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Structural Dominance Of Public Sector Undertakings ("PSUs")/National Oil Companies ("NOCs")

India's oil and gas sectors are structurally characterized by the dominance of vertically integrated monopolies – present in both upstream and downstream operations – mostly owned and operated by the public sector. NOCs – primarily, Oil and Natural Gas Corporation Limited ("ONGC") and Oil India Limited ("OIL") – together account for about 85% of crude oil exploration and production ("E&P") and 76% of the natural gas production[1].

Similar to E&P, the refining segment is also dominated by NOCs and their subsidiaries; accounting for about (74-56%) of India's total refining capacity. There are a total of 22 refineries in India, of which 17 are owned by NOCs, 2 by joint venture companies and only 3 by the private sector[2].

In natural gas transportation, GAIL (India) Limited ("GAIL") is the most dominant player. Indian Oil Corporation Limited ("IOCL") and OIL own cross country crude oil pipelines while GAIL, IOCL, Hindustan Petroleum Corporation Limited ("HPCL") and Petronet LNG Limited [a Government owned joint venture of GAIL, ONGC, IOCL and Bharat Petroleum Corporation Limited ("BPCL")] own product pipelines.

In the retail segment, the story is similar, with a private sector market share of about only 2%[3].

There is no denying the fact that most oil and gas PSUs and NOCs enjoy dominant positions[4]. After all, the oil and gas industries were historically the domain of the public sector long before the liberalisation process commenced. The Government had the responsibility to supply the oil and gas needs of its people, thereby creating Government controlled monopolies which, with the passage of time, were no longer efficient in protecting consumer interests. However, private sector participation and investment as a result of the liberalisation push has not been sufficient to unseat these PSUs and NOCs from their dominant positions.

While progressive liberalization of the exploration licensing policy attracted some private domestic and foreign firms[5], it is argued in some quarters that creation of a competitive environment is hampered by the existence of monopolies or a few dominant players who, having traditionally enjoyed dominant positions (of strength), operate independently of competitive forces, and have the ability to steer or affect the market in their favour. While dominance itself is not anti-competitive, it could lead to market distortions if abused by the dominant enterprise. Given the dominant position that PSUs and NOCs enjoy, there is always a possibility of (its) abuse.

In fact, there have been allegations of abuse of dominant position against a few PSUs and NOCs. For example, the Gujarat State Petroleum Corporation Limited ("GSPCL") had filed a complaint before the Petroleum and Natural Gas Regulatory Board ("PNGRB") against GAIL, amongst others, alleging abuse of dominant position with respect to sale of regasified LNG to GSPCL from the Dahej LNG Terminal. The brief facts of the complaint are as follows:

- GSPCL, being one of the first bulk off takers of regasified LNG from the

Dahej LNG Terminal had requested permission to build a gas pipeline directly into the Dahej Terminal premises to off take the regasified LNG.

- GAIL, being one of the shareholders of Petronet LNG Limited (“Petronet”) which owns, manages and operates the Dahej LNG Terminal (the first LNG terminal to commence commercial operations in India), refused permission to GSPCL (through its nominated director at a Board meeting of Petronet) to develop gas transportation pipelines into the premises of the Dahej Terminal, on the grounds that GSPCL would be in competition with Petronet off takers in the same market.
- GAIL insisted on offering regasified LNG to GSPCL only if it was bundled with the obligation to use the gas transportation pipeline of GAIL to deliver the LNG.
- GAIL was thus the exclusive gas transporter that could transport regasified LNG from the Dahej Terminal.
- GAIL was therefore using its position as an integrated gas supplier and transporter to bundle gas transportation services together with the sale of regasified LNG.
- GSPCL was left with no option but to enter into a gas sale agreement with GAIL (on payment of connectivity charges to GAIL for use of its pipeline) with a delivery point 500 meters outside the Dahej Terminal.

The members of the PNGRB were in agreement that GAIL had, in fact, abused its dominant position to block direct connectivity to the Dahej LNG Terminal, instead opting for a 500 meter transmission pipeline and as such, had indulged in an unfair trade practice intended to limit competition in exercise of a monopoly or dominant position. It may be worthwhile to note that the PNGRB while arriving at their decision placed reliance on the fact that the location of the delivery point under the gas sale agreement with GAIL which was 500 meter outside the Dahej Terminal was not for the purposes of the pipelines of GAIL but to get GSPCL to pay extra charges in addition to the price of gas, which will consequently be passed on to a large number of consumers. The PNGRB further held that since one of the main objectives of the constitution of the PNGRB is the promotion of competitive markets for the protection of consumer interests, the PNGRB cannot be a party to consumers’ interests being adversely affected in this manner. Since the PNGRB is only a regulator for the midstream and downstream segment and may have been restricted by its powers and functions, it would have been interesting to see the outcome if this complaint had been filed before the Competition Commission of India (“CCI”) and the CCI had considered and applied the “essential facility” doctrine to this case[6].

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