



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF**

**SHOW CAUSE NOTICE ISSUED TO ENGRO VOPAK TERMINAL
LTD**

(File No. 08/REG/COMP/LOTTE PAK/CCP/10)

Dates of hearing: April 14, 2011
May 4, 2011
May 13, 2011

Present: Ms. Rahat Kaunain Hassan
Chairperson

Mr. Abdul Ghaffar
Member

Ms. Vadiyya S. Khalil
Member

On behalf of:

Engro Vopak Terminal Limited: Sheikh Imranul Haque, Chief Executive Officer
Mr. Asad Umar, President
Mr. Andaleeb Alavi, GM Legal & Company
Secretary
Mr. Vijay Kumar, Manager Finance &
Corporate Services
Mr. Rohail Muhammad

Lotte Pakistan Ltd: Mr. Asif Saad, Chief Executive Officer
Mr. Aamir Ali, Chief Financial Officer
Mr. Humair Ijaz

ABS & Co. Advocates: Barrister Amber Darr
Barrister Sami Uddin

ORDER

1. Through this order the Competition Commission of Pakistan (the “Commission”) shall dispose off the proceedings initiated under Section 30 of the Competition Act, 2010 (the “Act”) vide Show Cause Notice No. 03/2011 dated March 25, 2011 against Engro Vopak Terminal Limited (EVTL) for abusing its dominant position. The principle issue in this case is whether monopoly of EVTL created in its favour by virtue of a concession agreement enables EVTL to dictate its own terms and conditions and abuse its dominant position in the relevant market in violation of Section 3 of the Act.

2. At the outset we would like to place on record that while the proceedings were initiated under the Competition Ordinance, 2010, the competition law now stands transitioned and enacted as the Competition Act, 2010. By virtue of Section 62 of the Act any thing done including actions taken, proceedings initiated, powers assumed by the Commission or exercised by its officers on or after October 2007 (when the Competition Ordinance was first promulgated) shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and provisions of the Act shall have and shall be deemed to always have had effect accordingly.

UNDERTAKING

3. EVTL is a joint venture between Engro Chemicals Pakistan Limited and Royal Vopak of the Netherlands engaged, *inter alia*, in handling and storage of chemicals at Port Qasim and is an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Act.

BACKGROUND

4. Port Qasim Authority (PQA) entered into an agreement with EVTL (then known as EPTL) on February 18, 1996 for setting up of integrated liquid chemical terminal and storage farm at Port Qasim and granted EVTL the exclusive rights for thirty (30) years to handle and store all liquid

chemicals and gaseous liquid chemicals entering the PQA area (hereinafter referred to as the “Implementation Agreement”). EVTL also entered into an agreement with Lotte Pakistan PTA Limited (then known as ICI) to provide Jetty and Storage services for a period of 15 years vide an agreement signed between the both parties on April 04, 1996 for Reception Storage and Delivery of Paraxylene and Acetic Acid (hereinafter referred to as the “Storage Agreement”).

5. Lotte Pakistan PTA, Limited (Lotte Pakistan) filed a formal complaint through its legal counsel M/s ABS & Co. against EVTL on August 17, 2010 under regulation 17 (2) of the Competition Commission (General Enforcement) Regulations, 2007 (hereinafter the “Complaint”). In its Complaint, Lotte Pakistan has alleged that monopoly of EVTL created in its favour by virtue of exclusive concessionary rights granted by PQA under the Implementation Agreement enables EVTL to charge exorbitant prices for handling and storage facilities/services and abuse its dominant position in violation of Section 3 of the Act.
6. After receipt of formal complaint the Commission initiated an Enquiry in accordance with Section 37(2) of the Act read with Regulation 17(2) of the Competition Commission (General enforcement) Regulations, 2007 in respect of alleged violation of Section 3 of the Act by EVTL. The Commission exercising its powers under Section 28(2) of the Act appointed Ms. Nadia Nabi as an Enquiry Officer to investigate the matter as to whether (a) EVTL holds a dominant position and (b) EVTL has abused its dominant position, thereby, violating Section 3 of the Act and prepare a comprehensive Enquiry Report.
7. Lotte Pakistan in its formal Complaint filed before the Commission has made following submissions:
 - a. *In 1995 ICI Pakistan Limited (ICI) decided to set up a PTA Plant at Port Qasim Karachi to cater to the requirements of Pakistani Polyester Industry. This investment was not only to reinforce ICI’s global leadership position but also aid Pakistani economy.*

- b. *The total cost of the Project was US \$490 M, which is the biggest investment to date in Pakistan's petro-chemical industry. To set up the PTA plant ICI also had to invest in facilities that are generally provided to by Port Authorities in other countries.*
- c. *To facilitate its manufacturing process ICI also entered into the following partnerships*
- *15 years Take-or-pay contract with BOC Pakistan Limited (BOC) to procure nitrogen and hydrogen for the PTA plant*
 - *15 years Take-or-pay contract with EPTL to procure chemical handling and storage facilities at Port Qasim, while EPTL was in the process of negotiating with PQA an exclusive concession for the storage and handling of chemicals.*
- d. *The PTA plant was commissioned in 1998 however in 2000, ICI demerged its PTA business as an independent entity under the name of Pakistan PTA limited (PPTA). ICI and PPTA continued to remain subsidiaries of ICI plc of the United Kingdom. In 2001 PPTA was listed on three stock exchanges and was recognized as a company. In 2008 AkzoNobel acquired ICI Plc and consequently PPTA became a part of it. In 2009, Lotte, a pre-eminent international Korean group acquired PPTA from AkzoNobel. Consequently the name of the company was changed to Lotte PPTA.*
- e. *On 18th February 1996 Engro Paktank Terminal Limited (EPTL) had entered into the Implementation Agreement with PQA to offer chemical terminal and storage farm facility on a BOT basis. By virtue of the Implementation Agreement PQA granted EPTL a 30 years concession to finance, insure, construct, test, commission, complete, operate, manage and maintain an integrated Liquid Chemical Terminal and Storage Farm in the PQA area. PQA also granted EPTL the exclusive right to handle and store all liquid and gaseous liquid chemicals (except for LPG) entering the PQA area. PQA expressly directed that customers using the jetty be obliged to store the product at the storage farm built by EPTL.*
- f. *When the Implementation Agreement took place, ICI was negotiating with EPTL for a storage facility for Paraxylene and Acetic Acid imported by ICI for its plant's requirements. These negotiations culminated in the Storage Agreement (the "Storage Agreement") on 4th April 1996.*
- g. *The Storage Agreement was to stay valid for fifteen (15) years during which EPTL was to provide ICI with services related to berth at Jetty, reception of products from the ships, their storage and delivery to ICI owned road tankers. By virtue of the Storage Agreement ICI agreed to pay EPTL a fixed amount of US \$ 9.2 M per annum in addition to variable cost depending on the quantum of product stored.*
- h. *In recognition of the fact that EPTL was charging higher than international providers of similar Facilities, EPTL issued a letter to ICI stating that if at any time after 7 years and 6 months from the*

start date of Storage Agreement ICI received a bona fide commercial offer from a reputable international third party to provide services similar to being provided by EVTL on more favorable terms than EPTL would enter into good faith negotiations with ICI to revise the Tariffs under the storage agreement. Given the exclusivity offered to EPTL by PQA no third party was ever in a position to enter the arena and offer ICI better prices. Commitment made by EPTL was therefore meaningless.

- i. When Competition Ordinance 2007 (2007 Ordinance) came into existence, ICI and its PTA business had not only demerged but both companies had also been acquired by AkzoNobel. By this time EPTL had changed its name to EVTL to reflect investment by Royal Vopak of Netherlands in the company.*
- j. To bring the Storage Agreement in conformity with changes in law, PPTA applied to the Commission for an exemption under section 4 of the 2007 Ordinance and was granted such for the entire term of the Storage Agreement to last till 4th November 2012.*
- k. A few months ago Lotte PPTA (after being acquired by the Lotte group in 2000) approached EVTL to negotiate a renewal of the Storage Agreement in accordance with the terms of the said agreement as the period of the agreement neared end.*
- l. In those negotiations Lotte PPTA emphasized that EVTL should lower the price of its services based on the following two reasons.*
 - Lotte PPTA has already Paid to EVTL up till 2009 an aggregate sum of US \$133M including US \$20M as variable charges and would have paid an aggregate sum of US \$170M by the expiry of Storage Agreement in November 2012 as of when EVTL will have recovered sums far in excess of the capital expended by them in setting up facilities for storage of Paraxylene and Acetic acid imported by Lotte PPTA.*
 - Prices being charged by EVTL continue to be far in excess of such services offered elsewhere in Asia as well as internationally (The current price charged by EVTL is US \$ 25.60 per tonne of Px, while the price of similar facilities elsewhere in Asia is US \$ 5.00 per tonne of Px)*
- m. In response of these negotiations EVTL has proposed to store Paraxylene and Acetic acid at US \$ 21.00 per tonne of Px, which is still excessively high compared with international benchmarks.*
- n. EVTL is able to take this position and therefore dictate market terms by virtue of the exclusivity granted to it by PQA and the fact that Lotte PPTA has EVTL as the only viable option considering the nature required by Lotte PPTA for storage of the chemicals mentioned above.*
- o. EVTL has abused its dominant position in contravention of Section 3 of the Act by charging a price for its storage facilities which was far higher than the international or regional price of similar services.*

ICI had however agreed to pay this price because the specific storage and handling services it required at Port Qasim could only be offered by EVTL as it was the only company that had the permission to build such facilities at Port Qasim.

- p. In consideration of services provided by EVTL under the Storage Agreement, Lotte Pakistan has up till 2009 paid EVTL an aggregate sum of US\$133,000,000 including US\$20,000,000 as variable charges. By November 2012 when the Storage Agreement expires, Lotte Pakistan would have paid EVTL an aggregate of US \$ 170,000,000. This amount more than adequately covers the cost that may have been incurred by EVTL in order to build facilities.*
 - q. Despite this, EVTL is still adamant, on renewal of the Storage agreement, to charge a price which is significantly higher than the international prices. Whilst PTA producers elsewhere in Asia charge US\$ 5 per tone of Px the best price that EVTL could offer was US \$ 21 per tone of Px- and that too for few services as compared to similar facilities elsewhere.*
 - r. Lotte Pakistan finds itself in a very difficult situation as it has no other option but to liaise with EVTL for the storage as no other party can invest in this sector due to express provisions of the Implementation Agreement. Option to use Karachi Trust Port is not viable for these kind of facilities because it would require transport of 1000 metric tones of highly flammable and hazardous chemicals on daily basis through crowded streets of Karachi which would pose a grave health and security risk to public and environment. Exercising this option would also raise the price of PTA due to high cost of insurance incurred in transport. Further, frequent strikes and unrest in the city may also adversely affect the transportation which in turn may result in shut down of the PTA plant. It was for these reasons that ICI had set up the PTA plant at Port Qasim.*
 - s. EVTL's persistence in charging high prices is disruptive of competition in the market. If Lotte Pakistan is forced to pay high price it will not only constrain for expansion its operation but also would translate into a substantially higher cost for the end user.*
8. A copy of Complaint was forwarded to EVTL to seek their comments thereon and the same were received vide letter dated October 25, 2010. Submissions made by EVTL in response to the Complaint are summarized as under:
- a. EVTL was granted a concession to handle and store all liquid and gaseous liquid chemicals entering the PQA area by virtue of an implementation agreement (IA) in February 1996 after a competitive bidding process initiated by PQA in March 1995.*
 - b. Engro Chemical Pakistan as a joint venture with Royal Vopak (Engro Vopak) has invested US \$115M in the terminal*

infrastructure, most recent being for specialized cryogenic tanks to facilitate ethylene in 2009.

EVTL's Performance as Chemical Terminal Operator

- c. Engro Vopak has invested in a specialized chemical jetty and storage farm of international standards in the PQA area. The company has been operating the Jetty and specialized storage facilities for the last more than 12 years with enviable safety records amongst its peers in Vopak Asia region. By the end of the 3rd quarter of 2010 EVTL has safely handled 9 million tons of chemicals and LPG, 1375 ships and 165,000 road tankers since its commissioning. The characteristics of these chemicals and LPG require specialized handling and excellent operational management.*

Tariff Issue with Lotte PPTA

- d. The effectiveness of the Implementation Agreement between PQA and EVTL was made subject to the Storage Agreement with ICI (now Lotte PPTA) signed in April 1996. Lotte PPTA has therefore incorrectly alleged that prices agreed to by ICI were a result of exclusivity granted to EVTL as they had the ability to fully explore all other options for import / storage of their chemicals, including building their own jetty.*
- e. Also when setting up its PTA plant, ICI strongly requested EVTL to proceed with the chemical terminal in anticipation of superior facilities and strong emphasis on safety, health and environment that were non-existent at the time. ICI was also impressed with their Joint Venture partner who was the largest private terminal operators in the world and considered experts in the field.*
- f. EVTL only bid for the terminal project after ICI made a request as they neither wanted to construct their own terminal nor did they find the facilities available at KPT or Port Qasim in accordance with their requirements. Hence "monopoly" of EVTL was not the reason behind the Implementation Agreement or the tariff.*
- g. The Tariff eventually negotiated was an outcome of extensive negotiations with ICI and our subsequent exclusivity was a consequence of the Storage Agreement signed by them. So the situation is opposite to what Lotte PPTA has alleged.*
- h. To further elaborate importers who did not wish to use our terminal such as DSFL and RFL (importers of MEG prior to Implementation Agreement) and were obliged to do so after our Implementation Agreement was signed, went into litigation against PQA over a decade ago and we have not had any benefit of their business.*

- i. *However ICI who also imports MEG for their polyester plant entered into a separate agreement with EVTL in 2002 and renewed the same in 2009 after the original 7 year term expired. It did not join other companies in litigation*
- j. *The point being that quality conscious companies are willing to pay a premium for quality terminal services. If ICI requested EVTL to build the terminal it was for this reason.*
- k. *Another point to be noted is that the terminal project was developed based on ICI's specifications including SHE requirements that then formed the basis of tariff eventually negotiated.*
- l. *The way Tariff is calculated is such that an increase in storage utilization results in a decrease in Tariff. ICI had constructed the PTA plant on the basis that its capacity would soon double and as a result it proactively pursued EVTL to build extra storage tanks to cater for that. This cost was built into the tariff with ICI's consent. ICI however did not carry out the expansion that even if it carries out now would reduce its Tariff because of higher throughput and higher turns. For about the same revenue Lotte Pakistan can double the volume of product through EVTL terminal which would effectively render a tariff reduction by about 40 %.*
- m. *With regards to the paragraph in the side letter mentioned in Lotte Pakistan's complaint with regards to renegotiation of tariff in case a reputable international third party offers similar facilities to Lotte at a lower tariff after 7 years and 6 months of the initiation of the Storage Agreement, it was a competitive offer agreed to by EVTL at ICI's request rather than the other way round as alleged by Lotte Pakistan so that ICI could have a chance to prove the tariff was high.*
- n. *Charges paid by Lotte Pakistan in absolute terms provide only partial information as maintaining the facility at international standards requires recurring investments in people, equipment, systems. Stoppage in such investments would compromise the quality of services and could jeopardize the safety and integrity of the port.*
- o. *Keeping in view the initial capital outlay, recurring operating and Maintenance expenses for the upkeep of the chemical terminal and the country risk involved, the returns on the project are extremely reasonable. GOP allows higher Internal rate of return (IRR) IPPs (15%), Wind Power (18%), Thar Coal (25%)) on the equity investment under its power policy to secure against a variety of variables such as exchange rate fluctuations. EVTL is afforded no such protection by the GOP. The actual returns*

from the project have also turned out to be significantly lower than the ones projected in the financial model provided in the Implementation Agreement.

- p. *Lotte Pakisan's claim of paying back initial investment of EVTL with highly attractive returns is misleading in that the return is being considered in absolute terms. By actual financial standards, projects are evaluated on the basis of measures such as Internal Rate of Return. Lotte Pakistan only referred to gross revenue while ignoring operating expenses, financial costs and corporate tax. Furthermore the actual returns from the project have been significantly lower than projected in the financial model provided in the Implementation Agreement.*
- q. *Lotte Pakistan states that till the expiry of the current contract, EVTL would have recovered sums far exceed their initial outlay for setting the storage facilities and therefore the tariff they charge after renewal should be bare minimum. We do not see it as the right view as all commercial organizations seek return on investment to meet operational expenses and organization do not reduce their prices on depreciation of their plant. For example Lotte Pakistan plant would be fully depreciated by 2012, would then Lotte Pakistan based on its own proposition start charging its customers less (raw material cost + variable cost basis), as their revenue of USD 4 billion is significantly higher than their initial investment of USD 490 million. The PTA plant of Lotte Pakistan is over Rs 3B as of June 2010.*
- r. *Despite this EVTL has offered significant reduction in its tariff post contract expiry and intends to pursue negotiations in good faith.*
- s. *Lotte Pakistan is under no obligation to renew the contract. At Lotte Pakistan's request EVTL through a written formal proposal on January 1, 2010 offered them rates lower than the existing ones. Subsequently meetings took place between Lotte Pakistan and EVTL in which Lotte Pakistan clarified their expectations and strategy of no further expansion asking for a revised offer which was given to them on June 1, 2010. The Lotte PPTA team did not revert back to us with a counter offer.*
- *The comparison with similar facilities available internationally is not correct as constructions costs in Pakistan are higher due to a variety of variables such as higher cost of importing specialized material and country risk. Furthermore Tariff calculations are based on throughput volumes, which the case of PTA plant as compared with their counter parts in other countries.*
 - *Furthermore as per Lotte Pakistan's own acknowledgement the quality and safety standards being offered at storage and handling facilities at Karachi port do not measure up in comparison with those of EVTL.*

- t. *It is in view of these factors that EVTL could not offer tariffs comparable to regional market, but in two meetings with Lotte Pakistan options were discussed by which effective tariff could be reduced and a win-win situation reached, however Lotte Pakistan did not respond to our revised proposal of June 1, 2010 and instead took the step of contacting BOI and CCP.*
- u. *The comparison provided by Lotte Pakistan in annexure D of complaint is not correct, in that it doesn't properly reflect other factors such as waiving \$ 2m off its variable tariff by EVTL. Thus the actual reduction in June 1, 2010 proposal is more than 25%. Acetic Acid Tariff at Al Rahim is incorrect which should be about US \$ 30 / ton based on the unsigned quote attached*
- v. *EVTL's exclusivity has hardly any reliance to renewal of Lotte Pakistan contract as a few miles away at Karachi Port Trust jetties are available to unload chemicals. Storage facilities can be built and are already there allowing Lotte Pakistan the option to shift their businesses to KPT if they so desire.*
- w. *Lotte Pakistan has provided quotes from Al Rahim Tank Terminal (Pvt.) Limited that is lower than EVTL proposal of June 1, 2010. There is no comparison between the services offered by EVTL and Al Rahim. EVTL services are far superior in quality as they follow international standards.*
- x. *Lotte Pakistan admits if their raw material is imported at Karachi Port Trust, their transportation and insurance cost will increase. It means Lotte Pakistan saves significant cost in shape of transport and insurance premium besides hassle of transportation. In addition to this Lotte Pakistan can lay pipe from EVTL to their plant for transfer of chemicals which will result in significant savings to Lotte Pakistan.*
- y. *Current tariff is less than 2.75% of the cost of production of PTA and has no material impact on the price of PTA to buyers in Pakistan. PTA is sold at international prices and not based on actual cost of production and reasonable return on investment. The matter is of a pure commercial one between the parties.*
- z. *EVTL strongly rebuts the contention that it is acting in violation of Section 3 of the Act for the following reasons:*
 - i. *EVTL is not dominant due to availability of other options for handling of its products, available to Lotte Pakistan. Karachi Port Trust is available and Lotte Pakistan has obtained offer from an operator there. The bulk of Pakistan's imports including dangerous goods are still made through Karachi Port Trust and recent construction of the link roads bypassing Karachi has eliminated the factor of safety.*

- ii. *Even if EVTL is dominant, intervention of the Commission is not required as Lotte Pakistan has other options available as mentioned above.*
- iii. *The comparison between EVTL's proposed charges and that of other terminals in Pakistan and abroad is not appropriate for the reasons explained.*
- iv. *There is no public policy or competition issue involved as this is a private contract, effects are which do not transcend into the public domain. EVTL's charges presently comprise only around 2.75% of the cost of production and will reduce further once new rates come into effect in December 2012. Thus there is negligible effect of the EVTL tariff on consumers of PTA who anyway are only 3 or 4 companies.*
- v. *The Complainant is asking for two things from the Commission. First is removal of exclusivity and secondly fixation of charges. it is not the policy of the Commission to fix prices or tariff.*
- vi. *It is not sufficient to merely make a comparison between tariffs being charged and costs of providing the services since the economic value of the service must also be taken into account.*
- vii. *The Commission can intervene only if terminal operator is also involved in downstream market and is charging excessive tariff to Lotte Pakistan to its business uncompetitive versus its own. There is no such situation.*

9. EVTL in its reply to Compliant took a different stance on the factual position, in particular, in respect of tariff issues with Lotte Pakistan. Therefore, Lotte Pakistan's comments were invited vide letter dated December 03, 2010 and the same were received on December 13, 2010. Rebuttal of Lotte Pakistan is summarized as under:

- a. *It is stated by way of clarification that the investment of US\$ 115,000,000 may, in the absence of any information provided by EVTL, be inferred as being the total investment made by EVTL from the inception of the project to date. Furthermore, any reference to this investment is irrelevant because the Storage Agreement was based on the capital cost originally incurred by EVTL which is much lower than the US\$ 115,000,000 in setting up the facility.*

- b. *It is pertinent to state that as per Lotte Pakistan's understanding, EVTL is charging its sister concern, EPCL, a tariff substantially more favorable than that it is charging Lotte Pakistan for comparable services to Lotte Pakistan under Storage Agreement.*

- c. *It is denied that prices agreed to by ICI in 1996 were not due to the exclusivity of the Implementation Agreement. All prices under the Storage Agreement were negotiated in light of the underlying agreement between PQA and EVTL. Given that only EVTL had authority to construct and operate facilities at Port Qasim, ICI had no choice but to deal with EVTL and on the prices dictated by EVTL at the time. While it is theoretically plausible to argue that ICI had other options, practically this would have been entirely unviable due to the cost and time factor involved.*

- d. *It is stated that the Storage Agreement does not state anywhere the formula for computing the tariff and Lotte Pakistan has been concerned for some time that the tariff being charged by EVTL is far in excess of the original understanding between both parties at the time of entering into the agreement. It is pertinent to mention that when Lotte Pakistan approached EVTL for clarification, it point blank refused to offer any help. It is also pertinent to mention here that even during the negotiation for renewal of the Storage Agreement; EVTL has refused to consider international benchmarks in price determination. Difference between international bench marks and EVTL's revised rates is substantial. In the absence of any information provided as to the basis of tariff, it would be considered admission on the part of EVTL that tariff is based on the actual capital cost of the facilities.*

- e. *It is specifically denied that storage facilities are under-utilized which has resulted in a higher tariff as compared to elsewhere in the region. Since commencing its operation, Lotte Pakistan has exceeded the minimum level of throughput at all times that is required under the Storage Agreement. Even otherwise level of utilization is irrelevant as the Storage Agreement is a take-or-pay contract and provides for Lotte Pakistan paying minimum monthly payments based on maximum throughput. Lotte Pakistan has guaranteed EVTL these payments irrespective of its actual throughput and in this manner has reimbursed EVTL for much more than the capital cost incurred by it.*

- f. *EVTL has resisted every effort by Lotte Pakistan to understand the IRR being charged by it under the Storage Agreement. EVTL's reference to GOP protection against various currency and interest rate risks for Independent Power Projects is fallacious in relation to the Storage agreement. The Storage Agreement is a dollar based contract and gives rise to US dollar cash flows with IRR which is much higher than the US dollar interest rates prevailing at any time since inception of the*

Storage Agreement to date, thereby eliminating any currency or interest rate risks.

- g. EVTL optimized the jetty tariff not as special favour to Lotte Pakistan but because EVTL had other customers for using the same facilities as a result of which EVTL was obliged in terms of Storage Agreement to reduce Lotte Pakistan's tariff for the shared facilities accordingly.*
- h. Lotte Pakistan reiterates its claim that EVTL will have recovered its initial investment with high attractive returns by the end of the Storage Agreement. While EVTL accepts tariff computed by applying an IRR equal to capital cost gives rise to gross revenues but it fails to specify the IRR on the basis of which tariff was computed or indeed what the actual capital cost of project was. EVTL has failed to provide information which it is required to give under the Storage Agreement. As per the information now available to Lotte Pakistan, not only the actual cost of the dedicated facilities lower than the cost on which tariff has been computed but also that the IRR of over 25% is substantially higher than the IRR of 15% which appears to have been agreed with ICI. EVTL has already admitted that the GOP allows a higher IRR of 15% for IPPs etc. Therefore, EVTL is admitting that Lotte Pakistan is being charged an IRR (25%) which is not on the higher side but is exploitative. It is further stated that EVTL's contention that projects are evaluated on the basis of net return is correct. EVTL has however failed to establish the manner in which it has priced its own project. Nowhere in the Storage Agreement have the words "net returns" been used while referring to IRR- that clearly shows that the term IRR denotes gross and not net returns and EVTL's reference to net returns is irrelevant.*
- i. EVTL is charging US\$ 26 per tonne under the Storage Agreement whereas operators of similar terminals in Europe, China and the Far East are currently charging in the range of US\$ 4 – 7 per tonne. EVTL is trying to mislead and obfuscate the facts regarding reduced tariff proposed by the in negotiation for renewal of the Storage Agreement. The correct position is as follows:*

Paraxylene

Existing tariff comprises:

(1) Fixed component of US\$ 19.7 per tonne, plus

(2) Variable component of US\$ 5.94 per tonne.

Total Tariff: US\$ 25.64 per tonne.

As per EVTL's quotation of 1 June 2010 the fixed and variable components have been combined to give a single number of US\$ 21 per tonne.

- j. It is stated that quotation from Al Rahim Tank Terminal (Pvt) Limited is in respect of a new facility which it will set up to meet Lotte Pakistan's and globally safety standards.*
- k. EVTL is charging a substantially lower IRR on the dedicated facilities set up for one of its sister companies, EPCL, within EVTL's existing premises for similar services being rendered to EPCL.*

10. Comments received from ABS & Co on behalf of Lotte Pakistan were forwarded to EVTL to seek their clarification. EVTL in its letter dated February 09, 2011 requested for extension in the date of submission of reply and later on, submitted a detail rebuttal on February 18, 2011. Para-wise comments of EVTL are summarized as follows:

- a. EVTL terminal would not have been built without the Storage Agreement with Lotte Pakistan. It is incorrect to state that ICI funded the setting up of the terminal; rather all investment required to meet the requirements of ICI was funded by EVTL based on the Storage Agreement.*
- b. It is correct that EVTL has made a total investment of Rs.5.5 billion to date.*
- c. Following users other than Lotte Pakistan have been using the facility successfully based on availability of reliable, efficient and safe terminal operations:*
 - i. ICI Pakistan Ltd. (MEG imports)*
 - ii. Fauji Fertilizer Bin Qasim Ltd.*
 - iii. Engro Polymer & Chemicals Ltd.*
 - iv. LPG importers*
 - v. Dewan Salman Fibres Ltd. (now shut down)*

The benefits are apparent insofar as ICI (Polyester) who were importing their chemicals through KPT, actually shifted to EVTL's terminals and have been satisfied with the services received in spite of high charges paid to EVTL as compared to those at KPT.

We categorically deny that Engro Polymer & Chemicals Ltd (EPCL) tariff is more favorable than Lotte Pakistan. It is a policy

of EVTL that contracts with subsidiary or affiliated business are taken at an arm's length. EPCL's fixed tariff is over US\$ 100 per ton with minimum guaranteed volumes of 72,000 tons. Whereas Storage Agreement with Lotte Pakistan does not provide for any change in fixed tariff rate even in case the import volumes increase i.e. in case Lotte Pakistan's throughput volume exceeds 280,000 tonnes per annum, Lotte Pakistan will be charged the same amount. This would have facilitated expansion of Lotte Pakistan's plant as projected by it and fourth tank was built in advance by EVTL in anticipation of capacity increase.

In order to understand the tariff, one needs to understand the operating environment, country risk etc. EVTL handles dedicated products for dedicated customers which require dedicated facilities for such products. Cost of such dedicated facilities coupled with underutilization results in higher tariff.

- d. It is denied that Lotte Pakistan made a decision to use facilities at PQA as KPT was very much available for construction of the required facilities and was evaluated by ICI at that time. EVTL was able to offer superior facilities which is why Lotte Pakistan entered into the Storage Agreement.*

Lotte Pakistan in fact is aimed to create pressure for negotiating commercial terms for duty protection from government and misrepresenting facts by giving impression that ICI v/s EVTL has created this infrastructure for Pakistan and has paid 3/4/5 times the investment by EVTL. Government of Pakistan can also claim that to a 200 MW IPP with a 30 years PPA and sovereign guarantees, it has paid over US\$3.6 billion for a plant of worth US\$175 million.

References to international prices are irrelevant and it is also denied that the rates proposed by EVTL would make it uneconomical for Lotte Pakistan to renew the Storage Agreement. In fact Lotte Pakistan is not serious in negotiation for renewal of contract and using bullying tactics.

The Implementation Agreement was signed based on master plan of PQA wherein jetties and storage locations for various categories of commodities (e.g. oil, chemicals, edible oil, molasses, containers, grains etc.) were clearly identified by PQA.

The reason why rates for EPCL are lower than Lotte Pakistan is the nature of products and the facilities required for their handling and storage. As compared to EPCL, Lotte Pakistan require special featured tanks e.g. separate dedicated marine loading arms, fully insulated tanks and downstream pipelines, ship loading facility, separate slop tanks at jetty and shore, tank

heating facilities etc. All these factors coupled with underutilization of facilities has resulted in higher tariff for Lotte Pakistan.

One Paraxylene tank of 12000 cbm and one Acetic Acid tank of 2500 cbm remained unutilized throughout the period. The extra storage tanks were built at the request of Lotte Pakistan keeping in mind their future expansion which did not happen and is a business decision ownership of which should be taken by Lotte Pakistan and not pass the impact of that onto EVTL.

- e. Lotte Pakistan's claim that EVTL has earned an IRR of over 25% is incorrect. It is repeated that amounts earned by EVTL under the Storage Agreement are not under discussion in this compliant.*
- f. Lotte Pakistan has relied in their compliant on a terminal in Korea to show the tariff for Paraxylene. We have confirmed that Korean terminal is basic and has no comparison with EVTL. Further, that Korean terminal is a distribution terminal and its services cannot be compared with the industrial terminal like that one EVTL has.*
- g. Comparison with international prices is not correct. If this reasoning is applied the banking sector in Pakistan enjoys 7-8% banking spread while in rest of world it is only 2-3%. There is rationale for this, just as there are reasons for differences in tariffs required by EVTL and tariffs charged in more developed economies.*
- h. Lotte Pakistan is not obliged to continue business with EVTL they can look for other options at KPT as they have claimed that they have received an offer from Al-Rahim Terminal at KPT. Further, construction of two bypasses has made transportation from KPT much easier. However, facilities at Al-Rahim Terminal are different form EVTL for the following reasons:*
 - i. Less storage capacity*
 - ii. Inappropriate design code*
 - iii. Tanks and pipes are not insulated*
 - iv. Tanks are not equipped with heating coils*
 - vi. No slop handling facility*
 - vii. No safety arrangements*
 - viii. No automation system*

If these special features are added Al-Rahim's cost and tariff will be double or almost comparable to EVTL's tariff. Further, we would like to reiterate that (price) competitiveness is determined by the total supply chain costs including land transportation, insurance costs, shipping costs etc, and that taking into account these costs at the KPT option will be comparable to the EVTL option. It is global phenomenon that prices are set on the basis of the competitiveness of the entire supply chain and being a part of a strong supply chain allows to demand some premium.

11. After examining the written submissions filed by Lotte Pakistan as complainant and EVTL as respondent, Storage Agreement, Financial Model submitted by EVTL to PQA at the time of grant of concession for setting up its terminal, the Enquiry Officer completed the Enquiry by submitting the Enquiry Report on 18th March, 2011. The Enquiry Report concluded that EVTL has abused its dominant position by imposing unfair trading conditions on its customer i.e. Lotte Pakistan in the form of exorbitant rates in contravention of Section 3 generally and, in particular, Section 3(3)(a) of the Act. Similarly, negotiation by EVTL for renewal of the Storage Agreement on unfair terms, *prima facie*, amounts to constructive refusal to deal with its customer in violation of Section 3 generally and, in particular, Section 3(3)(h) read with sub-section (3)(a) of Section 3 of the Act and that it is necessary in the public interest to initiate proceedings against EVTL under Section 30 of the Act.

12. Based on the recommendations made in the Enquiry Report, the Commission initiated proceedings under Section 30 of the Act and issued Show Cause Notice to EVTL on 25th March, 2011 which, *inter alia*, stated:

Whereas, in view of foregoing, it appears that the Undertaking which was given exclusive rights for thirty (30) years has recovered not only the capital cost as projected in the Financial Model submitted to PQA but also the total investment made so far in the project within the span of early 15 years from a single customer i.e. Lotte Pakistan by charging exorbitant charges. On the other hand customer has no other readily available option in the relevant market to avail handling and storage facilities as the Implementation Agreement grants the Undertaking concessionary rights to the exclusion of any other possible competitor. Under such circumstances, subjecting a captured customer to unfair trading condition, *prima facie*, results

into abuse of dominant position by the Undertaking in violation of Section 3 (1) and 3(3) (a) of the Act.

Whereas in terms of para 24-35 of Enquiry Report, both parties have entered into negotiations for renewal of the storage agreement as per their contractual terms provided in Clause 6.2 of the Storage Agreement. It appears that the rates quoted by the Undertaking in negotiation for renewal of the Storage Agreement reflect the same approach as taken by the Undertaking previously at the time of signing of the Storage Agreement. Major amount of tariff should have been reduced as the capital cost of the infrastructure has been recovered with reasonable profits; however, it appears this is not the case here. Customer is entirely dependent on services of the Undertaking and there is no other option available to it. Under this scenario, such practice of the Undertaking to impose unfair conditions for renewal of the Storage Agreement, prima facie, amounts to constructive refusal to deal with its customer in violation of Section 3(3)(h) read with sub-section (3)(a) of Section 3 the Act.

13. EVTL was directed to respond to SCN and was afforded with an opportunity of hearing to explain as to why the Commission should not proceed against the parties for the, *prima facie*, violation of Section 3 of the Act.

14. Reply to Show Cause Notice was filed by EVTL on 8th April, 2011.

Salient points of the reply are summarized as under:

- a. The price of PTA to Lotte Pakistan's consumers will not be any different even if the Commission finds the complaint to be justified. EVTL's charges are presently only 2.75% of the cost of production of PTA and based on on EVTL's offer for renewal of the Storage Agreement, the storage charges will comprise only around 1.75% of the cost of production of PTA.*
- b. The original storage contract of April 1996 was signed with ICI Pakistan who were perfectly happy with that contract, so much so, that in 2002 they shifted their MEG business from KPt to EVTL. If ICI had been abused by EVTL they would not have shifted their MEG business also to EVTL.*
- c. The present complainant is really the new major shareholder of the PTA company who bought shares in 2009. They have made a 400-450% gain in less than 2 years on their acquisition. The Storage Agreement and its cost were obviously factored into the share price that was paid and this complaint is an attempt to increase their gain.*
- d. If ICI had not decided to enter into the storage Agreement, EVTL's Implementation agreement with PQA would have lapsed.*

ICI had invested in other infrastructure like water and electricity grid etc. and could have also built its own terminal. However, ICI chose to go with EVTL due to its first class sponsors and high quality standards.

- e. Across the world all business including chemical terminals set their pricing strategies on basis of competitiveness of entire supply chain and being part of a strong supply chain (e.g. through superior geographical location with deep water facilities) allows to demand premium. EVTL's tariff is competitive with Al-Rahim considering its quality and transportation/insurance cost Lotte Pakistan would have to pay.*
- f. Extension of the Storage Agreement is still under negotiation between the parties and a subsequent offer has already been made on March 22, 2011. This complaint/Show Cause Notice is therefore pre-mature. Tariff in the Storage Agreement reflects a mutually agreed amount taking into account all factors. Tariff was not subject to reopening depending on the actual capital cost a is apparent from the agreement. Both parties took the risk that the return for EVTL could go higher or lower depending on various factors including EPC bids, actual completion cost, ongoing maintenance costs, tax rates etc. The real issue is that Lotte Pakistan wants to utilize the Rolls Royce of the terminal world but pay the price of a Suzuki.*
- g. It is unclear to EVL that whether the Storage Agreement fails to disclose the basis of tariff can be investigated by CCP? And whether EVTL is charging exorbitant rates is an unfair trading condition in violation of Section 3 of the Act can be investigated by CCP? Further, Lotte Pakistan itself accepted the validity of the Storage Agreement after coming into force of the Competition Ordinance in 2007 and applied for and obtained an Exemption from the CCP for the agreement. It cannot now say that the Storage Agreement is in violation of the Ordinance/Act.*
- h. Tariff charged in the existing Storage Agreement is a closed chapter. In most recent proposal, EVTL has reduced its tariff by 40% from the existing tariff as the tariff is not based on initial investment for the dedicated facilities but for its economic value and the premium which EVTL is entitled to charge because of its competitive edge.*
- i. Break up of estimated cost in the Financial Model shows that there were three major components of project i.e. jetty, shared facility and dedicated facility. In addition to these three components of cost, there were some other related costs e.g. project development and management and this cost was to be allocated to these three components.*
- j. As per clause 4.7 of the guidelines for the preparation of BOT proposal, general basis for calculation of tariff (such as capital cost, operating cost, nature of product, product volume and parcel size) were provided in financial proposal and financial*

model and financial model was developed based on weighted average basis.

- k. Tariff was agreed with ICI and neither party desired to explain its basis in the Storage Agreement as it was not subject to re-opening. It is impossible that the negotiating team of ICI had agreed the tariff without satisfying themselves on all counts including the basis thereof.*
- l. Regarding reasonable rate of return it is submitted that keeping in view the capital investments and recurring O&M expenses of the company for the up keep of the chemical terminal, the return on the project are extremely reasonable and competitive given the country risk and business environment of the country. Government of Pakistan allows a higher rate of return (15% for IPPs, 18% for winf power IPPs, 20.5% Thar Coal) on the equity investment with GOP guarantees and protection against escalation of USD/PKR exchange rate, Consumer Price Index, Fuel Prices, foreign currency based O&M expenses and interest rate fluctuation on foreign currency loans. There is no such protection to EVTL which has fixed contracts with private parties with no government off take or payment guarantees.*

15. ABS & Co. also filed para-wise comments on 2nd May, 2011 in respect of EVTL's reply to Show Cause Notice. These comments are summarized as under:

- a. The only element Lotte Pakistan is targeting is EVTL's practice of setting exorbitant prices without providing or having any justification for their computation. Storage Agreement is silent about the computation of the tariff rates. Whereas it was mutually understood that the tariff would be based on providing a fair return on the capital cost of the storage facilities.*
- b. EVTL has recovered its capital cost is completely relevant to whether it should be allowed to charge such higher prices and abuse its dominance. EVTL's latest offer is substantially higher than the international prices.*
- c. No where in Lotte Pakistan's complaint has it suggested that the CCP should fix the tariff. Lotte Pakistan requests two actions from CCP which are (i) to declare that the IA is a prohibited agreement and (ii) to penalize EVTL for abusing its dominant position through exploitative practices.*
- d. Lotte Pakistan would have paid in excess of US\$170 million by the end of the contract period is very relevant in this case because EVTL would have not only have recovered its original cost of the dedicated facilities but would have also made excessive profits thereon by abusing its dominant position. Since EVTL would have recovered its original capital cost of Lotte Pakistan's dedicated facilities, there is, therefore also no justification for allowing its exclusivity in the PQA area to continue for another 15 years.*

- e. *Negotiations for future renewal of the contract have stalled precisely because of the large gap between the revised price offered by EVTL of US\$19.00 per ton of Paraxylene versus US\$5-7 per tone that would be available to Lotte Pakistan without EVTL's monopoly.*
- f. *Storage Agreement does not provide for computation of the tariff rates and that any correspondence exchanged between ICI and EPTL regarding tariff was based on the general understanding that tariff would be based on providing a fair return on the capital cost of the storage facilities.*
- g. *EVTL is charging 26% IRR on the cost of dedicated facilities which is far higher than 18% given in the financial model.*
- h. *EVTL's contention that the "total estimated capital expenditure while one of the element was not the only factor in setting the tariff. Operating expenses, taxes and many other factors also came into play" is misleading. Reference to offer letter dated 8th November 1995, Clause 6.1 clearly states that tariff is based on capital cost. Para 7 of the same latter further clarifies that services cover use of jetty, storage tank and all other ancillary facilities etc..... this further is spelt out in para 1 of counter offer by ICI on 21st November 1995 which states that operating costs included in EVTL's quoted tariff of US\$45 per tone is higher.....only this but para 7 also highlights the same that "also note that for every \pm 1 M\$ change in capital cost the tariff will stand revised by \pm 0.75 per tone.*
- i. *EVTL is itself admitting that the IRR allowed by the government on power and other projects is on the equity investment. This implies calculation of IRR on the project cost only and not on working capital which is required for operating expenses. Furthermore EVTL's plea that it does not have protection against "escalation of the USD/PKR exchange rate, Consumer Price Index, etc." is factually incorrect as para 6 of EVTL's proposal letter of 8th November 1995 clearly states that: "Whereas the fixed fee will be in US Dollar terms and will remain unchanged for the entire duration of the contract, the variable fee will be in Rupee terms and will be escalable annually based upon the Consumer Price Index (CPI) as published by the Government of Pakistan".*
- j. *From EVTL's financial reports it appears that project was funded with a long term debt/equity mix of 60/40. Total long terms loan was Rs.1,232 billion. EVTL's exposure to "escalation in the USD/PKR exchange rate" was limited to 44 % of total cost of the project and that too on a reducing loan balance which was completely repaid by 2006. On the other hand, the tariff paid by Lotte Pakistan for 15 years was to be in US dollars and converted to PKR at the USD/PKR exchange rates prevailing on the due dates of payment. This proves that EVTL's argument on exposure to USD/PKR exchange rate movements is incorrect but also IRR earned by EVTL on overall project and the dedicated facilities in particular is higher than 26% computed in US dollars.*

16. During the course of hearing several questions were raised by the Bench and additional information was sought from the parties. EVTL submitted further information on 2nd, 9th and 12th May, 2011. Lotte Pakistan also submitted further submissions on 11th May, 2011. These submissions by both parties are reproduced below for the sake of brevity:

EVTL's submissions Dated 2nd May, 2011

- a. *A terminal consists of shared facilities, jetty and dedicated facilities. As the first and only customer ICI's tariff had to provide a return to EVTL on all the facilities constructed by EVTL. ICI agreed to it because it is not possible to provide services without constructing the entire terminal (dedicated and shared facilities).*
- b. *Tariff was calculated on the basis of full investment at lower Dollar IRR and take project risk based on the hope for growth of the chemical business in Pakistan. However, the IRR had to be sufficient for achieving financial close with the lenders.*
- c. *Agreed IRR with Lotte Pakistan was 10.5%, however, actual IRR of EVTL from Lotte Pakistan is 11.4%. increase in IRR of 0.9% is mainly due to reduction in project cost from those assumed earlier partly offset by higher O&M cost. Effective tariff of Lotte Pakistan in 2010 was US\$34/tonne. Shared facilities were utilised by other customers in subsequent years and even with this additional revenue IRR of investment made by EVTL in 1995 would be about 13.6%. as per Implementation Agreement we would have earned 18% IRR. Based on 3rd revised offer, IRR of ICI project over 30 years would be 12.4%.*

EVTL's submissions on 9th May, 2011

- a. *EVTL is not relying on its exclusivity in the negotiations for renewal of the Storage Agreement but our offer is based on the economic value of the service we provide.*
- b. *KPT and PQ must be considered to be within the same geographical market due to their proximity and the fact that they serve the same hinterland. CCP in its dredging case has already held that KPT and PQ are in the same geographical market.*
- c. *Comparison with international prices is not tenable for the reason of turn over and country risks etc. Further, tanks rented out to KP Chemicals at Stolthaven are basic and can in no way be compared to the facilities purposefully built for Lotte Pakistan at EVTL. Stolthaven is a distribution terminal and services rendered there cannot be compared to a high standard*

industrial terminal like that at EVTL. The throughput at Stalhaven is three times higher than at EVTL.

- d. The real issue is economic value of the service being offered and its competitiveness with the very alternative that Lotte Pakistan itself has proposed i.e. Al-Rahim Terminal at KPT. EVTL asserts that if the total actual cost to Lotte Pakistan of Al-Rahim Terminal is taken including the low quality service/product loss, the higher safety issues, potential demurrage and consequently higher insurance costs and transport cost to PQA etc. then the rates offered by EVTL are competitive.*
- e. IRR is calculated on net cash flow taking into account operation & maintenance expenses and applicable tax payments. The reference to the capital costs in the letter referred to does not exclude other factors always taken into account for calculating IRR, though of course capital cost is a large factor.*

Lotte Pakistan's Submissions Dated 11th May, 2011

- a. The IRR computation was agreed between the two parties only for the dedicated facilities and not for the shared facility. Lotte Pakistan's computation of the excessive IRR of 26% actually earned by EVTL is based on the capital cost incurred and tariff charged for the dedicated facilities only.*
- b. EVTL has now admitted that the capital cost of the project was substantially lower (i.e. by US\$ 7 million) than the amount earlier disclosed to ICI/PPTA and on the basis of which the tariff had been computed. This clearly substantiates Lotte Pakistan's assertion that the reason EVTL never wanted to disclose its actual cost was because it was aware that doing so would mean reducing the tariff in line with its offer letter dated 8 November 1995.*
- c. With regard to dedicated facilities EVTL itself has admitted that it has earned 19.3% IRR which is much higher than the 15% stated in ICI's letter dated 21 November 1995 or even the 18% indicated in the Financial Model.*

EVTL's Submissions Dated 12 May, 2011-05-20

- a. Neither EVTL's letter of November 8, 1995 nor the Storage Agreement dated April 4, 1996 states any IRR figures/basis. However, obviously both parties must have negotiated the final contract on the basis of the IRR that EVTL should have reasonably earned. It is repeated that it is incorrect to view a return on dedicated facilities only. The return has to be viewed for the entire project as services cannot be provided by*

simply building tanks (dedicated facility) without including jetty and shared facilities. Lotte Pakistan's figure of 26% IRR is presumably based on considering only the capital cost incurred on the dedicated facilities, however, seems presumably not to consider other factors in calculating the IRR, e.g. O&M expenses, taxes etc.

- b. EVTL always disclosed its actual cost and never stated that it is not available or lost in the fire. Actual IRR earned by EVTL was a little higher than we have re-structured as of the contract signing date. However, EVTL is entitled under the guidelines and the Implementation Agreement to earn an 18% IRR.*
- c. IRR is always calculated on free cash flows derived after deduction of O&M expenses and applicable taxes. If we accept the view of Lotte Pakistan that tariff was agreed based on capex only then IRR based on estimated capex would be 30%.*

ISSUES

17. In view of the written submissions and arguments made by the parties the following issues need to be addressed:

- a) What is the relevant market?
- b) Whether EVTL enjoys dominance by virtue of its exclusivity in the relevant market?
- c) Whether tariff charged pursuant to the Storage Agreement can be termed as an abuse of dominant position on part of EVTL in violation of Section 3(3)(a) of the Act during the existing term of the Storage Agreement?
- d) Whether non-disclosure of tariff break-up for future contract can be termed as refusal to deal in violation of Section 3(3)(h) of the Act?

ANALYSIS

Issue I: Relevant Market

18. EVTL's preliminary objection is that the relevant geographic market cannot be confined to only PQ area. A few miles away at Karachi Port

Trust (KPT), jetties are available to unload chemicals. Storage facilities can be built and are already there allowing Lotte Pakistan the option to shift their businesses to KPT if they so desire. Lotte Pakistan has already got the quotes from Al Rahim Tank Terminal (Pvt.) Limited situated at KPT that is lower than EVTL proposed rates for renewal of the Storage Agreement. EVTL relied on the order passed by the Commission in dredging case whereby it was held that “both PQA and KPT should be considered together for the purpose of Relevant Market”. EVTL further stated that decisions of the EU also confirm that ports so close together would be considered part of the same geographic market.

19. In this case we are relying on the findings/determination on identical issue in the Order passed with respect to SCN No.23/2010 dated July 06, 2010 against PQA and EVTL for entering into a prohibited agreement (hereinafter referred to as the “Order in SCN 23/2010”). For ease reference we are reproducing the relevant excerpts from the said the Order which shall, mutatis mutandus, apply to this case.

20. Section 2(1)(k) of the Act defines the relevant market comprising of product and geographic dimensions and is reproduced below for the sake of brevity:

Relevant Market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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 homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.

21. According to definition provided in the Act, determination of the relevant market depends on the availability of substitutable services for customers i.e. whether there is a cross-elasticity of demand between EVTL’s handling and storage facilities and other facilities. This interchangeability is gauged by how different from one another are the offered services in character or use, how far customers will go to substitute one

for another. For inter-changeability only those substitute facilities or services will be considered which are substantially fungible. Similarly, which area is significantly important to be considered where undertakings involved in supply of handling and storage services face homogenous conditions in competing with each other.

22. Basically three competitive constraints are important in defining the relevant market; (i) demand substitutability, (ii) supply substitutability and (iii) potential competition. From an economic point of view the most important among all is the demand substitutability. If customers are in a position to switch easily to available substitute services or suppliers located elsewhere, no supplier can have a significant impact on the prevailing conditions of sale such as price. Therefore, definition of market consists in identifying the effective alternative sources of supply for the customers of the undertaking involved, both in terms of services and geographical location of suppliers. This requires that suppliers be able to switch to relevant services and market them in the short term without incurring significant additional costs. For customers it is equally important to assess switching costs for diverting its order to other supplier or area in terms of impact of transport costs and restrictions depending on the nature of the relevant services.

23. To sum up the discussion the relevant market encompasses the competitors who effectively compete with the undertaking and are capable of constraining the undertaking's behaviour. European Commission's *Notice on the Definition of the Relevant Market for the purposes of Community Competition Law*¹ also explains the concept of relevant market in the similar manner as follows:

The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.

¹ OJ [1997] C 372/5, [1998] 4 CMLR 177

24. Question to be determined before this Bench is who are the competitors of EVTL? and is there any substitutable facilities available for handling and storage of liquid chemicals which can give effective competition to EVTL for its similar facilities? For this purpose we will consider other ports along with PQ area.
25. **Facilities:** Chemical liquids like different types of paraffin, acids, plasticizers, alcohols, alkalis, aromatics etc are specific types of liquid chemicals which are used as raw materials by Petrochemical industry in Pakistan. These chemicals are highly volatile liquids and can vaporize to form an ignitable mixture in the air and have other corrosive properties. These liquid chemicals are offloaded at a port through a jetty to handle their specifications. Once off loaded they are then stored in purpose built storage farm. Port Qasim has substantial allocation of land in its master plan for chemical industry and different types of terminals. So it will not be wrong to say that unlike other ports Port Qasim was developed to serve specific purposes including to cater chemical industry in Pakistan. None of the other ports of KPT and Gwadur except PQ have specialized facilities to handle and store chemicals with above illustrated chemical properties.
26. **Exclusivity:** The Implementation Agreement grants EVTL an exclusivity to handle and store liquid chemicals in PQ area and obliges every consumer of EVTL's facilities to use jetty and storage farm as an integrated facility. Clauses 3.1 and 3.3 of the Implementation Agreement state:

PQA also grants EPTL the exclusive right to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area.

The Jetty and Storage Farm would be considered as an integrated facility i.e., Customers using the Jetty will also be obliged to store the products at the storage Farm.

Such restriction abruptly denies the option of customers to avail any other storage facility, if any, available. Customers have no choice but to

use storage facility of EVTL along with its jetty to the exclusion of any other service provider/supplier in PQ area.

27. **Customer's Choice:** It is also important to note here that development plans of a port and investment/expansion plans of service providers/suppliers have serious impact on customers' business decisions dependent on that port and supplier for their imports of chemicals. They are in a way captured and restricted to a supplier which can provide them services to meet their specifications. For example, Lotte Pakistan invested to set up its PTA plant in the vicinity of the Port Qasim on the understanding that a purpose built chemical jetty and storage farm will be operated from Port Qasim which have the appropriate and required facilities to handle and store liquid chemicals. Not only this Lotte Pakistan also invested to build water and electricity grid at PQ to facilitate storage of its chemicals.

28. **Supply- substitutability:** Once having invested heavily in plant nearby Port Qasim, it is very difficult to switch to other facilities, if any, available at other ports. There is no such facility in existence or readily available on other ports that can be compared with EVTL. EVTL in its submissions dated February 18, 2011 filed in a complaint proceedings² initiated against it for abuse of dominance, itself has admitted that the only offer made to Lotte Pakistan by Al-Rahim Terminal at KPT is not comparable to EVTL's facilities for the following reasons:

- i. Less storage capacity
- ii. Inappropriate design code
- iii. Tanks and pipes are not insulated
- iv. Tanks are not equipped with heating coils
- v. No slop handling facility
- vi. No safety arrangements
- vii. No automation system

² Complaint filed by M/s Lotte Pakistan PTA Limited against Engro Vopak Terminal Limited for Abusing its Dominant Position by virtue of the Implementation Agreement. (File No. 8/Reg/Comp/Lotte Pak/CCP/10)

29. **Demand- Substitutability:** Now considering the possibility to explore other options that may be available in future. Conscious mind has to take into account if customers are in a position to switch easily to available substitute services or suppliers located elsewhere and that suppliers in other areas are able to switch to relevant services and market them in the short term without incurring significant additional costs. During the course of hearing CEO, Lotte Pakistan gave an alternative to shift to KPT to avail handling and storage facilities. However, this option would require another investment to upgrade the existing facilities at KPT. Whether the new supplier would be willing to invest on its existing facilities for up-gradation or it would come from Lotte Pakistan is an important factor. Among other factors include serious environmental hazards if these materials are moved on daily basis and will also create national security threat in case the materials fall into the hands of miscreants. Besides transportation hassle, it will also cause huge cost when transportation of materials will consume more than one million liters of diesel per year and will also result in additional insurance premium that will eventually add to cost of downstream market manufacturers.

30. EVTL in its written submission and during the course of hearing has relied upon dredging case (2011 CLD 101) and contends that the Commission has laid down in its order that both PQ and KPT come under the same geographic market. We would like to address the finding given in dredging case by the Commission that “both PQA and KPT should be considered together for the purpose of Relevant Market” (para 44, page 34). In dredging case the issue before the Commission was; whether M/s China Harbour Engineering Company Limited (CHEC) and M/s China International Water & Electric Cooperation (CWE) have divided territories i.e. KPT and PQA among themselves and have colluded with each other and filed cover bids to realize such division in violation of Section 4(2)(e) read with Section 4(1) of the Act?

31. While determining relevant market we have to keep in mind the facts peculiar to that particular case. Relevant market cannot be same for every case rather it varies depending upon the product/service involved for which suppliers in neighboring areas are competing with each other under homogenous conditions. In dredging case the relevant market is entirely different in terms of its product market and geographic area. Therefore, such reliance would not be relevant. In dredging case both KPT and PQA invited tenders simultaneously for dredging services at their respective ports. CHEC, equal competitor of CWE, gave a cover bid to secure tender for CWE at KPT. On the other hand CWE did not participate in bid for dredging at PQA to eliminate competition for CHEC. Both undertaking were competitors with equal muscles having capability to compete in KPT and PQA (geographical area) to render identical services of dredging (relevant product). They both could have given competitive bids in KPT and PQA tenders; however, they colluded to eliminate competition with each other in the area of KPT and PQA in respect of their identical services of dredging. Therefore, we do not see any similarity between the two cases and any reason to apply the analogy used for determination of relevant market in dredging for the issue at hand.

32. Now we come to the other cases quoted by the legal representative of EVTL in support of its submissions for relevant market.

In a merger case decided by Commission of the European Communities (Case No IV/M. 1674-Maersk/ECT) it was held:

The geographic area that they generally serve determines the geographic scope related to their services. One can therefore determine the geographic ranges (or catchments areas) which are served from a particular group of ports. For example all deep sea container ports in Northern Europe are considered to belong to a single geographic market, due to routes undertaken by shipping lines.

In another merger case decided by Commission of the European Communities (Case No COMP/M.5398-Hutchison/Evergreen) it was held:

Substitution between Northern and Central European ports and Southern European ports does not take place to any considerable degree because of their catchment areas.

33. As observed in the Order passed in SCN 23/2010, we do not find merit in EVTL's argument that both ports i.e. PQA and KPT should be considered within the same geographical market due to their proximity. Also, the assertion that PQA and KPT serve the same hinterland and in this regard reliance on case laws referring to ports which served same catchment areas as one single market, completely ignores the two dimensions of a relevant market. Relevant product and relevant geographic area are two essential constituents of definition of the relevant market. Product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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 homogeneous. We have already discussed this at length that both elements: (i) current non-availability of substitute facility at any other port except PQA and (ii) the switching costs for both suppliers at other ports to provide and customers to avail a comparable facility, do not make KPT and PQ as a single geographic market.

34. In view of the above, we are in agreement with the determination made in the Order passed in the SCN 23/2010 that liquid chemicals need specialized chemical jetty and storage farm to encounter their specifications. EVTL terminal is only facility that has these unique features and there is no close substitute facility readily available at other ports. Facilities that do not exist or will be available in future cannot be a benchmark for comparability with EVTL. Further, switching costs for both suppliers and customers and also hazards involved make it a bleak option for the customers to look for other avenues at the moment. Hence, keeping in mind the factors of demand and supply side substitutability we hold that currently there is no effective competition in the area of PQA and KPT vis-à-vis the facilities required for handling and storage of liquid chemicals.

Issue II. Whether EVTL enjoys dominance by virtue of its exclusivity in the relevant market?

35. Having determined the relevant market, next step is to assess whether EVTL holds a dominant position in the relevant market. Definition of 'Dominant Position' is given in Section 2(1)(e) of Act and is reproduced below for ease of reference:

Dominant Position of an undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have ability to behave to an appreciable extent independently of its competitors, consumers, customers and suppliers and the position of an undertaking shall be presumed to be dominant if its market share of relevant market exceeds 40%.

36. In Port Qasim Area which is the relevant market in the instant case only EVTL has the specialized jetty and storage farm to provide handling and storage services in respect of liquid chemicals having specific chemical properties. EVTL has been granted concessionary/exclusive right to construct and operate such facilities under the Implementation Agreement entered into by and between EVTL and PQA in 1996. This monopoly created in favor of EVTL through a concession agreement entails the essential constituents of definition of dominant position as given above.

37. Exclusive rights granted to EVTL pursuant to the Implementation Agreement create entry barriers for any new entry and prevents competition in respect of handling and storage of chemicals at Port Qasim for 30 years. Moreover, storage terminals existing at the time of the grant of concessionary rights to EVTL who were forced to avail the services of EVTL have obtained stay from the court. However, these parties are not service providers and are catering for their own business needs and therefore, are not competitors of EVTL in effect. Hence, the dominance of EVTL in the relevant market is quite obvious.

38. United Brands V. Commission³ in 1978 defined a 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 competitors, customers and ultimately consumers.” In the given facts, foreclosure of market to new entrants by virtue of the Implementation Agreement in our view enables EVTL to behave independent of its customers and competitors (if any).

Issue III: Whether tariff charged pursuant to the Storage Agreement can be termed as an abuse of dominant position on part of EVTL?

39. Lotte Pakistan’s main grievance in the Complaint is that EVTL has abused its dominant position by charging exorbitant price for its storage facilities. ICI (predecessor of Lotte Pakistan) had agreed to pay this price because the specific storage and handling services it required could only be offered by EVTL as it was the only company that had the permission to build such facilities at Port Qasim. Lotte Pakistan’s claim for abuse of dominance by EVTL is based on the following assertions:

a. Lotte Pakistan would have paid an aggregate sum of US \$170M by the expiry of Storage Agreement in November 2012 as of when EVTL will have recovered sums far in excess of the capital expended by it. Even the tariff charged is more than the total investment of US\$ 115M made by EVTL to- date.

b. Any reference to EVTL in terms of US\$115,000,000 or Rs.5.2 billion for its total investment is irrelevant because the Storage Agreement was based on the capital cost originally incurred by EVTL which is much lower than the US\$ 115,000,000 in setting up the facility.

³ 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.

c. Prices being charged by EVTL are far in excess of such services offered elsewhere in Asia as well as internationally. The current price charged by EVTL is US \$ 25.60 per tonne of Paraxylene, while the price of similar facilities elsewhere in Asia is US \$ 5.00 per tonne of Paraxylene. At Annex D-2 of the Complaint, Lotte Pakistan has attached a letter from Jeongil Stolthanven Ulsan, Korea where Jetty and Storage facility is provided to Lotte's parent company for chemical of same family. The infrastructure includes dedicated storage tanks and pipelines from jetty. Parent company of Lotte Pakistan is paying US\$5 for the same facility in Korea. Again at Annex D-3 of the Complaint is another letter from Lotte Chemical UK Limited which mentions that paraxylene infrastructure includes dedicated pipeline from jetty and storage tanks and the total tariff charged is US\$6.

39.1. During the hearing Lotte Pakistan filed further submissions elaborating on their concerns in the following manner:

d. The Storage Agreement does not provide for computation of the tariff rates. Any correspondence exchanged between ICI and EPTL (predecessors of Lotte Pakistan and EVTL respectively who originally entered into the Storage Agreement) regarding tariff, before the Storage Agreement was signed, was based on the general understanding that tariff would be based on providing a fair return on the capital cost of the storage facilities.

e. EVTL's contention that the "total estimated capital expenditure while one of the element was not the only factor in setting the tariff. Operating expenses, taxes and many other factors also came into play" is misleading. Lotte Pakistan made reference to Offer Letter dated 8th November 1995. Clause 6.1 (Jetty Charge), 6.2 (Potentially Shareable Facilities charge) and 6.3 (ICI Dedicated Facility Charge) of the said letter lays down a clear and unambiguous basis for computation of the tariff as follows:

*“The Charge quoted above is based on the Capital Cost Estimate of the **. However, if the capital cost changes due to differences in duties/taxes and/or change in Capital Cost due top bids, then the tariff will stand revised accordingly.”*

*[** substitute for the cost and description of jetty, potentially shareable facilities or ICI dedicated facilities as the case may be.]*

Lotte Pakistan claims that it is absolutely clear from the above that EVTL computed the total tariff of \$45.00 per tone only on the basis of capital cost and that it was meant to cover all of EVTL’s operating expenses, taxes and/or any other factors.

This is further borne out by paragraph 7 which specifies:

“Services Covered by the Tariff- include the use of the jetty, storage tanks and all other ancillary facilities such as unloading from vessels, product transfer from jetty lines to storage tanks, loading into road tankers, safety facilities, etc.”

It is therefore, follows that the total estimated capital expenditure was the only element agreed by both parties for calculating the tariff and, as a result, the IRR of the project. All operating costs, taxes etc, were to be borne by EVTL. This understanding was also clearly spelt out in paragraph 1(b) of ICI’s counter proposal for tariff dated 21 November 1995 which states that the operating costs included in EVTL’s quoted tariff of US\$ 45 per tone are higher than ICI’s estimate and that these should be reduced by US\$ 0.5 million per annum.

One other point to note from the Offer Letter id the last sentence after paragraph 6.3:

“Also note that for every -+ 1 M\$ in Capital Cost the tariff will stand revised by -+ 0.75 per ton.”

f. *EVTL is charging 26% IRR on the cost of dedicated facilities which is far higher than 18% given in the financial model.*

39.2. Lotte Pakistan further filed submissions vide its letter dated 11th May 2011 narrowing down its assertions to:

g. *The IRR computation was agreed between the two parties only for the dedicated facilities and not for the shared facility as shared facilities were meant to have many more users/customers. The possibility of ICI and EPCL agreeing an IRR for the shared facilities simply did not exist and it is, therefore, of no relevance to these proceedings. Lotte Pakistan's computation of the excessive IRR of 26% actually earned by EVTL is based on the capital cost incurred and tariff charged for the dedicated facilities only.*

h. *EVTL has now admitted that the capital cost of the project was substantially lower (i.e. by US\$ 7 million) than the amount earlier disclosed to ICI/PPTA and on the basis of which the tariff had been computed. This clearly substantiates Lotte Pakistan's assertion that the reason EVTL never wanted to disclose its actual cost was because it was aware that doing so would mean reducing the tariff in line with its offer letter dated 8 November 1995.*

40. On the other hand EVTL came up with following averments in its defence:

a. *Tariff in the Storage Agreement reflects a mutually agreed amount and was not subject to reopening depending on the actual capital cost as is apparent from the said agreement. Both parties took the risk that the return for EVTL could go higher or lower depending on various factors including EPC bids, actual completion cost, ongoing maintenance costs, tax rates etc...*

b. *Lotte Pakistan's claim of paying back initial investment of EVTL with highly attractive returns is misleading in that the return is*

being considered in absolute terms. Lotte only referred to gross revenue while ignoring operating expenses, financial costs and corporate tax. Total estimated capital expenditure while one of the element was not the only factor in setting the tariff. Operating expenses, taxes and many other factors also came into play.

- c. The comparison with similar facilities available internationally is not correct as constructions costs in Pakistan are higher due to a variety of variables such as higher cost of importing specialized material, turn over and country risk. Tariff calculations are based on throughput volumes, which the case of PTA plant as compared with their counter parts in other countries. Further, tanks rented out to KP Chemicals at Stolthaven are basic and can in no way be compared to the facilities purposefully built for Lotte Pakistan at EVTL. Stolthaven is a distribution terminal and services rendered there cannot be compared to a high standard industrial terminal like that at EVTL. The throughput at Stalhaven is three times higher than at EVTL.
- d. Agreed IRR with Lotte Pakistan was 10.5%, however, actual IRR of EVTL from Lotte Pakistan is 11.4%. Increase in IRR of 0.9% is mainly due to reduction in project cost from those assumed earlier partly offset by higher O&M cost. Shared facilities were utilised by other customers in subsequent years and even with this additional revenue, IRR of investment made by EVTL in 1995 would be about 13.6%. As per Implementation Agreement we would have earned 18% IRR.
- e. A terminal consists of shared facilities, jetty and dedicated facilities. As the first and only customer ICI's tariff had to provide a return to EVTL on all the facilities constructed by EVTL. ICI agreed to it because it is not possible to provide services without constructing the entire terminal (dedicated and shared facilities). It is incorrect to

view a return on dedicated facilities only. The return has to be viewed for the entire project as services cannot be provided by simply building tanks (dedicated facility) without including jetty and shared facilities. Lotte Pakistan's figure of 26% IRR is presumably based on considering only the capital cost incurred on the dedicated facilities, however, seems presumably not to consider other factors in calculating the IRR, e.g. O&M expenses, taxes etc. If we accept the view of Lotte Pakistan that tariff was agreed based on capex only then IRR based on estimated capex would be 30%.

f. The real issue is economic value of the service being offered and its competitiveness with the very alternative that Lotte Pakistan itself has proposed i.e. Al-Rahim Terminal at KPT. EVTL asserts that if the total actual cost to Lotte Pakistan of Al-Rahim Terminal is taken including the low quality service/product loss, the higher safety issues, potential demurrage and consequently higher insurance costs and transport cost to PQA etc. then the rates offered by EVTL are competitive.

41. There is no statutory definition of "abuse". However, Competition Act, 2010 explicitly refers to the most possible abuse by a monopolist undertaking. Section 3(3)(a) prohibits limiting production and sales and increasing unreasonably prices and other unfair trading condition. Section 3 in relevant parts is reproduced as under:

3. 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;*
- (h) *Refusal to deal.*

Article 102 of Treaty on the Functioning of the European Union (ex Article 82 EC Treaty) also lists exploitative practices among other examples of abuse:

102(a): Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.”

42. Comparison of the language of the Act given above with the article 102(a) of the TFEU suggests that primary objective of competition law is to ensure that dominant firms do not directly or indirectly exploit their customers by charging supra-competitive prices and other anti-competitive commercial terms. In EU this provision has been interpreted as proscribing high monopolistic prices with no need to prove that competition has been harmed in the case of *Sirena*⁴ in 1971.

43. Even though Section 3(3)(a) does not mention unfair or unreasonable price rather talks about unreasonable increase in price unlike European law which explicitly addresses “unfair selling or purchase price”. However, “unreasonable increase in price” read in conjunction with “other unfair trading conditions” also includes taking undue advantage of consumers by using market power to charge grossly excessive prices or impose unjustifiably onerous or unfair terms. It arguably applies only in cases where there are significant barriers to entry created in favour of dominant player or that cannot be overcome by investments in anticipation.

44. In essence, Section 3(3)(a) of the Act and Article 102(a) of TFEU manifest behavioral economics which conceives that individuals do not

⁴ Case 40/70 *Sirena v. Eda* (1971) CMLR 260.

necessarily behave rationally. Manufacturers or service providers may manipulate customers through shrouded practices. Customers may be faced with complex pricing strategies ending up in undesired deals e.g. low up-front fee coupled with expensive follow-on services which warrants interventionist course of action by competition agencies. The European Commission also have given due consideration to behavioral economics in findings of abuse of dominance. In Tetra Pak II the European Commission found that a dominant undertaking has unlawfully rented packaging equipment to its customers on unfair conditions. Customers who modified or moved the leased equipment were made to pay an “amount not only equivalent to almost all present and future rental payments combined but moreover roughly the same as, and sometimes even higher than, selling prices.”⁵

45. Similarly, Section 3(3)(a) of the Act focuses on the harm caused to consumers directly. These provisions in the Act and EU law differ from US approach which is based on “why fix what ain’t broken”. The Sherman Act, has been interpreted as prohibiting only exclusionary conduct that created or maintained a monopolistic position, rather than the monopolistic status or its exploitation. Sherman Act emphasizes on the preservation of competitive conditions and leave the market to be regulated by its unseen forces. If any firm engages in the practice of monopolistic pricing it will be controlled by the market forces. After *Trinko*,⁶ EU and US law diverge, in that US law appears to assume that excessive pricing will always invite new entry, and antitrust authorities should not interfere.

46. Comparing the established market economy (economic, social and political values) of US with Pakistan, section 3(3)(a) of the Act stands to justify the fair treatment and regulation of behaviour of a monopolist who

⁵ Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty 92/163/EEC IV/31043-Tetra Pak II) O.J., L-72/1, para, 131.

⁶ Verizon Commc’ns Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

reaps benefits higher than it would do if it faced effective competition. Consumer should have right to enjoy part of the total welfare created by the trade. Even if argued that monopolists is entitled to charge a high price because it brings productive and dynamic efficiency, still higher prices charged by monopolists offset the maximization of consumer welfare.

47. Lotte Pakistan's claim that EVTL is abusing its dominant position is premised on excessive pricing and unfair practices. Lotte Pakistan considers that tariff charged to Lotte Pakistan for storage and handling services is far excess of the total investment made by EVTL to- date on its facilities. The Storage Agreement between the parties does not provide for computation of the tariff rates. The Storage Agreement was signed between ICI and EPCL (predecessors of Lotte Pakistan and EVTL respectively) with the mutual understanding that tariff will be based on a fair return on the capital cost of the storage facilities only and that it did not include operating expenses, taxes and many other factors as later on added by EVTL. Lotte Pakistan further considers that IRR% was agreed between the two parties only for the dedicated facilities and not for the shared facility. Currently IRR computation is 26% on the cost of dedicated facilities which is higher than 18% allowed to EVTL under the Implementation Agreement or 13.5% actually earned as claimed by EVTL. Even capital cost of the project is substantially lower than the amount earlier disclosed to ICI and on the basis of which the tariff is being computed currently. Lastly, Prices being charged by EVTL are far in excess of such services offered elsewhere in Asia as well as internationally.

48. Both parties have relied upon United Brands Company and United Brands Continental BV V Commission of the European Communities- Chiquita Bananas- Case 27/76/ which lays down the principle to determine excessive price and whether such excessive price is abusive or not. The European Court of Justice (ECJ) annulled the decision of European Commission and focused on the relationship between the dominant firm's

costs and its prices and held that abuse occurs where a dominant firm charges a price which “has no reasonable relation to the economic value of the product.

49. EVTL on the other hand has strengthened its claim as to the economic value of the service being offered and its competitiveness with the very alternative that Lotte Pakistan itself has proposed i.e. Al-Rahim Terminal at KPT. EVTL has quoted decision of the Commission of the European Communities in the case of Scandlines Sverige AB V Port of Helsingborg- Case COMP/A.36.568/D3.

50. We have heard the parties at length and deem it appropriate that examining the aspect of excessive pricing is only relevant once we determine whether in the given facts, when parties on their own volition had entered into a contractual arrangement and had agreed to certain mechanism of pricing can subsequently, challenge the same and question its legality on the ground of ‘abuse of dominance’ by the other party under the Act.

51. We are of the considered view that the given circumstances and peculiar facts of this case do not permit us to interfere in the commercial arrangement entered into by and between the parties. Before we enumerate the relevant and peculiar facts, we must record that most of the important facts have only been revealed during the course of hearing.

52. These facts include:

- a. The admitted position before us is that bid on part of EVTL for the terminal project was made upon ICI’s request as it neither wanted to construct its own terminal nor did it find the facilities available at KPT or Port Qasim in accordance with its requirements.

- b. Also, when setting up its PTA plant, ICI urged EVTL to proceed with the chemical terminal in anticipation of superior facilities and strong emphasis on safety, health and environment that were non-existent at the time. EVTL's joint partner is the largest private terminal operator in the world and considered as expert in the field.
- c. The Tariff eventually negotiated was an outcome of extensive negotiations with ICI and EVTL's subsequent exclusivity was a consequence of the Storage Agreement signed between the parties. In this regard the assertion made on part of Lotte Pakistan (which has stepped into the shoes of ICI) that owing to the exclusivity granted EVTL has been charging exorbitant rate stands negated. There seems merit in EVTL's stance that Lotte Pakistan has incorrectly alleged, that prices agreed to by ICI were a result of exclusivity granted to EVTL when the grant of exclusivity was subsequent and dependent upon execution of the Storage Agreement in terms of Clause 2.2 of the Implementation Agreement. Therefore, ICI had the ability to fully explore all other options for import/ storage of their chemicals, including building their own jetty.
- d. Another point to be noted is that the terminal project was developed based on ICI's specifications including SHE requirements that then formed the basis of tariff eventually negotiated between the parties.
- e. Tariff in the Storage Agreement reflects a mutually agreed amount taking into account all factors. Tariff was not subject to reopening depending on the actual capital cost as is apparent from the said agreement.
- f. It is relevant to note that the original Storage Agreement of April 1996 was signed with ICI Pakistan and in 2002 it shifted MEG business from KPT to EVTL. Also, tariff

payments under the Storage Agreement have been made till 13 years without disputing the computation of tariff. Moreover, counsel and representatives of Lotte Pakistan stated during hearing that the main concern lies with respect to proposed rate of tariff for the renewal of the Storage Agreement. In this regard, however, Lotte Pakistan emphasized that exclusivity issue is also pivotal.

- g. While Lotte Pakistan, the present complainant, is really the new major shareholder of the PTA company who bought shares in 2009. However, it is our considered view that the Storage Agreement and its cost must have been factored into the share price that was paid by the acquirer company after carrying out due diligence. Resultantly, it is entitled to enjoy all rights and honor all obligations which have passed on to Lotte Pakistan arising from acquisition of shares.
- h. The Complainant in questioning the tariff apart from the international prices has strongly urged to refer to the offer letter dated 18 November 1995 and counter offer letter dated 21 November 1995 in support of its own interpretations for basis of tariff. These two documents are not relevant to decide this case, in particular, when we have before us the Storage Agreement wherein Clause 16.6 expressly envisages that the Storage Agreement supersedes all the earlier communications made between the parties before entering into the said agreement on 04 April 1996. Clause 16.6 of the Storage Agreement reads as under:

16.6. Entire Agreement: This Agreement (together with the Appendices hereto) constitutes the entire agreement between the parties and save as otherwise expressly provided no modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement and duly signed by the parties hereto.

- i. Moreover, mere comparative international prices without appreciating the volume, number of customers, nature of product, specification of terminal etc. is of little help. In any event even, if these factors were provided these would not have been relevant for the period parties have contracted for. Unless it could be established that it is adversely impacting the competition in the relevant market. This is so because in view of stated facts, at the time of determination of mechanism of prices it was the complainant who enjoyed the superior bargaining position and parties had entered into such contract free from any duress.
- j. The Complainant neither addressed in the submissions nor was able to explain during the hearing as to what competitive harm was caused in the relevant market.

53. It is relevant to mention that subsequent to filing of Complaint before the Commission, Lotte Pakistan has filed a civil suit in Sindh High Court whereby 'exorbitant tariff' has been alleged against EVTL and recovery of an amount of US\$ 152 million has been sought. Perhaps a representation to Board of Investment was also filed before approaching the Commission. While pursuing legal remedies is a legal right of any party, however, the conduct of the parties, the stage at which the Complainant has approached and importantly the assertions made during the hearing; all do indicate that initiation of these proceedings was primarily focused on renewal of the Storage Agreement for the next term of fifteen years (due in November, 2012) negotiations with respect which were underway at the time of filing of Complaint before the Commission.

54. We are of the considered view that the Commission should not indulge in determining or correcting the commercial terms of private free bargain. In the given facts, it is not for the Commission to determine as to what

should be included in calculating capital cost of the project on the basis of which customer will be charged; or the reasonable IRR% or computation of IRR is to be on the dedicated facility or whether it includes the ancillary facilities under the Storage Agreement.

55. Our approach is in line with the United Kingdom, where subject to exceptional circumstances, UK competition law will not intervene to correct the terms of bargains. Abuse of dominant position law in the UK is geared primarily to preventing exclusionary conduct, rather than protecting undertakings in weaker economic position from those with superior economic bargaining positions. Similarly, the stance in the United States is that U.S. anti-trust law would not interfere in the bargain struck between two (private) contracting parties, absent a showing of substantial competitive harm. Moreover, in the absence of harm to competition, competent authorities should generally make every effort not to interfere in privately-negotiated contracts. In this regard, the Complainant neither addressed in the submissions nor was able to explain during the hearing as to what competitive harm was caused in the relevant market.

56. In view of the foregoing, we are of the opinion that the issue of excessive/exorbitant pricing under the Storage Agreement is rendered irrelevant for the purpose of the subject proceedings. Accordingly in the given facts, no case for abuse of dominance is made out on account of charging excessive/exorbitant pricing and unfair trading conditions under the Storage Agreement as alleged in the Complaint.

Issue V: Whether non-disclosure of tariff break-up for future contract can be term as ‘refusal to deal’ in violation of Section 3(3)(h) of the Act?

57. The facts relevant to this issue are that the Storage Agreement will expire in November 2012. As per contractual term, both parties have entered into negotiations for renewal of the Storage Agreement. Clause 6 of the Storage Agreement states:

6. *Term:*

6.1. *This Agreement shall come into force on the date hereof and shall continue until the date which is fifteen years after the Start Date.*

6.2. *ICI shall have the option, exercisable at any time upto*

6.2.1. *thirty months prior to termination in accordance with Clause 6.1 and*

6.2.2. *twelve months prior to the expiration of each and every extension of the term referred to in Clause 6.1*

To renew this Agreement for a further period of five years, provided that the maximum duration of this Agreement shall be 30 years.....

58. In response of these negotiations, EVTL has proposed on 01 June 2010 to store Paraxylene at US \$ 21.00 per tonne of Px. Existing tariff for Paraxylene comprises (i) fixed component of US\$ 19.7 per tonne, plus (2) variable component of US\$ 5.94 per tonne with a total tariff of US\$ 25.64 per tonne. As per EVTL's quotation the fixed and variable components have been combined to give a single number of US\$ 21 per tonne. Lotte Pakistan asserts that basis of proposed tariff has not been disclosed. In the absence of a fair computation of tariff the proposed rate amounts to excessive/exorbitant price. Therefore, excessive rates of tariff proposed in the absence of disclosure of basis or calculation are unfair terms imposed by EVTL amounting to refusal to deal with its customer in respect of renewal of the Storage Agreement for which negotiations are underway as per the contractual terms agreed upon between both parties.

59. EVTL enjoys dominant position in handling and storage services in the relevant market pursuant to the Implementation agreement entered with PQA which confers exclusive rights in this regard. Being in dominant position EVTL is now in a superior bargaining position for setting tariff/pricing for the renewal of the Storage Agreement. Lotte Pakistan, customer of EVTL, on the other hand has no substitute readily available in the relevant market to avail handling and storage facilities in terms of our findings on the issue of relevant market. Lotte Pakistan claims that it has been offered new rates without disclosing the basis and computation.

60. Present controversy of exorbitant/excessive charges has arisen because of the asymmetry of information to customer as to the computation of tariff

to be charged to it. EVTL's initial refusal to provide Lotte Pakistan with the requested information of the breakup of tariff for future contract could be viewed as a tool to induce customer to accept its trading conditions

61. In our considered view, Section 3 (2) of the Act makes it categorically clear that 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. Such is the case before us, EVTL is a monopolist in the relevant market and failure of EVTL to disclose basis of tariff in negotiations for a future contract may distort consumer's choice and consequently affect competition in the relevant market.

62. 'Refusal to deal' is not only to be viewed as outright refusal to do business. Strangulation of customer by a dominant supplier to do business on unrealistic terms is tantamount to a refusal to deal and has been termed as constructive refusal to deal which covers the instances of excessive pricing, imposing unfair trading conditions, treating a customer in discriminatory manner and margin squeeze etc. . Richard Whish describes refusal to deal in following words:

Unilateral refusals to supply are caught, if at all, under Article 82. The term 'refusal' in this context includes a constructive refusal, for example by unreasonable prices or imposing unfair trading conditions for the supply in question or by treating a particular customer in a discriminatory manner; a margin squeeze can also be seen as a constructive refusal to supply.⁷

63. A refusal to deal with customers who are not competitors can produce anti-competitive effects where the refusal is in reality a threat or punishment or inducement designed to make a customer adopt a particular course of action. A dominant firm would rely on its privileged market position as a bargaining tool to induce customers to accept certain trading conditions of its choice.

64. In the matter of Intel Corporation (Docket No. 9288), the Federal Trade Commission, US charged Intel with abusing its market dominance in the

⁷ Richard Whish, Competition Law, Sixth edition, page 688.

field of microprocessors by withholding technical information and product samples from three established customers--Digital Equipment Corporation, Intergraph Corporation, and Compaq Computer Corporation which were manufacturers who made or used products that would compete with certain Intel products, or by demanding unreasonable licensing terms. A consent order in the matter was passed in March, 1999 which prohibited Intel from withholding or threatening to withhold certain advance technical information from a customer or taking other specified actions with respect to such information for reasons relating to an intellectual property dispute with that customer. It also prohibits Intel from refusing or threatening to refuse to sell microprocessors to a customer for reasons related to an intellectual property dispute with that customer. The Consent Order in the matter further stated that it is "limited to the types of information that Intel routinely gives to customers to enable them to use Intel microprocessors, not information that would be used to design or manufacture microprocessors in competition with Intel."

65. It may be relevant to add that the Ireland Competition Authority lists refusal to supply information as an example of abusive refusals, which, if done by a dominant undertaking would amount to abuse of dominant position. Therefore, in the given facts we are inclined to hold that withholding information or failure to disclose basis of tariff to be charged to customers which is requisite for entering into an agreement in future amounts to refusal to deal in contravention of Section 3(3)(h) of the Act. Such conduct will have effect on competition, in particular, when the supplier has monopoly in the relevant market, hence, likely to result into abuse of dominant position with respect to excessive pricing in terms of Section 3(3)(a) of the Act.

66. However, keeping in view the facts on record that:

- Negotiations between the parties for renewal of the Storage Agreement started before a formal Compliant was filed before the Commission on August 16, 2010. EVTL in its first proposal on June 01, 2010 reduced the tariff rated upto 25 %. During the course of

proceedings EVTL, further revised its proposal and offered 40% reduction in the tariff rates against the initial demand of 50%.

- EVTL even agreed to disclose the break up and computation of tariff rates in the presence of the Commission officers which was initially agreed by Lotte Pakistan. However, subsequently, Lotte Pakistan submitted in writing that “whilst it respects the good intentions of the Hon’ble Commission in recommending negotiations between Lotte PPTA and EVTL, any such negotiations can only take place, once the exclusivity question has been fully decided.” In this regard it was clarified by the Bench that during the hearing it was given the understanding that the negotiations are underway and for this reason parties were asked whether they were interested in pursuing the proceedings first or the negotiations. As for the emphasis that negotiation is subject to determination of the issue of exclusivity under the Implementation Agreement, the Bench considered not being bound to proceed as per the Complainant’s desire.

67. It needs to be recognized that whereas non-disclosure of the subject information is being held as refusal to deal (which EVTL in any event has agreed to disclose during the proceedings), the Commission does not have the mandate to determine the cost or its basis for the purposes of future private/commercial bargain. Accordingly, we are of the considered view that the given facts do not warrant imposition of any penalty on EVTL.

(RAHAT KAUNAIN HASSAN) (ABDUL GHAFAR) (VADIYYA S. KHALIL)
CHAIRPERSON MEMBER MEMBER

Islamabad, the June 29th, 2011