Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.1, 2 and 5 of 2012

Dated: 18th Dec, 2013

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON

HON'BLE MR. NAYAN MANI BORAH, TECHNICAL MEMBER

APPEAL No.1 of 2012

In the Matter of:

Indian Oil Corporation Limited.,
G-9, Ali Yavar Jang Marg,
Bandra (East)
Mumbai-400 051

….Appellant

Versus

1. **Gujarat State Petroleum Corporation Limited.,**
   GSPC Bhawan,
   Behind Udyog Bhawan,
   Sector-11, Gandhinagar-382 010

2. **GAIL India Limited.,**
   16, Bhikaji Cama Place,
   New Delhi-110 066

3. **Bharat Petroleum Corporation Limited.,**
   Bharat Bhawan,
   4 & 6, Currimbhoy Road,
   Ballard Estate, PB No.688,
   Mumbai-400 001

4. **Petroleum and Natural Gas Regulatory Board,**
   1st Floor, World Trade Centre,
   Babar Road, New Delhi-110 001

….. Respondent(s)

Counsel for the Appellant : Mr.Rajat Navet

Counsel for the Respondent(s): Mr. C S Vaidyanathan, Sr Adv
Mr. Piyush Joshi
Mr. Aspi Kapadia,
Ms. Sumiti Yadava &
Ms.Nimisha S.Dutta
for GSPCL
Mr. Raghu Nayyar for GAIL
Mr. Inderbir S Alag &
Mr. Rakesh Dewan for PNGRB

APPEAL No.2 of 2012

In the Matter of:
Bharat Petroleum Corporation Limited.,
Bharat Bhawan,
4 & 6, Currimbhoy Road,
Ballard Estate, PB No.688,
Mumbai-400 001

….Appellant

Versus

1. **Gujarat State Petroleum Corporation Limited.,**
   GSPC Bhawan, Behind Udyog Bhawan,
   Sector-11, Gandhinagar-382 010

2. **GAIL India Limited.,**
   16, Bhikaji Cama Place,
   NEW DELHI-110066

3. **Indian Oil Corporation Limited.,**
   G-9, Ali Yavar Jang Marg,
   Bandra (East)
   Mumbai-400 051

4. **Petroleum and Natural Gas Regulatory Board,**
1st Floor, World Trade Centre,
Babar Road,
New Delhi-110 001

….. Respondent(s)

Counsel for the Appellant : Mr.Rajat Navet

Counsel for the Respondent(s): Mr. C S Vaidyanathan, Sr Adv
Mr. Piyush Joshi
Mr. Aspi Kapadia,
Ms. Sumati yadav &
Mr. Simon Bengamin for GSPCL
Mr. Raghu Nayyar for GAIL
Mr. Inderbir S Alag &
Mr. Rakesh Dewan for PNGRB

APPEAL No.5 of 2012

In the Matter of:
GAIL (India) Limited.,
16 Bhikaji Cama Place,
New Delhi-110 066

….Appellant

Versus

1. **Gujarat State Petroleum Corporation Limited.,**
GSPC Bhawan, Behind Udyog Bhawan,
Sector-11, Gandhinagar-382 010

2. **Indian Oil Corporation Limited.,**
207/3 J.B Tito Marg,
Sadiq Nagar,
New Delhi-110 049

3. **Bharat Gujarat Petroleum Limited.,**
ECE House, Connaught Circus,
New Delhi-110 001

4. Petroleum and Natural Gas Regulatory Board,
1st Floor, World Trade Centre,
Babar Road, New Delhi-110 001

….. Respondent(s)

Counsel for the Appellant : Mr.M G Ramachandran
Mr. Ankit Jain

Counsel for the Respondent(s): Mr. C S Vaidyanathan, Sr Adv
Mr. Piyush Joshi
Mr. Aspi Kapadia,
Ms. Sumati yadav &
Mr. Simon Bengamin for GSPCL
Mr. Rajat Navet for IOCL and BPCL

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. These three Appeals i.e. Appeal No.1, Appeal No.2 and Appeal No.5 of 2012 have been filed by Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited and Gas Authority of India Limited (GAIL) respectively against the impugned orders passed by the Petroleum and RLNG Regulatory Board (Board):-

i) Chairman(PNGRB)'s Order dated 13.9.2011; and

ii) Order of two Members (Majority Decision) of PNGRB dated 10.10.2011.

2. Since the impugned orders are the same, a common judgment is being rendered in all these Appeals.

3. The relevant facts leading to filing of these Appeals in short, are as follows:

(a) GAIL India Limited., the Appellant in Appeal No.5 of 2012 established a gas pipeline for transportation of gas from Hazira in the State of Gujarat to Jagdishpur in the State of Uttar Pradesh(HVJ i.e. Hazira – Vijaypur-Jagdishpur Pipeline) in the year 1988.

(b) The Dahej LNG Terminal was set-up in the year 1995.

(c) Prior to setting up of the said Dahej Terminal, there were considerable supply constraints in the availability of adequate supply of Natural Gas to the Industry. The Appellant in Appeal No.5, the Government of India and others took initiative of scouting for import of Natural Gas. Government of India facilitated the process of importation of Liquefied Natural Gas (LNG) for setting-up of Dahej LNG Terminal for Re-gasification of LNG and supply of RLNG (Regasified LNG) including its transportation from Dahej LNG Terminal to the consumers premises through gas pipelines.

(d) The Petronet LNG Limited (Petronet) was incorporated on 2.4.1998 with GAIL, Indian Oil Corporation, Bharat Corporation Ltd., and Oil and Natural Gas Corporation for import of LNG, re-gasification of imported LNG and sale of RLNG in India.

(e) RasGas, a foreign supplier of LNG entered into an Agreement with the Petronet for sale of LNG by RasGas from Qatar on 31.7.1999. This agreement involved an integrated system comprising broadly of the following elements:

(i) The RasGas was to set-up facilities in Qatar for the Liquefaction of Natural Gas i.e. LNG and Petronet to set-up facilities for establishing a Terminal for Regasification of LNG at Dahej in the State of Gujarat.

(ii) The GAIL was to establish the Dahej-Vijaypur pipelines for transportation of the Natural Gas (RLNG) to the consumers. It was also provided that the LNG was to be regasified at the Dahej Terminal of the Petronet which, in turn, would sell the entire Natural Gas (RLNG) of initial quantum of 5 MMTPA (millions tonnes per annum) to GAIL, Indian Oil and Bharat Petroleum Limited, the Appellants.

(iii) As per this Agreement, the GAIL was required to invest in the gas pipelines for evacuation of the RLNG from the Dahej LNG Terminal to the prospective purchasers.

(f) By the order dated 13.11.1999, the Ministry of Petroleum and Natural Gas decided to nominate the GAIL as the sole transporter of the RLNG from Dahej Terminal to the prospective consumers. Accordingly, the gas pipeline for transportation of RLNG contracted with the Petronet was to be laid down by the GAIL.

(g) On 18.12.2001, the Board of Directors of GAIL approved the laying of the Dahej-Vijaypur pipeline in pursuance of the commitment given to the suppliers of LNG to keep sufficient pipe-line infrastructure ready within the timeframe to evacuate the RLNG, and to interconnect with the HVJ pipeline.

(h) A Board meeting of the Joint Venture Company namely, the Petronet was held on 24.7.2003. In that meeting, the Gujarat State Petroleum Corporation Ltd., (the Gujarat Petroleum), the 1st Respondent made a request to the Petronet for direct purchase of RLNG from Dahej LNG Terminal. This request was considered but, ultimately it was not agreed to as the entire quantum of the RLNG already stood committed

to be sold to the GAIL, Indian Oil Corporation and Bharat Petroleum Corporation Limited, the Appellants on account of their significant LNG project initiative, financial guarantees and commitments. Accordingly, the Petronet was not in a position to supply RLNG directly to Gujarat Petroleum. Therefore, the Gujarat Petroleum was required to purchase the RLNG only from GAIL, Indian Oil Corporation and Bharat Petroleum, the Appellants.

(i) In view of the above, the Gujarat Petroleum (R1) negotiated and requested for many concessions from GAIL for purchase of RLNG. Ultimately, on 7.2.2004, the Long Term Gas Sales Agreement was entered into between GAIL, the Appellant and the Gujarat Petroleum, the 1st Respondent for sale and purchase of RLNG obtained from regasification of LNG from Dahej LNG Terminal on the terms and conditions contained in the said Agreement.

(j) Similarly, Long Term Gas Sales Agreements were also subsequently executed by the Gujarat Petroleum (R1) with Indian Oil Corporation on 12.2.2004 and with Bharat Petroleum Corporation Limited on 16.2.2004.

(k) Under all the above three Gas Sales Agreements, the Delivery Point of gas was agreed to be at a specific place of delivery located in the Gujarat Industrial Development Corporation area at Dahej. The Delivery Point was at a distance of 300 mtrs from Dahej Terminal. Therefore, the RLNG was to be transported from Dahej Terminal to the Delivery Point through the DVPL Gas pipelines of GAIL. This was the exclusive pipeline established for evacuation of gas from the Dahej Terminal. There was no other pipeline existing at the relevant time for transportation of the said gas (RLNG). The price to be paid by the Gujarat Petroleum for supply of gas consisted of the contract price, transportation charges, taxes and duties for such delivery at the Delivery Point.

(l) In March, 2004, DVPL Gas Pipeline was established and commissioned by GAIL connecting Dahej Terminal to HVJ pipelines facilitating flow of RLNG from the Dahej Terminal.

(m) On 24.3.2004, the sale and transportation of RLNG to the Gujarat Petroleum commenced. Since then, the Gujarat Petroleum has been purchasing RLNG from GAIL, Indian Oil Corporation and Bharat Petroleum Corporation Limited by taking delivery of the same after it has been transported on the DVPL lines

from Dahej Terminal to the Delivery Point. This RLNG transportation arrangement had continued right up to the filing of the complaint by Gujarat Petroleum before the PNGRB on 4.4.2011.

(n) Gujarat Petroleum continued to take delivery of RLNG purchased from GAIL, Indian Oil and Bharat Petroleum at the designated Delivery Point and also paid connectivity/transportation charges to GAIL, the transporter from the year 2004 onwards.

(o) On 31.03.2006, the Petroleum and Natural Gas Regulatory Board Act, 2006 was notified.

(p) The Ministry of Petroleum and Natural Gas sent a letter on 18.5.2006 deciding and accepting the recommendations of the Tariff Commission pertaining to common transportation of HVJ and DVPL pipeline. Accordingly, the GAIL implemented the same with effect from 1.6.2006.

(q) On 31.5.2006, the transportation charges were determined by GAIL as per the letter dated 8.5.2006 of the Government of India. Thereupon, GAIL wrote a letter to Gujarat Petroleum on 16.6.2006 determining the revised transportation charges for transportation of Gas from Dahej Terminal to Gujarat Petroleum facilities with effect from 1.6.2006 on the HVJ-DVPL pipelines.

There was a Board meeting of the Petronet held on 17.10.2006. At that point of time, a proposal was made by the Gujarat Petroleum for direct connectivity of the gas pipelines proposed to be established by the subsidiary of Gujarat Petroleum to the extent of capacity contracted by the Gujarat Petroleum Corporation for purchase of gas from GAIL, Indian Oil Corporation and Bharat Petroleum Limited. However, this proposal was not accepted by Petronet. Such direct connectivity for purchase of gas in excess of such capacity then committed by Petronet to GAIL, Indian Oil and Bharat Petroleum (7.5 MM TPA) was, however, approved and given to Gujarat Pipeline Company.

(r) On 1.10.2007, the Petroleum Board(PNGRB) was established and all the provisions of the PNGRB Act, except Section 16, came into force.

(s) At this stage, Petroleum Board framed the Authorisation Regulations namely Petroleum and Natural Gas Regulatory Board (Authorising entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 and notified the same.

(t) In terms of Regulation 17 (a) of the Authorisation Regulations, the GAIL submitted the details in

Schedule 'H' Format for its HVJ/DVPL Natural Gas pipelines system indicating the Petronet Dahej as the source of pipelines system.

(u) On 20.11.2008, PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations (hereafter referred to as "Tariff Regulations") was notified by the Petroleum Board. The Tariff Regulations, inter-alia, made provision for determination of Zonal Tariff for transportation of RLNG through a gas pipeline.

(v) On 31.12.2008, the Price Agreement letter was executed between the GAIL and the Gujarat Petroleum for the contracted price for gas supply inclusive of the connectivity/transportation charges, taxes and duties etc. Identical Price Side Letters were signed by Gujarat Petroleum with Indian Oil Corporation and Bharat Petroleum. These Price Side Letters, inter-alia, state:

> 'Connectivity Charges" means the charges payable by the Buyer to Seller for providing the transmission services of Gas up to the Delivery Pont'.

(w) Thereupon, GAIL filed an Application on 15.6.2009, before the Petroleum Board for the

determination of transportation tariff for the DVPL pipelines in pursuance of the Tariff Regulations.

(x) The Gujarat Petroleum, the Respondent represented to the Board asking for excluding all the quantum of the gas purchased by Gujarat Petroleum from GAIL, Indian Oil Corporation and Bharat Petroleum Limited from being covered by the zonal tariff of DVPL Gas pipelines.

(y) On 19.4.2010, the Petroleum Board determined the provisional initial natural gas pipelines tariff for DVPL gas pipelines including for the up-gradation of gas pipelines as per the provisions of the Tariff Regulations.

(z) The Gujarat Petroleum on 13.5.2010, made a representation to the Petroleum Board seeking clarification on the applicability of the order dated 19.4.2010 in regard to the transportation charges payable by the Gujarat Petroleum on the transportation of the RLNG from Dahej LNG Terminal to the Delivery Point as per the Gas Sales Agreement.

(aa) The Petroleum Board ultimately passed the Order on 9.6.2010 determining the zonal tariff applicable for the HVJ-DVPL pipeline at the Zone-1(0-

300 km) tariff of Rs.19.83/MMBTU effective from 20.11.2008.

(bb) Accordingly, the Appellants from June, 2010 onwards have been claiming transportation charges from Gujarat Petroleum, the Respondent on the basis of the Provisional Order dated 19.4.2010 of the Board. However, the Gujarat Petroleum failed to make payment of the charges as per the above Order.

(cc) For the resolution of this dispute raised by the Gujarat Petroleum, a meeting was held at the office of the Petroleum Board on 08.02.2011. However, the conciliatory talks held in the meeting did not yield fruits. Therefore, the Gujarat Petroleum (R1) filed a complaint before the Petroleum Board on 4.4.2011 u/s 12 (1) (a) read with Sections 12 (1) (b) (v) and 13 (1) (g) of the PNGRB Act and the Regulations framed thereunder against GAIL and other Companies alleging Restrictive Trade Practices and abuse of dominant position.

(dd) After hearing the parties, the Petroleum Board responded to the complaint filed by the Gujarat Petroleum vide Impugned Orders dated 13.9.2011 (minority Orders) passed by the Chairperson and Order dated 10.10.2011 (majority Order) passed by two

Members and rendered the following findings and directions in the impugned order dated 10.10.2011:

(i) GAIL and its companies shall allow the Gujarat Petroleum to take delivery from the Gujarat Petroleum Ltd's "Delivery Point" instead of compelling them to take delivery from the "Delivery Point" of the Appellant.

(ii) The GAIL is not entitled to any inter connectivity charges from 4.4.2011 i.e. the date of the complaint filed by the Gujarat Petroleum Ltd.

(iii) The Gujarat Petroleum shall pay to GAIL the first zone tariff under the Gas Supply Agreement from 20.11.2008 to 4.4.2011 and out of this amount; GAIL has to deposit 50% of the amount with the Board for utilisation for the viability gaps in the pipeline to be built in uneconomic regions. No payment shall be made by the Gujarat Petroleum to the GAIL beyond the date of 4.4.2011.

(iv) The GAIL and other companies are directed to desist from restricting Gujarat Petroleum Ltd., for direct connectivity on the ground of contractual provision under the Gas Sales Agreement.

(ee) Aggrieved by the above impugned Orders dated 13.9.2011 and 10.10.2011, the Appellants have filed these Appeals in Appeal No.1, Appeal No.2 and Appeal No.5 of 2012 respectively.

4. The Appellants have made the following submissions in these Appeals assailing the impugned Orders passed by the Petroleum Board:

(a) The Gas Supply Agreements entered into between the Gujarat Petroleum, the Respondent and the Appellants have Arbitration Clauses. Hence, the Petroleum Board has no jurisdiction to adjudicate upon the issues raised by the Gujarat Petroleum in their complaint filed before the Petroleum Board. The dispute raised should have been resolved or raised only under the Arbitration clause.

(b) The complaint filed by the Gujarat Petroleum was barred by limitation in as much as the Gas Supply Agreements were entered into between the parties in 2004 itself. Therefore, the complaint which was filed as late as on 4.4.2011 was not maintainable.

(c) The proposed change in Delivery Point from the existing location as per the Gas Supply Agreement which is situated at about 300/500m away from Petronet Dahej Terminal would amount to re-writing the

Agreements by the quasi-judicial authority namely the Petroleum Board. This is not permissible under law.

(d) The direct connectivity to Dahej LNG plant, when it was asked for by the Gujarat Petroleum earlier, was not granted by the Petronet. The Appellant, GAIL established DVL-HVJ Gas Pipelines for transportation of RLNG from Petronet Dahej Plant to various consumers. The Appellant, GAIL built the DVL-HVJ pipelines at a huge cost as integral elements of Qatar-India LNG Agreement as the sole and exclusive pipelines to carry RLNG as per the decision taken by the Ministry of Petroleum and Natural Gas, Government of India. Once the GAIL pipeline was built, the duplication of such facilities is not permissible, since, avoiding infructuous investment is built into as a policy in the PNGRB Act.

(e) The Gujarat Petroleum, the 1st Respondent wilfully signed Gas Supply Agreements with the Appellants as early as in the year 2004. At that time, the only gas pipeline available for transporting gas from the Dahej LNG Terminal to the Delivery Point was the DVPL pipeline of GAIL. From then onwards, the Gujarat Petroleum continued to pay connectivity/transportation charges without raising any objection till the date of the complaint. Only after a

lapse of more than 6 years, the Gujarat Petroleum filed this complaint before the Petroleum Board alleging that the Appellants had indulged in Restrictive Trade Practices.

(f) Prior to the constitution of PNGRB, tariff for the DVPL pipeline was fixed by the Government of India. The Gujarat Petroleum made representation seeking reduction in the tariff, considering the proximity of the Delivery Point to the Dahej Terminal. However, no issue was raised at the time by Gujarat Petroleum as to their subsequent complaints about alleged Restrictive Trade Practices and abuse of dominant positions by the Appellants.

(g) Further, even later, on a number of occasions during 2005, Gujarat Petroleum asked for more quantum of RLNG from GAIL on the same terms and conditions of the existing Gas Sales Agreement which included transportation of RLNG from the Dahej LNG Terminal to the Delivery Point. No issue about coercion or abuse of dominant position by the Appellant, GAIL was raised by Gujarat Petroleum at this stage.

(h) The allegations of Restrictive Trade Practices made in the complaint against the Appellants have no

basis at all. The real purpose of the complaint was to challenge the levy of tariff at Rs.19.83 per MMBTU as per Zone-I tariff determined by the Petroleum Board which would enhance the connectivity/transportation charges from Rs.8.74 per MMBTU to Rs.19.83 per MMBTU up to the Delivery Point. There was no complaint of restrictive Trade Practices so long as the tariff was not increased to Rs.19.83 per MMBTU by the decision of PNGRB dated 9.10.2010.

(i) Gujarat Petroleum had specifically represented to the Petroleum Board at two stages that the Zone-1 tariff for DVPL gas pipeline should not be applied to Gujarat Petroleum, but this contention was not accepted by the Petroleum Board.

(j) The Gujarat Petroleum, the Respondent was not in a position to purchase the RLNG directly from the Petronet since the entire quantum of RLNG was already sold to the Appellants. Therefore, there was no question of any Restrictive Trade Practices being adopted by the Appellants. In fact, the GAIL, Appellant had only one nominee Director on the Petronet Board. The decision taken by the Petronet Board not to sell the RLNG directly to the Gujarat Petroleum cannot be attributed to the Appellant on account of any coercion

by the alleged dominant position enjoyed by the Appellant.

(k) The Gas Supply Agreement with the Gujarat Petroleum is a Gas Supply and Transmission Contract. GAIL's pipelines were the only prevalent pipeline to transmit RLNG from Petronet Dahej Plant to the Delivery Point. The connectivity charges initially fixed and accepted as per the GSA have been subsequently revised as Zone-I tariff by the Petroleum Board on 9.6.2010 itself. This was not challenged by Gujarat Petroleum. Hence this has attained finality. Therefore, the Appellant GAIL was bound to charge the Gujarat Petroleum, the Respondent with the Zone-1 tariff fixed by the Petroleum Board.

5. In regard to these grounds, the following reply submissions have, inter-alia, been made by the Respondents namely Petroleum Board as well as the Gujarat Petroleum:

(a) The disputes raised by the Gujarat Petroleum with reference to Restrictive Trade Practices relate to rights in rem and do not relate to actions in person am. Therefore, disputes raised do not come under the purview of Arbitration Clause.

(b) Since charging of tariff in terms of GSA by the Appellant was continuing, the cause of action for filing

the complaint was also a continuous one. Hence, the bar of limitation is not applicable to the present case.

(c) The request made by the Gujarat Petroleum for direct connectivity to the Petronet to off-take the RLNG directly at Dahej was not agreed to. Instead, the Appellants compelled Gujarat Petroleum to off take the RLNG at Delivery Point located at about 500m away from the Dahej Petronet plant at the HVJ gas pipeline. In fact, the Petronet, at the instance of the Appellant misusing its dominant position, rejected the proposal of Gujarat Petroleum for direct off-take of the RLNG from the Dahej Plant. Thus, the Appellant indulged in Restrictive Trade Practices.

(d) Investment for a dedicated direct RLNG/gas pipeline from Petronet Dahej plant to Delivery Point covering a distance of 500m at the prevalent time would have amounted to just about Rs.500 Crores only, but the connectivity charges paid by Gujarat Petroleum till date to the Appellants as per the GSA already had far exceeded this amount. The cost of developing Appellant's trunk HVJ pipeline cannot be imposed on the Gujarat Petroleum in the absence of an Agreement to that effect.

(e) There was no general exclusivity under applicable law, which had been vested with GAIL for laying of pipeline to off-take RLNG from PLL Dahej Terminal. The Ministry of Petroleum and Natural Gas did not vest any enforceable legal right on the Appellant to be the sole transporter of RLNG ex-Petronet Dahej Terminal. The document provided by the Appellant in support of its claim is only the recording of the proceedings of a meeting which cannot create any enforceable legal right. The document is neither a notification, nor a license, nor even an executive order and it cannot claim to have legal effect of limiting rights of third parties or the general public.

(f) Under the terms of Gas Sale Agreements, it is the obligation of the Seller of RLNG to deliver the RLNG/Natural Gas at the delivery point using only the seller's facilities which are to be developed at no cost to the buyer, namely, Gujarat Petroleum. The transportation charges that were agreed to, were with respect to the Seller's facilities and not with any trunk pipeline such as HVJ – DVPL pipeline of the Appellant.

(g) The Gas Sale Agreement entered into between the Appellant and Gujarat Petroleum neither mandates nor does it refer to the GAIL's pipelines for transmitting gas sold to the Gujarat Petroleum up to the Delivery

Point. The Appellant's claim that the Gas Agreement is a gas supply and transportation contract is unfounded. The Gas Sale Agreement is an agreement for purchase and sale of RLNG/natural gas and the Appellant had undertaken a contractual obligation to develop the Seller's facilities till the Delivery Point only at the Seller's risk, cost and expense. Hence, trunk line gas transmission charge is not applicable to Gujarat Petroleum.

(h) All these aspects have been fully considered by the Petroleum Board consisting of the members of the Petroleum Board including the Chairman which have correctly concluded that the Appellant indulged in Restrictive Trade Practices and have, unanimously directed GAIL, Indian Oil Corporation and Bharat Petroleum to desist with immediate effect the said Restrictive Trade Practice. The Impugned Order, therefore, does not warrant any interference.

6. In the light of the rival contentions urged by the parties, the following questions would arise for consideration:

(a) Whether the Petroleum Board is right in holding that the Arbitration Clause would not be applicable to the present case and the complaint was maintainable as it was not barred by limitation?

(b) Whether in the facts and circumstances of the case, the Appellant GAIL could be held to have indulged in Restrictive Trade Practices in regard to delivery of RLNG/gas sold by the Appellants through HVJ-DVPL gas pipe lines laid, operated and maintained by the GAIL, the Appellant?

(c) Having agreed to take delivery of the RLNG/gas purchased from the Appellant at the Delivery Point specified in the Agreement which involves transportation of the gas from Dahej Terminal to the Delivery Point and on that basis, the GAIL, implemented the above arrangements of taking delivery through the gas pipelines of the Appellant GAIL from the year 2004, whether the Gujarat Petroleum could now make claim for taking delivery directly at the Dahej Terminal itself through its (or its subsidiary company's) pipeline?

(d) Whether the Petroleum Board is right in releasing Gujarat Petroleum from its obligation under the Gas Sales Agreement entered into with the Appellants in relation to the transportation of the gas without deciding on the consequent loss of revenue to the Appellant GAIL, particularly, when the tariff allowed to the Appellant is a regulatory tariff which involves the return

as determined by the Petroleum Board in addition to the cost and expenses?

(e) Whether in the facts and circumstances of the case, there was any issue of Restrictive Trade Practices on the part of the GAIL, the Appellant, when the Appellant has acted in accordance with the Gas Sales Agreement by laying down the HVJ/DVPL pipelines as per the authorisation of the Central Government, charged tariff from time to time as per the guidelines of the Government of India/Tariff Commission for such transportation and after the constitution of the Petroleum Board as per the tariff approved and notified by the Petroleum Board ?

(f) Whether in the facts and circumstances of the case, the Petroleum Board was justified in accepting the contentions of the Gujarat Petroleum that the Appellant had indulged in Restrictive Trade Practices at the time when the Gas Sales Agreements were entered into the year 2004 and in allowing the Gujarat Petroleum to take delivery of the gas directly from the Dahej Terminal when such a connectivity was established by Gujarat Petroleum only in the year 2008?

(g) Whether the Petroleum Board, having concluded that the Gujarat Petroleum got into a Long Term Agreements with the Appellants on its own volition and it should have approached the MRTP Commission, if at all it had any grievance regarding Restrictive Trade Practices and having acknowledged and accepted the contention of the Appellant that the Appellant was to be paid for the services rendered and that transportation charges shall be paid as per the tariff order passed by the Petroleum Board, was right in holding that the Appellant had indulged in Restrictive Trade Practices as Petronet had not allowed the Gujarat Petroleum to have the direct connectivity to take delivery at the Dahej Terminal?

(h) Whether in the facts and circumstances of the case, Gujarat Petroleum, after taking RLNG/gas supply at the designated Delivery Point for about six years can unilaterally wriggle out of the gas transmission portion of long-term Gas Supply Agreements with the Appellants?

(i) Whether in the facts and circumstances of the case, the Petroleum Board can release Gujarat Petroleum from its contractual obligations under binding Gas Supply Agreements without allowing due

compensation to the Appellants and overturning its (i.e. Petroleum Board's) own tariff order?

7. On these issues, we have heard the learned Counsel for both the parties who argued at length.

8. Before dealing with these issues, it would be appropriate to refer to some of the factual aspects in this case.

9. As mentioned earlier, the Gujarat Petroleum, the 1st Respondent filed a complaint before the Petroleum Board seeking for a relief against alleged Restrictive Trade Practices and anti-competitive measures being adopted by the Appellants in respect of market for sale and transmission of re-gasified LNG (RLNG) from the Dahej LNG Terminal of Petronet.

10. After hearing the parties, the Petroleum Board passed two impugned orders. One order was dated 13.9.2011 passed by the Chairman of the Board. The other order passed by the two other Members of the Board dated 10.10.2011. Though there was a difference of opinion on certain issues in the impugned orders, both of them have concluded that the Appellants had deliberately and unfairly blocked the direct connectivity of Gujarat Petroleum to the Dahej Terminal of the Petronet for commercial reasons and thereby, the Appellants indulged in Restrictive Trade

Practices and misused their monopoly position within the scope of Section 11(a) of the Petroleum Board Act, 2006.

11. The Petroleum Board through both the impugned orders dated 13.9.2011 and 10.10.2011 had directed the Appellants to immediately desist from insisting the Gujarat Petroleum (the Complainant) to take delivery of RLNG at Delivery Point utilising the GAIL's facilities. The impugned orders further permitted Gujarat Petroleum, the Respondent to take the RLNG directly at the Dahej Terminal through the pipelines of Gujarat State Petronet Limited, a subsidiary of the Gujarat Petroleum.

12. However, the Chairman of the Petroleum Board, through the impugned order dated 13.9.2011 held that the Appellant GAIL would not be entitled to the transmission charges as per the Zone-1 tariff determined by the Petroleum Board for the period from 27.10.2008 i.e. the date of the Appellant's direct connectivity with Dahej LNG terminal of Petronet became operational. But the other two members gave a majority decision through the order dated 10.10.2011, while differing from the Chairman's conclusion in respect of some of the aspects thereby giving some directions as follows:

(a) The Gujarat Petroleum is directed to pay the transportation charges to the Appellant GAIL as per the

tariff determined by the Petroleum Board till the date of filing the complaint i.e. 4.4.2011;

(b) Gujarat Petroleum is directed to deposit with GAIL, the Zone-1 Tariff as determined by the Petroleum Board for the period up to date of filing of the complaint i.e. on 4.4.2011;

(c) Out of the said amount deposited with the GAIL, the Appellant GAIL is directed to deposit 50% of such amount paid by the Gujarat Petroleum with Petroleum Board for utilising the same for funding the viability gaps in the pipelines to be built in the backward or uneconomic regions.

13. Keeping in mind the above conclusions and directions, we shall now trace out the genesis of the present dispute.

14. The Government of India in the context of shortage of domestic gas availability decided to source imported gas from Countries like Qatar in the Middle East. The process involved an integrated system comprising broadly, the following elements:

(a) The exporter in Qatar namely RasGas to set up facilities in Qatar for Liquefaction of the gas i.e. LNG;

(b) Petronet Limited to set-up facilities at Dahej in Gujarat for regasification;

(c) GAIL has to establish gas pipelines for transportation of the Regasified LNG (RLNG) to the customers;

15. The establishment of integrated system facilities involved significant investments to be serviced over a long time through the long term contracts.

16. The GAIL, Indian Oil Corporation and Bharat Petroleum Corporation, the Appellants, undertook to purchase the entire quantity of LNG re-gasified by the Petronet at Dahej Terminal (5 million Tonnes per Annum, MMTPA). The entire quantity of RLNG output of Petronet Dahej was to be purchased/marketed by GAIL, Indian Oil Corporation and Bharat Petroleum Corporation with allocation of quantity as 60%, 30% and 10% respectively.

17. At that stage, the Gujarat Petroleum approached the Petronet to permit them to directly purchase certain quantity of RLNG from the Dahej terminal. However, Petronet Limited expressed their inability to directly sell the RLNG to Gujarat Petroleum since the entire quantity was already earmarked for GAIL, Indian Oil Corporation and Bharat Petroleum Corporation, the Appellants.

18. Thereupon, the Gujarat Petroleum entered into Gas Sales Agreements for purchase of RLNG with GAIL, Indian Oil Corporation and Bharat Petroleum on 7.2.2004, 12.2.2004

and 16.2.2004 respectively. In these Agreements, the gas Delivery Point was earmarked at a point about 500m away from Petronet Dahej terminal.

19. On 24.3.2004, the sale and transportation of RLNG to Gujarat Petroleum commenced with the delivery of gas to the purchaser at the Delivery Point on GAIL's trunk gas pipeline. This arrangement of RLNG transportation and delivery continued right up to the time of filing of complaint by Gujarat Petroleum before the Petroleum Board on 4.4.2011.

20. The fact of the proximity of the Delivery Point (i.e. only about 500m from the Dahej Terminal) was given weightage by the GAIL while fixing transportation/connectivity tariff for Gujarat Petroleum. At that point of time, the GAIL's pipeline was the only prevalent pipeline to transport gas from Petronet Dahej. The Gujarat Petroleum accepted the Delivery Point located on the GAIL pipeline and continued to pay for consequent transportation charges as per the Gas Supply Agreement.

21. Subsequently, Gujarat Petroleum requested for an additional quantum of 1.75 MMSCMD of RLNG from Dahej Terminal with direct connectivity of their subsidiary Gujarat pipeline instead of transporting the RLNG to the Delivery Point of the GAIL's pipeline. The Petroleum Board approved this direct connectivity exclusively for the additional RLNG quantum

only over and above the first 5 MMTPA and the Tranche 'A' Quantity of 2.5 MMTPA. The Delivery Point of the additional quantum of the RLNG has, accordingly been availed of by the Gujarat Petroleum through direct connectivity from 2008 onwards.

22. Till the time the Petroleum Board approved the tariff for the Zone-1 of GAIL's HVJ-DVPL pipeline on which the Delivery Point was located, the transportation charges at Delivery Point were as per the Gas Supply Agreements signed between the Gujarat Petroleum and Appellants. The Petroleum Board approved the tariff for Zone-1 of GAIL's HVJ-DVPL pipelines effective from November 20, 2008.

23. At that time, just before Zone-1 tariff fixation, the tariff was fixed at Rs.8.74 /MMBTU as transmission charges. Prior to the Zonal tariff revision, Gujarat Petroleum, the Respondent raised objection before the Petroleum Board that the transmission charges up to Delivery Point should not be a part of the new tariff being worked out for the GAIL. However, the Gujarat Petroleum's representation against applying the new Zonal tariff at the Delivery Point was rejected by the Petroleum Board. Therefore, the transmission charges at the Delivery Point became same as the Zone-1 tariff of the GAIL's pipeline.

24. The tariff was revised by the Petroleum Board on 19.4.2010 and 9.6.2010 increasing the tariff to Rs.19.83/ MMBTU. On the basis of these orders, the Appellants informed the Gujarat Petroleum that the applicable RLNG transportation charges at the Delivery Point would be the Zone-1 tariff. Accordingly, the Appellants raised their relevant tariff invoices. However, the Gujarat Petroleum disputed the sellers' claim that the tariff order passed by the Petroleum Board made the GAIL's Zone-1 trunk pipeline tariff applicable to approximately 500m connectivity till the Delivery Point.

25. To resolve this dispute, there were a spate of correspondences and a combined meeting between the Appellants and the parties including the Petroleum Board. However, the dispute was not resolved. Therefore, the Gujarat Petroleum on 4.4.2011 filed a complaint before the Petroleum Board alleging Restrictive Trade Practices and violation of the Petroleum Board's Act committed by GAIL in supply of RLNG from the Petronet Dahej Terminal.

26. The Petroleum Board ultimately passed the two impugned orders i.e. one on 13.9.2011 and another on 10.10.2011 concluding that the GAIL indulged in Restrictive Trade Practices and violation of the Petroleum Board's Act. Hence these Appeals have been filed.

27. As mentioned above, the Chairman's order indicates the following conclusions:

(a) The dispute is not covered by the Arbitration Clause contained in the GSA read with Section 12 (1) (a) of the Petroleum Board Act, 2006 as the matter relates to Restrictive Trade Practices.

(b) Interests of a large number of consumers have been adversely affected through the adoption of unfair trade practice by GAIL intended for restricting and preventing competition as GAIL has blocked the direct connectivity option for Gujarat Petroleum and forced it to take delivery of the RLNG from the pipeline of GAIL.

(c) The Zone-1 transmission tariff of Rs.19.83 per MMBTU determined by Petroleum Board is not applicable to the case of Gujarat Petroleum taking the RLNG at the Delivery Point. Gujarat Petroleum shall not be obliged to pay any transmission charges from the date their direct connectivity with Petronet Dahej plant became operational on 27th October, 2008.

28. The two other members through their majority order have agreed with the Chairperson with the first two aspects relating to the Arbitration Clause as well as the adoption of unfair trade practices. But, the majority order differed on the 3rd aspect from the Chairperson's conclusion. They have

held in the impugned majority order that the Gujarat Petroleum is required to pay the Zone-1 tariff at Rs.19.83/MMBTU fixed by the Petroleum Board till the date of the complaint though they found that GAIL indulged in Restrictive Trade Practices.

29. In the light of the above factual aspects and the submission made by the parties, we shall now consider the issues.

30. With respect to the issues, namely, applicability of the Arbitration Clause and the finding on the bar of limitations, GAIL, the Appellant did not challenge those findings in its Appeal. However, the other Appellants have raised these grounds on those aspects in their Appeals. But, during the course of the arguments, the other Appellants did not seriously challenge these findings. We have gone through the impugned findings in respect of these issues. We are unable to say that the findings on these issues are wrong. As correctly pointed out by the Petroleum Board, the existence of the Arbitration Clause in the Gas Sales Agreement would not bar the jurisdiction to inquire into the allegations contained in the complaint raising the dispute over the alleged Restrictive Trade Practices.

31. As correctly pointed out by the Petroleum Board, the existence of the Arbitration Clause in the Gas Sales Agreement would not bar the jurisdiction to inquire into the

allegations contained in the complaint raising the dispute over the alleged Restrictive Trade Practices.

32. Similarly, the question of bar of Limitation also would not arise as the transactions referred to in the complaint are continuous in nature. Therefore, the findings given by the Petroleum Board on these issues are perfectly justified.

33. The remaining core issue before this Tribunal is, therefore, the question as to whether the Petroleum Board is right in coming to the conclusion that GAIL and other Appellants had indulged in the Restrictive Trade Practices within the meaning of Section 11 of the Petroleum Board Act, 2006.

34. We shall now deal with this main question, which is as follows:

> **"Whether the findings rendered by the Petroleum Board that the Appellants had indulged in Restrictive Trade Practices within the meaning of the Section 11 of the Petroleum Board Act is correct or not?"**

35. The learned Counsel for the Appellants submit that if this Tribunal comes to the conclusion that the allegations regarding the Restrictive Trade Practices have not been established then both the entire impugned orders passed by the Petroleum Board are liable to be set aside and, consequently, the Gujarat Petroleum will have to pay and continue to pay Rs.19.83/MMBTU as transmission charges

till the expiry or termination of the Gas Sales Agreement with GAIL, Indian Oil Corporation and Bharat Petroleum Corporation.

36. In the light of the above submissions of the Appellants, we are called upon to decide the question as to whether the conclusion arrived at by the Petroleum Board as against the GAIL with respect to its Restrictive Trade Practices are justified or not.

37. In this context, we have to first refer to the meaning and definition of the term "Restrictive Trade Practices".

38. The definition under Section 2 (zi) of the Petroleum Board Act, 2006 provides as follows:

> *"Restrictive Trade Practices means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular;-*
>
> > *(i) which tends to obstruct the flow of capital or resources into the steam of production, or*
> >
> > (ii) *which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or RLNG or services sin such manner as to impose on the consumers unjustified costs or restrictions;"*

39. We shall now refer to other relevant provisions of the Petroleum Board Act, 2006. They are Section 11(a), 11(e), 11(f) (iii) and 11 (f) (iv) which are as under:

"11. Functions of the Board-The Board Shall-

(a) Protect the interest of consumers by fostering fair trade and competition amongst the entities;

(e) Regulate by regulations:

(i) Access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities and for that purpose specify pipeline access code;

(f) in respect of notified petroleum, petroleum products and natural gas-

(vi) Monitor transportation rates and take corrective action to prevent restrictive trade practices by the entities;"

40. Let us now refer to some of the decisions rendered by the Hon'ble Supreme Court with reference to the definition of the Restrictive Trade Practices the term referred to in various other Acts. The Definition under Section 2 (zi) of the Petroleum Board Act, 2006 is analogous to the Definition of Restrictive Trade Practices u/s 2 (O) of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969.

41. The Hon'ble Supreme Court, while interpreting the definition of Restrictive Trade Practices under Section 2 (O) of the MRTP Act, made the following observation in the case of DLF Universal Ltd v DG (Investigation and Registration), (2008) 7 SCC 513 as under:

"23. Section *2 (o) defines "Restrictive Trade Practices" to mean:*

"2. (o) a trade practice which has, or may have the effect of preventing, distorting or restricting, competition in any manner and in particular-

(i) ……..

(ii) This tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers' unjustified costs or restrictions."

The definition of Section 2 (o) clearly goes to show that it is exhaustive and non an inclusive one. The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a Restrictive Trade Practices".

42. Let us now refer to other decisions.

43. It is a settled law that what is enforced by the Statutory Authority cannot be held to be Restrictive Trade Practices on the part of the party. This prayer has been held in the following decisions:

"(A). <u>Haridas Exports Vs All India Float Glass Manufacturers Association (2002) 6 SCC 600</u>

58. The matter may be examined from another angle. In this case, there is a sale of float glass by the exporter in Indonesia. If the float glass was ready and available, then being ascertained goods the sale would be regarded as having taken place where the goods existed at the time of sale, i.e., in Indonesia. If the glass had to be manufactured and not readily identifiable, then the sale would take place outside India when the goods are appropriated to the contract

by the foreign exporter. Here the appropriation would take place in Indonesia when the glass is earmarked and exported to India. In either case the MRTP Commission would have no jurisdiction to stop that sale. If the said sale cannot be stopped and the import policy permits the Indian importer to import on payment of duty then we fail to see what jurisdiction the MRTP Commission can possibly have till a Restrictive Trade Practices takes place after float glass is imported into India.

59. It is not as if the Indian industry has no remedy against goods being exported to India at predatory prices. It is because of the need for such a provision that the Customs Act was amended and anti-dumping provisions were incorporated. Recourse to this was taken by the respondents but then that remedy was not pursued. At this stage, it is relevant to refer to the provisions of Section 11 of the Customs Act. The said Section gives the Central Government a power to prohibit importation or exportation of goods, if it is satisfied that it is necessary to do so for any of the purposes specified in sub- section (2). Under sub-section (2), such prohibition can be for the purpose of establishment of any industry (sub-clause (i)); preventing serious injury to domestic production of goods of any description (sub-clause (j)); the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India (sub-clause (s)); the prevention of the contravention of any law for the time being in force (sub-clause (u)) and any other purpose conducive to the interest of general public (sub-clause (v)) Inasmuch as, the import into the country is, inter alia, governed by the Customs Act and the power to prohibit or not to prohibit the importation of any goods is with the Government, then unless and until, a law prohibiting import is infringed, it is difficult to perceive

as to how the MRTP Commission can prevent the importation of the goods. In this connection, it is also useful to refer to Section 33(3) of the Act which reads as under:

> *"33. (3) No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorized by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement."*

60. In as much as the importation of float glass is permitted by law, under the provisions of the Customs Act and the Import Control Act, then an agreement in relation to such an import may not be liable to be registered under the provisions of the Act. It is only in respect of float glass, which is imported and thereafter if in respect to that a Restrictive Trade Practices is indulged can the MRTP Commission have jurisdiction qua post import Indian end of the transaction.

(B) Madura Coats Ltd., Vs Hindustan Petroleum Corporation Ltd., (2004) CPJ 7 (MRTP)

"……The petitioner is stated to have been purchasing HSD oil from the respondent regularly from its supply outlet at Cochin in the State of Kerala. This being an inter-State Sale, the petitioner has been paying Central Sales Tax @ 4% as required under the Central Sales Tax Act, 1956. It has been alleged that in August, 1989, the respondent discontinued the supplies from Cochin and called upon the petitioner to draw supplies from the respondent's storage outlet at Madurai in Tamil Nadu. As a consequence of this, the petitioner is stated to have been subjected to payment

of local sales tax @ 18%, which was higher than the rate of Central Sales Tax @ 4% earlier payable by the petitioner.

……

The petitioner further alleged that the said change in the distribution and marketing system amounted to Restrictive Trade Practicess as defined in the relevant provisions of MRTP Act, 1969, and as a result of this Restrictive Trade Practices, on the part of the respondent, the petitioner has suffered financial loss.

……

7. Learned Counsel for the respondent contended that the present case is squarely covered by the aforesaid judgment of the MRTP Commission because the subject-matter of the case, the cause of action and the relief claimed, are exactly identical except that the name of the respondent is different. Learned Counsel for the respondent also referred to the observations made by the MRTP Commission in the aforesaid judgments which are reproduced below:

> *"The rationale behind the impugned change in the distribution arrangement of HSD oil and other petroleum products is abundantly clear from the above circulars. The motivating factor behind the change in the distribution arrangement appears to be nothing but public interest. Further, it has the approval of the Ministry of Petroleum, Government of India. This being so, the respondent cannot be faulted and held guilty of Restrictive Trade Practicess in view of the provisions contained in Section 38(1)(i) of the*

MRTP Act which deals with presumption as to the public interest."

"In the instant case, the impugned restriction to draw supplies from the State in which the buyer is located has the approval of the Ministry of Petroleum, Government of India, and, therefore, it cannot be said to be violative of the provision contained in Section 33(1) read with Section 37 of the MRTP Act in view of the gateway available under Section 38(1)(i). Nor is it a Restrictive Trade Practices within the meaning of Section 2(o). Since the impugned policy decision is uniformly applicable to all the dealers/buyers and has the approval of the Ministry of Petroleum, Government of India, it cannot be said to have the effect of preventing, distorting or restricting competition. Nor does it impose any unjustified costs or restriction on the consumer. Whatever the rates of taxation, it is established law that inter-State sales attract Central Sales Tax and the sales within the State attract local taxes. Just because the rate of Central Sales Tax is lower than the rate of local sales tax, the applicant cannot be allowed to circumvent the law of its own advantage on the unsustainable ground that the change in the policy subjects the applicant to higher rate of taxation and as such it amounts to imposing unjustified costs as contemplated in Section 2(o) of the MRTP Act. The clause relating to unjustified costs cannot be read in isolation."

44. The Hon'ble Supreme Court in other decisions gave guidelines to understand the scope of Restrictive Trade Practices. Those decisions are as follows:

(a) Tata Engineering & Locomotive Co Ltd.,Vs Registrar fo the Restictive Trade Agreement (1977) 2 SCC

"29. The definition of Restrictive Trade Practices is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on doctrine that any restriction as to area or price will per se be a Restrictive Trade Practices. The question in each case is whether the restraint is such as regulates and thereby promotes competition or whether it is such may suppress or even destroy competition. To determine this question three matters are to be considered, namely, (1) what facts are peculiar to the business to which the restraint is applied, (2) what was the condition before and after the restraint was imposed, and (3) what was the nature of the restraint and what was its actual and probable effect.

……

56. The question of competition cannot be considered in vacuo or in a doctrinaire spirit. The concept of competition is to be understood in a commercial sense. Territorial restriction will promote competition whereas the removal of territorial restriction would reduce competition. As a result of territorial restriction there is in each part of India open competition among the four manufacturers. If the territorial restriction is removed there will be pockets without any competition in certain parts of India. If the dealer in Kashmir is allowed to sell anywhere in India wealthy cities like

Delhi, Bombay, Calcutta will buy up trucks allocated for Kashmir and the buyer in Kashmir will not be able to get the trucks. The other three manufactur- ers whose trucks are not in equal demand will have Kashmir as an open field to them without competition by Telco. Therefore, competition will be reduced in Kashmir by the successful competitor being put out of the field.

57. The real reason for exclusive dealership is that instead of diminishing competition between four manufacturers each dealer tries to do his best for his own trucks, bus and thus reduce keen competition among the four manufacturers. If one dealer deals in trucks of one or more manufacturers one cannot be expected to compete with itself it is, therefore, clear that exclusive dealership promotes instead of re- tarding competition.

58. Clauses 1 and 3 are in the interest of the consumer and ensure equal distribution as far as possible of the goods at a fair price. These provisions do not tend to obstruct the flow of capital or resources into the stream of production or to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

59. In the present case the restriction imposed by Telco on dealers not to sell bus and chassis outside their territories does not restrict competition for the foregoing reasons.

(b) Mahindra & Mahindra Ltd v Union of India (1979) 2 SCC 529

"14. *It is now settled law as a result of the decision of this Court in the Telco case that every trade practice which is in restraint of trade is not necessarily a Restrictive Trade Practices. The definition of Restrictive Trade Practices given in section 2(o) is a pragmatic and result oriented definition. It defines 'Restrictive Trade Practices' to mean a trade practice which has or may have the effected of preventing, distorting or restricting competition in any manner and in clauses (i) and (ii) particularizes two specific instances of trade practices which fall within the category of Restrictive Trade Practices. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a Restrictive Trade Practices. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of Restrictive Trade Practices, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuo but it must append on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would, be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a Restrictive Trade Practices*

15. It is true that on the subject of Restrictive Trade Practices, the law in the United States has to be approached with great caution, but it is interesting to note that the definition of "Restrictive Trade Practices" in our Act echoes to some extent the 'rule of reason' evolved by the American Courts while interpreting section 1 of the Sherman Act. That section provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is hereby declared to be illegal" and literally applied,, it would outlaw every conceivable contract which could be made concerning trade or commerce or the subjects of such commerce. The Supreme Court of United States, therefore, read a 'rule of reason' in this section in the leading decision in Standard Oil Company v. United States. It was held by the Court as a 'rule of reason' that the term "restraint of trade" means that it meant at common law and in the law of the United States when the Sherman Act was passed and it covered only those acts or contracts or agreements or combinations which prejudice public interest by unduly restricting competition or unduly obstructing the due course of trade or which injuriously restrain trade either because of their inherent nature of effect or because of their evident purpose. Vide also United States v. American Tobacco Co. It was pointed out that the 'rule of reason' does not freeze the meaning of "restraint of trade" to what it meant at the date when the Sherman Act was passed and it prohibits not only those acts deemed to be undue restraints of trade at common law but also those acts which new times and economic conditions make unreasonable. This 'rule of reason' evolved by the Supreme Court in the Standard Oil Company's case and the American Tobacco Co's case has governed the application of section 1 of the Sherman Act since then and though it does not furnish an absolute and unvarying standard and has been applied, sometimes more broadly and some times more narrowly, to the different problems coming

before the courts at different times, it has held the field and, as pointed out by Mr. Justice Reed in the United States v. E.I. Du Pont, the Supreme Court has not receded from its position on this rule. The 'rule of reason' has, to quote again the words of the same learned Judge "given a workable content to anti-trust legislation". Mr. Justice Brandeis applied the 'rule of reason' in Board of Trade v. United States for holding that a rule prohibiting offers to purchase during the period between the close of the call and the opening of the session on the next business day for sales of wheat, corn, oats or rye at a price other than at the closing bid, was not in "restraint of trade" within the meaning of section 1 of the Sherman Act. The learned Judge pointed out in a passage which has become classical:

> *"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the, restraint is applied; its condition before and after the restraint was imposed the nature of the restraint, and its effect, actual or probable. The history of the restraint the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."*

45. In the light of the above authorities, we shall now refer to some factual aspects which are relevant to decide the issue:

(a) The Gas Sales Agreements dated 7.2.2004, 12.2.2004 and 16.2.2004 were entered into by Gujarat Petroleum Corporation, the Respondent with the Appellants on its own volition for its commercial purpose and without any compulsion, coercion etc. At the time when the Agreements were signed or at any time immediately thereafter, Gujarat Petroleum Corporation did not raise any issue regarding the abuse of dominant position by GAIL or GAIL indulging in Restrictive Trade Practices;

(b) Each of the Gas Sales Agreements defines the Delivery Point and describes the same in the map attached as Appendix -2. The map clearly shows that the Delivery Point is outside the Dahej LNG Terminal and not within precincts of the Dahej LNG terminal.

(c) The Gas Sales Agreements were signed by GAIL, Indian Oil and Bharat Petroleum with Gujarat Petroleum in the year 2004. By that time, GAIL, Indian Oil, Bharat Petroleum and Oil and Natural Gas Commission had taken significant steps for import of LNG, setting up of Dahej LNG terminal, regasification of LNG to RLNG, laying down of pipeline by GAIL for transportation of RLNG. This involved substantial financial commitments including guarantees to RasGas, the Exporter of gas. The gas imported from

RasGas i.e. 5 MMTPA had already been sold by Petronet LNG Ltd to GAIL, Indian Oil and Bharat Petroleum;

(d) Before signing the Gas Sales Agreements, Gujarat Petroleum, the Respondent approached Petronet LNG Ltd for direct purchase of RLNG from the Petronet LNG and was advised that the same was not possible as the sale for the entire quantity of RLNG had already been committed to GAIL, Indian Oil and Bharat Petroleum.

(e) At the relevant time, the only gas pipeline available for transporting the Gas/RLNG from the Dahej LNG terminal to the Delivery Point was of GAIL i.e. DVPL pipeline. There was no other gas pipeline available;

(f) The delivery was done at GIDC (Gujarat Industrial Development Corporation) Estate for the Gujarat Petroleum Corporation to locally distribute the gas there from;

(g) The gas pipeline of Gujarat Petronet LNG Ltd was not available in the year 2004. Admittedly, it was not ready on 27.10.2008;

(h) Neither, Indian Oil nor Bharat Petroleum had a gas pipeline. As mentioned herein above, the Government of India (which exercised the Regulatory Powers prior

to such functions being vested in PNGRB) had authorised GAIL exclusively to lay down the gas pipeline for transportation of RLNG from the Dahej LNG Terminal. The transportation of gas of Indian Oil and Bharat Petroleum was also by GAIL.

46. As narrated above, before finalising the Gas Sales Agreement with the GAIL, Indian Oil Corporation and Bharat Petroleum Corporation, the Gujarat Petroleum had approached the Petronet for sale of RLNG directly to the Gujarat Petroleum instead of purchasing RLNG from Appellants.

47. At that time, the Petronet Limited took note of the fact that entire quantum of RLNG i.e. 5 MMTPA stood committed to GAIL and other Appellants on account of their significant initiatives, financial guarantees and commitments. Therefore, the Petronet was not able to agree to sell the RLNG directly to the Gujarat Petroleum but asked the Gujarat Petroleum to purchase the RLNG from GAIL and other Appellants instead of directly purchasing the same from Petronet. This decision was taken by the Board of Petronet on 24.7.2003. The said decision is referred to as below:

"Mr. S C Mathur informed to the Board that the Company has received a letter from Gujarat State Petronet Corporation Ltd., Government of Gujarat

Undertaking, for direct off take of around 1 million ton of equivalent RLNG from Dahej terminal. Mr. B S Negi mentioned that GSPCL is not a direct consumer of RLNG and in case they purchase RLNG from PLL, they would be competing with the PLL off takers in the same market place. Since the entire RLNG is already committed by PLL to off takers, PLL should ignore such request of GSPCL. Chairman, however, desired that any proposal for sale of RLNG from Dahej terminal be kept alive and be given due consideration whether it is a direct off take from PLL or sale through off takers".

48. In the light of the above decision taken by the Petronet Board on 24.7.2003, the Gujarat Petroleum did not proceed further with reference to the request for direct purchase of RLNG from the Petronet for any direct connection to Dahej Terminal of Petronet LNG. Thereupon, the Gujarat Petroleum began to negotiate a contract for purchase of RLNG/natural gas from GAIL, Indian Oil Corporation and Bharat Petroleum Corporation Limited. Accordingly, Gujarat Petroleum entered into a Gas Sales Agreement on 7.2.2004 with GAIL, on 12.2.2004 with Indian Oil and on 16.2.2004 with Bharat Petroleum. The Delivery Point for the above supply by the Appellants to the Petroleum Corporation was specifically agreed to on the pipeline about 500m from the Dahej Terminal. It was not stipulated that the quantum of RLNG purchased will be delivered either at the Dahej Petronet Terminal or through the connectivity directly to the pipeline of the Gujarat Petroleum.

49. On 24.3.2004, as stated earlier, the sale and transportation of RLNG to Gujarat Petroleum commenced. Since then, the Gujarat Petroleum Corporation was purchasing the RLNG from the Appellants and taking delivery of the same after it has been transported on the DVPL pipeline till the Delivery Point.

50. Admittedly, the above position had continued right up to filing of the complaint before the Petroleum Board on 4.4.2011.

51. During this period, there has been tariff fixation for the above mentioned pipeline by the Government of India i.e. prior to the constitution of the Petroleum Board. There has been representation from Gujarat Petroleum for reduction in the tariff taking into account the proximity of the Delivery Point of the gas in the pipeline to the Terminal in the case of Gujarat Petroleum. However, at that time, Gujarat Petroleum never raised the issue stating that Gujarat Petroleum was being exploited by the monopoly position of the GAIL being the exclusive transporter of the gas from the Dahej Terminal.

52. On the other hand, the Gujarat Petroleum continued to take the delivery of the RLNG sold by the Appellants at the Delivery Point and also paid the transportation/connectivity charges from the year 2004 onwards. These transportation/connectivity charges were paid not only for

RLNG sold by GAIL, but also for RLNG sold by India Oil ad Bharat Petroleum.

53. That apart, the Gujarat Petroleum wrote letters to the Appellant dated 19.3.2005, 31.3.2005, 8.4.2005 and 23.9.2005. These letters would indicate that the Gujarat Petroleum asked for more quantum of RLNG on the same terms and conditions which included transportation of RLNG from the Dahej LNG terminal to the Delivery Point. This would show that the Agreements entered into between the parties in the year 2004, were voluntary and without any coercion and the same were acted upon. These letters have not been disputed.

54. The learned Counsel for the GAIL, the Appellant, pointed out that during the period 2005-2006, there was a development with Gujarat Petroleum requesting the GAIL for additional quantum of 1.75 MMSCMD of RLNG from the Dahej terminal. The issue of Delivery Point of gas arose at that point of time. GAIL was proposing the Delivery Point at the same place mentioned in the Gas Sales Agreement.

55. On the other hand, the Gujarat Petroleum was proposing the Delivery Point of gas from the Dahej Terminal itself.

56. On this issue, there was a meeting held on 17.10.2006 at Petronet Limited wherein the Board of Directors participated. In that meeting, the proposal of direct connectivity to Dahej

Terminal of Gujarat Petroleum was considered. In that meeting, the following decisions were taken:

> *"MD & CEO presented the agenda to the Board. He informed that GMB vide their letter dated 8th August, 2006 has suggested that PPL may explore the possibility for direct pipeline connectivity to GSPCL, and convey its decision in the matter at the earliest, so as to enable them to take appropriate decision, vis-à-vis their approval for expansion of Dahej Terminal. Moreover, Government of Gujarat had earlier also desired direct connectivity so as to provide flexibility and remove avoidable transmission costs.*
>
> *On a query from Chairman, Mr. P Dasgupta confirmed that direct connectivity from PPL's Dahej LNG Terminal to GCPCL pipeline (less than 500meters) would provide operational flexibility to PLL and partially mitigate the risk due to occasional shutdown in GAIL's system. Moreover, it would provide PLL a level playing field vis-à-vis Shell in terms of pipeline connectivity.*
>
> *Mr. A K Purwaha expressed his concern with respect to non-utilization of GAIL pipeline capacity and also recalled the decision of MOP&NG taken in 1999 for the exclusive use of GAIL pipeline for supplies from Dahej terminal. Chairman, clarified that the decision of 1999 was only for the first 5 MMTPA. The matter was deliberated in detail by the Board and it was noted that the first 5 MMTPA, and also the Tranche 'A' quantity of 2.5 MMTPA, is / would be sold entirely by PLL to the Off-takers. Should the Off takers therefore decide to sell gas to GSPC and /other customers in Gujarat , it would be upto the Seller (Off takers) and the Buyer to decide which pipeline to use. Mr. Dasgupta assured the Board this direct connectivity*

would not be used to the detriment/disadvantage of GAIL and is meant to provide operational flexibility.

Board thereafter passed the following resolution:

"RESOLVED THAT approval of the Board be and is hereby accorded to provide direct connectivity between PLL's LNG terminal & GSPCL's pipeline network. The construction of the pipeline shall be carried out by GSPCL at its own cost".

57. The above decisions would indicate that the Gujarat Petroleum had purchased additional quantum of RLNG(1.75 MMBTU) not through GAIL but the same was taken delivery of by Gujarat petroleum directly from the Dahej Terminal on the Gujarat Petronet's gas pipeline. This would show that the GAIL did not exercise its "dominant" position in the Petronet Limited to prevent the sale. Such delivery was taken from 2008 onwards when a direct connectivity got established.

58. At this stage also, there was no allegation raised by the Gujarat Petroleum against the GAIL alleging adoption of Restrictive Trade Practices or abusing its dominant position. Admittedly, the quantum of gas purchased through the Gas Sales Agreement entered into the Year 2004 had continued to be delivered at the Delivery Point mentioned in the Gas Sales Agreements.

59. The functions of the Tariff Determination were discharged by the Tariff Commission appointed by the Government of India

prior to the constitution of the Petroleum Board. The applicable tariffs for the transportation of gas for Gujarat Petroleum were fixed as under:

(Rs./MMBTU)

April, 2008 to June, 2008	-	8.34
July, 2008 to Sept, 2008	-	8.31
Oct, 2008 to Dec, 2008	-	8.55
Jan, 2009 till review of tariff By the PNGRB	-	8.74

60. After constitution of the Board, the Petroleum Board approved the tariff for HVJ-DVPL Zone 1 with effect from November 20, 2008 at Rs.19.83/MMBTU by the order dated 9.10.2010. Admittedly, there was no complaint of Restrictive Trade Practices so long as the transportation tariff was not increased to Rs.19.83/MMBTU.

61. According to the Appellant, the real issue of Gujarat Petroleum is not that it has any grievance of taking delivery of gas through DVPL pipelines, but the actual grievance is that the tariff had been increased from Rs.8.74/MMBTU to Rs.19.83/ MMBTU. We find force in this submission.

62. The learned Counsel for the Appellant has pointed out one more aspect.

63. Gujarat Petroleum was paying tariff of Rs.8.74 /MMBTU for transportation of gas to the Delivery Point when the

Petroleum Board notified the Tariff Regulations u/s 22 of the Act. The GAIL filed an application on 15.6.2009 before the Petroleum Board for determination of the tariff. In that application, the GAIL had proposed a zonal tariff as per the principles laid down in the Tariff Regulations framed by the Petroleum Board when the application was pending.

64. Gujarat Petroleum on 15.10.2009 had specifically represented to the Board that the tariff for DVPL gas pipeline should not be applied to Gujarat petroleum. However, the Petroleum Board by the order dated 19.4.2010 did not accept the contention of the Gujarat Petroleum and fixed the tariff.

65. On 13.5.2010, the Gujarat Petroleum again represented to the Board not to apply Zone -1 tariff. This representation also, was rejected by the Petroleum Board and on 9.6.2010, the Petroleum Board passed the tariff order. Thus, the Gujarat Petroleum had specifically represented against the zonal tariff proposed at two stages and the same was not accepted by the Board holding that the tariff order of the gas pipeline of GAIL is applicable to Gujarat Petroleum.

66. As pointed out by the learned Counsel for the Appellant, the tariff order passed on 9.6.2010 fixing the zone-1 tariff at Rs.19.83/MMBTU effective from 20.11.2008 for Zone-1(0-300 Km) attained finality since the said order was not

challenged by the Gujarat Petroleum even though opportunity was given to Gujarat Petroleum to make representation before the said order was passed on 9.6.2010.

67. On behalf of the Gujarat Petroleum, it is contended that it is not liable to pay the Transmission Charges and it is liable to pay only the inter-connection charges for interconnection to Dahej LNG terminal and therefore, the charges payable by the Gujarat Petroleum cannot be equated with that of the charges payable by others including the Zonal charges for transportation of gas of DVPL gas pipelines. This argument has been advanced before the Petroleum Board.

68. We find from the impugned order that the two Members of the Petroleum Board consisting of the majority, have categorically held that the transportation charges of Rs.19.83/MMBTU is payable by the Gujarat Petroleum till the date of the compliance.

69. According to the Appellant, the connectivity charges mentioned in the Agreement is nothing but the Transportation charges for transmission of gas at DVPL gas pipelines upto the Delivery Point and this aspect has been correctly decided by the Majority of the Members of the Petroleum Board.

70. The following is the discussion and finding rendered by the Petroleum Board:

> *(a) We are of the view that since GAIL has provided the 500meter pipeline and serviced the complainant, it is entitled to be compensated for it. If the complainant was so aggrieved by the stand of the Respondent No.1 in denying direct connectivity as sought by it, it could have approached the erstwhile MRTP Commission for relief even as it had entered into a GSA with the Respondent in the absence of any other option. It has not been brought to the attention of this Board that there was such an initiative by the complainant. Therefore, we are persuaded that the complainant had entered into a GSA with GAIL voluntarily and out of its own free will.*
>
> *(b) The relief sought by the Petitioner is to direct the Respondents to the effect that connectivity charges till Delivery Point under the GSA be determined in place of transportation tariff for Zone-1 and award compensation to reimburse the loss caused due to restrictive trade practices of the three Respondents. With regard to this prayer, it may be stated that there is no provision for any connectivity charges under the Regulations notified by the Board. As such, it is not possible for us to consider this prayer as it is outside the scope of the relevant Regulations. ……*
>
> *This Bench directs the Respondents to desist forthwith from requiring the Petitioner from doing so.*
>
> *(c) While we cannot allow entities to gain from what is clearly an unfair trade practice at the cost of the consumers, justice demands that GAIL be compensated for the service rendered through performance of the GSA. We cannot grant a relief which entails contravention of the Board's own tariff*

determination Regulations and as such, the relief prayed for by the Petitioner cannot be granted. GSPCL is hereby directed to deposit with GAIL, the 1st zone tariff as determined by the Board for supply of gas under its GSA with GAIL for the period up to the date of present complaint filed by GSPCL before the Board.

71. In the light of the above findings, we shall take into consideration the following factual aspects which are relevant to decide the main question:

(a)The Delivery Point is at a distance of 500m from the Dahej Terminal;

(b) There is only one pipeline owned by GAIL for evacuation of RLNG from Dahej Terminal of PLL at the time when the Gas Supply Agreements were entered into by Gujarat Petroleum with GAIL, Indian Oil and Bharat Petroleum.

(c) The price side letter defines the connectivity charges for the transportation of gas up to the Delivery Point.

(d) Email correspondence between the Gujarat Petroleum and Appellant GAIL would refer to the connectivity charges as meaning charges payable by Gujarat Petroleum to the seller for transportation of gas up to Delivery Point.

72. In the light of the above facts, we shall now consider the main issue.

73. Factually, the Appellant GAIL was required to make significant investments in the gas pipelines under a Scheme. Under this Scheme, the purchaser of the RLNG from Dahej Terminal would service the investments through transportation tariff. Gujarat Petroleum had, in fact, accepted the above position while executing the Gas Sales Agreement with the GAIL dated 7.2.2004, with Indian Oil Corporation dated 12.2.2004 and with Bharat Petroleum Corporation Limited on 16.2.2004.

74. Admittedly, Gujarat Petroleum did not raise any objection with reference to the alleged Restrictive Trade Practices by the Appellants till the date of complaint namely 4.4.2011. As pointed out by the Petroleum Board, the Gujarat Petroleum did not take any action despite the fact that there were avenues available under the MRTP.

75. As mentioned above, the complaint about the alleged Restrictive Trade Practices was launched for the first time only on 4.4.2011. There was no reason as to why the Gujarat Petroleum had all along kept quiet and on the other hand, the Gujarat Petroleum voluntarily executed the Agreements as early as in 2004 with the Appellants on different dates, namely, 7.2.2004, 12.2.2004 and 16.2.2004.

76. Gujarat Petroleum has argued that it did not take action so long as the tariff was not considered unreasonable by the Gujarat Petroleum which was till the order dated 6.11.2010 passed by the Petroleum Board, but it had thought it fit to file the complaint only when the tariff was increased from Rs.8.74/MMBTU to Rs.19.83/MMBTU.

77. Admittedly, this increase was not by the Appellant but it was due to the orders of the Petroleum Board. Therefore, the order of the statutory authority i.e. Petroleum Board increasing the tariff applicable after giving an opportunity to the Gujarat Petroleum to make its submissions cannot, at all, be considered to be a Restrictive Trade Practice committed by the Appellant. If Gujarat Petroleum felt aggrieved over the increase in the tariff, it must have filed an Appeal as against the said order u/s 33 of the Petroleum Board Act. The Gujarat Petroleum for the reasons best known to them did not take steps to file an Appeal as against the order increasing the tariff to Rs.19.83/MMBTU. In that situation, it is surprising to see that the Petroleum Board has given such a finding that the Appellants have indulged in Restrictive Trade Practices even after having held that the Gujarat Petroleum had entered into a Gas Sales Agreement with the Appellant, namely GAIL voluntarily and out of its own free will.

78. The mere insistence on the use of gas pipeline by the off takers for taking delivery of RLNG contracted for purchase when the pipeline had been laid with significant investment along with other facilities to enable the importation and supply cannot amount to Restrictive Trade Practices. In fact, the Petroleum Board erroneously held that there was an abuse of dominant position by GAIL in not allowing direct connectivity and this conclusion was on the basis that the Gujarat Petroleum did not get direct connectivity to Dahej Terminal without analysing the ratio and the Rule of Reason as enumerated by the Hon'ble Supreme Court in its various decisions for holding that there is a Restrictive Trade Practice.

79. In fact, the definition of Restrictive Trade Practice under Rule 2 (zi) of the Petroleum Act, 2006 has not been elaborated in the light of the wordings contained in the Definition Section as also the facts and circumstances of the present case.

80. The ratio and guidelines given by the Hon'ble Supreme Court as referred to in various decisions quoted earlier could be culled out which are as follows:

(a) The decision as to whether Trade Practice is restrictive or not has to be arrived at by applying the Rule of Reason and not on the principles that any

restrictions as to area or price will per se be a Restrictive Trade practice.

(b) Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as it regulates and thereby promotes competition or whether it is such as may suppress or destroy competition.

(c) To determine the question whether a Trade Practice is restrictive or not, three aspects are to be considered:

(i)The fact that is peculiar to the business to which the restraint is applied;

(ii) What was the condition before and after the restraint is imposed;

(iii) What is the nature of the restraint and what is its actual and probable effect.

If answers for these things are looked into, then we can find out a solution as to whether the restraint promotes competition or it destroys the competition. So, the comprehensive facts have got to be considered to decide the issue.

(d) The question of competition cannot be considered in vacuo. The concept of competition is to

be understood in a commercial sense. Territorial restrictions will promote competition whereas the removal of territorial restriction would reduce competition.

(e) Every trade practice which is in restraint of trade is not necessarily a Restrictive Trade Practice. The definition of Restrictive Trade Practices is a pragmatic and result oriented definition. It defines 'Restrictive Trade Practices' to mean a trade practice which has or may have the effects of preventing, distorting or restricting competition in any manner. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a Restrictive Trade Practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of Restrictive Trade Practice, even though it may be, to some extent, in restraint of trade.

(f) Whenever a question arises before the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical reasoning, but by inquiring whether the trade practice may have the effect of preventing, distorting or restricting competition.

81. A Restrictive Trade Practice must have the following elements:

(a) It should be a trade practice defined under a definition Section of the Act;

(b) It should have an actual effect of preventing, distorting or restricting Competition in some manner.

(c) The Competition necessarily envisages the same or a similar situation;

(d) There should be a manipulation of prices

(e)There should be unjustified costs or restrictions as a result of such manipulation

82. Admittedly, the above guidelines and the principles laid down by the Hon'ble Supreme Court in various decisions have not been taken note of by the Petroleum Board while holding that the Appellant GAIL abused its dominant position and indulged in Restrictive Trade Practices.

83. As mentioned earlier, the Majority Members of the Petroleum Board even though held that the Agreement was entered into with the Appellant by the Gujarat Petroleum voluntarily and out of its own free will, it held that there is abuse of dominant position and as such there is a Restrictive Trade Practice adopted by the Appellant.

84. The very same finding has been given by the Minority Member also namely, the Chairman of the Board.

85. Let us refer to the said findings of the Minority Member which is as under:

> *"23. Going into the merits of the complaint, it rests on the premise that the Petitioner was unfairly denied their request to off take the agreed volume of RLNG from the PLL terminal and forced to agree in the GSA to off take the gas merely 500meters from the delivery point in the terminal. The Petitioner has produced the extracts from the minutes of the Board Meeting of PLL held on 24.7.2003 in support of their contention. The authenticity of these documents has not been countered by any of the Respondents. The relevant extract establishes that the Petitioners did approach PLL for direct off take of the agreed amount of RLNG from the terminal. The only objection raised against the request when the matter came up for consideration of the Board of Directors of PLL, was by the nominee Director of GAIL on the ground that the Petitioner was not a direct consumer and that "in case they purchase RLNG from PLL they would be competing with the PLL off takers at the same market place. Since the entire RLNG is already committed by PLL to off takers, PLL should ignore such request of GSPCL". The minutes go on to state that the Chairman, however, desired that any proposal for sale of RLNG from the Dahej terminal be kept alive and be given due consideration whether it was a direct off take from PLL or sale through off takers. The Petitioner has alleged that GAIL as one of the promoters of PLL used its position to force off take of gas by them by bundling the sale of gas with transmission charges up to the delivery point on their pipeline for which they have been charging*

connectivity charges. Similarly, the other off takers, who according to the Petition, are Respondents no.2 & 3 are also promoters of PLL who have entered into similar agreements with the Petitioner as per which they have been paying connectivity charges which is passed on to the Respondent no.1.

24. From the undisputed facts in this matter, it emerges that GSPCL and its subsidiary entered into a GSA with the 3 Respondents to off take RLNG to the extent of 20% of the capacity of the PLL terminal. It is also not denied that the complainant did approach PLL for direct off take of the gas under the GSA from the terminal. It also appears from the extracts of the minutes of the 49th Board Meeting of the PLL held on 24.7.03 that for evacuation of this gas from Dahej to their pipeline network which was 6Kms away from Dahej, the Petitioner within the knowledge of the PLL management had already awarded the job for extending their pipeline to Dahej and had desired to know the exact location from where the tap off could be taken so they can connect their pipeline at that location. This clearly indicates that the Petitioner, which was extending its pipeline network towards the terminal, was in discussion with PLL for connecting directly to the terminal for the gas off take but was denied the facility. The ground of denial, as recorded in the minutes, is clearly the objection of Respondent No.1 not on any technical ground but on the ground that since the petitioner operates in the same market, they would be competing with the PLL off takers in the same market place. In none of these documents relating to Board-level decisions on this issue submitted by the Petitioners which have not been disputed by any of the Respondents, PLL is on record having raised any objection to provide the facility of direct off take to the Petitioner. It is clear therefore that the only ground on which the request of the Petitioner was denied was at the behest of

Respondent No.1, which is one of the promoters of the PLL, specifically to restrict competition. As far as the Respondents No.2 and 3 are concerned, it is clear from their stand that since they pass on the connectivity charges collected from the Petitioner to Respondent No1, their interests as off takers was not adversely affected. As a matter of fact, in the extract of the item No.PLL/427/2003: Evacuation of Re-gasification of LNG by GSPCL from the 51st Meeting of the PLL Board held on 23.10.2003, the nomine of Respondent No.1 is on record that while Respondent No.3's quota for RLNG was only 0.5 MMTPA and Respondent No.2 had already committed to consume their quote of RLNG on their Panipat and Mathura Refineries, their discussion with GSPCL (the Petitioner) had no practical purpose. In view of this, only GAIL (Respondent No.1) could deal with GSPCL regarding the evacuation of the gas. This clearly establishes that the Respondent No.1 blocked the direct off take of RLNG from the terminal by the Complainant and forced it to agree to a delivery point 500meters away with Respondents No.2 and 3 also the promoters of PLL and party to the above decisions as Members of the Board of Director of PLL, falling in line with the specific and deliberate intent of limiting competition and putting the Petitioner to commercial disadvantage in the market place through imposition of avoidable additional cost by way connectivity charges.

25. It is significant to note in this context, as brought out by the Petitioner, that the matter regarding allowing direct connectivity to the Petitioner for supply of RLNG again came up for consideration of the Board of Directors of PLL in its 69th meeting held on 17.10.06. The agenda item for the said meeting submitted by the complainant, which again has not been countered by any of the Respondents, brings out that GSPCL had "once again" approached PLL vide

their letter of 20.07.06 for supply of RLNG out of the LNG received as spot cargos in addition to the LNG supplied to them under existing GSAs. The agenda item noted that the "provision of direct connectivity from PLL's terminal to GSPCL would enhance the flexibility of the network to reach consumers in Gujarat and would provide an alternate source of supply in calamity such as recent flood in Surat". The PLL management recommended to the Board that the "direct connectivity from PLL's LNG terminal to GSPCL pipeline meets the requirement of GMB, provides operational flexibility to PLL, partially mitigates the risk due to possible upsets in GAIL system and ensures the security of supply. Additionally, it would enhance the flexibility of the network to reach various consumers in Gujarat". In view of this, the PLL management recommended to the Board to go for the direct connectivity as proposed which shall be constructed by GSPCL. This would clearly indicate that there was no ground, technical or otherwise, not to give direct connectivity to GSPCL in the PLL terminal for off take of gas other than what is recorded in the minutes of the Board meeting referred to earlier when the Petitioner's request was considered and denied. On the other hand, as the agenda for the subsequent request for direct connectivity notes, there were, in fact, adequate reasons to provide direct connectivity which was ultimately allowed.

26. The Petitioner in support of his contention has cited in detail, the relevant provisions of the GSA (GAIL GSA) entered into between Petitioner and Respondent No.1 on 07.02.2004. Similar, GSAs were entered into on 12.02.2004 with IOCL (IOC GSA) and on 16.02.2004 with BPCL (BPC GSA) who are Respondents no.2 and 3 respectively in this matter. The documents relating to agenda items and decisions in the meetings of the Board of Directors of

PLL do not mention HVJ and DVPL pipelines while considering the off take of the agreed quantities of gas by the Petitioners as per the GSAs with the three Respondents. This further establishes the fact that the reason for the denial of direct of take of the RLNG from the terminal at Dahej was not only for restricting competition in the market but also for making the petitioner pay an additional avoidable cost by deliberately making the delivery point 500mtrs. Outside the intended off take point from the terminal. As the agenda items on this issue for the PLL Board indicate, the gas supplied to the Petitioners is distributed to a large number of consumers across Gujarat. In effect, all these consumers have to willy nilly pay an extra cost for the gas delivered to them which would obviously be passed on to the subsequent and ultimate consumers through the products and services provided by these units thereby adversely affecting a large number of common consumers.

27. That the location of the delivery point of the gas under the three GSAs 500mtrs outside the terminal was not for the purpose of the transmission pipelines of HVJ and DVPL of Respondent No.1 is also borne out by the relevant provisions of the GSAs entered into by the Petitioner with the three Respondents. It is clear from these provisions as well as the definition of connectivity charges that the main purpose was to get the petitioner pay extra charges in addition to the price of gas by denying them direct access to the terminal as per their requests. In view of this, we have no doubt in our mind that denial of direct access to the Petitioner for off take of gas under the GSAs in the manner referred to earlier is clearly in violation of the provisions of Section 11 (a) of the said Act".

86. The above findings would reveal that the Chairman of the Petroleum Board had come to the conclusion that the main

purpose of the Appellant was to get the Gujarat Petroleum to pay extra charges in addition to the price of gas by denying them direct access as per the request and as such there is clear violation of the provisions of Section 11 (a) of the Petroleum Act.

87. The similar findings have been given by other two Majority Members. The Majority Members have not discussed about these aspects in detail but however they simply said that they agreed with the observations of the Chairperson with reference to this issue. The same is as follows:

> *"(d) We agree with the observation of the Chairperson that GAIL deliberately and unfairly blocked off direct connectivity to the terminal for commercial reasons and thus indulged in restrictive trade practice. GAIL has in fact, abused its monopoly position to block direct connectivity to Dahej Terminal instead opting for a 500meter transmission pipeline and as such, has indulged in Restrictive Trade Practice which falls under the ambit of Section11 (a)".*

88. The above conclusion on the basis of the discussions in the impugned order would indicate that the Petroleum Board was of the considered view that the Appellants deliberately prevented PLL (Petronet Limited) from giving direct connectivity to the Gujarat Petroleum to the Terminal for commercial reasons and the Appellants were responsible for increase in the tariff and thus indulged in the Restrictive Trade Practice. This is quite surprising.

89. As narrated earlier, it was the decision of the Petronet not to give direct connectivity long back. Admittedly, that was not challenged. Similarly, the increase in tariff also was made by the Petroleum Board in the tariff order. This is the decision of the quasi judicial authority to increase the tariff and for that the Appellants cannot be made responsible. The order passed by the Petroleum Board increasing the tariff admittedly, had not been challenged.

90. Under the above circumstances, we are at a loss to understand as to how the Petroleum Board have come to the conclusion that the Appellant GAIL deliberately and unfairly blocked off direct connectivity to the Terminal and thus indulged in the Restrictive Trade Practice.

91. The Appellant has contended that GAIL has a separate transmission Grid with Bharat Petroleum under which the Bharat Petroleum has an obligation to pay transmission charges of minimum specified quantity to the GAIL on a "Ship or Pay Quantity" meaning thereby that irrespective of actual quantity transported, the Bharat Petroleum, in terms of the gas transmission agreement is under an obligation to pay transmission charges on a minimum specified quantity.

92. That being so, when the Petroleum Board changes the Delivery Point with regard to supply of RLNG, the Board ought to have considered the same only after making

appropriate amendments/changes in the Gas Transmission Agreements entered into between the Bharat Petroleum and GAIL. Otherwise the same would have serious monetary consequences to the Bharat Petroleum and this aspect has not been gone into by the Petroleum Board.

93. It is also contended that the Gujarat Petroleum filed a complaint seeking change of Delivery Point which was already stipulated in the Gas Supply Agreement between the parties and, consequently, praying for the permission not to pay connectivity charges as determined in terms of the Agreement. Virtually, the Gujarat Petroleum has sought for rewriting of the terms and conditions of the Gas Supply Agreement entered into between the parties which are not permissible in law.

94. This aspect requires consideration. Even according to the impugned order, the Gujarat Petroleum voluntarily and out of its own free will, entered into a Gas Supply Agreement with GAIL. Having entered into a Gas Supply Agreement with GAIL with open eyes and full knowledge of the comprehension of the terms and conditions of the Agreement, the Gujarat Petroleum cannot be allowed to agitate contending that it was not bound by the terms and conditions which were not applicable to the Gujarat Petroleum and that therefore, the Delivery Point was required to be changed.

95. As indicated above, by way of complaint, the Gujarat Petroleum has virtually sought change in the terms and conditions of the Gas Supply Agreement, such as Delivery Point, Change in Transmission/Transportation Rate etc., on the ground that the said terms and conditions were unfair and unreasonable. This is not permissible under law in view of the dictum laid down in the judgment of the Hon'ble Supreme Court in the case of Assistant Excise Commissioner Vs Issac Peter reported in (1994) 4 SCC 104 which reads as under:

> *"We are, therefore, of the opinion that in case of contracts freely entered into with the state, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if*

the licensees are going to pay more to the State in case they make substantial profits".

96. This is reiterated in another judgment of Hon'ble Supreme Court in the case of Shin Satellite Public Company Limited Vs Jain Studios Limited reported din (2006) 2 SCC 628 wherein it has been held that a Court of law shall read the Agreement as it is and cannot rewrite or create a new one. Gujarat Petroleum's demand for change in Delivery Point would amount to rewriting/creating a new contract between the parties. This is not permissible under law.

97. In view of the above, in the cases of Agreements freely and voluntarily entered into between the parties, there can not be any question for invoking the doctrine of fairness and reasonableness against one party to the Agreement for the purpose of altering or adding to the terms and conditions of the Agreement. As held by the Hon'ble Supreme Court, there is no compulsion on anyone to enter into these contracts.

98. In view of the above, the prayer of the Gujarat Petroleum through which it was actually seeking change in the terms of the Agreement on the ground that they are unfair and unreasonable, cannot be granted.

99. As mentioned above, the main prayer in the complaint filed by the Gujarat Petroleum was with reference to the change in Delivery Point under the Gas Supply Agreement to the

Delivery Point of the direct interconnection between the Gujarat Petroleum pipeline network and PLL's LNG facilities w.e.f. 1.4.2011. In support of its prayer, the Gujarat Petroleum relied upon the Minutes of the Meeting held in Petroleum Board on 8.2.2011 and directions issued by the Board with reference to the tariff rates and interconnectivity.

100. Let us refer to the minutes of the meeting dated 8.2.2011. They are as under:

> "*5. Consequent to hearing the views of the stakeholders, after balancing the interests of the entities and consumers and keeping in mind the provisions of the PNGRB Act and the Regulations, the following conclusions on the way forward in the matter were conveyed by PNGRB:*
>
> > *(a) Upon the period till 31.3.2011, GSPCL, GAIL and PLL marketers should settle the issue in accordance with the applicable Tariff Rates specified by PNGRB in the order dated 09.06.2010 as relevant sale/purchase transactions have been concluded and cannot be reopened.*
> >
> > *(b) W.e.f 1.4.2011, GAIL, as a seller and transporter of RLNG should not compel GSPCL to use the GAIL/GSPCL interconnectivity in case they desire to use their direct connectivity for entire volumes…..".*

101. Admittedly, the Gujarat Petroleum had not paid the amount to the Appellant towards transmission charges in accordance with the applicable tariff rates specified by the Petroleum Board in the order dated 9.6.2010. There is no

reference about this in the complaint filed by the Gujarat Petroleum with reference to the compliance of the directions issued by the Petroleum Board vide minutes of the meeting dated 8.2.2011.

102. The following are the aspects which are to be taken into consideration for concluding that the Appellants cannot be accused of having indulged in the Restrictive Trade Practice:

(a) The GAIL, Appellant established HVJ gas pipeline for transportation of RLNG/gas from Petronet's Dahej plant to various consumers. HVJ pipeline was built by GAIL at a huge cost as an integral element of Qatar-India LNG Agreement as a sole and exclusive gas pipeline to carry Petronet's RLNG. This is in pursuance of the decision taken by the Ministry of Petroleum and Natural Gas, Government of India.

(b) Since GAIL's HVJ pipeline was an already existing entity with enough in-built capacity to transport RLNG for the Gujarat Petroleum and as the Gas Supply Agreements were voluntarily entered into by the Gujarat Petroleum with the Appellants GAIL, Indian Oil Corporation and Bharat Petroleum Corporation for transportation of RLNG up to the Delivery Point, it is not open to the Gujarat Petroleum to terminate the long term Gas Supply Agreements in between.

(c) The exclusivity of GAIL's HVJ pipeline was decided by Government of India which was the Regulator prior to setting up of the Petroleum Board. The exclusivity was granted by the Government of India on larger public interest and for public good. The Appellant, GAIL cannot, therefore, be held guilty of indulging in Restrictive Trade Practices in maintaining such exclusivity.

(d) There was only one pipeline namely the HVJ pipeline in which the entire RLNG from the Petronent LNG plant at Dahej was to be carried, supplied and sold. As held by the Petroleum Board in the impugned order, Gujarat Petroleum on its own volition agreed to the transportation by GAIL for delivery at Delivery Point as per the terms of Gas Supply Agreement. This Agreement was entered into on 16.2.2004.

(e) Only after a lapse of more than six years, the Gujarat Petroleum now has filed a complaint before the Petroleum Board alleging that the Appellants had indulged in Restrictive Trade Practices.

(f) The Gujarat Petroleum claimed that the Appellant prevented the PLL Board from granting direct connectivity. This allegation against the GAIL has no substance. The Appellant GAIL in fact had only one

nominee Director on the Petronet Board. The decision taken by the Petronet Board not to sell directly the RLNG to the Gujarat Petroleum cannot be termed as a decision made by the Appellant or the decision taken by the Petronet Board on account of any coercion or compulsion by the alleged dominant position enjoyed by the Appellant. In fact, the Gujarat Petroleum was not in a position to purchase RLNG directly from the Petronet since the entire quantum of RLNG was already sold to the Appellants GAIL, Indian Oil Corporation and Bharat Petroleum Corporation. Therefore, there is no question of any Restrictive Trade Practice being adopted by the Appellants in offering RLNG required by the Gujarat Petroleum.

(g) The Gujarat Petroleum voluntarily and wilfully signed Gas Supply Agreements with the Appellants. Thereafter, it continued to pay connectivity charges without raising an accusing finger that the Appellants indulged in Restrictive Trade Practice till the date of the complaint i.e. after 6 years. The Appellant has merely complied with the long term Gas Supply Agreement and the tariff order passed by the Petroleum Board.

(h) At a meeting held on 13.11.1999, it was decided by the Ministry of Petroleum and Natural Gas, Government of India to nominate the Appellant as the

sole transporter of the RLNG from Petronet's Dahej Terminal to the prospective purchasers. It was also decided that the entire output from the Petronet's Dahej Terminal would be purchased and marketed by the GAIL, Indian Oil Corporation and Bharat Petroleum Corporation at 60%, 30% and 10% respectively. Only on that basis, huge investments had been made by the Appellant GAIL, as the Appellant got the exclusivity in regard to the transportation of the RLNG through its HVJ pipelines till the Delivery Point and beyond, and recover its investment through tariff.

(i) Appellant's trunk pipelines were the only prevalent physical means of delivering gas to the Gujarat Petroleum at the Delivery Point. The Gujarat Petroleum was fully aware of this fact. Accepting this ground reality, the Gujarat Petroleum all along continued to pay interconnectivity charges as per the terms of the Gas Supply Agreement. The real purpose of filing the complaint is by way of challenging the levy of tariff at Rs.19.83/ MMBTU as per Zone-I tariff determined by the Petroleum Board. This tariff of Rs.19.83/MMBTU was fixed by the Tariff Order dated 9.6.2010. The said order has not been challenged by Gujarat Petroleum before the appropriate Forum.

(j) On the other hand, after some months, the Gujarat Petroleum under the garb of filing complaint alleging adoption of the Restrictive Trade Practice by the Appellant has approached the Petroleum Board with the sole purpose of challenging the increase in levy of tariff at Zone-1 tariff level of Rs.19.83/MMBTU from the connectivity charges of Rs.8.74/MMBTU.

(k) On 15.10.2009, the Gujarat Petroleum represented to the Petroleum Board that DVPL pipeline tariff should not be applied to them. But this premise was rejected by the Board on 19.4.2010. On 13.5.2010, the Gujarat Petroleum Board, again, represented to Petroleum Board not to apply Zone-I tariff to them. But the Petroleum Board, by the order dated 9.6.2010, passed the tariff order without again accepting the contentions of the Gujarat Petroleum. Thus, the Appellants merely complied with the Petroleum Board's tariff orders. This cannot be considered to be indulging in Restrictive Trade Practice by the Appellants.

(l) The discussions held at the meeting of the Board of Directors of Petronet in the year 2003 were with reference to the proposed purchase of gas by Gujarat Petroleum directly from Petronet and not with reference to the transportation of gas. Even after rejection of the

request made by the Gujarat Petroleum for direct off take of the gas from Petronet, the Gujarat Petroleum had duly signed the Gas Sales Agreement first with the GAIL and, subsequently, with Indian Oil Corporation and Bharat Petroleum Corporation Limited. When such being the factual situation, it cannot be contended that GAIL, the Appellant influenced the Board of Directors of Petronet through its alleged dominant position to reject the claim of Gujarat Petroleum for direct off-take of RLNG from Petronet Limited. In fact, the Appellant had only one nominee Director on the Board of Petronet. The other Directors were not the nominees of the Appellant. Therefore, the decision taken by the Petronet not to sell RLNG directly to the Gujarat Petroleum cannot be attributed as a decision made by the Appellant or on account of any coercion or compulsion by the Appellant.

(m) The issue of direct connectivity from Petronet's Dahej Terminal to Gujarat Petroleum was raised for the first time in the year 2006 much after the signing of the Gas Sales Agreements, and that too, after implementing the Agreements by taking Delivery of the RLNG on the Delivery Point on HVJ/DVPL pipelines. The minutes of the meeting held on 17.10.2006 relied upon by the Gujarat Petroleum to contend that direct

connectivity was wrongly refused to Gujarat Petroleum relate to a time much after the implementation of the Gas Sales Agreement in the year 2004.

(n) The grievance of the Gujarat Petroleum had arisen only on account of fixing of the Zone-1 tariff by the Petroleum Board in its order dated 9.6.2010 and not on account of the fact that the Gujarat Petroleum was taking delivery of the RLNG on the HVJ/DVPL pipelines. As mentioned earlier, for a period of more than 6 years, the Gujarat Petroleum had continued to take delivery of the gas from the HVJ/DVPL pipelines.

103. In view of the above aspects, it has to be held that the ingredients of the "Restrictive Trade Practice" have not been satisfied at all in the present case in exercise of the jurisdiction u/s 11 read with Section 2 (zi) of the Petroleum Act.

104. <u>Summary of our findings:-</u>

i) In the light of our detailed discussion made above, it has to be held that the conclusion arrived at by the Petroleum Board to the effect that the Appellant GAIL had indulged in "Restrictive Trade Practice" by abusing the dominant position with regard to Delivery of the gas sales by the Appellants to Gujarat Petroleum through

HVJ/DVPL gas pipelines laid, operated and maintained by the Appellant GAIL is patently wrong. Hence, the impugned orders are liable to be set aside.

ii) In the light of our above findings we pass the following consequential orders and directions.

iii) As mentioned earlier, we passed an interim order dated 23.1.2012 pending the Appeal. In that order, we had permitted the Appellants to allow the Gujarat Petroleum to change the Delivery Point and to take the connectivity to the Dahej Terminal through pipelines as per the impugned order passed by the Petroleum Board subject to the following conditions:

> ***(a) From 20.11.2008 to 4.4.2011 i.e. the date of the complaint, the inter connectivity charges has been fixed as Rs.19.83 per MMBTU. The differential amount between rate prevailing prior to Board's order i.e. Rs.8.74 per MMBTU exclusive of Service Tax and Rs.19.83 per MMBTU has to be kept by the Petroleum Corporation Ltd in a separate account. If the final decision of the Appeals filed by GAIL and other companies is in favour of Petroleum Corporation Limited, the said amount need not be paid to GAIL. In case, the decision in these Appeals is in***

favour of the Appellant namely GAIL, the amount payable to GAIL, if any, will be adjusted as per final judgement of this Tribunal.

b) From 4.4.2011 i.e. the date of the complaint, till the date of the Appeal filed before this Tribunal, the rate applicable would be as per rate prevailing prior to the order of the Board i.e. Rs.8.74 per MMBTU (excl. taxes) which the Petroleum Corporation Ltd should pay to GAIL. Depending on the outcome of the case, the amount payable, if any, over and above this amount, up to a ceiling of Rs.19.83 per MMBTU may have to be given by Petroleum Corporation to GAIL for which Petroleum Corporation should give an undertaking.

c) From the date of filing of this Appeal till the date of shifting of Delivery point, the above arrangements will continue. From the date of shifting of Delivery Point, an amount equivalent to existing rate i.e. Rs.8.74 per MMBTU (excl. taxes) as per the gas supply agreement should be kept in separate account by the Petroleum Corporation Ltd., with an undertaking that in case final decision is given in favour of GAIL, this amount would be paid by the Petroleum Corporation Ltd to GAIL even for the period when the Delivery point of the Appellant has not been used and that Delivery point which

has been shifted now would be shifted back to GAIL Delivery point. If the case is decided in favour of the Petroleum Corporation, then this amount can be taken back by the Petroleum Corporation Ltd."

iv) In pursuance of the above interim order, in which the various conditions were imposed, the Gujarat Petroleum Corporation deposited the differential amount between the rate prevailing prior to the Board's order, namely, Rs.8.74/MMBTU and Rs.19.83/MMBTU for the period 20.11.2008 to 4.4.2011 and this differential amount has to be kept by the Gujarat Petroleum Corporation in a separate account.

v) As per the said conditions, if these Appeals are allowed in favour of the GAIL, the amount kept in the separate account is payable to GAIL. Therefore, the Petroleum Corporation has to comply with the orders by making the said payment to GAIL since the Appeal filed by the GAIL is allowed.

vi) We had also directed the Gujarat Petroleum Corporation in the interim order to make the payment to GAIL as per the rate of Rs.8.74/MMBTU for the period from 4.4.2011, the date of complaint till the date of the Appeal filed before this Tribunal.

So, since the Appeals have been allowed, the amount of Rs.19.83/MMBTU shall be paid to the GAIL by the Gujarat Petroleum Corporation.

vii) With reference to the period from the date of the acceptance of the delivery point as we have directed, the amount equivalent to existing rate i.e. Rs.8.74/MMBTU should be kept in a separate account. Already undertaking has been given by the Gujarat Petroleum Corporation that in case the final decision is given in favour of the GAIL, this amount will be paid by the Gujarat Petroleum to the GAIL. Accordingly, this amount is directed to be paid to GAIL.

105. In view of our findings and consequential directions, the impugned orders are set aside. The Appeals are allowed. However, there is no order as to costs.

(Nayan Mani Borah)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:18th Dec, 2013

√REPORTABLE/~~NON-REPORTABALE~~