, the Shareholders Agreement required that “In voting or granting consents with respect to matters in which it or its Affiliates are involved as parties to a Project Contract, each Shareholder shall act in good faith in the best interest of the Company.” (Section 5.4).

The Shareholders Agreement defines the term “Affiliate” to include “with respect to any Person, any other Person that (i) owns or controls the first Person.” “Own” is defined to include ownership of more than 50% of the equity interests of the person. “Control”, the provision continues, “means the power to direct the management or policies of the Person, whether through the ownership of voting securities, by contract, or otherwise....” (Section 1.1)

The Shareholders Agreement further provides that “the exclusive method for resolving any claim” is arbitration under Section 8.1 of the agreement. That section defines a “claim” to include “any dispute” between shareholders “arising out of this Agreement or any of the Organizational Documents or the rights and duties of the Shareholders and the Company arising out of this Agreement or any of the Organizational Documents...”

In full, the Arbitration Clause reads as follows:

8.1 Arbitration. If any dispute or claim (other than over a price per Share as described in Section 6.3(c)) between two or more Shareholders or between one or more Shareholders and the Company (in this Section 8.1, each a “disputing party”) arising out

of this Agreement or any of the Organizational Documents or the rights and duties of the Shareholders and the Company arising out of this Agreement or any of the Organizational Documents (in this Section 8.1, a “claim”) has not been resolved by mutual agreement on or before the 30th day following the first notice of the subject matter of the claim to or from the disputing parties, then any disputing party may refer the claim to arbitration under the following provisions:

(a) To refer a claim to arbitration, a disputing party must provide notice to the other disputing parties stating (i) a general description of the claim and (ii) that the claim is being referred to arbitration under this Section 8.1.

(b) The disputing parties (excluding the Company) shall endeavor to agree promptly on a panel of three arbitrators. If on or before the 15th day following the notice described in Section 8.1(a) they have not so agreed, then:

(i) if there are only two sides to the claim, the disputing party or parties on each side may designate one arbitrator, and

(ii) in all other cases, each Shareholder or group of Shareholders with an aggregate Ownership Percentage equal to or exceeding half the aggregate Ownership Percentages of all disputing parties may designate one arbitrator.

For purposes of this Section 8.1(b), Shareholders may group together at their option to be only one side or group. If no arbitrator or only one arbitrator is selected as just provided by the 15th day following the expiration of the 15-day period referred to at the beginning of the immediately preceding sentence, any disputing party may request the Chief Judge of the United States District Court for the Southern District of New York to designate a number of arbitrators so that two in total have been designated. The two arbitrators designated as provided above in this Section 8.1(b) shall endeavor to designate promptly a third arbitrator. If the two arbitrators have not designated the third arbitrator by the 15th day following the designation of the second arbitrator, any disputing party may request the Chief Judge of the United States District Court for the Southern District of New York to appoint the third arbitrator. If the judge named above has failed to designate an arbitrator, then on or after the 15th day following the request any disputing party may request the Judicial Arbitration and Mediation Service (or its successor) to designate the arbitrator. If

any arbitrator resigns, becomes incapacitated, or otherwise refuses or fails to serve or to continue to serve as an arbitrator, the disputing party or other Person that designated that arbitrator shall designate a successor.

(c) The arbitration shall be conducted in New York City or such other place as the disputing parties may agree. The arbitrators shall set the date, the time, and the place of the hearing, which must commence on or before the 30th day following the designation of the third arbitrator. The hearing may be adjourned to later times and dates as the arbitrators determine. The arbitration shall be conducted under the rules of the International Chamber of Commerce not inconsistent with the provisions of this Agreement or such other rules as the disputing parties may agree. The arbitrators shall endeavor to notify any disputing parties not present of any adjournment to other dates or places; however, the proceedings may continue in the absence of any disputing party that has received notice of the date, the time, and the place of the initial session of the hearing. All hearings shall be conducted in English.

(d) The arbitrators shall endeavor to render their decision on or before the 30th day following the last session of the hearing. If the position of one or more disputing parties prevails, then the other disputing party or parties shall pay all fees and expenses of the arbitrators and the prevailing disputing party in the arbitration. If the positions of multiple disputing parties prevail, the arbitrators' decision must include an allocation of the fees and expenses of the arbitrators to the disputing parties based on the extent to which those disputing parties do not prevail on their positions. Each disputing party against which the decision assesses a monetary obligation shall pay that obligation on or before the 30th day following the decision or such other date as the decision may provide.

(e) The decisions of the arbitrators are final and binding on all disputing parties and are not subject to appeal. Without limiting the provisions of Section 8.2, the decisions of the arbitrators may be enforced in any court of competent jurisdiction, and the disputing parties authorize any such court to enter judgment on the arbitrators' decisions.

(f) EACH OF THE SHAREHOLDERS AND THE COMPANY AGREES THAT ARBITRATION UNDER THIS SECTION 8.1 IS THE EXCLUSIVE METHOD FOR RESOLVING ANY CLAIM

AND THAT IT WILL NOT, AND WILL NOT PERMIT THE COMPANY TO, COMMENCE AN ACTION OR PROCEEDING BASED ON A CLAIM, EXCEPT TO ENFORCE ARBITRATORS' DECISIONS AS PROVIDED IN SECTION 8.1(e) OR TO COMPEL THE OTHER PARTY TO PARTICIPATE IN ARBITRATION UNDER THIS SECTION 8.1.

III. THE CLAIMS

A. *The Basis of the Claims*

As a predicate to its claims here, EEMC contends that the energy policy of SOM underwent a dramatic reversal between the beginning of the Project and its intended consummation, all as a result of political change in its government. As carried out, EEMC submits, the new policies entailed a series of breaches of duties owed to DPC by the state and its instrumentalities. Then, the argument continues, DPC was left powerless to redress these wrongs by a further set of actions designed to frustrate its ability to act. It is this set of actions, claimed to violate the Shareholders Agreement, that triggers this dispute.

As to MPDCL, Claimant alleges that it breached the Shareholders Agreement in several ways. By refusing to vote for the board nominees of CIPM I and EEMC, Claimant contends, MPDCL prevented the board from obtaining a quorum and thus frustrated DPC's ability to take actions necessary to protect its rights and effect its policies. By supporting the positions of MSEB and SOM in contravention of DPC's rights, and then interfering with DPC's efforts properly to vindicate those rights, MPDCL is alleged to have put the interests of its Affiliates ahead of those of DPC, in violation of its duty of good faith. And by bringing, in Indian forums, various proceedings designed to prevent DPC corporate action to redress its grievances, Claimant asserts that MPDCL violated its obligation to submit such intra-corporate disputes exclusively to international arbitration.

Claimant also seeks to hold MPDCL liable under the indemnity clause of the Shareholders Agreement for the wrongs perpetrated by MSEB and SOM against DPC in connection with the Project, particularly in violating contracts with DPC and “thwarting DPC’s efforts to pursue contractually-stipulated remedies” against them, including international arbitration.

Finally, EEMC claims that, because, in committing all these breaches, MPDCL has acted as the alter ego and agent of MSEB and SOM, they are responsible for those breaches and must pay MPDCL’s liabilities incurred as a result thereof. And, because MPDCL, as a state agency, is owned and controlled by SOM, SOM is responsible to EEMC, it asserts, for MPDCL’s wrongful acts. Accordingly, by a Request For Arbitration dated September 10, 2003, and received by the Secretariat of the ICC Court on September 15, 2003, this proceeding was initiated to vindicate such claims.

B. *The Relief Requested*

Claimant submits that the coordinated actions of Respondents, taken together, operated to deprive it of its fundamental rights in the Project by substantially denying EEMC its use and reasonably expected economic benefit. Accordingly, EEMC seeks the following relief, as set out in the Terms of Reference, and elaborated upon by the proofs and in subsequent submissions:

1. An award of monetary damages for losses sustained by EEMC as a result of the wrongs specified above, including the total amount of its investment in the Project of US\$158.2 million, and additional damages measured by the attorneys’ fees and costs incurred as a result of Respondents’ wrongful acts in pursuing various proceedings in India both in its courts and before the Company

Law Board designed to frustrate both EEMC's rights as a shareholder of DPC and its contractually-stipulated right to exclusive recourse to international arbitration to vindicate those rights;

2. Injunctive relief restraining Respondents from taking any further actions in breach of the Shareholders Agreement or Articles of Association;
3. Injunctive relief restraining Respondents from continuing or commencing any proceedings in India, or taking any steps which have the purpose and/or effect of interfering with this arbitral proceeding or otherwise interfering with EEMC's right to arbitrate disputes under the Shareholders Agreement;
4. An award of pre- and post-award compound interest;
5. An award of the costs of this arbitration, including EEMC's attorneys' fees, incurred both in these proceedings and in the ancillary proceedings in the United States District Court for the Southern District of New York brought in aid of this arbitration;
6. Any other relief this Arbitral Tribunal deems just and appropriate.

IV. CONSTITUTION OF THE TRIBUNAL AND PROCEEDINGS

A. *Constitution of the Tribunal*

In their Request for Arbitration, CIPM I and EEMC jointly nominated James H. Carter to act as arbitrator. On September 22, 2003, EEMC, along with CIPM I which was then still active in the matter, brought a proceeding in the United States District Court for

the Southern District of New York, the court specifically vested with jurisdiction over such issues by Section 8.2 (a) and (b), which read as follows:

8.2 Jurisdiction. (a) This Section 8.2 does not affect the limitations set forth in Section 8.1 on commencing judicial proceedings, but may be used to enforce arbitrators' decisions, to compel Persons to participate in arbitration, or to compel Persons that have brought judicial proceedings other than in compliance with this Article VIII to dismiss those proceedings.

(b) ANY ACTION ARISING OUT OF THIS AGREEMENT OR ANY OF THE ORGANIZATIONAL DOCUMENTS OR THE RIGHTS AND DUTIES OF THE SHAREHOLDERS OR THE COMPANY ARISING OUT OF THIS AGREEMENT OR ANY OF THE ORGANIZATIONAL DOCUMENTS MAY BE BROUGHT, IF AT ALL, ONLY IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (OR IF THAT COURT REFUSES JURISDICTION, THE SUPREME COURT OF THE STATE OF NEW YORK SITTING IN AND FOR NEW YORK COUNTY) AND NOT IN ANY OTHER COURT OR TRIBUNAL.

They sought an order compelling MPDCL to arbitrate, and simultaneously moving for injunctive relief against any action by MPCDL to interfere with this proceeding.

MPDCL did not appear in the federal court action, but immediately obtained an *ex parte* order from a court in Maharashtra purporting to restrain Claimants from pursuing this proceeding. The federal court in New York issued successive orders enjoining MPDCL from interfering with the arbitration, all of which MPDCL ignored. MPDCL also informed the ICC Court that it would neither participate in the arbitration nor name an arbitrator as called for by Section 8.1(b)(i) of the Shareholders Agreement.

On October 26, 2003, the federal court in New York granted a default judgment compelling MPDCL to participate in this proceeding. MPDCL neither obeyed the order nor designated an arbitrator. Accordingly, as contemplated by the Shareholders Agreement, EEMC petitioned the Chief Judge of the United States District Court for the

Southern District of New York to exercise the jurisdiction conferred by the United States Federal Arbitration Act (9 U.S.C. section 206) to designate an arbitrator in lieu of MPDCL. The petition was granted, and on February 19, 2004, the Court appointed Jonathan Rosner to act as co-arbitrator. On March 26, 2004, the ICC Court confirmed Mr. Carter and Mr. Rosner as co-arbitrators. On April 28, 2004, the ICC Court confirmed Louis A. Craco as Chairman, upon the joint nomination of the co-arbitrators.

B. *Proceedings*

On April 29, 2004, the Secretariat of the ICC Court forwarded to the Arbitral Tribunal the file in the case. As already noted, that file included the submissions by each of the Respondents objecting to the continuation of these proceedings, and informing the ICC Court of the injunctive proceedings in India and their outcome, as of the date of the submissions. Specifically, the file included the letters to this effect from: M&M Legal Ventures of Mumbai, India, counsel to MPDCL, dated September 26, 2003 (with its attachments); Wadia Ghandy & Co. of Mumbai, India, counsel to SOM, dated October 9, 2003 (with its attachments); and of Little & Co. of Mumbai, India, dated October 3, 2003 (with its attachments). The Arbitral Tribunal took note of these communications when they were received from the Secretariat of the ICC Court.

Section 8.1 (c) of the Shareholders Agreement required that the hearing in any arbitration conducted under its terms “must commence on or before the 30th day following the designation of the third arbitrator,” which in this case occurred on April 28, 2004. Accordingly, the Arbitral Tribunal issued its Order No. 1, directing that the hearing would commence in New York City on May 26, 2004 for the purpose of considering the formation of the Terms of Reference, the provisional timetable for further proceedings and “such other matters as the disputing parties may desire to raise...” The Respondents were

each given notice of the hearing, pursuant to Article 3 (2) of the ICC Rules, by service upon them of a copy of Order No. 1 by facsimile directed to the offices of their respective counsel who had submitted the letters enumerated above.

On May 26, 2004, the hearing commenced as ordered. The Arbitral Tribunal noted that it had received no communication in response to Order No. 1 from any Respondent and that none was present or represented at the hearing. Counsel for the Claimant represented that CIPM I was not proceeding with the arbitration so long as the subsisting Indian injunction was in effect. The Arbitral Tribunal adverted to Article 6(3) of the ICC Arbitration Rules which provides, in relevant part that “if any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.” After hearing and considering the views of Claimant EEMC, the Arbitral Tribunal set a schedule for completing the Terms of Reference, and a provisional timetable for further conduct of the case.

The proceedings taken on May 26 were memorialized in Order No. 2, issued on June 18, 2004. The Order, among other things, called for the submission on July 9, 2004 of a full presentation on papers of the proofs in support of the claims and any defenses. The Order also specified that any party objecting to the jurisdiction of the Arbitral Panel could confine its submission on that date to materials sufficient to make out its objection, without prejudice to its objection or to its right to submit materials in support of its position on the merits thereafter. Order No. 2 was notified to the all the parties in the same manner as Order No. 1.

On June 22, 2004, pursuant to the Tribunal's direction, Claimant's counsel sent to Respondents a final draft of the Terms of Reference, requiring comments, if any, by July 25, 2004.

On July 9, 2004, counsel identified above transmitted to the Arbitral Tribunal, on behalf of each of the Respondents, a letter objecting to the continuation of the arbitration. Each letter referred to the prior objections lodged with the ICC Court, and each letter relied on the subsisting injunction issued at the instance of MPDCL as a basis for its refusal to participate in the proceedings. In addition, MSEB noted that it was not a party to the Shareholders Agreement, and SOM protested (without further elaboration) that the "Arbitral Tribunal has no jurisdiction whatsoever in respect of the State of Maharashtra."

For its part, Claimant EEMC submitted extensive materials in support of its claims in compliance with the order. These materials included the witness declarations of W. Foster Wollen, Esq., Patricia N. Chiu, and Donald C. Sturmer, together with binders containing 177 exhibits, many of them of considerable length. Claimant also submitted a Memorial in support of its position.

No comments were received from Respondents in response to Order No. 2 and, accordingly, Order No. 3 was issued on July 28, 2004. It directed Claimant's counsel to furnish each of the Respondents with the Final Terms of Reference, and requested the respondents to execute them and return them to the Chairman by August 5. The Order noted the intention of the Arbitral Tribunal to proceed in accordance with Article 18(3) of the ICC Rules in the event the Respondents failed to execute the Terms of Reference. Respondents did not execute them, and the procedures of that Article were accordingly

followed. The Terms of Reference were approved by the ICC Court on October 8, 2004 pursuant to that Article.

By Order No. 4 of September 15, 2004, a hearing was set for September 27 in New York City, and Claimant was directed to produce Messrs. Wollen and Sturmer at that time to respond to questions from the arbitrators. The Order, which was duly served on the Respondents, furnished an opportunity to them to question these or any other witnesses at the hearing. The hearing was held as scheduled; no Respondent appeared or indicated any desire to question any witnesses. After interrogation by the Arbitral Tribunal, and argument by Claimant's counsel, the hearing was recessed.

On October 18, 2004 a supplemental submission was made by Claimant, as directed by the Arbitral Tribunal at the hearing. This submission responded to certain questions raised at the hearing, and proffered Claimant's evidence quantifying its claims for attorneys' fees in this proceeding and the ancillary United States court case, as well as the costs it claimed were incurred in connection with Indian litigation alleged to be conducted in breach of the Shareholders Agreement. The Arbitral Tribunal denied Claimant's application, first made at the hearing, to impose a confidentiality requirement as a condition of Respondents' right to receive copies of the transcript of the hearing and the supplemental submission, and directed that all such materials be delivered to Respondents with the Arbitral Tribunal's invitation that they respond if so advised. No response was forthcoming. Accordingly, on December 18, 2004, the proceedings were closed pursuant to Article 22 of the ICC Rules.

At its session of April 8, 2005, the ICC Court extended the time limit for the rendering of the final award until July 31, 2005.

V. JURISDICTION

During the course of the procedures leading to constitution of the Arbitral Tribunal, Respondents had been advised that, pursuant to Rule 6 (2) of the ICC Rules, the ICC Court referred the question of arbitral jurisdiction to the Arbitral Tribunal, and, as noted, forwarded to it as part of the file in the case Respondents' materials objecting to its continuation. Respondents renewed their objections in the correspondence submitted to the Arbitral Tribunal in response to its Order No. 2, as recited above. The Arbitral Tribunal has given these materials respectful and close attention in its deliberations. It concludes that the Respondents' objections are without merit and must be rejected.

Properly speaking, the jurisdictional issues in this case are actually two. First: are the claims asserted in the Request For Arbitration within the scope of the arbitration clause EEMC has invoked? Second: are MSEB and SOM, neither of which is a signatory to the Shareholders Agreement, nevertheless subject to the jurisdiction of this Arbitral Tribunal for resolution of the claims made against them?

We conclude that both questions require an affirmative answer, and, accordingly, we hold that the Arbitral Tribunal has jurisdiction to decide all the claims presented against all the Respondents named. The factual findings and analysis supporting this conclusion are, in the nature of this case, intertwined with the merits of the dispute, and will be developed as the Award addresses those subjects.

Suffice it now to summarize our conclusions on the first question thus: the political decision of SOM to drastically change its energy policy, in support of which the Project had been undertaken, was carried out by a series of actions that separately and together constituted material breaches of several of the Project documents, which worked to the serious damage of DPC; the intra-corporate maneuvers which MPDCL undertook to

prevent DPC from seeking redress of those breaches in appropriate forums also constituted breaches of duties imposed on MPDCL by the Shareholders Agreement; and the wrongs done to DPC by SOM and MSEB were willful misconduct for which MPDCL as their Affiliate is liable under the indemnification clause of the Shareholders Agreement; the issues tendered, therefore, fall directly within the scope of the arbitration clause of the Shareholders Agreement.

As to the second issue, it is unmistakably clear from the evidence that all of the behavior of MPDCL complained of here was done at the behest of SOM and MSEB, as their agent-in-place in DPC, for the purpose of effectuating their policy objectives, and that MPDCL could not have and did not have any independence of objective or action.

MPDCL *was* SOM and MSEB operating in the DPC corporate structure, and those entities can properly be held to account, through recourse to the exclusive arbitral procedure set out in its terms, for the breaches of the Shareholders Agreement MPDCL formally committed as their alter-ego.

In fact, however, neither of these jurisdictional arguments has been given more than passing mention in the documents submitted by Respondents. Their most forcefully urged objection to the conduct of these proceedings stems from the subsisting orders of the Indian courts purporting to enjoin the parties from participating in it, and purporting also to stay the proceeding itself. This is not, strictly speaking, a jurisdictional objection, since arbitral jurisdiction arises from the contractual arrangements of the parties and the content of the applicable municipal and international law that gives force to them. Respondents in essence insist that the Arbitral Tribunal abstain from exercising its jurisdiction in deference

to the Indian decree. Since the Respondents' position, if sustained, would be a threshold obstacle to consideration of the case, it is convenient to treat it here.

The governing law of the Shareholders Agreement is that of New York, and the applicable body of international law includes the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as certain international agreements to which India is a party creating a legal framework within which private investment in that country could be made. No authority from this body of jurisprudence has been drawn to our attention that would support Respondents' position on the facts of this case, and neither we nor the United States District Court when confronted with the same issue, have found any such authority.

Claimant brings this arbitration seeking to vindicate rights it claims under the Shareholders Agreement against another shareholder and its Affiliates. The Shareholders Agreement, in the long, elaborate dispute resolution section quoted *in extenso* earlier in this award, makes international arbitration the exclusive remedy for such matters. The shareholders emphasized the exclusivity of that forum by printing its terms in full capital letters. They also went to great lengths to craft the architecture and processes of that arbitration in specific detail. The legitimate expectations of the parties in this regard could hardly have been more clearly expressed. That provision is valid and binding as a matter of the contract's governing New York law and as a matter of international law.

Every submission by Respondents invoking the action of the Indian courts as a bar to this proceeding states that the injunction was procured at the instance of MPDCL; they each therefore begin with a factual assertion admitting that the injunction was obtained as a direct result of a material breach of the Shareholders Agreement by MPDCL. It would be

anomalous to hold that MPDCL could insulate itself and its Affiliates from liability for breach of the Shareholders Agreement by committing yet another breach of that agreement. Such a result would render all its undertakings under the agreement illusory by depriving its counterparties of their contractually exclusive remedy. And endorsing such a course of conduct would undermine the international undertakings deliberately created to induce foreign entities to invest capital and effort in ventures such as the Dabhol project, and conspicuously relied upon by EEMC and its co-venturers in the Project. Nothing in the applicable New York or international law countenances such an outcome much less requires it.

The Arbitral Tribunal therefore rejects Respondents' contention that they should benefit from MPDCL's wrongful act, and refuses Respondents' demand that it refrain from exercising its jurisdiction in this case.

VI. THE MERITS OF THE DISPUTE

The Arbitral Tribunal has studied Claimant's evidentiary and legal submissions with special care, and has independently interrogated certain key witnesses about their written declarations, all to the end of satisfying itself that the result it reaches is correct and fair notwithstanding the decision of Respondents to abstain from the proceedings. The Arbitral Tribunal has unanimously attained that level of confidence. The ensuing narrative represents the findings of fact and conclusions of law reached by the Arbitral Tribunal on the basis of its study and its assessment of the credibility and reliability of the evidence before it, and its consideration of the pertinent authorities.

A. *The Project Agreements*

It was anticipated by all participants from the very outset that the Project would be, as Sturmer put it, "the largest privately owned independent power project in the world." It

was intended to help remedy the acute shortfall in power already experienced in India and well documented internationally; it was also meant to furnish power to meet the increasing requirements of the planned major economic growth of the nation. These present and anticipated power shortfalls represented a pent-up and prospective demand that provided reasonable assurance of a market for the power to be produced by the Project.

At the same time, it was recognized that the public sector was a crucial player in deciding how, and on what terms, the power produced by the Project would be distributed among the consumers that would compete for it. The success of the Project thus demanded a sustained collaborative effort between the private, foreign investors in and developers of the Project, on the one hand, and the relevant government entities on the other hand. Without solid assurances of that collaboration, none of the co-venturers would have committed the resources necessary to its completion.

Once it was decided to situate the plants contemplated by the Project in Maharashtra, it was to SOM and its responsible instrumentalities that the sponsors and DPC, their corporate entity that was the Project's owner, looked for the necessary assurances. Those assurances came in the form of the "Project Agreements" which ultimately lie at the heart of this case. These agreements were a Power Purchase Agreement ("PPA") between MSEB and DPC; an SOM Guarantee in favor of DPC; and the State Support Agreement ("SSA") executed by SOM. Separately and in combination they defined a series of relationships and reciprocal obligations that were intended to codify the private-public collaboration on which the Project fundamentally rested, and to establish the agreed methods by which financial feasibility and adequate cash flows could be created and sustained. The evidence overwhelmingly supports the common-sense proposition that

EEMC and its co-participants from the foreign private sector would not have embarked on such a huge and difficult enterprise except in reliance on the assurance of governmental cooperation and financial soundness that the Project Agreements furnished. A brief description of each is in order.

1. *The PPA*

MSEB, it will be recalled, is a state board created under Indian statute to supply electricity to Maharashtra. When the Project was first outlined in 1992, MSEB was the public-sector signatory to the Memorandum of Understanding. A year later, in December 1993, MSEB entered into the PPA with DPC. The PPA was the principal asset of DPC. Under it, DPC was to build, operate and maintain the power stations contemplated by the Project and to generate and sell to MSEB sufficient power to meet MSEB's requirements. The PPA obliged MSEB to purchase power from DPC at rates defined in the agreement, and established monthly payments to be made by MSEB, such obligation to be secured by a letter of credit. The PPA gave DPC the right to terminate the agreement if MSEB failed to perform its obligations and to require MSEB to purchase the Project for an elaborately calculated price denominated the "Transfer Amount". Any disputes arising under the PPA were to be resolved by international arbitration in London pursuant to the UNCITRAL Arbitration Rules. There can be no doubt that EEMC is correct in asserting that this type of dispute resolution provision is both customary in international project finance agreements with governmental counter-parties, and a material term of the PPA in this Project.

2. *The SOM Guarantee*

The Electricity Supply Act pursuant to which MSEB was created made it wholly an instrument of SOM. The state had the authority to control the MSEB board by appointing its members, removing them at pleasure, setting and directing its policies, and totally

controlling its funding. The commitments made by MSEB in the PPA were, therefore, entirely dependent on the willingness of SOM to have them carried out. To protect the flow of funds to DPC on which the Project depended from the risks SOM's control inherently entailed, DPC and SOM entered into a guarantee agreement. Under its terms, SOM "irrevocably and unconditionally" obligated itself to pay for any power for which MSEB failed to pay, to pay any portion of the Transfer Amount that was not paid by MSEB if that requirement were triggered, and to indemnify DPC from losses that might result from the unenforceability of either the PPA or the guarantee itself. Like the PPA, the guarantee required disputes to be submitted to international arbitration in London under the UNCITRAL rules.

3. *The SOM SSA*

In June 1994, DPC received further assurances of the collaboration of SOM in the Project with the execution of the SSA by SOM. That agreement pledged SOM to take the necessary steps to support the efforts of DPC in carrying the Project forward, and, in particular, to assist DPC in acquiring permits and approvals from local agencies. Importantly for this case, SOM expressly promised in Section 6.2 of the SSA to abstain from conduct likely to prejudice the interests of DPC, the Sponsors (i.e. DPC's shareholders) or the lenders to the Project.

B. *The Events of 1995-1998*

Since Indian independence, the Indian Congress Party had been in control of the government of SOM. It had been a staunch supporter of the Project, and had provided for the execution of the instruments described above. In the elections of 1995, two major opposition parties, the Bharatiya Janata Party ("BJP"), led in SOM by Gopinath Munde, and the nationalist Shiv-Shena party, both dedicated to a wide range of measures to rid

SOM of “alien” influences, came to power. In the course of their campaigns they had stirred up substantial popular opposition to the Project. When the two parties formed a coalition government, they set about reversing years of encouragement given the Project by their predecessors. Munde, who had threatened during the campaign “to throw [the Project] into the Arabian Sea,” was named to head an inquiry to review whether it was in the interests of SOM. In July 1995, the Munde report recommended cancellation of the Project, and the government of SOM immediately announced its abandonment; SOM and MSEB both directed DPC to stop construction.

DPC immediately initiated international arbitration against SOM under the SSA and the SOM Guaranty. SOM challenged the jurisdiction of the Arbitral Tribunal, claiming that the arbitration provisions were invalid and ineffective insofar as they called for arbitration under any law or procedure other than Indian. On February 7, 1996, the Arbitral Tribunal in London issued an interim award in which it ruled that it had exclusive authority to decide the dispute between DPC and SOM. This jurisdictional ruling forced SOM to retreat from its repudiation of the Project and to begin renegotiation of the Project Agreements.

Extensive negotiations ensued and culminated in the execution by the parties of an amended PPA, a Supplemental State Support Agreement and a reaffirmation by MSEB and SOM of their obligations under the Project Agreements. The Advocate General of SOM, C.J. Sawant, issued a formal opinion that the SOM Guarantee was legal, valid and irrevocable.

SOM also entered into a consent award in the London arbitration in which that tribunal declared the validity and enforceability of the Project Agreements. SOM also

accepted that the PPA was valid, binding and enforceable in accordance with its terms, undertook to withdraw and abandon any allegation, contention or submission that the PPA was invalid, illegal or otherwise unenforceable, and admitted that the arbitration clauses in the Project Agreements were valid. As we shall see, the binding concessions made in the London arbitration required SOM, when it again decided to repudiate the Project, to adopt different tactics to cut off DPC's means of redress.

As part of these negotiations, in order to give SOM a financial interest in the Project and a significant voice on the board of DPC, SOM arranged for MSEB to buy 30% out of the 80% of DPC's equity then held by EMC. Under the Shareholders Agreement, this acquisition carried with it three seats on the DPC board.

To implement this transaction SOM directed MSEB to create MPDCL as the "Special Purpose Vehicle" to use the money raised by MSEB to buy and hold the DPC stock, and MPDCL was certified as the "nominee" of MSEB for that purpose. There is no doubt that in buying and holding the DPC stock, and in its actions as a shareholder of DPC, MPDCL has acted wholly as an instrumentality of MSEB and SOM. For one thing, all the references made by either SOM or MSEB to MPDCL make clear their absolute control of that entity as a holding company for the shares. The legality of the transaction was opined on by the Legal Department of SOM, which advised that "MSEB is authorized to form and hold shares in MPDCL to undertake the [DCL stock purchase], those actions being ancillary to the lawful activities of MSEB." And the same opinion specifically notes on what authority MSEB entered into the transaction in the first place: "In accordance with [SOM's] powers to establish policies for MSEB in MSEB's discharge of its functions, [SOM] has directed MSEB...to invest in...either itself or through entities promoted by

MSEB...enterprises involved in or concerned with generation of power in the State of Maharashtra and...specifically to undertake the [DPC stock purchase].” It is, accordingly no surprise that the legally required seven equity-holding members of MPDCL were MSEB itself, five of its employees and the SOM Energy Secretary. All the individual holders of nominal interests in MPDCL gave powers of attorney to MSEB endowing it with “absolute discretion” to exercise their rights as directors and shareholders of MPDCL.

The Share Purchase and Sale Agreement of October 1998 is replete with representations to the effect that MPDCL is a company nominated to acquire and hold the shares by MSEB and SOM and that it is “wholly owned and controlled” by SOM “or by entities wholly owned and controlled by” SOM. In a related agreement, MSEB represents that so long as it is a DPC shareholder, MPDCL “shall be wholly owned and controlled by [SOM] or entities “wholly owned and controlled” by SOM. MSEB and SOM are plainly “Affiliates” of MPDCL as that term is defined in the DPC Shareholders Agreement.

On October 31, 1998, MPDCL formally became a shareholder of DPC by executing the General Accession Agreement. In Section 1.1 of that instrument, MPDCL agreed “to become a party to the Shareholders Agreement and to be bound by the Shareholders Agreement as a Shareholder.”

With this closing, the stage was set for the events of the ensuing years that have brought this dispute here.

C. *Events Leading Up to This Dispute*

After the resolution of the first repudiation dispute along the lines just described, DPC resumed constructing the two plants that together comprised the Project. In May 1999, the first plant came on line and entered into commercial service. The second plant was under construction and expected to be ready for commercial service by mid-2001.

This in turn would increase the financial obligations of MSEB as it was required to purchase more power, fund a second escrow account and increase the standby letter of credit. And, pursuant to the SOM Guarantee, MSEB's obligations were ultimately SOM's as well.

These additional financial obligations loomed at a time when MSEB was suffering the consequences of years of politically popular but fiscally unsound energy policies. For years there had been a program of politically motivated subsidies to selected classes of power consumers, together with handouts and favors to large power-consuming constituencies. MSEB had also failed to check rampant theft of electricity from the grid and unmetered service, both of which obviously depleted MSEB's revenue stream. By 2000, MSEB itself admitted that more than half of the electricity it purchased and distributed was "lost" to these abuses.

At the same time, state election campaigns in 1999 re-ignited the clamor against the Project that had led to the 1995 repudiation. A coalition of parties with expressed hostility to the Project formed a government. Also in 1999, SOM created the Maharashtra Electricity Regulatory Commission ("MERC") as an administrative subdivision of the SOM government, pursuant to a national enabling law passed the previous year. The mandate of MERC was to regulate the power sector in SOM and to set the tariffs charged to power consumers by MSEB. MERC is, by law and in fact, controlled by SOM.

By September 2000, MSEB began to fall short on its payments to DPC. In the early part of 2001, MSEB stopped paying altogether. SOM refused to respond on its Guarantee upon DPC's demand. While the energy policies of MSEB had for years been

financially disastrous, SOM was at pains to declare that the refusal of MSEB and SOM was a policy, not a financial, decision. As the SOM Finance Minister put it:

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

All of this obviously developed into a serious financial threat to the Project, and on April 12, 2001, DPC brought international arbitrations against MSEB under the PPA, and against SOM under the SOM Guarantee and SSA. On May 19, 2001, it issued two Preliminary Termination Notices to MSEB under the PPA, designed to commence the procedure leading to the transfer of the Project to MSEB upon default, and consequent Transfer Payment. Four days later, on directions from SOM, MSEB purported to rescind the PPA. It followed that action by bringing a proceeding before MERC seeking an injunction to prevent DPC from pursuing its arbitration under the PPA. On May 29, 2001, MSEB announced it would cease purchasing power from DPC.

On the same day, MERC issued an injunction which MSEB had sought two business days before, restraining DPC from pursuing the international arbitration it had commenced under the PPA. There being considerable doubt about MERC’s jurisdiction to enter such an order, DPC appealed the order to the Bombay High Court. That court decided that it was for MERC to decide its own jurisdiction and continued the injunction. On appeal, the Indian Supreme Court reversed the ruling that MERC should determine its own jurisdiction and remanded for the High Court to decide that question. It nevertheless continued the injunction in effect. On remand, the High Court sustained MERC’s jurisdiction in broad terms, and continued the injunction. An appeal of that ruling to the Indian Supreme Court is still pending. The Bombay High Court, at the instance of MSEB,

also enjoined recourse to the MSEB letter of credit, cutting off DPC's last source of funds to meet its obligations to lenders and trade creditors. This led in due course, through a series of steps it is unnecessary to detail here, to the appointment of a receiver to take over the assets of DPC.

DPC, meanwhile, was energetically moving to protect its rights against SOM by obtaining an injunction from the English High Court against interference by SOM with the London arbitrations DPC had brought against SOM, particularly forbidding SOM to initiate or participate in any Indian court proceedings to that effect. SOM, obviously unwilling to repeat the humiliation of the 1996 retreat in the face of an adverse international arbitration ruling, launched a new strategy with the aim, and, ultimately the effect, of disabling DPC itself from pursuing its remedies.

The attack came in the form of a series of internal corporate maneuvers plainly undertaken as a matter of policy by SOM and MSEB, although necessarily carried out by their designee-shareholder, MPDCL. By May, 2002, a series of events had reduced the number of directors of DPC to three. These events included the reduction of MPDCL's number of directors from three to one when it pulled out of financing Phase II of the Project; the resignation of EMC's seven directors upon Enron's bankruptcy; and the resignation of the two representatives of the Indian bank lenders. On May 2, 2002, MPDCL's director resigned, leaving the board without the quorum of three required under the DPC Articles of Association for corporate action, including, most obviously, the prosecution of the international arbitrations.

The remaining two directors reacted by convening a special board meeting to appoint a third director to act until the next annual meeting. The board, with its quorum

restored, took measures designed to protect its interests in the Indian litigations and to pursue the arbitral remedies against SOM in London. MPDCL brought proceedings, again in violation of Section 8.1 of the Shareholders Agreement, before the Company Law Board, to have it set aside the appointment of the third director.

There followed a series of thrusts and parries in the Indian courts, which it is unnecessary to recount in detail. Three salient points about these skirmishes are important, however, in the Arbitral Tribunal's view of this case. First, they were all carried out by MPDCL, as a shareholder of DPC, in contravention of its undertaking in the General Accession Agreement to submit controversies arising from DPC's "Organizational Documents" to binding international arbitration. Second, they were avowedly carried out in the interest of SOM, an Affiliate of MPDCL, which interest was directly at odds with those of DPC, and thus they breached the covenant of the Shareholders Agreement designed particularly to prevent such intra-corporate disloyalty. Indeed, MPDCL openly asserted its conflicted position when it told the Company Law Board that the other shareholders' interest was "to continue with the arbitration proceedings which are pending in London" between DPC and SOM, which proceedings, it went on to assert, "are not in the best interests of *the State of Maharashtra*." Third, the end result of the proceedings was to leave in place a board of three directors designated at an Annual Meeting held at the Company Law Board's direction, but, by injunctions obtained by MPDCL, to strip that board of authority to act to protect DPC's interests in the Indian proceedings or to pursue its London arbitrations against SOM. And lest there be any doubt about it, the evidence before the Arbitral Tribunal includes correspondence containing the frank admission by SOM's counsel that SOM was "closely coordinating all the matters pertaining to DPC and

all issues relating thereto with all parties concerned including MSEB and MPDCL on a regular basis,” and asserting that in the steps it had taken (summarized above), MPDCL was acting “in the interest of the State of Maharashtra.”

The other shareholders of DPC then commenced this arbitration proceeding under the terms of section 8.1 of the Shareholders Agreement, bringing the claims described earlier in this Award. MPDCL responded with yet further violations of the Shareholders Agreement by bringing suit in the Indian courts to enjoin participation in this proceeding, and refusing to respond to or obey the orders of the United States court designated in the Shareholders Agreement to proceed with the case and not interfere with it.

On the basis of these findings, the Arbitral Tribunal concludes:

First, MPDCL violated Section 2.5(a) of the Shareholders Agreement, which required the shareholders to vote for each others’ nominees in order to ensure the election of each shareholder’s designated members, by failing to vote in concert with the other shareholders to constitute a functioning board of directors in May 2002 and thereafter.

Second, MPDCL repeatedly violated section 5.4 of the Shareholders Agreement by failing to act in good faith in the best interest of DPC in matters in which its Affiliates, MSEB and SOM, were involved adversely to DPC, and by acting instead in the best interests of those Affiliates.

Third, MPDCL repeatedly violated section 8.1 of the Shareholders Agreement by initiating and maintaining judicial and administrative proceedings adverse to DPC and its other shareholders instead of submitting such matters to international arbitration as it was required to do; by maintaining proceedings in such forums designed to frustrate such arbitral proceedings, including the instant case, when they had properly been initiated by

DPC or the other shareholders; and by disobeying the orders of the United States District Court for the Southern District of New York, rendered pursuant to Section 8.1 and 8.2 of the Shareholders Agreement compelling it to arbitrate the instant dispute before this Arbitral Tribunal.

Fourth, MSEB and SOM are “Affiliates” of MPDCL, and of each other, as that term is defined in the Shareholders Agreement.

Fifth, MSEB and SOM by their acts described above separately and taken as a course of conduct each breached the provisions of Project Contracts, including the PPA, the SOM Guarantee and the SSA. Pursuant to the terms of Section 7.2 of the Shareholders Agreement, MPDCL is liable to the Claimant for its losses and damages arising out of those wrongful acts and course of conduct.

Sixth, MPDCL was the agent and alter ego of SOM and MSEB, and, accordingly, they are liable to Claimant for the damages for which MPDCL is itself found liable in this proceeding.

Seventh, the coordinated course of conduct, including the several breaches found above, are all in violation of the Shareholders Agreement, the law of the State of New York which governs that contract, and the applicable standards of international law requiring recognition of written agreements to submit to international arbitration and forbidding uncompensated expropriation of Claimant’s property.

Eighth, the coordinated course of conduct, including the several breaches found above, operated as a total expropriation of the Claimant’s investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein.

VII. DAMAGES

The conclusion that the actions of the Respondents separately and in concert extinguished Claimant's total investment in the Project does not relieve Claimant of making adequate proof of what that investment was. The same is true of the other claims for damages set forth in the Request for Arbitration and the Terms of Reference. In the interest of substantial justice, the Arbitral Tribunal has scrutinized Claimant's proof on these matters with particular care. Claimant presented the statement of Patricia N. Chiu in support of its damage claims. For the most part Chiu described and authenticated evidence from the corporate accounts of Claimant's parent that reflected the investments made through Claimant in pursuit of the Project. Wollen and Sturman, in their statements, also provided substantiation of the basis of many of these expenditures. Finally, at the request of the Arbitral Tribunal, Claimant filed a Supplemental Submission on October 18, 2004, dealing, in part, with some of the damage elements in greater detail.

A. *Damages for Destruction of EEMC's Equity*

Claimant seeks recovery of the total amount of its investment in the Project, which it calculates at US\$158.2 million "to date". The Arbitral Tribunal grants this claim in part and denies it in part.

The major portion of the amount Claimant seeks to recover under this head of damages consists of its direct equity contributions to DPC of US\$49.3 million for Phase I of the Project and US\$45.4 million for Phase II. The supporting statements and corporate accounts establish that these amounts were in fact invested as claimed. The total extinguishment of Claimant's investment resulted in the total loss of these amounts, with no possibility of their being recouped from future operations of the Project as

contemplated. Accordingly, Claimant is entitled to recover US\$94.7 million as damages for the loss of its direct investment in the Project.

Claimant also seeks to recover the costs it incurred to finance this direct investment. The evidence shows that EEMC obtained an equity bridge loan from ABN Ambro, from which it drew down, from time to time, to make equity contributions as they were required. The evidence also supports Claimant's submission that, through June 2004, the interest and fees incurred for this facility amounted to (rounded) US\$31 million. Claimant also has offered proof sufficient to show that it obtained a letter of credit in favor of ABN Ambro in the amount of the equity bridge loan in order to lower the interest rate on the bridge loan. The cost of this letter of credit was shown to be US\$6.9 million through June 2004. The cost of financing the investment by these borrowings was established as US\$31.9 million, which EEMC asks us to award.

The amounts spent to finance the equity investment, however, represent the result of an economic choice made by EEMC and its parent to borrow such contributions and recoup the financing costs through future revenues of the Project. This may well have been a reasonable, indeed customary, approach to the financing of a venture like the Dabhol project. But in economic reality, the claim here is a proxy for the loss, *pro tanto*, of the earnings from which the borrowings would have been repaid in the ordinary course. Section 7.3 of the Shareholders Agreement bars recovery for "indirect, incidental, or consequential damages." The claims for these financing costs fall analytically into that category, and, accordingly, recovery of those amounts is denied.

The same is true, in the Arbitral Tribunal's view, of EEMC's claims for the costs of contingent equity letters of credit and letters of credit to DPC's lenders. As Claimant puts

it in its Supplemental Submission, these items were financing costs for additional tranches of equity, and were to be “repaid over time with Project revenues.” The claims, totaling US\$9.8 million, for these items are denied.

Finally under this general demand for relief, Claimant seeks US\$11.6 million for costs incurred to put itself in a position to make the investment, obtain financing and secure approvals as required. These internal costs, together with the interest at 6% on them requested by Claimant, are also denied. For one thing, while the proof presented was sufficient to show, for the most part, that such expenses were incurred, there was insufficient proof offered to show that they were reasonable and necessary. More generally, however, they again belong to the class of costs incurred to make the investment that the Award is returning in full to Claimant, with the expectation that they would be recouped out of future earnings. They are, in the view of the Arbitral Tribunal, barred by the terms of Section 7.3 of the Shareholders Agreement.

Accordingly, on account of the destruction of its equity in the Project, Claimant is entitled to recover US\$94.7 million from the Respondents. Because, as we have explained, each Respondent, under the structure of the Shareholders Agreement, is fully liable for the wrongs of each other Respondent, such damages are awarded against the Respondents jointly and severally. To this should be added 9% simple interest, the legal rate under New York law, running from May 2, 2002, the date as of which it is determined the extinction of Claimant’s equity had been accomplished, and continuing until the Award is paid.

B. *Attorneys’ Fees in This Arbitration and Ancillary Proceedings*

Invoking Section 8.1 of the Shareholders Agreement requiring payment by the losing party or parties of the fees and expenses of the arbitrators and the prevailing party, and Article 31 of the ICC Rules allowing the tribunal to fix the costs of the arbitration,

Claimant asks that the Award in this case include these items. It has submitted, at the Arbitral Tribunal's direction, adequate proof of its legal fees in this arbitration, in the total amount of \$2,406,006. The Arbitral Tribunal, on the basis of its view of the materials submitted to it and the understanding it has acquired during the course of the proceedings of the extent, difficulty and quality of the services for which these fees are claimed, finds them to be reasonable, and this amount will be allowed in the Award.

The fees incurred in connection with the action in the United States court to appoint the second arbitrator and to compel this arbitration and related procedures are also properly compensable and will be awarded. Such fees are not normally imposed on the losing party in American courts and were neither imposed nor collected in the proceedings in question here. The scrutiny undertaken by the Arbitral Tribunal, in the course of this arbitration, of the material submitted in the ancillary United States court case establishes that the fees claimed under this head of damages were necessarily incurred and were reasonable.

The same is true of the fees and costs, aggregating US\$318,956, incurred in defending the jurisdiction of this arbitration and opposing Respondents' legal efforts to interfere with its continuance. All these items are properly recoverable as ancillary to the arbitration itself. They are also properly awarded as damages for Respondents' violations of Section 8.1 in bringing such actions in the first place.

As to these elements of damage, since the costs were incurred at widely varying dates, and since the Arbitral Tribunal is lacking evidence as to when, if at all, they have actually been paid, the Arbitral Tribunal exercises the discretion vested in it by New York law to refrain from imposing pre-Award interest on these amounts. Since, upon issuance of

this Award, such amounts become legal debts of the Respondents, it is appropriate that post-Award interest be allowed, and the Award so provides.

The Award will also provide that 100% of the fees of the arbitrators and other expenses of the arbitration shall be paid by Respondents. The ICC Court fixed the costs of the arbitration (the fees and expenses of the arbitrators and the ICC administrative expenses) at US\$285,000. Therefore, Respondents must pay Claimant EEMC US\$285,000, together with post-Award interest at the New York legal rate for the same reason articulated above with regard to recoverable legal costs.

C. *Costs of Other Indian Legal Proceedings*

The Arbitral Tribunal denies EEMC's demand for recovery of costs and expenses incurred in the proceedings before the Indian Company Law Board and in other proceedings in India brought to "thwart" the arbitral initiatives by DPC against MSEB and SOM. These actions were, as has already been held, ingredients of the course of conduct for which recovery of the entire investment has been ordered, and that return of the total investment fully compensates Claimant for all the several wrongs by which the ultimate extinction of Claimant's equity was accomplished. The Arbitral Tribunal therefore concludes that it would be duplicative to award a further sum for this element of the overall course of Respondents' conduct. Moreover, the proof of the amounts expended is insufficient to allow a confident judgment as to the necessity and reasonableness of those amounts.

D. *Injunctive Relief*

The Arbitral Tribunal, in the exercise of its discretion, also denies EEMC's prayer for an injunction against the Respondents from further interference with this proceeding or otherwise interfering with its right to arbitrate disputes under the Shareholders Agreement.

These proceedings come to an end with the issuance of this Award, and further interference with their course is no longer possible. As to similar attempts in similar proceedings in the future, there is no indication what they may be, and no reason to believe that the procedures specified in Article 8.1 cannot be invoked if necessary to protect against abuse then. And, finally, this tribunal is loath to issue an injunction when several issued by the United States and English courts have already been ignored and disobeyed, especially since it lacks any capacity to compel acquiescence by Respondents.

As noted above, CIPM I had joined in bringing this proceeding, but withdrew promptly thereafter in light of Indian injunctions against its further prosecuting it. In doing so, it reserved its rights to pursue such claims if and when the Indian injunctions ceased to bar them from doing so. The Arbitral Tribunal, taking note of this position, reiterates its earlier statement that nothing in this award shall be construed as determining or otherwise affecting whatever rights CIPM I may have in the premises.

As to all other claims for relief and contentions preserved in the Terms of Reference and submitted by Claimant EEMC and Respondents, the Arbitral Tribunal has given them full consideration. Except as otherwise set forth in this Award, they are denied. Except as to CIPM I, this Award is in full resolution of all disputes tendered to the Arbitral Tribunal and all issues identified in the Terms of Reference.

It is, therefore, the Award of the Arbitral Tribunal in this proceeding that:

1. The Arbitral Tribunal has jurisdiction over Respondents and each of them, and has jurisdiction to determine all the issues tendered to it by the Terms of Reference and to render an Award thereon.

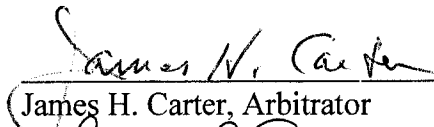
2. Respondents are jointly and severally liable for and, pursuant to the terms of Section 8.1 (d) of the Shareholders Agreement, shall pay to Claimant EEMC on or before the 30th day following the date of this Award, the amount of Ninety-four million seven hundred thousand dollars (US\$94,700,000), with simple interest thereon at the rate of 9% per annum from May 2, 2002, to the date of this Award and thereafter at such rate on any unpaid balance of such amount until it has been paid in full.
3. Respondents are jointly and severally liable for and, pursuant to the terms of Section 8.1(d) of the Shareholders Agreement, shall pay to Claimant EEMC on or before the 30th day following the date of this Award, the additional amount of two million seven hundred twenty-four thousand nine hundred sixty-two dollars (US\$2,724,962) with simple interest on any unpaid balance thereof at the rate of 9% per annum from the date of this Award until paid in full.
4. Respondents shall pay in full the costs of this arbitration. Respondents shall therefore be jointly and severally liable for and, pursuant to the terms of Section 8.1(d) of the Shareholders Agreement, shall pay to Claimant EEMC on or before the 30th day following the date of this Award, the additional amount of two hundred eighty-five thousand dollars (US\$285,000) with regard to the costs of the arbitration as fixed by the ICC Court, with simple

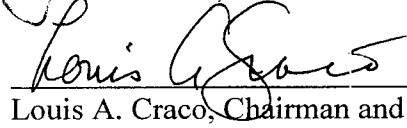
interest on any unpaid balance thereof at the rate of 9% per annum
from the date of this Award until paid in full.

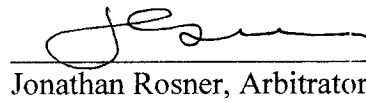
5. All other claims for relief should be and the same hereby are
denied.

Place of Arbitration: New York, New York, U.S.A.

Date of Award: April 27, 2005


James H. Carter, Arbitrator


Louis A. Craco, Chairman and Arbitrator


Jonathan Rosner, Arbitrator