Restarting Dabhol

Who Will Bear the Cost? And Why?

The news that the Enron project at Dabhol will soon be revived is not an occasion for a sigh of relief. The unofficial information suggests that thanks to the shenanigans of unaccountable political bosses and the bureaucrats, the Indian taxpayers will end up paying significantly more for a 'second-hand' project as compared with an equivalent 'new' project. The elected representatives have repeatedly refused to grab the opportunities to escape from the Power Purchase Agreement, possibly in order to avoid an open scrutiny of the deal. If the political class escapes this time as well, there is the danger that this strategically critical project – after being cleaned up at huge public cost – would be given on a platter to a private player.

Prayas Energy Group

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The Enron or Dabhol Power Company project is again in the media limelight, this time for news of its revival. There is considerable public interest in (if not anxiety about) the revival of the project, partly due to a severe shortage of electricity in many states, including Maharashtra, where the plant is situated. However, the efforts for its revival are shrouded in secrecy and there is hardly any official information available to the public in this matter. Before we enter into a discussion of the limited information available as reported in the media, a short summary of the history of the controversy would be helpful for understanding the context of the current discussions.

Brief History

Dabhol Power Company (DPC) and its huge power project (2184 MW, liquefied natural gas-based) were promoted by Enron Corporation, along with two other US multinational corporations, GE and Bechtel. It came into being on the basis of a power purchase agreement (PPA) between DPC and the Maharashtra State Electricity Board (MSEB). The controversial PPA was negotiated secretly and was kept under wraps for a long time. It was a one-sided, badly negotiated contract that contained provisions which defied every logic. The PPA, which was signed first in 1993, was cancelled by the state government after the change in government following the 1995 state elections. However, the new government soon renegotiated the PPA, with conditionalities that made it worse than the earlier PPA.

The criticism of DPC was that the project itself was unwarranted, the design was sub-optimal, the choice of the fuel (for the base load plant) was wrong, the plant cost was much higher than that of comparable plants, the equipment had technical problems, all risks were borne by MSEB, and many financial and legal provisions were blatantly one-sided and unjustified. Such provisions included mandatory recourse to international arbitration and the now ill-famed 'Take or Pay' clause, which assured DPC a revenue stream. The worst part was the various punitive provisions – including excessively high contract termination fees and linked guarantees from state and central governments – that made it impossible for MSEB to exit this one-sided and extremely harmful contract.

The project started operations in 1999 and soon, the cost of per unit of electricity shot up to Rs 7.5 (due to a lack of demand to run the plant at full capacity, as was predicted by the critics of the project, and high naphtha prices). This created a big public outcry. Then MSEB acted on the repeated failure of DPC to abide by its technical commitments in the PPA and levied heavy penalties as per the PPA. The dispute escalated, resulting in closure of the plant as well as the 'rescinding' of the PPA by the MSEB on the charges of mis-declaration in the middle of 2001. In a few months, the Enron scandal erupted in the US and the company eventually filed for

bankruptcy proceedings. Subsequently, in 2004, a part of Enron's claimed equity (out of the 65 per cent equity in the project) was purchased by GE and Bechtel for the paltry sum of US$ 20 million.

At the end of 2000, as the result of the public outcry over the excessive cost of DPC's electricity, the state government was forced to appoint a high-power expert committee (called the Energy Review Committee) to investigate the PPAs of three IPPs and suggest ways to minimise damages. In April 2001, the committee came out with detailed and unanimous findings, vindicating the objections and allegations against the project made by critics. The report found many provisions in PPA unjustified, resulting in an excessive and unbearable burden on the economy of Maharashtra. It also suggested financial restructuring of the project. The committee opined that there had been "consistent and broad failure of governance" at all levels of government and at administrative as well as political levels. Hence, the chairperson and one member of the committee recommended that a commission of enquiry be appointed to investigate the process that led up to the sanction of the project. On the basis of the report of such a judicial enquiry commission, the government could prove serious problems in the PPA as per the Contract Act. This would lead to the PPA becoming legally void, which would allow MSEB to escape from the deadly dilemma created by of the otherwise inescapable PPA. This deadly dilemma, on one side, involved the mandatory (Take or Pay) payment of the excessive and unaffordable annual bill of Rs 6,500 crore, if the project was kept running. On the other hand, it would mean a financial disaster for the state because of the legal compensation to DPC estimated to be over Rs 20,000 crore, in case the PPA was terminated. Again, under severe public and media pressure, the state government had to appoint an appropriately empowered commission. The commission started its enquiry, but had to suspend the proceedings due to a stay by the Supreme Court.

Efforts for Revival

After the closure of the plant, the government of Maharashtra adopted the strategy of keeping its hands off the project and leaving the matter to the central government; though MSEB continued to make spirited attempts to fight the arbitration and other proceedings against it. The Indian financial institutions and the central government made several and diverse attempts to revive the project. However, GE and Bechtel continuously blocked all efforts for revival with obstinate demands of a hefty upfront payment. They effectively held the governments and people of India at ransom, using the punitive provisions in the PPA as a threat.

After the new (UPA) government came into power at the centre last year, the efforts for revival got a new lease of life. A high-power group of (senior) ministers was appointed to design and oversee this revival. These efforts got a further boost because of the current power shortages in Maharashtra. It is interesting that, during the same period, there are news items about the awards of various tribunals located in foreign countries giving compensation of large sums to GE and Bechtel.

The grapevine suggests that a deal on the revival of the project has been almost finalised. The government of India, foreign lenders to the project, and GE have reportedly agreed to the terms of the deal. However, there is hardly any official information available to the public on this purported deal. This situation calls for a fresh public discussion of the issues involved in the revival, which is necessary to ensure that the secrecy and the other factors involved (discussed in subsequent paragraphs) do not result in a raw deal for the Indian people, Indian taxpayers, and investors in Indian public finance institutions, which have a huge exposure (about Rs 6,000 crore) in this project.

Issues of Concern

Because of the complete secrecy, it is not possible to come out with a detailed critique of the revival formula. However, a combination of various factors – viz, the scale of the deal, the track-record of the governments in this matter, and the complete secrecy – require, to begin with, a critical review of the current situation as well as public voicing of the concerns and grievances.

Trap of International Arbitration

One of the most intriguing issues that was uncovered during the Enron saga is how the multinationals take advantage of international treaties and international arbitration, by playing on weaknesses and susceptibilities of the governments in developing countries. The two American multinational corporations (GE and Bechtel) have initiated more than six arbitration procedures in different countries, under different legal provisions, against one single action of 'rescinding' the contract by MSEB.

Enron, GE, and Bechtel had secured insurance against 'political' risks from the OPIC, the American state agency for promotion of investments by American firms in foreign countries. After the closure of the project, GE and Bechtel went to OPIC claiming that the government of India had appropriated their assets. OPIC, after some proceedings, paid compensation of about US$ 57 million to these companies. Now OPIC is recovering this money from the Indian government. It is noteworthy that the Indian agencies – though they are the affected parties – do not even have access to the petitions in the OPIC-GE (+Bechtel) arbitration; leave aside having a chance to represent their case. This does not stop here. The equity of bankrupt Enron was finally bought by the GE but through its Dutch subsidiary. This GE subsidiary in Netherlands promptly initiated international arbitration against the government of India under the Indo-Dutch bilateral treaty. It appears that the Dutch subsidiary of GE (and not from any other country) was chosen because the treaty between India and Netherlands was more suitable for GE's tactics. The corporations are also claiming under the Indo-Mauritius economic treaty, through their Mauritian subsidiaries, an expropriation of assets by the government of India. Here they are arguing that contract abrogation was done for 'political' reasons.

The government agencies from the developing countries lack functional agility and tactical and strategic planning necessary to tackle such trickery by multinational corporations. They do not have experienced staff; lack coordination among different departments; consultants are changed frequently; and the political bosses lack understating of the complex issues involved. Often, these agencies fail to find competent professionals and lawyers to fight their cases in the arbitration procedures, as the corporations 'reserve' these lawyers by paying hefty 'retaining' fees. The abovementioned lacunas, many times, prove very costly. For example, the statements made by ministers – who are often oblivious of the gravity and nature of the arbitration proceedings – for domestic political convenience sometimes are used by the multinationals against the governments, causing serious damage.

In short, the Enorn controversy is a demonstration of the modus operandi adopted by some 'rogue' multinational corporations that use all available means to get unaccountable political bosses in developing countries to secretly sign contracts that are hopelessly one-sided and predatory in profit flows. To make these contracts legally ironclad, conflicts resolution through international arbitrations is made mandatory. Once such a contract is signed, it is beginning of the end for the interests of consumers and taxpayers of these countries. These corporations then raise loans and seek insurance against 'political' risks from the government agencies in their 'home' countries. This then brings into fray the governments of developed countries that have great economic and political muscle to use against the governments of 'erring' developing countries.

It is interesting to note that dozens of developing countries are currently defending themselves in several arbitration procedures initiated by many American and European multinational corporations.

Lost Opportunities

Before we get into the discussion of the current efforts for revival, it will be worthwhile to discuss the previous opportunities that were lost due to inaction or neglect by the governments. Brief discussion on a couple of these lost opportunities would help us to contextualise the current efforts.

As mentioned before, under severe public and media pressures, the state government appointed a judicial enquiry commission to investigate the manner of sanction of the project, following the recommendation of the high-power Energy Review Committee. However, after a few months, the government of India went to the Supreme Court to get an injunction against the functioning of the commission. This was on the excuse that the state government cannot appoint a commission to enquire into affairs in which the central government is involved. The Supreme Court gave a stay, which has not been vacated until now and, as said before, the commission is in limbo.

Let us understand the political economy behind these developments. First, the national government, which went to the Supreme Court, was led by BJP (or Bharatiya Janata Party) and the minister in charge of the power ministry in this ministry came from the state-level party Shiv-Sena (SS). The coalition of BJP and SS was in the power in the state government when the renegotiated PPA was signed by MSEB with DPC. However, after the Court's stay, the state government never made any serious attempt to vacate the stay, despite consistent requests and protests by many. This state government is led by the coalition of the Congress party and its breakaway state-level faction, viz., the Nationalist Congress Party (NCP). The Congress party was in power when the first deal was signed and Sharad Pawar – who is now the head of the NCP – led the Congress government in the state, which entered into the first PPA with DPC. It is interesting to note that this government was defeated in the elections by the BJP-SS combine, which were fought on the plank of allegations of corruption in the Enron deal.

In short, (all) the four leading political parties from Maharashtra – which were involved in the Enron deal at one point of time or other – ensured that the enquiry commission would not work, without bothering about the fact that this would mean continuation of the stranglehold of PPA. This sacrifice of the commission was carried out by bosses of these political parties, despite the well-known fact that the commission could provide possibly the only publicly known route to escape out of the death-grip of the one-sided PPA with DPC. In other words, the politicians from the four parties colluded to save their own skins, by jeopardising the future of the entire state.

For the Indian people, this was the loss of an opportunity to remove the sword hanging over their heads through, possibly, the only known transparent route for making the PPA legally void. With this opportunity lost, the only way out left for Indians was to rely on politicians and bureaucrats for negotiating a deal with the American companies, who had already demonstrated their predatory intentions. This meant that they would be entirely at the mercy of these corporations and the politicians.

Another opportunity was lost when the Enorn controversy erupted in the US and Enron went bankrupt. The government, after repeated suggestions, failed to respond to the opportunities to buy Enorn's equity in DPC, especially when the corporation desperately needed cash to save itself from bankruptcy. This inaction and apathy is so blatant and unjustified that one wonders what and who made the government contemplate and deliberate such non-action. The gravity of loss of this opportunity could be assessed in the light of the fact that the other two American companies bought a large part of Enron's 65 per cent stake in DPC (claimed to be worth about US$ 550 million) at the paltry sum of US$ 20 million. Had the government shown willingness and flexibility to act in time, it would have been placed itself in an unassailable position of owning a majority share in DPC's equity, rendering the two American corporations toothless. The abject failure of the politicians to respond to another opportunity to adopt an open and transparent route for resolution of the issue needs to be seen in this light.

Is Secrecy Necessary?

The current efforts led by the group of ministers need to be seen in this entire context. The keyword here again is complete secrecy. The need for secrecy is justified with an argument that the negotiations in such a matter of business need flexibility and quick decision-making and, hence, these negotiations cannot be held in an open and transparent manner. For more than one reason, this appears to be an excuse. For example, the readiness of government to adopt flexible approach while going for secret negotiations appears quite disturbing, especially in view of its failure to adopt flexibility when open and transparent opportunities for resolution (mentioned before) were available.

Second, the irony of the situation is that government's internal sensitive documents on this matter are available through the commercial information services, which openly circulate the documents to their subscribers (who are able to pay their high fees). Thus, while the common people who cannot pose any danger to the negotiations are denied information, those whose interest could be different from the public interest get even the internal documents of governments openly on the internet. All this makes the government's claims for the need of secrecy questionable and suspicious.

Credibility of Negotiators

The suspicion over the government's preference to the route of secret negotiations thickens further when one looks into the past track record of the individuals who are conducting and overseeing these secret negotiations.

The prime minister was the minister of finance at the time of the first deal with Enron. Then, the current finance minister, P Chidambarm, whose ministry – and not the power ministry – is in charge of the current secret negotiations, was one of the main legal counsels of Enron Corporation, aiding the legal shenanigans by Enron against the Indian government. It is believed that he advised Enron to make sure that the clauses for international arbitration in the PPA – which were not in the first draft submitted by Enron – are introduced. We are told that he is not personally involved in these negotiations, but his ministry is put in charge of the entire effort.

The third person who is in a powerful seat of the government and has a questionable track record in the Enron controversy is Montek Singh Ahluwalia. He was the finance secretary when the government of India sanctioned the Enron project. He is not, however, an official member of the group of ministers. His role in helping Enorn in overcoming the main hurdle in its path – the statutory economic sanction from Central Electricity Authority – has been well-known and found a place in the report by the energy review committee appointed by the government itself.

The oddest member of the group of ministers is Sharad Pawar, who was the chief minister of Maharashtra at the time of the sanction of the first PPA and who has always been an avid supporter of Enron's cause. His party was defeated in the elections fought over the issue of corruption in Enron. Curiously, he is a member of the group though he is the minister for agriculture and has nothing to do with the finance or power ministry. Ironically, the current minister of power in the government of India – who has no track record in the Enron controversy – seems to be playing a very marginal role in the current efforts for revival.

In short, it will be an understatement to say that the track record of the main members of the group of ministers in charge of the revival of the Enron project does not inspire much confidence. As mentioned before, the suspicion thickens when this track record is juxtaposed with the complete secrecy during negotiations.

Real Costs of Revival

Though there is no official information available on the deal to be sealed soon, some bits and pieces of information are emerging through the grapevine. As per these details, the 'known' capital cost of the four-year old project comes to around $ 2.3 billion (Rs 10,000 crore), which includes the following:
– Payment of around $580 million to GE and Bechtel. This includes: (a) US$ 137 million towards the cost of work done but not paid by DPC as per the claims of GE/ Bechtel; (b) a large sum of US$ 200 million towards the cost of restarting Phase I and completing the remaining work of Phase II and the LNG terminal; and (c) full payment of the equity claim of US $ 243 million (comprising US $ 186 million direct claims and US $ 57 million through OPIC).
– Debt (from Indian sources) of around US $ 750 million to retire or buy out the foreign debt
– Indian debt of around of US$ 850 million
– Other costs of about US $ 150 million for asset preservation, interest during construction, etc.

A part of these costs are expected to be paid through the settlements of claims of US government agency OPIC.

In addition to this cost, the Indian government will offer tax concessions such as exemption of various import duties for equipment and LNG, and forgo the customs dues of DPC of Rs 324 crore. Further, governments will suffer the loss of MSEB's equity in DPC worth US $ 186 million (or Rs 850 crore as per the old rates). Then the loss of interest to Indian financial institutions also needs to be considered. Thus, the 'known' total cost of the project to the Indian governments goes up to Rs 11,000 (10,000 + 850) crores, apart from the foregone interests by the Indian financial institutions.

In addition to all these, the Indian government is learnt to have owned up potential liabilities of unresolved claims on DPC worth US $ 450 million (or Rs 3,740 crore) by LNG suppliers and the tanker company. It is likely that the LNG supply contract would be awarded to these companies in lieu of these claims. This may have implications for the rate at which the LNG would be bought. It is noteworthy that, if the LNG price is raised by just 10 cents/ mmbtu, then it would amount to an increase in the LNG payments to the tune of US $ 100 million, or Rs 440 crore (NPV @ 10 per cent)!

These costs could have been higher if we were to bear the full burden of: (a) Enron's equity of US $ 553 million (reduced to its purchase costs of US $ 20 million) and (b) interest foregone by the foreign financial institutions. Curiously, it appears that Enron quickly repaid some of its foreign debt (about US$ 160 million) when the project was running; details on this issue are not available. In addition, Enron is said to have paid out hundreds of millions of dollars in cash bonuses over the few years after financial closure.

If we consider the total 'known' cost to Indian governments of Rs 11,000 crore to be paid for this four year old 'second-hand' or 'used' project, it is about 30 per cent higher than the total capital cost of an equivalent 'new' project (this does not include the potential higher cost of LNG supply). This is the cost Indian people and Indian taxpayers are paying for the Himalayan blunder of our political bosses. Unfortunately, we have no mechanism to hold them accountable for their deeds.

The finances necessary to pay for the cost of buying out foreign investors and institutions (around US $ 761 million or about Rs 3,300 crore) are likely to be raised through the following means:
– Equity input by GAIL and NTPC
– Upfront payments by Indian financial institutions for purchase of equity
– Payment of about US $ 113 million by MSEB either as past dues to DPC or as purchase price of the equity in the restructured entity

The NTPC, GAIL, financial institutions, and MSEB may get equity in the restructured entity. An additional amount of US$ 300 million would be raised through long-term bonds (20 years duration

or so), with guarantee from the government of India. The LIC may be asked to purchase these bonds.

To ensure a continuous cash flow for the restructured project, a new PPA would be signed between restructured DPC and the purchasing utility (ies). It appears that the government of Maharashtra has agreed to purchase a part of the power from the plant. It is likely that the project would be structured as a multi-state project to avail benefits of the Mega Power Project Policy; and the sale of power to other state utilities and or Power Trading Corporation (PTC) could thus be facilitated. This would also move the process of PPA approval from the state regulatory commission to the central commission.

In this whole process, the government of India is making settlement of one of the largest international claims on India. But while doing this, it has not bothered to follow the basic norms of checking the claimed figures. It has not checked whether the claims of equity invested by these multinationals are correct. Neither has it audited the expenditure of nearly US $ 3 billion claimed by DPC. We are not sure whether and how the government has carried out an independent evaluation of the claims by GE and Bechtel for their past dues and for the cost of the restarting the project.

Some other actions on the part of the government during this period are another source of suspicion. Some months before the ministry of finance had initiated retaliatory actions against the arm-twisting tactics of these obstinate corporations. However, things seem to have changed suddenly, instead of being intimidated, these corporations raised their demands further. During the same period, even a couple of foreign financial institutions (ABN Amro and ANZ Export Finance Ltd) seem also have raised their demands by US $ 25 million. Curiously, even the governments seemed to be in the mood to agree to these increased demands, instead of following up with retaliatory action.

Future Concerns

In such a scenario, even if we stick to the 'costs' of Rs 10,000 crore to be levied on the project, it may not be viable unless there are provisions for substantial additional subsidies. This would most probably come through low-cost, long-term debts from public financial institutions like LIC, which are often treated like domestic milch cows by our politicians. Unfortunately, we have no means to control this, but our elected representatives and media should monitor and expose these kinds of efforts in future.

The history of reforms in our country points at another possibility. Once this project is cleaned up and new PPAs are tied up, at huge public costs described above, the project becomes a very attractive mine of precious stones – another Mukta-Panna. This is not just because of the present generation capability and the present assets. But the location and structure of the project is such that subsequently significant expansion could be carried out in a highly profitable manner. Further, the location, the specialised jetty and LNG facility with huge capacity (twice that required for the present project), and the size of the project would make it a highly strategic asset for any integrated energy company, giving it unparallel advantage for acquiring market dominance. Thus, there is a great danger that this new gold mine with a clean slate would be the target for acquisition for predatory corporations – indigenous or foreign, with support from the rhetoric of privatisation and always-willing politicians.

Conclusion

In conclusion, the news that the Enron/ DPC project is being revived is not an occasion for a sigh of relief. The track record of many of the individuals involved in the revival is dubious and does not inspire confidence that they would take a tough stand on matters of public interest. Further,

the path of so-called secret negotiations seems to be an excuse to keep the public in the dark and avoid accountability. The elected representatives have repeatedly refused to grab the opportunities to escape from the PPA, possibly in order to avoid open and transparent scrutiny of the deal.

The unofficial information suggests that thanks to the shenanigans of the unaccountable political bosses and their crony bureaucrats Indian taxpayers will be paying significantly more for a 'second-hand' project as compared with an equivalent 'new' project. Further, if the politicians are allowed to escape this time, there is danger that this strategically critical project – after being cleaned up at huge public cost – would be given on a platter to a private player. The question is, does the Indian democracy have the means to stop the politicians who are on a rampage?

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