

COMPETITION COMMISSION OF PAKISTAN

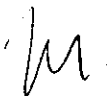
ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED BY LUCKY COMMODITIES (PVT.)
LIMITED AGAINST PAKISTAN INTERNATIONAL BULK TERMINAL
LIMITED FOR ALLEGED VIOLATION OF THE COMPETITION ACT, 2010**

Maliha Quddus | Irfan Ul Haq | Aqsa Suleman

Dated: December 18, 2019



BACKGROUND & FACTS

1. This enquiry report is prepared pursuant to a formal complaint filed before the Competition Commission of Pakistan (the "Commission") under Section 37(2) of the Competition Act, 2010 (the "Act") by M/s Lucky Commodities (Pvt.) Limited ('the Complainant') against M/s Pakistan International Bulk Terminal Limited ('the Respondent' or 'PIBT') regarding the rates implemented by PIBT for handling of coal at its terminal located at Port Qasim ('PQ'). The Complainant alleged that the Respondent has increased handling tariff thrice during the period from September 2018 to December 2018 and has implemented ancillary charges without objective basis that is adversely affecting the industries relying on coal (copy of the complaint is attached as Annex 'A').
2. According to the Complainant, prior to the use of the Respondent's terminal, handling of coal was carried out at Karachi Port Trust (KPT). In 2014, a constitutional petition was filed before Honorable High Court of Sindh, by the residents living nearby the KPT area, to address the issue of pollution caused due to handling of huge quantities of coal at KPT. During the proceedings concerning the said petition, a representative of KPT admitted that while transferring the coal from vessels to dumper trucks there is leakage of coal dust that causes pollution. In the said matter, the Honorable High Court of Sindh passed an order and directed the KPT to reduce the quantity of coal lying at the coal yard from 750,000 Metric Tons to 200, 000 Metric Tons within thirty days from the date of passing of the order. Moreover importers were directed to lift the stock of coal from KPT within 20 days of unloading of coal (copy of the referred order is attached as Annex 'B').
3. In addition to the above, while the matter was pending in the Honorable Sindh High Court, the Honorable Supreme Court of Pakistan initiated *suo motu* proceedings on June 20, 2018. A hearing was held in the presence of all stakeholders and subsequently order was passed directing that all vessels carrying coal shall not be unloaded at KPT and rather be sent to the Respondent at PQ as unloading of coal at KPT causes serious health hazard (copy of Supreme Court order is attached as



Annex 'C'). A civil review petition is currently pending before the Honorable Supreme Court of Pakistan against the said order.

4. In result of the order of the Honorable Supreme Court of Pakistan, PIBT became the only terminal where commercially imported coal can be handled. As per the Complainant, since PIBT is the only port left in the country, it started abusing its dominant position by charging exorbitant tariff rates from all coal importers. A summary of tariff provided by the Complainant charged to importers of coal by the Respondent before and after Supreme Court Order is as under:

Table 1					(PKR)
Date of Invoice	Tariff	Ancillary Charges	Discount	Final Rate	
May 07, 2018	635	58	114.5	578.5	
May 18, 2018	635	58	114.5	578.5	
May 23, 2018	635	58	114.5	578.5	
Supreme Court Order Dated June 20, 2018					
September 03, 2018	682	125	-	808	
October 29, 2018	726	133	-	860	
December 12, 2018	763	140	-	903	

5. As per the details provided in the complaint, order of the Honorable Supreme Court restricted the Respondent from charging rate other than what was being charged at the time of the order. However, the Respondent within the period of around 06 months increased its rate from PKR 578.5 to PKR 903. The Complainant is aggrieved that, the Respondent has started to increase its rate without any justification and reduced the time of storage from 20 days to 15 days. Moreover, the Respondent has started imposing miscellaneous charges on account of 'truck leveling' and 'shifting charges' from the importers. Relevant portion of the Supreme Court order referred by the Complainant regarding the charge of rates is as under.

"Thus in the Circumstances, we direct that all the ships carrying imported coal to Pakistan shall not be unloaded at KPT, rather at




Port Qasim at the same rate which is being presently charged from them by Pakistan International Bulk Terminal....”

6. Apart from the above, it is alleged that PIBT is charging its customers including the Complainant in US Dollar as opposed to Pakistani Rupee, which as cost component affects the cost of production. In the complaint, it is prayed that the Commission may: (i) declare the increase of tariff as unlawful; (ii) establish price mechanism in consultation with all stakeholders of the industry; (iii) to refund within 15 days the excess tariff charged to the Complainant; (iv) to provide minimum 20 days storage time to the Complainant as was practice at KPT; (iv) restrain respondent from charging tariff in US Dollars; and (v) restrain respondent from charging additional charges.
7. Keeping in view the above, an enquiry was authorized on February 12, 2019, under Section 37 (2) of the Act read with Regulation 17 (2) of Competition Commission (General enforcement) Regulations, 2007 (the “Regulations”) in respect of the alleged violation by PIBT, the Commission exercising its powers under Section 28(2) of the Act appointed Maliha Quddus (Joint Director, Cartels & Trade Abuse), Irfan Ul Haq (Deputy Director, Cartels & Trade Abuse) and Aqsa suleman (Assistant Director, Cartels & Trade Abuse) as enquiry officers (the “Enquiry Committee”) to prepare and submit a report in the matter.
8. On February 22, 2019, the Enquiry Committee wrote to PIBT to respond to the allegations made against it by the Complainant and to provide the following information:
 - a. Month-wise quantity of coal handled by PIBT for the time period January 2017 to January 2019;
 - b. Coal handling capacity of PIBT for January 2017 to January 2019; and
 - c. Provide month-wise quantum of tariffs and all other ancillary charges applied by PIBT, for the time period January 2017 to January 2019, clearly indicating any changes/increase



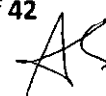
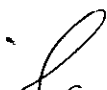
9. PIBT submitted its response in the matter on March 15, 2019 (which will be referenced subsequently in this Enquiry Report and placed at Annex 'D1') vehemently denied the allegations put forth against it in the complaint. PIBT's main arguments are summarized as follows:
- a. PIBT was not a party to the proceedings in which the Supreme Court Order was passed and it made no representations whatsoever before the Supreme Court in respect of the matter.
 - b. On November 06, 2010 Port Qasim Authority ('PQA') and PIBT entered into an Implementation Agreement ('IA') whereby the latter was granted concessionary rights for the establishment and operation of a coal, clinker, and cement terminal at PQ on a build, operate, transfer basis for a period of 30 years.
 - c. PIBT's terminal became fully operational in May 2017. Capital in excess of USD 300,000,000 was invested in the project.
 - d. Through Article 20.1 of the IA, PIBT is entitled to invoice handling charges for cargo handled as per the tariff set out in Schedule 21 of the IA i.e. USD 5.49 per tonne.
 - e. With respect to additional storage facilities and charges for other services, PIBT is entitled to charge customers depending on the nature of services provided to them on a case-to-case basis. Customers are invoiced for other ancillary charges in accordance with the terms of the IA. Ancillary charges include but not limited to storage charges, customer service charges, yard facilities charges, weighment charges and labour charges.
10. On March 20, 2019 the Enquiry Committee requested PIBT to provide additional information related to its terminal and coal handling operations. PIBT was requested to provide: a copy of IA entered into between PQA and PIBT; factors that caused PIBT to increase charges after Supreme Court Order; basis of offering discount to



customers; and percentage of customers that are offered discount. Furthermore, Lucky Commodities was forwarded above filed reply of PIBT for comments.

11. PIBT in response to the above vide letter dated April 02, 2019 submitted that all services provided to customers are being charged in accordance with the IA. PIBT has not increased the vessel handling tariff since the inception of operations. Charges applied to the Complainant include 'Vessel Handling Charge' at USD 3.22 per ton, PQA Royalty' charge at USD 2.27 and 'Other Ancillary Charges' at USD 1.01 have remained unchanged. Regarding the basis of offering discount to customers, PIBT submitted that during the first year of its establishment customers were offered discounts to incentivize the provision of services and attract customers. However currently discounts are being offered on the basis of the volume of cargo imported by customers, nature of service provided to specific customer and type of cargo as certain cargo requires additional equipment and maintenance. Furthermore, PIBT submitted a copy of the IA and copy of invoices that were offered discount (Copy of reply is attached herewith as Annex D2).

12. Whereas, the Complainant in reply to PIBT's submission vide letter dated May 09, 2019 stated that PIBT does not possess the capacity or infrastructure to handle large quantities of coal. Since December 2018 around USD 4.5 million have been paid as demurrage by importers due to delay in unloading of coal. Such delays are primarily due to non-availability of single conveyor belt which as per the guidelines for preparation of proposal issued by PQA was initially supposed to be 2 rail. PIBT's assertion that it is operating as per international standards to ensure environmental safety is misleading as the level of carbon monoxide at PIBT have gone up to 4.67 mg/m³ whereas the maximum limit is 5 mg/ m³. Furthermore, additional charges have been levied on the importers of coal in respect of ancillary services which have been categorized as labour and equipment charges, weighment charges, customer service charges, MIS charges etc. Such charges have neither been defined in IA of PQA nor there any mechanism for their calculation. PIBT by bifurcating the rates of handling services is adding charges under a separate head to depict that the charges have remained the same (Annex E1).



13. Above submissions of the Complainant were forwarded to PIBT for comments. PIBT vide letter dated July 19, 2019 with regards to the level of carbon monoxide at PIBT terminal, noted that a recent report of air monitoring, submitted with the Sindh Environmental Protection Agency shows that the level of carbon monoxide is within the limits as prescribed by the environmental laws. With respect to the delays in unloading of coal which result in the demurrage charges on coal importers, PIBT submitted that the allegation put forth by the Complainant is baseless and irrelevant to the subject enquiry. In relation to the Complainant's claim that charging importers of coal in USD is unfair trading practice, PIBT stated that the incurred project cost is in USD, is required to service its debts to foreign lenders is USD, obligated to pay the royalty to PQA in USD, bound to make payment to its engineering procurement and construction contractors and other technical consultants for sale of machinery, spare parts and provision of technical and maintenance services in USD. PIBT further submitted that the complainant's allegation that the additional or related charges are applied at the discretion of PIBT is denied as the Article 20 read with Schedule 21 of the IA entitles PIBT to charge for ancillary services in addition to the handling tariff of USD 5.49 depending on service requested by customers on case to case basis. Regarding the provision of free storage, PIBT offers free storage of 15 days for initial storage of cargo (Annex D3).
14. Apart from the above, the Enquiry Committee sought additional information from PIBT vide letter dated June 24, 2019 for: reasons behind imposition of different charges on commercial importers and other importers; reasons why some customers are charged in USD and some in PKR and copies of invoices issued to customers for handling coal for the period January 2017 to January 2019.
15. PIBT in response vide letter dated July 12, 2019 stated that Lucky Commodities has instituted legal proceedings (Suit No. 818 of 2019) in Sindh High Court seeking inter alia, a declaration that PIBT is involved in the unlawful monopolistic practices on the basis of the same cause of action which is subject of investigation by CCP. Therefore it is important for CCP to consider that the subject matter is already sub-judice before the High Court of Sindh in exercise of its original civil jurisdiction. The information shared with CCP is highly sensitive and should be kept confidential



as the Complainant has used such information out of context in the proceedings. Regarding the queries raised PIBT submitted the following.

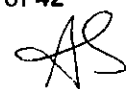
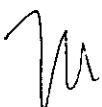
- i. PIBT charges handling tariff to its customers on equal basis irrespective of whether such a customer is a commercial importer or a consumer. The apparent difference in the invoices mainly because of the discount offered on the quantum of cargo imported. The terminal handling charges are directly dependent on the quantum/volume of coal imported on annual basis by the customer. Following charges are applied based on the quantity of quantity of coal.

Annual Coal Weight Committed	Total Charges
< 500,000 MT	USD 6.50/MT
500,000 MT – 1,000,000 MT	USD 6.25/MT
>1,000,000 MT	USD 6.00/MT

- ii. Moreover, mechanism used by PIBT for issuing invoices and provision of discounts is also important. For this purpose, following information is noteworthy:
 - a. Commercial Importer: Imported goods on its own name for an independent onward sale of such cargo in the local market. These are named as “consignee” in the shipping documents (incl. the bill of lading) by the consignor and are generally responsible for payment of all custom duties and applicable taxes.
 - b. Consumer: Imports good for self-consumption and is also labeled as “consignee” in the shipping documents including the bill of lading.



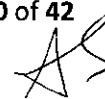
- c. Indenter: Primarily agents of the consignee to facilitate the import transaction. The shipping documents and the bill of lading are not in the name of indenters. Therefore, PIBT relies on Import General Manifest (IGM) filed with the custom authorities through their computerized system known as "WEBOC", to get the details regarding vessel, consignee name, type of cargo, and weight of cargo.
- iii. For commercial importers, PIBT has a direct contractual relationship with such person or entity and the terminal handling and storage charges are claimed therefrom. In case of indenters, PIBT based on the information received from IGM, prepares and issues invoices to those entities who have name mentioned in the IGM as consignees. It is often the case that certain commercial importers are also indenters. Thus, the remaining cargo imported in its capacity as indenter is charged to relevant consignee as per the details set out in IGM. Thus there appears no conceivable basis for commercial importers to gain more discounts on quantities imported as the discounts are provided to each consignees on their own respective quantities. Moreover, PIBT does not enter into contractual obligations with indenters nor does it issue any invoice for its services to such indenters. All indenters are treated uniformly across the board without any discrimination and accordingly no indenter is offered discount.
- iv. The Complainant Lucky Commodities Pvt. Ltd acts both as an indenter and a commercial importer. The Complainant has wrongfully tried to seek discounts on its quantities imported under both capacities. It would be unfair to give discounts to only one indenter and others are charged as per the aforesaid mechanism. Moreover, the information regarding consignee name and weight is obtained from a reliable source of customs i.e. IGM through WEBOC; thus there is no disparity in the charges.



- v. During the first year of commercial operations i.e. from July 01 2017 to June 30 2018, PIBT only had few customers. Through discount offers, PIBT has expanded its customer base exponentially and also entered into long term commitments with certain customers and catered to their specific service requirements.
- vi. The discount policy was rationalized by the end of the first year of commercial operations and it is being applied consistently since then. In the second year of operations, PIBT has entertained 100 customers and has discharged 8.5 million MT of coal cargo at its terminal.
- vii. With regards to application of charges in USD rather than PKR, PIBT stated that it has incurred its project costs in USD and is also required to service its debt to foreign lenders in USD. It also pays its royalty to PQA in USD and makes payments to its engineering procurement, construction contractors, and other technical consultants in USD. Therefore, the invoices issued to the customers are converted to PKR as per the prevailing exchange rate at the time of the invoice. (Annex D4).

16. Whereas, Lucky Commodities vide letter dated September 25, 2019 submitted following additional information:

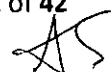
- i. As per Clause 2.3 of the Tender and Article 3.1(b) of the IA, the bulk handling of coal is on a non-exclusive basis. However, during negotiations pertaining to the IA, the contents of the tender documents were not taken into consideration resulting in conflict between the two. The breach of non-exclusivity clause is evident from Article 3.26 of the IA which granted the exclusive rights to PIBT by; (i) PQA will cease operations at marginal wharfs after completion of the terminal; (ii) coal handling at marginal wharfs of PQA could be only utilized for Pakistan Steel Mills, Al Tuwaqirqi Steel Mills, or any other coal based power plants. Clause 2.3 and Article 3.1(b) is reproduced below.



Clause 2.3 the bidder may seek exclusive right for clinker and cement handling at Port Qasim. Terms and conditions/mechanism of the exclusive right could be discussed during the negotiations of the on the IA. Handling of coal shall be however, on non-exclusive basis. PQA retains the right to handle any commodity at its own wharves/berths under special circumstances. ..

Article 3.1(b) "... The bulk handling of coal and other commodities shall however be on non-exclusive basis."

- ii. Despite the approved tariff of USD 5.49 per MT, charges labelled as "ancillary charges" ranged between USD 0.5 to USD 1.61 per MT are implemented. This is again in contravention to the Tender Document and Article 20.1 of the IA. Moreover, storage charges start post 20 days which have been changed to 15 days.
- iii. Similarly, there is no justification of charging USD 1 as trucking charges as the transportation of trucks is arranged by the companies themselves.
- iv. Three times more charges compared to KPT with no difference of services are imposed on customers. The charges imposed are in USD instead of Pak Rupees. Due to depreciation of PKR against USD, the companies pay heavy amounts on handling charges against the same services.
- v. Queries raised with PIBT regarding the mechanism of charges such as storage charges, etc. remained unanswered despite several emails and reminders. The free storage period also varies from customer to customer. Similarly, the companies in the same industry are charged differently for advance/up-front such as 50% advance for some while 100% advance from others. No such criteria is defined, published, or notified.



- vi. No mechanism exists for monitoring the actual loss incurred during handling. Due to this, the handling shortages vary significantly causing quantities to differ. It is feared that such shortages are deliberately created in order to sell cargo in the market.
 - vii. PIBT enjoys monopolistic position in the market and dictates its terms and conditions regarding the handling of coal. PIBT claims to have obtained exemption from Competition Commission of Pakistan on the IA. However, circumstances have changed drastically over the time as previously it was not dominant and catering only 2 to 3 coal importers. Whereas, following the order of the Supreme Court of Pakistan dated June 20, 2018, it has become the sole coal handling facility provider (Annex E2).
17. In view of the submissions made by the Complainant, the Enquiry Committee considered it pertinent to send a copy of the complaint to PQA to seek their comments on the matter. PQA in response to the complaint submitted the following details.
- i. The project of establishment of Coal, Clinker/Cement Terminal was advertised in the year 2006 and six companies submitted their Expression of Interest (EOI). After evaluation, PIBT was declared successful with royalty offer of \$2.27 per ton. The IA (IA), as approved by PQA Board, ECC, and Ministry of Law & Justice, was signed with PIBT on November 6, 2010. The coal handling charges are set at US \$5.49 per ton as per Schedule 21 of the IA which are not limited to loading/un-loading of cargo from onto vessels and other related services. The schedule also states that the company will charge the customers for additional services provided to them. However, the other charges for the services requested by the customer will be negotiated on case to case basis as per para-3 of Schedule 21. The article 20.3 of IA clearly mentions that the company cannot increase the tariff without seeking approval from



PQA. However, the company has not applied for any increase in its tariff nor it has been allowed such increase by PQA.

- ii. The *suo motu* notice was taken by the then Chief Justice of Pakistan on the environmental concerns and subsequent to the order of Supreme Court dated June 20, 2018 the handling of coal shifted from KPT to PIBT. An application for permission to file Civil Review Petition regarding the said order is currently pending before the Supreme Court of Pakistan.
- iii. In terms of complaints against PIBT, a similar suit is filed by M/S Sitara Chemical Industries Ltd & Others in the High Court of Sindh on the same cause and prayers as delineated in the complaint before CCP (Annex F).

18. Apart from the aforementioned information gathered, the Enquiry Committee subsequently held meetings with the Complainant and the Respondent both to clarify certain aspects of the matter.

ISSUES

19. Based on the foregoing the following issues have been identified for further analysis:
- a. What is the relevant market and whether PIBT holds a dominant position in the relevant market;
 - b. Whether PIBT has abused its dominant position by indulging in: (i). unjustified increase in handling tariffs; (ii). unfair ancillary charges; and (iii). discriminatory practices.



ANALYSIS

Undertakings

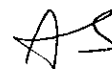
20. PIBT is a public limited company which has entered into a Build Operate Transfer ('BOT') agreement with PQA on November 06, 2010 for construction, development, operations and management of coal and clinker/cement terminal at PQ for a period of 30 years and commenced commercial operations on 03rd July 2017¹. PIBT is involved in the provision of cargo handling and other related services at its terminal for which customers are invoiced a certain fee. PIBT is therefore, an undertaking in terms of Section 2(1)(q) of the Act.
21. Lucky Commodities (Pvt.) Limited is a company engaged in the import and sale of coal. It is therefore, an undertaking in terms of Section 2(1)(q) of the Act.

Relevant Market

22. Section 2(1)(k) of the Act defines relevant market as follows:

“relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas;

¹ PIBT Quarterly Report March 31, 2019. <http://www.pibt.com.pk/pdf/QuarterlyReportMarch2019.pdf>



23. Coal is a fossil fuel utilized as an energy source mainly by the power generation, steel and cement sectors in Pakistan. According to estimates the major importers of coal in Pakistan are the power plants that import approximately 12 million tons and cement sector which imports approximately 08 million tons of coal².
24. Most of the coal consumed in Pakistan is imported as the domestic supply of coal is insufficient to cater to the local requirement. Locally coal deposits are located in Balochistan, Sindh Punjab and KPK comprising mostly of small scale operations. Pakistan's largest coal deposits are located in Thar – Sindh, however, only a fraction of it is being utilized. Table 2, below shows that as of 2017-18 imported coal comprised approximately 76 percent of total supply with the remainder 24 percent being met by domestic coal. Coal demand is also forecasted to rise as coal fired power plants under the China Pakistan Economic Corridor ('CPEC') umbrella come online.

Financial Year	Domestic Coal Production		Coal Import		Total Supply	
	Million Tons	Million TOE	Million Tons	Million TOE	Million Tons	Million TOE
2017-18	4.3	1.92	13.7	9.0	18	10.92
2018-19 (Estimated)	5.5	2.46	15.5	10.19	21	12.95

Source: Ministry of Energy Mineral Wing as quoted in the Economic Survey of Pakistan³

25. Coal is imported mainly from South Africa, Australia and Indonesia via sea in the form of bulk cargo. Bulk cargo refers to cargo that is transported unpackaged in large quantities. Pakistan has three operational deep water ports, capable of handling bulk i.e. Karachi Port Trust ('KPT') and PQ located in Karachi and Gwadar Port. Coal arrives from vessels in bulk and is offloaded at terminals with dedicated machinery and equipment. It is then stored in storage pits. Since coal tends to spontaneously combust its temperature needs to be monitored, it has to be sprayed with water and shuffled in the storage pit. The coal is transported out of the terminal via trucks to other storage yards or to railway links for transportation to upcountry. Since the

² Pakistan's coal imports to surge to 30 million tons per annum by 2020, The News, 08.01.2019.

³ Page 239, Chapter 14, Energy.

complaint pertains to the terminal handling services for commercial imports of coal; therefore the relevant market appears to be that provision of services for handling of imported coal.

26. Imported coal was being handled at KPT and PQA. Prior to the Supreme Court's ruling in the matter, coal was being offloaded at both KPT and PIBT at PQ. On June 20, 2019, the Supreme Court vide its Order ruled:

“Thus in the circumstances we direct that all the ships carrying imported coal to Pakistan shall not be unloaded at KPT, rather at Port Qasim at the same rate which is being charged from them by Pakistan Bulk Terminal within a period of six weeks from today”.

27. Pursuant to the directions of the Honorable Supreme Court, effective from August 2018, PQ became the only port that could handle imported coal. At PQ coal is being handled at 05 terminals out of which 03 are designated for exclusive use (Pakistan Steel Mills, PQEPC and Hauneng Fuyun) and 02 for non-exclusive use (PIBT and the marginal wharf). However, in practice, coal is being handled only at PIBT. After the order of the Honorable Supreme Court KPT was barred from handling coal. Apart from these ports, Gawadar Port has commenced its operations, and as per available information, it is currently not handling commercial imports of coal. PQ has 14 terminals/berths, purpose built for handling different forms of cargo or for the exclusive use of particular entities, the details of which are as follows:

- a. Qasim International Container Terminal - Containers;
- b. 2nd Container Terminal - Containers;
- c. Marginal Wharf - General Bulk Cargo, Vehicles, Machinery & Equipment and Project Cargo (except exclusivity granted by PQA). After the commencement of PIBT operations, the Marginal Wharf has ceased to handle coal;
- d. Iron ore and coal berth - Exclusive use of Pakistan Steel Mills;
- e. FOTCO Oil Terminal - Furnace oil, HSD, Mogas etc.;
- f. Engro VoPak Liquid Chemicals Terminal - Chemical (Phosphoric & Acetic Acid, Ethylene, EDC, & LPG);



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- g. Liquid Cargo Terminal - Edible oil;
- h. FAP grain and Fertilizer Terminal - Soya Bean, Canola, Rap Seeds, Wheat, Fertilizer, Rice & Corn
- i. SSGC LPG Terminal - LPG;
- j. EETPL LNG Terminal - LNG;
- k. PIBT - Coal and clinker and cement;
- l. PGPCCL LNG Terminal - LNG;
- m. PQEPC Coal Terminal 1320MW - Self use coal for power plant;
- n. Huaneng Fuyun Port & Shipping (Pvt.) Limited - Self use coal for Sahiwal Power Plant;

28. Coal imported at PQEPC Coal Terminal, Iron ore and coal berth and by Hauneng Fuyun Port & Shipping (Pvt.) Limited is used exclusively by the relevant importing firms for its own use and no other importer can use these terminals. PIBT is the only terminal at which any party can import coal. Furthermore, the concession agreement, between PIBT by PQA, applies only for this terminal, the geographic market is restricted to PQ area only. Based on the foregoing, the relevant geographic market for the purpose of this enquiry appears to be PQ area.

29. From the foregoing it appears that the relevant market is that of the provision of services for handling of imported coal at PQ.

Dominant Position

30. Dominant position is defined in clause (e) of sub-section (1) of Section 2 of the Act, as follows:

'Dominant Position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent'

31. In the case *United Brands*⁴ vs. Commission defined dominant position as “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it power to behave to an appreciable extent independently of its competitor, customers and ultimately consumers.*”
32. In the instant matter subsequent to the Honorable Supreme Court order, KPT is barred from handling coal therefore, the only other available option is through PQ. As discussed in paragraphs above, at PQ two berths/terminals are available for discharge of coal at PIBT and the Marginal Wharf, however, all coal arriving at PQ is being discharged at PIBT. It is noted that Clauses 1.6 and 3.1(b) of the IA between PIBT and PQA grant the former non-exclusive rights for handling coal, however, contrary to these 02 clauses, Clause 3.26 of the IA (Annex G) grants PIBT exclusivity in the handling of coal. The relevant clauses are reproduced below:

Clause 1.6 “*Cargo*”—*means*:

- (a) *All types of Cement and Clinker that shall be handled in bulk by the Company on an exclusive basis;*
- (b) *All types of Coal to be handled in bulk by the Company on a non-exclusive basis”.*

Clause 3.1(b) granted non-exclusive right to PIBT to handle coal:

“PQA hereby agrees that, subject to Article 3.1(c) no other concession in respect of the Clinker and Cement shall be granted to any Person/terminal/jetty by PQA until such date on which the said Cargo throughput at the Terminal exceeds 8(eight) million tonnes per annum in each of the three (3) consecutive years preceding such date. The bulk handling of coal and other commodities shall however be on non-exclusive basis”.

⁴ Case 27/76 [1978] ECR 207, [1978] 1CMLR 429; it has used the same formulation on several other occasions, e.g. in Case 86/76 Hoffmann –La Roche V Commission [1979] ECR 461, [1979] 3 CMLR 211, para 38.

Clause 3.26 allowed exclusive rights to PIBT to handle coal:

“Subject to the provisions of Articles 3.1(b) and (c) after the Completion Date, the bulk handling of the Clinker and Cement will not be permitted by PQA at any other berths at the port including berths of the Marginal Wharf. Further, after the Completion Date, the bulk handling of Coal by PQA shall cease at the Marginal Wharf. Coal handling may be allowed by PQA at IOCB Berths for Pakistan Steel Mills consumption only as per existing arrangement; by Al-Tawairqi Steel Mills at a dedicated Jetty or at IOCB Berths for their own consumption only; and at any other coal based power plant’s dedicated jetty for their own consumption only”.

33. From the above it is noted that apart from the exclusive arrangements for Pakistan Steel Mills and abovementioned coal based power plants, coal for commercial import is being handled at PIBT only. The Order of the Supreme Court in the matter, mentions *“We have been apprised and assured that appropriate facilities for the unloading of the coal at Port Qasim has been developed by P.I.B.T. Though earlier a ship carrying only 25000 tons could be facilitated for unloading the cargo at Port Qasim but now such facility stands enhanced to 65000 tons. Therefore, the importers of coal or the ships would have no difficulty of unloading or handling of the coal at Port Qasim.”* From the abovementioned Order we can assume that all coal at PQ was being and continues to be discharged at PIBT.

34. Subsequent to the Supreme Court Order which took effect in August 2018 the annual capacity of PIBT for handling coal is 12 million tons per annum⁵ and the quantities of coal handled by it have increased exponentially (As evidenced by the data in Table 3 below).

Year	Quantity Handled
May-Dec 2017	1,088,212

⁵ As submitted by PIBT in Annex A of its response dated 15.03.19

Jan-July 2018	2,258,783
Aug-Dec 2018	3,175,536
Jan-July 2019	4,772,313

Source: Collated from invoices submitted by PIBT

35. It appears from the clauses of the IA mentioned above and the Supreme Court Order that PIBT has a 100 percent share in the relevant market and therefore, *prima facie* holds a dominant position in terms of Section 2(1)(e) of the Act.

Abuse of Dominant Position

36. Section 3 of the Act defines Abuse of dominant position as follows:

“Abuse of dominant position. — (1) *No person shall abuse dominant position.*

(2) *An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce, or distort competition in the relevant market.*

(3) *The expression “practices” referred to in sub section (2) shall include, but are not limited to –*

(a) *limiting production, sales and unreasonable increases in price or other unfair trading conditions;*

(b) *price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;”*

37. Abusive practices may be bifurcated into two broad types: exploitative or exclusionary abuses. Exploitative abuses are more directly related to consumer harm since they include all practices of dominant firm which results in direct loss of consumer welfare. Examples of such abuses include inter alia excessive pricing, unfair trading conditions, discrimination, poor quality of products or services etc. Whereas exclusionary abuses refer to practices by dominant undertakings that impair the ability of competitors to compete in the market resulting in indirect harm to consumers. There is no clear distinction between the two categories as the same behavior may exhibit both exploitative/exclusionary characteristics.

38. The following abusive conduct has been alleged on part of PIBT:
- a. Unjustified increase in handling tariffs;
 - b. Application of unfair ancillary charges;
 - c. Discriminatory practices.
39. Before addressing each of the allegations it would be pertinent here to mention the status of the IA. The IA was signed between PIBT and PQA on 6th November, 2010 whereby PIBT was granted concessionary rights for the establishment and operation of a coal, clinker and cement terminal to handle the import and export of cargo at PQ on a BOT basis for a period of 30 years. According to submissions of PIBT, the IA was duly approved by the Economic Coordination Committee of the Cabinet.
40. An exemption application was made with the Commission and an exemption was conferred, under Section 5 read with Section 9 of the Act, and an exemption certificate was issued on 5th June 2013 for a period of 12 years. PIBT in its submissions states:

“Further, an exemption was sought from the CCP from the application of Section 4 of the Act on the IA, by way of a formal application pursuant to Sections 5 and 9 of the Act. On a consideration of the actual and ex-ante indicators which could result in anti-competitive behavior by PIBT as set out in the Act (including any possibility of abuse of dominant position in the future) the exemption as requested was granted to PIBT through an exemption certificate dated 5 June 2013 issued by the CCP.”

41. It is noted that in each exemption certificate issued under Section 5 read with Section 9 of the Act, including the particular exemption in question, the following is mentioned:

“Without prejudice to the generality of Section 6 of the Act, the grantee of the exemption shall inform the Commission forthwith and seek clearance for continuation of the exemption if there is

any material change, inter alia, in: (i) the terms of the agreement; (ii) the market share of the parties to the agreement; or (iii) the circumstances in the market in which the parties are operating”.

42. It appears that the Supreme Court’s ruling may constitute a material change w.r.t the market share of PIBT and circumstances in the market in which it operates. Therefore, parties to the IA may need to seek clearance for continuation of the exemption. As such it appears that none of the parties to the IA has approached the Commission for this purpose.

43. We now proceed to discuss each of the alleged abusive conduct one by one:

Unjustified increase in handling tariffs

44. At this point it would be instructive to examine a complete breakdown of the tariffs charged by PIBT. Clause/Article 20 read with Schedules 13 and 21 of the IA fixes the tariff charged by PIBT for handling of cargo (i.e. coal, cement and clinker). The relevant excerpts are reproduced below:

20.1 “The Company shall have the right to demand and receive for its account all handling charges for cargo using the Terminal as per the tariff set out in Schedule 21 (the “Tariff”). Such charges include but are not limited to loading/un-loading of Cargo from/onto vessels and other related services. The Company will also charge and receive for its account income from shipping lines and consignees/consignors and other parties for the additional services provided to them.

20.3 There will not be any increase in the amount of Tariff as set out in Schedule 21 unless under special circumstances including unforeseeable market conditions to be properly justified by the Company for such increase which will be subject to PQA approval. PQA may increase the rate of Royalty as mutually agreed between both the parties in writing, effective from the date

of such increase in the Tariff and the percentage of Royalty as set forth in Schedule 13 will be amended accordingly.

Schedule 21 –Schedule of Tariff

1. *The handling Tariff shall be charged at \$5.49 per ton*
2. *The Company will charge for additional Storage facilities provided by the Company to its clients as mutually agreed with its Customers.*
3. *Other charges for Services will depend on nature of Service requested by customer and will be negotiated on a case to case basis.*
4. *Tariff as listed above will be published by the Company before commencement of commercial operations.”*

Schedule 13-Schedule/Formula of Royalty Payments to the PQA by the Company

1. *The Company shall pay PQA a royalty for throughput volumes, which is based on the tariff proposed in Schedule 21, equates to:*

<i>S.No</i>	<i>Years</i>	<i>Rate/ton</i>
<i>a)</i>	<i>1-5</i>	<i>US\$ 2.27</i>
<i>b)</i>	<i>6-11</i>	<i>US\$ 2.3835</i>
<i>c)</i>	<i>12-16</i>	<i>US\$ 2.502675</i>
<i>d)</i>	<i>17-21</i>	<i>US\$ 2.627809</i>
<i>e)</i>	<i>22-26</i>	<i>US\$ 2.759199</i>
<i>f)</i>	<i>27-31</i>	<i>US\$ 2.897159</i>
<i>g)</i>	<i>32</i>	<i>US\$ 3.042017</i>

45. Based on a reading of the above, PIBT is allowed to charge a tariff of USD 5.49 per ton of cargo handled which is divided into the following two components:

- a. Royalty to PQA – US\$ 2.27 per ton (the royalty is fixed for the first five years of PIBT’s operations and will increase

incrementally however, the total amount of US\$ 5.49 per ton will remain unchanged).

b. Handling tariffs – US\$ 3.22 per ton

46. The Enquiry Committee asked PIBT to submit all invoices for coal handling issued by it to date based on which, it is observed that in addition to the US\$ 5.49 allowed by the IA, PIBT billed customers under the head “Other Ancillary Charges” in US dollars.

47. PIBT also offered some customers two types of discounts: discounts on ancillary charges and discounts on handling charges. Furthermore, some customers are charged for extra storage days (number of storage days and storage charges are discussed in detail in the later paragraphs). Therefore, the final bill will consist of the following elements:

		USD per ton
A.	Vessel Handling	3.22 (Fixed in IA)
B.	PQA Royalty	2.27 (Fixed in IA)
C.	Ancillary charges	1.01 (avg.)
D.	Discount on ancillary charges	
E.	Discount on handling charges	
	Total A+B+C-D-E	6.50

48. The Complainant has alleged that PIBT post the Supreme Court Order had unjustifiably increased tariffs therefore, for the purpose of analysis we compare the period before the Supreme Court Order (2nd May 2017⁶ to 31st July 2018) and after the Order (01st August 2018 to 29th June 2019). The Complainant submitted data (presented in Table 1 above) to prove its assertion of an increase in tariffs, however, this data is in PKR and the increase appears to be attributable to the appreciation of the US Dollar against PKR. When PIBT started commercial operations the USD to PKR rate was approximately @ 104.5 and as of August 2018 this rate slid to 122 and continued the downward trend to its current level of 155 (as per October 2019 exchange rate) .

⁶ PIBT commenced commercial operations on this date.

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49. Furthermore, the Enquiry Committee examined the record of all the invoices issued by PIBT for handling of coal which shows the following:

Period	No. of Invoices	Handling Tariffs (PQA+ PIBT) USD per ton
May 2017 to July 2018	159	5.49
Aug 2018 to June 2019	559	5.49

50. As per PIBT the reason it charges in USD is:

“It is pertinent to highlight that PIBT incurred its project costs in USD, is required to service its debt to foreign lenders in USD, obligated to pay the royalty to PQA by reference to an amount in USD, obligated to pay the royalty to PQA by reference to an amount in USD, bound to make payments to its engineering procurement and construction contractors and other technical consultants for sale of machinery, spare parts and provision of technical and maintenance services in USD. Therefore, any assertion to that the tariff being charged by PIBT must be in PKR is not only unreasonable but would serve to stifle the sustainability of the project and prejudicially impact the business operations of PIBT”.

51. Based on the foregoing it appears that PIBT is charging handling tariffs of USD 5.49 per ton as negotiated by it with PQA in the IA. The handling tariffs have not increased in dollar terms by PIBT however, currency depreciation of PKR against the USD has resulted in an exponential increase in tariffs in Rupee terms payable by importers.

Unfair ancillary charges

52. In addition to the tariff allowed under the IA, PIBT also invoices its customer’s ancillary charges which is a single amount for various subcategories. The Complainant has asserted that these ancillary charges are unfair for the reason: (i).

they are inherent to the coal handling and should not be applied in addition to the approved handling tariffs; (ii). charged in USD and on per ton basis; and (iii). have increased since the grant of monopoly status to PIBT.

53. With regard to the implementation of tariff and ancillary charges for handling of coal, the Enquiry Committee held a meeting with the representatives of PIBT. In the said meeting the reasons provided against the implementation of each category of charges is as under.

- a. Delivery of cargo on trucks (lift-on charges): Loading of discharged coal from storage area to trucks.
- b. Yard facilities charges: charged for the use of storage pit.
- c. Labor and equipment charges: for labour and equipment used in unloading coal from the vessel and transporting to storage pit.
- d. Weighment charges: weighing the cargo discharged.
- e. Draught Survey (by SGS) charges: A draught or draft survey is a calculation of the weight of the cargo unloaded from the vessel.
- f. Water charges: sprinkling the coal with water as a measure to prevent spontaneous combustion and coal dust.
- g. Customer Services charges.
- h. MIS charges: for the generation of invoices (reporting regarding stock status)
- i. Documentation charges: for generation of documents such as invoices
- j. Temperature monitoring charges: insertion of temperature probe to monitor the temperature of coal.
- k. Fuel adjustment charges: For fuel used in equipment.
- l. Landing charges inclusive of wharfage: PQA charges; and
- m. Storage charges: After being unloaded from the vessel, coal is stored in storage pits. According to PIBT, initially to attract customers it provided its customers 20 days of free storage however, later due to shortage of space it was reduced to 15 days.



54. PIBT in its defense has noted that it was allowed to bill ancillary charges in accordance with the provisions of the IA. It states:

“In addition to the vessel handling tariff for loading/unloading of cargo from/onto vessels at the rate of USD 5.49 customers are invoiced for ‘other ancillary charges’ in accordance with the terms of the IA described hereinabove. ‘Other ancillary charges’ include but are not limited to storage charges, customer service charges, yard facilities charges, weighment charges and labour charges. Such charges are based on the nature of the services offered by PIBT”.

For this purpose the relevant portions of the IA cited above are reiterated:

“20.1 The Company shall have the right to demand and receive for its account all handling charges for cargo using the Terminal as per the tariff set out in Schedule 21 (the “Tariff”). Such charges include but are not limited to loading/un-loading of Cargo from/onto vessels and other related services. The Company will also charge and receive for its account income from shipping lines and consignees/consignors and other parties for the additional Services provided to them”.

20.3 There will not be any increase in the amount of Tariff as set out in Schedule 21 unless under special circumstances including unforeseeable market conditions to be properly justified by the Company for such increase which will be subject to PQA approval. PQA may increase the rate of Royalty as mutually agreed between both the parties in writing, effective from the date of such increase in the Tariff and the percentage of Royalty as set forth in Schedule 13 will be amended accordingly.

Schedule 21 –Schedule of Tariff



1. The handling Tariff shall be charged at \$5.49 per ton
2. *The Company will charge for additional Storage facilities provided by the Company to its clients as mutually agreed with its Customers.*
3. *Other charges for Services will depend on nature of Service requested by customer and will be negotiated on a case to case basis.*
4. *Tariff as listed above will be published by the Company before commencement of commercial operations.”*

55. To ascertain whether the implementation of the ancillary charges by PIBT have objective basis, the Enquiry Committee conducted analysis of the justifications provided by PIBT. PIBT claimed that IA allows them to charge for such services, however, under the relevant sections of the IA reproduced above, the tariff for handling of coal is fixed at \$5.49 per ton. As per the IA, charges for additional services will depend on nature of service specifically requested by customers and may be negotiated on case to basis. It is noted that, in the instant matter additional charges are implemented by PIBT across the board on all customers without any specific requests by customers for such services. It appears that the services which PIBT terms as ancillary relate to the primary services against which it charges \$5.49 per ton to customers. From the implementation of additional charges it appears that PIBT is charging customers for services which they have already paid for under the \$5.49 billed.

56. For instance PIBT has imposed water charges on customers for sprinkling water on coal to prevent spontaneous combustion and protect environment from coal dust. It is relevant to note here that conservation and control of pollution is generally considered a responsibility of a firm engaged in any activity that pollutes environment. Schedule 12 of the IA (attached as Annex G) refers to the approval of Sindh Environmental Protection Agency (Karachi) as a prerequisite to make IA effective. Hence measures to protect environment appears to be responsibility of PIBT as part of service it provides rather than customers.

57. PIBT has implemented weighment charges, lift-on charges, yard facilities charges and labor and equipment charges for transportation of coal discharged from vessel to trucks, for use of storage pit, labor and equipment used in unloading of coal. PIBT has mentioned that it provides its importers storage free of charge for first 15 days which was previously 20 days and it charges customers extra beyond this period which we agree would constitute additional services. Despite that all these services pertain to the handling and shifting of coal within the premises of PIBT for which charges are implemented on customers, under Schedule of Charges that state: *Handling Tariff shall be charges at \$5.49 per ton*, there appears to be no reason for the implemented additional charges when customers have already paid under the head of 'handling tariff'.
58. From the invoiced list of charges, it appears that PIBT has also implemented certain charges on customers that are an innate part of customer dealing and/or relate to corporate responsibility such as MIS charges, documentation charges and customer service charges and these expenses incurred in their entirety do not appear to be responsibility of a customer.
59. From the data made available to the Enquiry Committee it appears that ancillary charges are applied to every customer engaged in the import of coal. Considering if all these services are essential why they are considered ancillary and not added to the schedule of charges. Similarly no rationale has been provided as to why these ancillary charges are charged on a per ton basis.
60. Furthermore there appears to be no pertinent reason against the implementation of temperature monitoring charges, fuel adjustment charges and storage charges on importers of coal. In addition to the ancillary charges 'truck charges' are also applied on every customer against which no plausible reason is noted.
61. Despite the claim of PIBT that above mentioned services are ancillary and in addition to the basic services availed by the importers of coal, it appears that under the term "terminal" defined in the IA: *"Terminal" – means a Coal and Clinker/ Cement Terminal to be established by the Company on and about the at the Port, including the jetty with backup reclaimed area, causeway/trestle and ancillary*

structures, buildings, silos, services, facilities and equipment for bulk handling, storage, conveying system and truck loading/unloading (dispatching/receiving) of the Cargo including pavements as per project scope defined in schedule 3 of this agreement. From the above-mentioned definition, it appears that all those services which PIBT terms as ancillary are part of essential services and are covered in the tariff \$5.49.

62. Apart from the above, Article 20.3 of the IA expressly states: There will be no increase in the amount of tariff set out in schedule 21 unless under special circumstances including unforeseeable market conditions to be properly justified by the company for such increase which will be subject to PQA approval...

Furthermore PQA in its reply has stated that: “As per Article 20.3 of the IA the company cannot increase tariff without approval of PQA. The company has neither applied for increase in tariff nor allowed such increase in tariff by PQA at any time...”. From this it appears that all the above charges applied by PIBT appear to be exploitative. In total 13 charges implemented on importers of coal apart from \$5.49 per ton charge. In the current instance, question arises that if these charges were essential for every importer why were the same not mentioned by PIBT during the time of IA. From the implementation of ancillary charges, it also appears that PIBT during the evaluation process of bidding for the award of contract by PQA has attempted to hide the actual charges implemented on customers and made them appear lower than actually implemented.

63. The application of ancillary charges applied by PIBT appears to be an exploitative conduct that results in increase in the end price of coal and in the production of products where coal is used as source of energy. Since PIBT is the only terminal where coal can be commercially imported, PIBT through the application of ancillary charges appears to be taking advantage of low bargaining power of importers. A plain reading of the abovementioned clause related to tariff shows that US\$ 3.22 (excluding royalty) is inclusive of loading/un-loading of cargo from/onto vessels and other related services and the services that PIBT considers as ancillary are related to the handling of coal and should automatically be covered in the handling tariff. Therefore, charging separately for ancillary services appears to be unfair trading condition in terms of Section 3(3)(a) of the Act.



64. Furthermore non-disclosure of information relating to additional charges during the time of bidding process appears to have impact on the bidding process and evaluation of bids placed by other competitors. The apparent lower bid of the PIBT that actually is not inclusive of all the above services that it terms as ancillary may have had harmed the business interests of other bidders.
65. It is further alleged that PIBT has increased these ancillary charges after August 2018. As noted earlier, PIBT bills ancillary charges and then provides discounts on these ancillary charges. For this purpose we calculate the average ancillary charges i.e. ancillary charges minus discount on ancillary charges between May 2017 to July 2018 and Aug 2018 to June 2019 for all invoices from that period. Table 5 and 6 show that on average in the 'before period' customers were billed USD 0.56 and in the 'after period' these charges rose to USD 0.89. The frequency with which customers were given discounts on ancillary charges also fell as shown from the values of the standard deviation.

Table 5 Net Ancillary Charges		
Period	May 2017 to July 2018	Aug 2018 to June 2019
Avg. Net Ancillary charges invoiced (USD)*	0.56	0.89
Median (USD)	0.41	1.01
Mode (USD)	0.41	1.01
Std. Dev	0.40	0.27

* Ancillary charges minus discounts on ancillary charges

Table 6 Net Ancillary Charges			
Period	May 2017 to July 2018	Aug 2018 to Dec 2018	Jan 2019 to June 2019
Avg. Net Ancillary charges invoiced (USD)*	0.56	0.91	0.88
Median (USD)	0.41	1.01	1.01
Mode (USD)	0.41	1.01	1.01
Std. Dev	0.40	0.28	0.25

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66. From the foregoing it appears that the average ancillary charges have increased by 58.9 percent between the periods May 2017 to July 2018 and Aug 2018 to June 2019⁷. This figure is the impact in USD terms and if the depreciation in the exchange rate is accounted for the net impact in Rupee terms comes to 135.7 percent⁸. PIBT has failed to justify the increase in ancillary charges. Prior to the Honorable Supreme Court order, when KPT was operational PIBT provided discounts to its customers in the services it terms as ancillary. However, the after Honorable Supreme Court order PIBT and becoming the only terminal to handle to coal, it stopped offering discounts to customers importing coal despite that PIBT business increased, it stopped offering incentive to customers which shows the ability of PIBT to set its own terms while dealing the importers of coal.
67. From the foregoing analysis it appears that the application of ancillary charges is a *prima facie* unfair trading condition. Moreover *prima facie* these charges are also being billed in USD for which no objective justification has been noted by the Enquiry Committee.
68. Since PIBT has a monopoly over the handling of coal, customers have little or no bargaining power with it and have no other option but to agree to the terms and conditions laid out by it including the invoicing of *prima facie* unfair ancillary charges. Since it began operations in May 2017 to June 2019, PIBT has charged customers a total of USD 8,215,719 or USD 8.2 million on account of *prima facie* ancillary charges (net of any discounts) out of which USD 6.13 million was in the period after the Supreme Court Order (refer to Table 7 below).

Table 7: Total Revenue from Net Ancillary Charges (Discounts deducted)		
	Qty Tons	Revenue (USD)
May 2017 to July 2018	3,406,507	2,085,060
Aug 2018 to June 2019	7,892,686	6,130,659
Total	11,299,193	8,215,719

⁷ Avg. net ancillary charges in May 2017 to July 2018 = USD 0.56 and Aug 2018 to June 2019 = 0.89. Therefore, $(0.89-0.56)/0.56*100$

⁸ Avg. USD @ 104.5 in before period. Avg. USD 155 in after period. $USD\ 0.56*104.5 = PKR58.52$
 $USD\ 0.89*155 = PKR\ 137.95$. Therefore, $(137.95-58.52)/58.52*100 = 135.7$ percent.

69. These ancillary tariffs are *prima facie* unfair in terms of Section 3(3)(a) of the Act because:

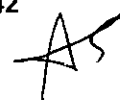
- a. These charges are by their very nature inherent to the handling of coal and ought to be included in the US\$ 3.22 as allowed in the IA. PIBT has failed to prove that these charges represent any 'ancillary services'.
- b. Whereas the IA allows PIBT to bill the handling charges in USD there is no such provision that allows it to bill ancillary charges in USD. Furthermore, there is no justification for charging these on a per ton basis.

Discriminatory Practices

70. The following discriminatory conduct has been alleged on part of PIBT:

- a. Discrimination in provision of discounts on ancillary charges: Different discounts (and hence net ancillary charges) for different customers;
- b. Discrimination in provision of storage services: Some customers have been given 20 days of storage and others 15 days (not correlated to quantity);
- c. Discrimination in requirement for advance payment: Some customers are required to make advance payments whereas others are not;

We now proceed to examine each of these abovementioned allegations.



Discrimination in provision of discounts on ancillary charges

71. PIBT was asked to provide the Enquiry Committee with the rationale for providing discounts to customers to which it had replied that in the initial period when it started commercial operations, discounts were regularly given to attract and build a customer base and currently PIBT gives discounts in its “best commercial interests”. The current policy *vis`a vis* discounts is that they are provided on basis of volume. PIBT’s response is reproduced below:

- (a) primarily on the basis of the volume of cargo committed to be handled annually for a customer as this allows PIBT to effectively plan operational efficiencies at the PIBT terminal;*
- (b) the nature of the service provided to a specific customer (which is negotiated commercially on a case to case basis);*
- (c) The type of customer e.g. the discounts offered depend on whether the cargo handling is for end users as opposed to the commercial traders of the commodity;*
- (d) The type of cargo as certain cargo handling requires additional equipment and maintenance. And*
- (e) The number of days spent by the cargo on the terminal premises, the pattern of deliveries of the cargo, and the location of the yard where cargo is stored (all of which affect potential discounts on storage services)”.*

72. With respect to point (a) above, i.e. discounts are based on annual quantities committed, PIBT has submitted a table laying out the different quantity slabs and discounts against each which is as follows:

Table 8: Discount slabs	
Annual Coal Weight Committed	Total Charges
< 500,000 MT	USD 6.50/MT

500,000 MT – 1,000,000 MT	USD 6.25/MT
>1,000,000 MT	USD 6.00/MT

73. As per Table 8, higher quantities committed annually will attract higher discounts. It is observed that post the Supreme Court Order all coal cargo has been diverted to PIBT, and figures in Table 3 show there has been a sizeable jump in the volume of cargo handled by it. If, discounts are based on volumes as asserted by PIBT, then since more cargo is handled by it the terminal should be offering more discounts. However, figures in Table 5 and 6 show that post the Supreme Court order the average net ancillary charges have actually risen i.e. fewer discounts are given. Furthermore, quantity slabs in Table 8, suggest that there should be a positive relation between quantity and discount i.e. higher discount on higher volumes. Therefore, based on the invoice data for the period August 2018 to June 2019, we calculate the correlation coefficient⁹ between quantity and discount which comes to 0.45 showing a weak relationship between the two variables or in other words there are factors other than quantity that determine discount.
74. With reference to discounts to commercial importers vs. final consumers point (c), PIBT (vide letter dated 12th July Annex D4) has argued at length why quantity discounts are applicable for final consumers and commercial importers and not indenters we assume this argument to be correct. However, Lucky Commodities has alleged that is being discriminated against even when it acts as a commercial importer. In order to ascertain the veracity of these claims PIBT was asked to provide all the invoices in the name of Lucky Commodities as shown in Table 9 below. It is noted out of 17 invoices of the period from August 2018 to July 2019 not even in a single instance discount was offered to it even in the instances where it was importing higher volumes and other customers importing similar volumes were offered discounts.

⁹ The correlation coefficient shows the strength of the relationship between the relative movements of two variables. Its values range between -1.0 and 1.0.

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Table 9: Lucky Commodities Invoices*

S.NO:	Invoice#	Vessel Name	QTY	Invoice Date	Rate	Ancillary charges	Disc on Ancillary charges
1	1055	MV JIN TAO	27500	28-08-18	5.49	1.01	0
2	1069	MV SONGA WAVE	12138	3/9/2018	5.49	1.01	0
3	1132	MV STOVE	3000	11/10/2018	5.49	1.01	0
4	1209	CALEDONIA MV FLC WEALTH	5500	17-12-18	5.49	1.01	0
5	1215	MV FLC WEALTH	2165	17-12-18	5.49	1.01	0
6	1218	MV GENCO AQUITAINE	28360	20-12-18	5.49	1.01	0
7	1318	MV FRÉDERIKE OLDENDORFF	20000	29-01-19	5.49	1.01	0
8	1334	MV AMERICA GRAECA	16500	8/2/2019	5.49	1.01	0
9	1437	MV ARIADNE	16262	31-03-19	5.49	1.01	0
10	1560	MV AERIKO	2000	29-06-19	5.49	1.01	0
11	201007	MV SBI TAURUS	5922	8/7/2019	5.49	1.01	0
12	201025	MV SBI TAURUS	5922	8/7/2019	5.49	1.01	0
13	201026	MV SBI TAURUS	5921	8/7/2019	5.49	1.01	0
14	201027	MV SBI TAURUS	5921	8/7/2019	5.49	1.01	0
15	201028	MV SBI TAURUS	4510	8/7/2019	5.49	1.01	0
16	201029	MV SBI TAURUS	4510	8/7/2019	5.49	1.01	0
17	201030	MV SBI TAURUS	4509	8/7/2019	5.49	1.01	0

**It is noted that prior to August 2018, Lucky was importing through KPT therefore, all invoices are after this period*

75. With regards to points (b) and (d) above, it appears that coal is a homogenous product and its handling is a standardized service therefore, PIBT stating that certain type of cargo requires additional maintenance does not appear to be justified.
76. With regards to point (e) above it is noted that unloading of coal and location of yard where cargo is stored is the discretion of PIBT. Offer of discount to only those customer who have cargo stored at location favorable to PIBT is beyond the control of importer and charging on same basis appears to be a discriminatory practice on the part of PIBT. It is noted that the handling of coal is a standard service and other than quantities there appears to be no objective reason for giving discounts to one customer and denying the same to others.

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77. Based on the foregoing it appears that PIBT *prima facie* indulged in price discrimination by charging different prices for the same services from different customers in an arbitrary and discretionary manner without any justification which is in *prima facie* violation of Section 3(3) (b) of the Act.

Discrimination in provision of storage services

78. The Complainant has alleged that it was allowed 20 days of storage (now being changed to 15 days) for lifting its cargo before storage charges are applied on the same. Nonetheless, the Respondent still charges storage facility charges as part of ancillary charges before completion of such time period.
79. In terms of storage PIBT has expressed the following point of view (vide Para 1.8 of its response dated 15.03.2019 —Annex D1):

“....PIBT generally offers a period of 15 days for initial free storage of cargo at the PIBT terminal at this point in time. The number of days granted as initial free storage period at the PIBT terminal is contingent upon various factors including but not limited to the volume of cargo following into the terminal at a given time. To the extent of PIBT’s knowledge, no other terminal in Pakistan gives free storage for a period of more than 10 days. Even at Port Qasim, a free period of only 7 days is provided for storage purposes. PIBT is the only dirty bulk cargo terminal that currently provides initial free storage space for 15 days. The charges for storage services are provided at the PIBT terminal are imposed in accordance with Article 20.1 read with Schedule 21 of the IA and depend on the nature of the service provided by PIBT and is negotiated commercially on a case to case basis”.

80. PIBT has asserted that storage is provided free of cost for 15 days however, an examination of the invoice data submitted shows that it charges for storage facilities

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under the head of ancillary charges as 'Storage Facilities at Storage Yard-15/20 days'. The Enquiry Committee examined the record of various invoices and noted that majority of customers were provided 15 days of storage whereas others were given 20 days (and in one instance 25 days) under the same charges. Sample invoices from August 2018 to July 2019 are shown in Table 10 below:

Table 10: Sample invoices for Storage days

S.NO:	Invoice#	QTY	Invoice Date	Ancillary charges	Disc on Ancillary charges	Storage days
1	1242	54309	17.1.2019	1.01	0.75	25
2	1243	60037	7.1.2019	1.01	0.5	15
3	1275	5500	14.1.2019	1.01	0.75	20
4	1281	3300	14.1.2019	1.01	0.75	20
5	1341	7700	15.2.2019	1.01	0	20
6	1342	2200	15.2.2019	1.01	0	20
7	1394	55658	18.04.2019	1.45	0	20
8	1501	21695	29.4.2019	1.01	0.75	20
9	1502	7700	29.4.2019	1.01	0.75	20
10	1497	54197	6.5.2019	1.45	0	20
11	1541	53950	29.5.2019	1.45	0	20
12	1566	38131	26.6.2019	1.45	0	20

81. Table 10 shows that some customers were allowed 20 days of storage in the USD 1.01 charges and given discounts while importing very small quantities. Others were given 20 days storage with higher ancillary charges. Some customers were given only 15 days storage while importing higher quantities. In short, there appears to be no pattern in the allowance of storage days and that PIBT exercises its discretion in deciding the same without any objective justification which is in violation of Section 3(3) (b) of the Act.

Discrimination in requirement for advance payment

82. The Complainant has alleged that PIBT requires some importers to pay 50 percent advance payment, whereas the Complainant is required to make full payment as advance against the handling of coal at the time of berthing of the vessel. It has even 'discriminated' among two companies of the same group i.e. Lucky Cement and

Lucky Commodities. To prove this allegation, the Complainant has provided invoices and copy of a letter issued by PIBT dated 05.07.2019, wherein it is asking it to deposit the total amount of tariff after which it would be allowed to lift the consignment (Copy of letter as Annex H1). It has also attached invoices which show that it has made a 50 percent advance payment to PIBT (Annex H2).

83. We also looked at the record of invoices to see whether advance payment has been requested from other importers as well.

Table 11: Sample invoices for Advance Payment

S.NO:	Invoice#	QTY	Invoice Date	Ancillary charges	Disc on Ancillary charges	Advance Payment
1	1181	56153	15.1.2019	1.45	0	80%
2	1316	35344	8.2.2019	1.01	0.75	50%
3	1393	60342	6.3.2019	1.01	0.75	50%
4	1315	54825	8.3.2019	1.45	0	80%
5	1394	55658	18.4.2019	1.45	0	80%
6	1497	14572	6.5.2019	1.45	0	80%
7	1541	53950	29.5.2019	1.45	0	80%
8	1566	53791	26.6.2019	1.45	0	80%
9	PI 1576	53572	10.6.2019	1.45	0	80%
10	PI 1578	59200	17.6.2019	1.01	0	50%
11	1008	56706	19.7.2018	1.45	0	80%
12	1040	55874	27.08.2018	1.45	0	80%
13	1047	58833	3.9.2018	1.45	0	80%
14	1049	59472	12.9.2018	1.45	0	80%
15	1138	54329	22.10.2018	1.45	0	80%
16	1157	59153	7.11.2018	1.45	0	80%

84. Invoice data presented in Table 11 above shows that the abovementioned customers have been asked to deposit 80 percent or 50 percent as advance payments and it appears that they have been discriminated as other customers have not been asked to deposit advance. There appears to be no objective justification for such a discrimination e.g. even between two (02) companies in the same group i.e. Lucky Cement and Lucky Commodities.

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85. From the foregoing it appears that PIBT's practice of asking some customers to pay advance is discriminatory and is *prima facie* violation of Section 3(3)(b) of the Act.
86. The Enquiry Committee observes that PIBT is the only coal handling terminal in Pakistan and importers are left with no option but to import through it. Coal is primarily used by power plants and the cement sector. Any *prima facie* discriminatory actions on part of PIBT, have an adverse impact on competition. For example, favourable terms and discounts by PIBT to one cement company and not to another would adversely impact the latter's costs and its ability to compete.

CONCLUSION & RECOMMENDATION

87. Based on the findings of paragraphs 22-29, the relevant market appears to be of the provision of services for handling of coal at PQ.
88. Based on the findings of paragraphs 30-35 it appears that subsequent to the Honorable Supreme Court order, KPT is barred from handling coal therefore, the only other available option available for commercial importers and consumers of coal is through PIBT. At PQ two berths/terminals are available for discharge of coal: PIBT and the Marginal Wharf, however, all coal arriving at PQ is being discharged at PIBT. PQA under clause 3.26 of the IA granted PIBT exclusivity in the handling of coal resulting in a monopoly for PIBT. PIBT has a 100 percent share in the relevant market and therefore, holds a dominant position in terms of Section 2(1)(e) of the Act.
89. The issues identified by the Enquiry Committee for further analysis were whether PIBT abused its dominant position by indulging in the following practices:
- a. Unjustified increase in handling tariffs;
 - b. Unfair ancillary charges;
 - c. Discriminatory practices.




90. **Unjustified increase in tariffs:** Based on the findings of paragraphs 44-51 it appears that PIBT is charging handling tariffs of USD 5.49 per ton as negotiated between it and PQA in the IA. The handling tariffs have not been increased by PIBT in dollar terms but, the currency depreciation of PKR against the USD has resulted in an exponential increase in tariffs in Rupee terms.
91. **Unfair Ancillary Charges:** Based on the findings of paragraphs 52-69 the ancillary charges invoiced by PIBT in addition to handling tariffs are *prima facie* unfair in terms of Section 3(3)(a) of the Act because:
- a. These charges are by their very nature inherent to the handling of coal and ought to be included in the US\$ 5.49 as allowed in the IA. PIBT has failed to prove that these charges represent any 'ancillary services'.
 - b. Whereas the IA allows PIBT to bill the handling charges in USD there is no such provision that allows it to bill ancillary charges in USD as well. Furthermore, there is no justification for charging these on a per ton basis.
92. **Discriminatory practices:** Based on *prima facie* findings in paragraphs 70-86 it appears that the following practices of PIBT are discriminatory in terms of Section 3(3)(b) of the Act:
- a. Discrimination in provision of discounts on ancillary charges: Different discounts (and hence net ancillary charges) for different customers;
 - b. Discrimination in provision of storage services: Some customers have been given 20 days of storage and others 15 days (not correlated to quantity);
 - c. Discrimination in requirement for advance payment: Some customers are required to make advance payments whereas others are not;

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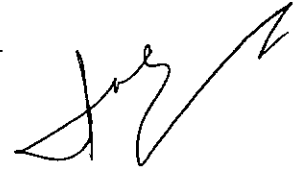
93. In light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against PIBT under Section 30 of the Act



Maliha Quddus
Enquiry Officer



Irfan Ul Haq
Enquiry Officer



Aqsa Suleman
Enquiry Officer