

MEMORANDUM

Development of Offshore Marginal Fields; Cluster 7 (B-192, B-45, WO-24); Western Offshore

Introduction

1. This memorandum sets out our opinion pursuant to Hindustan Petroleum Corporation Limited's Notice of Arbitration dated 15.5.2009.
2. The views expressed herein are based on the documents handed to us and your instructions.

Brief Background Facts

3. By the Memorandum of Understanding dated 29.6.2005, Prize Petroleum Company Limited, Hindustan Petroleum and you agreed to submit a proposal in response to the Oil and Natural Gas Corporation Limited's invitation to bid for the development of certain marginal fields.
4. By the Service Contract dated 27.9.2006, a consortium, comprised of Prize Petroleum, Hindustan Petroleum and you, agreed to develop certain offshore marginal fields for ONGC. The consortium was represented by its leader, Prize Petroleum. The Service Contract had been earlier awarded by ONGC's letter dated 31.3.2006.
5. Disputes and differences arose between the members of the consortium and the Service Contract was not performed. The members of the consortium were also negotiating the terms of the Joint Executing Agreement (JEA) between themselves. It is in dispute whether the JEA was agreed.
6. By a letter dated 4.9.2008, ONGC gave 90 days written notice of its intention to terminate under Article 31.3(i) of the Service Contract. Article 31.3(i) provides that the Service Contract may be terminated by ONGC upon giving 90 days written notice of their intention to do so where the consortium has failed to commence Petroleum Operations within 180 days of the Effective Date.
7. By a Notice of Arbitration dated 15.5.2009, Messrs Advani & Co, solicitors for Hindustan Petroleum, referred the disputes and differences between the parties to arbitration.

Views

8. In our view, Hindustan Petroleum's Notice of Arbitration raises 6 issues, which are (a) the Initial Development Plan (the IDP); (b) the Front End Engineering Design (the FEED); (c) the JEA; (d) the cash calls; (e) the budget for 2008-2009; and (f) your office in India.
9. These are factual issues, which we will deal with sequentially below. With respect to each issue, we begin with the position that, in our view, may be adopted and our concerns, followed by a summary of the relevant facts.

❖ Initial Development Plan

10. With respect to the IDP, the position that may be taken, in our view, is that Prize Petroleum was responsible for the reserve estimation to be included in the IDP. From the start, you had taken an interest in ensuring that a proper IDP was submitted on time to ONGC. However, the reserve estimations in the IDP were inaccurate. As a result, and due to other shortcomings, the IDP was repeatedly not approved by ONGC. Although, you tried to assist by engaging a consultant to determine the accurate reserves, it was too late and the Service Contract was terminated.
11. There are 2 concerns with respect to the IDP. The first concern is Hindustan Petroleum and Prize Petroleum's contention that the parties were to satisfy themselves as to the reserve estimation before submitting the proposal to ONGC and were bound by the reserve estimation stated in the proposal regardless of any subsequent studies. Clause 5.3 of the MOU does provide that the evaluation of data for the Marginal Fields shall be carried out by the parties independently. However, clause 5.5.1.4 of the MOU provides that Prize Petroleum will advise on the submission of the proposal to ONGC with respect to the oil and gas reserve estimation. In our view, clause 5.5.1.4, which is a specific provision, should prevail and Prize Petroleum would accordingly be responsible for the reserve estimation stated in the proposal. We are instructed that Prize Petroleum provided the reserve estimation stated in the proposal. Further, we are instructed that Hindustan Petroleum and Prize Petroleum's contention that you are bound by the reserve estimation stated in the proposal is illogical, as the parties would have known that a more detailed study would be done subsequently.
12. The second concern is that you questioned the reserve estimation at the 5th MMC meeting on 21.5.2008 after having signed the IDP on 10.1.2008, and were unable to provide the reserve estimation report by 21.6.2008, as agreed at the meeting on 21.5.2008. We are instructed that you questioned the IDP on 21.5.2008 after having signed it on 10.1.2008, as changes had been made to the reserve estimation on 2.4.2008. Further,

we are instructed that you were unable to submit the reserve estimation report within one month, by 21.6.2008, as the period given by ONGC was too short. You did not wish to protest at the meeting on 21.5.2008 but subsequently applied for an extension that was rejected by ONGC. The reserve estimation report was ready by July 2008 and was presented to the other members of the consortium on 1.8.2008.

13. A summary of the relevant facts is set out below:

- (i) by the MOU dated 29.6.2005, Prize Petroleum under clause 5.5.1.4 was to advise on the submission of the proposal to ONGC in the context of oil and gas reserve estimation including production profile. In the event the Service Contract was awarded by ONGC, under clause 5.6.1, Prize Petroleum was to carry out all the geological, geophysical (G&G) and reservoir related works, which we are instructed includes reserve estimations in the IDP. However, under clause 5.3, the evaluation of data for the Marginal Fields is to be carried out independently by the parties. And, under clause 5.4.1.3, you are to advise on the submission of the proposal to ONGC in the context of the preparation of a development plan;
- (ii) by a letter dated 15.6.2006, you expressed concern as to whether the IDP could be submitted by 30.9.2006 and requested that the sub-surface study be expedited to finalise the IDP;
- (iii) by an email dated 17.8.2006, you provided the technical and financial sections of the preliminary IDP to Prize Petroleum and said that you could not develop a case that provides a viable return for your investment;
- (iv) by a letter dated 13.9.2006, you proposed an alternative tie-in to an existing ONGC offshore complex and requested Prize Petroleum to obtain information from ONGC on this alternative towards finalizing the IDP for the kick-off meeting;
- (v) by a letter dated 15.9.2006, Prize Petroleum suggested that ONGC is of the view that the information requested by you may be provided at a later stage. Prize Petroleum recommended that the IDP be presented at the kick-off meeting and that any reservations or modifications be addressed by ONGC and the consortium later;
- (vi) at the 2nd Management Committee meeting on 26.9.2006 and 28.9.2006, the parties approved the appointment of Tracs as the sub-surface consultant and noted that, as per the MOU, Prize Petroleum would be responsible for sub-surface activities. We are

- instructed that part of Tracs' responsibility was the reserve estimation;
- (vii) the Service Contract dated 27.9.2006, under Article 2, provides that the IDP must commenced within 6 months of award of the Service Contract or else the Service Contract may be terminated. Article 2 also particularizes the contents that must be included in the IDP;
 - (viii) at the kick-off meeting on 17.10.2006, Prize Petroleum presented the IDP to ONGC and requested certain data. ONGC were informed that the interpreted G&G data would be validated by Tracs to further firm up the reserve estimates. The alternative you had proposed was also discussed;
 - (ix) by a letter dated 7.11.2006, you requested Tracs' report as this was vital to kick-off the FEED study and you requested Prize Petroleum's part of the IDP documents, which was targeted to be issued on 7.11.2006;
 - (x) at the 2nd meeting on 16.11.2006 with ONGC, the parties discussed the alternative you had proposed, and ONGC was of the view that it was possible. ONGC requested the consortium to submit the IDP immediately;
 - (xi) by a letter dated 15.2.2007, you notified Hindustan Petroleum and Prize Petroleum that ONGC had at the meeting on 17.10.2006 requested that the alternatives be presented as a single strategy by November 2006 but this had not been achieved. You also referred to the recently completed sub-surface study by Tracs, which showed that the reserves were a third of what had been publicized by Prize Petroleum. You noted that the data available to Tracs was also available to the consortium, and if Prize Petroleum had completed the sub-surface study by June 2006 as initially planned, the consortium would have had more accurate information on reserves before entering the Service Contract;
 - (xii) at a meeting on 6.3.2007, the consortium accepted Tracs' report of February 2007. You presented a proposed IDP and Prize Petroleum presented their comments, which showed an improvement of the reserves from Tracs' findings. Prize Petroleum would present Tracs report and its IDP to ONGC on 7.3.2007;
 - (xiii) at a meeting on 7.3.2007, the consortium agreed to seek an extension by 12.3.2007 from ONGC for the submission of the IDP. Prize Petroleum would prepare the IDP by 2.4.2007, circulate the IDP to the consortium and submit it to ONGC by 15.4.2007. A

reservoir study by Halliburton would be conducted to confirm recoverable reserves;

- (xiv) at a Management Monitoring Committee (MMC) meeting on 7.3.2007, ONGC noted that the project was not going as per schedule and requested the consortium to submit the IDP within 45 days;
- (xv) by a letter dated 27.3.2007, Hindustan Petroleum complained to Prize Petroleum and you that there was no visible progress on the IDP;
- (xvi) by a letter dated 2.4.2007, you informed Prize Petroleum and Hindustan Petroleum that the appointment of Computer Modeling Group Ltd, instead of Halliburton, was not in accordance with the decision at the meeting on 7.3.2007. You had not been party to the bidding, evaluation and award to CMG and were concerned about their expertise and obtaining another unfit report, as was the report from Tracs;
- (xvii) at a Executing Committee meeting between 16.4.2007 and 18.4.2007, Prize Petroleum justified the appointment of CMG on the grounds that they had the relevant experience and had previously worked for ONGC. You requested a summary of the pre-award evaluation with recommendation of CMG and asked Prize Petroleum to ensure the timely completion of deliverable to meet the proposed IDP submission date;
- (xviii) by a letter dated 15.6.2007, you complained to Hindustan Petroleum and Prize Petroleum that the consortium was almost one year late in determining reserves, recoverable reserves, number of wells to be drilled and their production profile, and without this vital information the project activities could not progress meaningfully. You also noted that despite the decision on 7.3.2007 to appoint Halliburton, CMG had been appointed. CMG's report was almost 2 months late and in its current form was unacceptable;
- (xix) at the 2nd MMC meeting on 3.7.2007, ONGC approved the IDP in principle subject to various conditions having to be met;
- (xx) by a letter dated 5.7.2007, you congratulated Prize Petroleum on obtaining ONGC's condition approval of the IDP and G&G report. However, despite the decision on 7.3.2007, the IDP and G&G report had not been circulated for review and approval prior to submission to ONGC;

- (xxi) by a letter dated 13.7.2007, you complained that a meeting had been called on 27.6.2007 and 28.6.2007 to review the draft CMG report and IDP but neither was complete. Further, at the 2nd MMC meeting on 3.7.2007, you were informed that the CMG report and IDP had been submitted to ONGC without your approval. You could have objected, but allowed the presentation of the CMG report and IDP. However, in the future, documents must have Executing Committee and Management Committee approval. As to Mr Borgohain, an employee of yours heading the finalization of the IDP, he had been assigned by you to assist Prize Petroleum. Prize Petroleum, as the Executing Contractor, must manage and direct critical work like the IDP. The latest IDP submitted to ONGC had various shortcomings that are particularised in this letter. The CMG report is inadequate for approval. Also, Prize Petroleum was to ensure the expeditious certification of the reserves;
- (xxii) by a letter dated 23.8.2007, you requested that the CMG report and IDP be brought to a status ready for approval by the other parties. Further, you requested the certification of the reserves;
- (xxiii) by a letter dated 17.9.2007, Prize Petroleum sought an extension from ONGC for the submission of the IDP on the grounds that the Service Contract had been executed on 27.9.2006, 6 months after the award on 31.3.2006, and on the basis that a 2nd G&G study had been conducted. Prize Petroleum noted that the IDP had been approved in principle on 3.7.2007;
- (xxiv) by a letter dated 3.10.2007, you complained to Prize Petroleum and Hindustan Petroleum that Prize Petroleum had not responded to various letters, including your letter dated 13.7.2007 enquiring as to the status of the CMG report and IDP approval. You noted that you did not have a copy of the final report on field reserves and recoverable reserves, the updated and approved IDP and certification of reserves;
- (xxv) by a letter dated 11.10.2007, you informed ONGC that, between April and May 2006, Prize Petroleum committed to reinterpret ONGC's data to produce reserve estimates and well production profiles by 30.6.2006. Prize Petroleum also committed to appoint reputable consultants to certify the reserves and the IDP by 31.7.2006. Although Prize Petroleum has since completed various studies, internally and by outside consultants, none of these produced a reliable basis for the project to move into full swing. The last report produced by CMG and Prize Petroleum had not been completed and endorsed. Therefore, the definition of recoverable reserves, which was the most vital input for the project to move

forward had not been completed. You reiterated your letter dated 3.10.2007 and said that you were not aware of Prize Petroleum's letter dated 17.9.2007 seeking an extension for the submission of the IDP. As a result, you had lost confidence in Prize Petroleum's ability to perform and requested that the MOU be reinstated by amending the JEA to reflect it. You requested ONGC to call an extraordinary meeting of the Committee of Grievances Settlement to determine the parties roles, establish a schedule and regular MMC meetings for Prize Petroleum and you to report the progress of the works in the presence of Hindustan Petroleum;

- (xxvi) by a letter dated 14.10.2007, Prize Petroleum explained that the reserves could only be certified after the development plan is approved, and until then the reserves were contingent. As to the G&G studies, Prize Petroleum explained that these were necessarily dynamic and changing. Prize Petroleum's initial estimate of reserves was based on pure G&G studies. Subsequently, CMG's estimate had increased as it was based on simulations. Prize Petroleum's estimates in March 2007 were in any event similar to CMG's estimate in July 2007. The difference between Tracs' estimate in January 2007 and CMG's estimate in May 2007 were due to erroneous pressure data. Apart from this, Prize Petroleum said that the IDP had been approved in principle by ONGC. With respect to the extension for the submission of the IDP, Prize Petroleum claimed that this had been recommended by the MMC and approved by you in an email dated 19.9.2007. Prize Petroleum expressed concern about you writing directly to ONGC. Prize Petroleum claimed that they could only perform to the extent you met cash calls;
- (xxvii) at the 3rd MMC on 22.11.2007, it was noted that Prize Petroleum had submitted the IDP on 2.11.2007. However, you had only received the IDP recently and did not agree with, amongst other things, the reserve estimates. The IDP was accordingly rejected. In addition, it was noted that there were various shortcomings in the IDP, including the firming up of the reserves. The decision of the MMC had not been taken into account before the submission of the IDP, as it should have been discussed with the Institute of Reservoir Studies, ONGC at Ahmedabad (IRS). The IDP was to be discussed with IRS and submitted by 10.1.2008;
- (xxviii) by a letter dated 27.11.2007, pursuant to the 3rd MMC, you noted that IRS would review the reserves and production profile in the IDP submitted to ONGC on 2.11.2007, enquired as to the input required and noted that Prize Petroleum had or would provide certain information, including the Tracs and CMG reports;

- (xxix) by a letter dated 28.11.2007, ONGC reiterated the position taken at the 3rd MMC;
- (xxx) by a letter dated 10.12.2007, you informed Hindustan Petroleum and Prize Petroleum that you had been appointed Executing Contractor at the 3rd MMC, expressed lack of confidence in the currently publicized recoverable reserves and requested a more reliable assessment before the IDP was resubmitted to ONGC;
- (xxxii) by a letter dated 12.12.2007, you informed ONGC that work was in progress for a more reliable assessment of reserves that would be completed before the IDP was resubmitted, that the IRS study would be undertaken and that the IDP would be updated based on the foregoing;
- (xxxiii) by a letter dated 13.12.2007, Hindustan Petroleum denied that you had been appointed Executing Contractor at the 3rd MMC. Prize Petroleum was the Executing Contract and Hindustan Petroleum did not want a change at that stage. As to the reserves, Hindustan Petroleum said that there were efforts "to get a better fix on the numbers". However, sufficient funds had to be invested by the consortium at the initial development stage;
- (xxxiv) by a letter dated 18.12.2007, Hindustan Petroleum said that you could not deny decisions on the IDP as you were party to these consortium decisions;
- (xxxv) by a letter dated 21.12.2007, you requested of Prize Petroleum and Hindustan Petroleum, based on Tracs and CMG's reserve estimates and the 8 drilled exploration wells, that recoverable reserves of between P50 and P90 be submitted to IRS rather than P50. You requested an early response to finalise the IDP;
- (xxxvi) by a letter dated 27.12.2007, Prize Petroleum informed you that P90 cannot be applied and the discrepancy between Tracs and CMG's reports was due to the OWC considered by Tracs. Therefore, CMG's report was to be the basis for reserves. In any event, Prize Petroleum emphasized that estimated reserves were stated in the bid to ONGC and regardless of any subsequent independent studies could not be deviated from. ONGC had rejected Tracs' report in the IDP, as the estimated reserves were lower than the bid;

- (xxxvi) at the 4th Management Committee meeting on 10.1.2008, the Management Committee signed off the IDP for submission to ONGC. You were present at this meeting;
- (xxxvii) by a letter dated 17.1.2008, you expressed your appreciation to Hindustan Petroleum on the consortium's effort to finalise and issue the IDP and Prize Petroleum's commitment to the Management Committee to accelerate certification of the IDP;
- (xxxviii) by a letter dated 23.1.2008, ONGC referred to the IDP submitted on 10.1.2008. Although this IDP claimed that it has been approved in principle in July 2007, actually it had been conditionally approved. These conditions were not met and the revised IDP was not submitted by 31.7.2007 but only in November 2007. The revised IDP had then been rejected at the 3rd MMC on 22.11.2007 and the IDP was to be resubmitted on 10.1.2008. A preliminary study of the IDP submitted on 10.1.2008 showed that it had not taken into account ONGC's letter dated 2.1.2008 and had various shortcomings. The IDP was accordingly to be amended and resubmitted;
- (xxxix) by a letter dated 24.1.2008, Hindustan Petroleum expressed surprise at your raising the certification of reserves, as it had been agreed that this would delay the project. The consortium was committed to the estimated reserves in the bid to ONGC but members were free to obtain certification on their own;
- (xl) by a letter dated 11.2.2008, Prize Petroleum maintained that the IDP had been approved in principle in July 2007. As to the shortcomings of the IDP submitted on 10.1.2008, Prize Petroleum informed ONGC that it would be updated and validated in due course but requested that the IDP be approved in broad terms;
- (xli) at the 4th MMC on 8.4.2008, ONGC said that the IDP submitted on 2.4.2008 could only be approved after all consortium members had accepted it. But you were unable to attend this meeting due to short notice;
- (xlii) at a Management Committee meeting on 18.4.2008, Prize Petroleum informed you that ONGC, at the 4th MMC on 8.4.2008, had no further queries on the IDP submitted on 10.1.2008 and clarified on 2.4.2008. ONGC would approve this IDP provided you accepted it. You said that you would need to discuss the changes internally and revert;

- (xlili) by a letter dated 30.4.2008, Prize Petroleum enquired as to your silence on the IDP and reminded you that 30.4.2008 was the cut-off date fixed by ONGC for submission of the IDP;
- (xliv) at the 5th MMC meeting on 21.5.2008, it was agreed that you would estimate the reserves by 21.6.2008 otherwise the reserves stated in the IDP submitted in January and April 2008 would be accepted;
- (xlv) by a letter dated 2.6.2008, Hindustan Petroleum said that you had been party to the reserve estimates stated in the bid document and the IDPs submitted in July 2007 and January 2008;
- (xlvi) by a letter dated 21.6.2008, you sought an extension from ONGC to submit the report on reserve estimate, as there had been a delay in collating data. The report was targeted to be completed by 19.7.2008;
- (xlvii) by a letter dated 26.6.2008, ONGC rejected your application for an extension to submit the reserve estimate report;
- (xlviii) at a Management Committee meeting on 1.8.2008, the study you had commissioned, which showed uncertainties in reserve estimates, was taken on record and the consortium agreed to prepare a project risk management report. Further, it was decided that you would send a letter to ONGC confirming your agreement to the changes carried out in the IDP submitted on 10.1.2008, with regards to the production profile and shifting of a well;
- (xlix) by an email dated 13.8.2008, you expressed concern about the findings of the sub-surface study commissioned by you and said that this would mean the plans would have to be reviewed;
- (l) by a letter dated 4.9.2008, ONGC gave 90 days written notice of termination of the Service Contract under Article 31.3(i);
- (li) by a letter dated 10.9.2008, you referred to the Reserves Assessment Report (RAS) presented to the consortium on 1.8.2008 and noted that the project involved substantial risks;
- (lii) by a letter dated 31.10.2008, you informed Hindustan Petroleum that the RAS had agreed with some of the findings of Tracs. However, the RAS had found that Prize Petroleum had altered data supplied by ONGC when providing it to CMG. Furthermore, following CMG's report, Prize Petroleum had increased the reserves on its own accord. You expected Prize Petroleum, as the leader of the consortium, to act based on the lower reserves found

by the RAS. In the absence of any initiative by Prize Petroleum and Hindustan Petroleum, you had prepared a fast track action plan to fulfill contractual obligations and obtain missing reservoir information;

- (liii) by a letter dated 10.11.2008, Hindustan Petroleum informed you that Prize Petroleum had been entrusted with the G&G works under the MOU and the consortium members were to satisfy themselves regarding the reserves before bidding; and
- (liv) by a letter dated 1.12.2008, you notified ONGC, that due to the delay in the development of the IDP, you had developed a fast track plan that had been proposed to Hindustan Petroleum but there had been no response.

❖ Front End Engineering Design

- 14. In our view, based on the facts summarized below, the position that may be taken with regards to the FEED was that the award was delayed due to Prize Petroleum failing to finalise the IDP. Further, the award of the FEED was delayed due to inappropriate bid evaluation criteria used by Prize Petroleum and their insistence on Trident, who was an inexperienced contractor.
- 15. The only concern is that Hindustan Petroleum and Prize Petroleum contend that you were party to the bid evaluation but failed to object until a late stage. However, based on the facts summarized below, it appears that you did comment on the bid evaluation criteria at the material time but these comments were pushed by Prize Petroleum to the recommendation for award (RFA) stage. At the RFA stage, you did object to the award of FEED to Trident.
- 16. A summary of the relevant facts is set out below:
 - (i) the MOU dated 29.6.2005 does not appear to specify which party is responsible for the FEED. During negotiations on the JEA, there was a dispute as to whether Prize Petroleum or you should be responsible for this;
 - (ii) at the 2nd Management Committee meeting on 26.9.2006 and 28.9.2006, the parties agreed that a combined tender would be prepared by you and issued by Prize Petroleum for the FEED. Prize Petroleum and you would prepare a list of potential bidders of global repute for inviting expression of interest (EOI) and send to the Management Committee for approval;

- (iii) by a letter dated 7.11.2006, you asked Prize Petroleum to expedite Tracs' report as this was vital to kick-off the FEED study;
- (iv) by a letter dated 27.3.2007, Hindustan Petroleum informed Prize Petroleum and you that the consortium had been permitted certain time lines for the FEED but there had been no visible progress;
- (v) at the Executing Committee meeting between 16.4.2007 and 18.4.2007, it was agreed that the EOI for FEED would be advertised by Prize Petroleum. You were asked to provide the input on previous EOI exercise to Prize Petroleum for the FEED invitation to bid (ITB). You were also asked to transmit bidders' interest to Prize Petroleum. You proposed to provide support services to expedite the ITB and technical evaluation criteria;
- (vi) at the Management Committee meeting on 23.4.2007, it was agreed that a separate EOI would be issued for FEED and EPIC;
- (vii) by a letter dated 23.8.2007, you said that the CMG report, IDP and certification of reserves had to be finalized as they were pre-requisites for the award of the FEED;
- (viii) by a letter dated 17.9.2007, Prize Petroleum noted that the IDP presented at the 2nd MMC meeting on 3.7.2007 had been approved in principle and informed ONGC that they had moved forward with FEED;
- (ix) by a letter dated 23.11.2007, Prize Petroleum requested certain information from ONGC to prepare a comprehensive FEED study;
- (x) by a letter dated 18.12.2007, Prize Petroleum informed ONGC that they were the Executing Contractor and that the FEED contract was in an advanced state of finalization, with your regular involvement in the award process;
- (xi) by an email dated 29.1.2008 (sic), Prize Petroleum sent you the bid evaluation criteria for the FEED and asked for your comments by 2.1.2008;
- (xii) by an email dated 14.1.2008, you provided detailed comments on the bid evaluation criteria for the FEED;
- (xiii) by an email dated 15.1.2008, Prize Petroleum said that your comments would be part of the RFA;

- (xiv) at a closed door meeting on 18.4.2008 prior to the Management Committee meeting, you said that you were unable to approve the award of the FEED to Trident, as their report had been late and unsatisfactory. Further, the evaluation of the bid was not carried out properly. Prize Petroleum objected to this and the Chairman said that the procedure would be difficult to undo, as your objections were late. The Chairman suggested that you satisfy yourself as to the process by going through Prize Petroleum's records;
- (xv) at the Management Committee meeting on 18.4.2008, an agreement was not reached on the FEED award due to your objections, while Hindustan Petroleum was in agreement with Prize Petroleum. The parties agreed to review the FEED recommendation with respect to the evaluation criteria;
- (xvi) by a letter dated 22.4.2008, you informed Hindustan Petroleum and Prize Petroleum that you had turned down the RFA of FEED to Trident as: (a) your comments on evaluation criteria in your email of 14.1.2008 had not been taken into consideration; (b) there was no formal technical & commercial evaluation report prepared by Prize Petroleum; (c) Prize Petroleum had not called a meeting to discuss critical issues on the bidders; (d) the extension of time granted to Trident to submit their report was not approved by the Executing Committee or Management Committee; (e) the report submitted by Mustang, another bidder, was superior; and (f) the report submitted by Trident was of poor quality;
- (xvii) by a letter dated 30.4.2008, Prize Petroleum responded to your letter dated 22.4.2008 and provided particulars for recommending Trident;
- (xviii) at the 5th MMC meeting on 21.5.2008, the consortium agreed to resolve the FEED contractual issues by 5.6.2008;
- (xix) by a letter dated 2.6.2008, Hindustan Petroleum claimed that you could not complain about the FEED selection process, as your representative had been party to it and it had been conducted with the approval of the Executing Committee;
- (xx) by a letter dated 11.6.2008, ONGC gave notice that the consortium could not resolve the FEED by 5.6.2008;
- (xxi) by a letter dated 23.6.2008, ONGC reiterated its letter dated 11.6.2008;

- (xxii) by a letter dated 4.9.2008, ONGC gave 90 days written notice of termination of the Service Contract under Article 31.3(i);
- (xxiii) by a letter dated 10.9.2008, you maintained that the JEA must reflect the MOU. However, Prize Petroleum had on 21.4.2008 counter-proposed Exhibit E, which sets out the parties roles and responsibilities and differed from the Exhibit E you had proposed on 31.1.2008. Under the present Exhibit E of 21.4.2008, Prize Petroleum would take over responsibility for FEED, which you were not agreeable to;
- (xxiv) by a letter dated 25.10.2008, Hindustan Petroleum claimed that an effort was made by representatives of Prize Petroleum and Hindustan Petroleum coming to Kuala Lumpur to discuss the Roles & Responsibility Matrix, but you took a rigid view on FEED and the matrix could not be finalized;
- (xxv) by your letter dated 31.10.2008, you said the FEED could not be resolved, as you were reluctant to allow Prize Petroleum control after they had insisted on inexperienced companies being involved in Pre-FEED and had used inappropriate selection criteria for the contractor for FEED. To move forward, by an email dated 21.10.2008, you had proposed that the FEED be a joint effort between Prize Petroleum and you, so you had not taken a rigid view;
- (xxvi) by a letter dated 10.11.2008, Hindustan Petroleum explained that, as Prize Petroleum had done the Pre-FEED, they should also do the FEED;
- (xxvii) by a letter dated 11.11.2008, you expressed similar concerns to ONGC on the award of the FEED as set out in your letter dated 22.4.2008; and
- (xxviii) by a letter dated 20.11.2008, you informed Hindustan Petroleum that you would do FEED jointly with the other parties.

❖ Joint Executing Agreement

17. In our view, based on the facts set out below, the position that may be taken with regards to the JEA is that the parties were negotiating its terms but never reached an agreement¹. The negotiations were protracted and

¹ See *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at pp 763-769, SC; *Lim Chia Min v. Cheah Sang Ngeow & Anor* [1997] 1 MLJ 127 at pp 133-135, FC; *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd* [2007] 7 MLJ 23 at para 23-26, CA

the parties were unable to reach an agreement, as Hindustan Petroleum and Prize Petroleum refused to abide by the framework of the MOU.

18. From the start, you were concerned about the delay in the execution of the JEA. Prize Petroleum did not revert with their comments on the draft JEA you had sent to them in January 2007 until March 2007. Prize Petroleum then contended that they were the Executing Contractor under the Service Contractor, when in fact such a provision had been deleted and they were only recognized as the leader of the consortium. In March 2007, as work was not progressing, you conceded that Prize Petroleum be the Executing Contractor provided that the work was jointly executed by the IPMT. The draft JEA was initialed in April 2007 merely as a record of the final draft, there were still outstanding issues as indicated in the draft itself. The parties, including Hindustan Petroleum, continued to negotiate important terms of the JEA after April 2007. By October 2007, you were no longer confident that Prize Petroleum could perform and insisted that you both be Joint Executing Contractors. In December 2007, the parties negotiated and agreed the Draft Accounting Procedure to be included in the JEA. In February 2008, you sent a signed draft of the JEA, which differed substantially from the draft initialed in April 2007. In April 2008, the parties negotiated substantial amendments to the JEA, some of them proposed by Hindustan Petroleum. In August 2008, you agreed to sign the April 2007 draft of the JEA after discussions with your management but were unable to agree to the terms thereof. In September 2008, the parties negotiated but were unable to agree on the Roles & Responsibility Matrix to be included in the JEA.
19. A summary of the relevant facts is set out below:
 - (i) by the MOU dated 29.6.2005, the parties agreed under clause 5.6 to form an Integrated Project Management Team (the IPMT) in the event the Service Contract was awarded and agreed their roles and responsibilities in the IPMT. Under clause 8.3, it was agreed that Prize Petroleum would act as the lead negotiator for the parties to acquire the development rights of the marginal fields. Under clause 10.1, it was agreed that in the event of the award of the Service Contract, Prize Petroleum and you would be the Joint Executing Contractor for 3 years and after that, subject to the approval of ONGC, Prize Petroleum would become the Executing Contractor. Under clause 13, the MOU was valid from the Effective Date for a period of 2 years, and would have accordingly expired on 29.6.2007;
 - (ii) by the Letter of Award dated 31.3.2006, ONGC awarded the development rights for the marginal fields to the consortium;

- (iii) by a letter dated 15.6.2006, you informed Prize Petroleum that ONGC had express concern on the lack of progress and requested that action be taken immediately to finalise the JEA;
- (iv) by a letter dated 22.6.2006, you insisted that Article 1.34 of the Service Contract be deleted as it provided that Prize Petroleum was the Executing Contractor, and this was not reflected in the MOU or in discussions with ONGC. Further, you requested that Article 1.45 that defined Prize Petroleum and you as the Joint Executing Contractor also be deleted as this was an internal arrangement to be addressed in the JEA;
- (v) by the Service Contract dated 27.9.2006, Prize Petroleum was recognized as the leader of the consortium. Article 7.4 provides that within 15 days of the Effective Date or longer period as may be agreed by ONGC, the consortium shall execute the JEA. The Articles 1.34 and 1.45 that you objected to do not appear in the Service Contract. There does not appear to be any provision in the Service Contract that provides that Prize Petroleum is the Executing Contractor, although they are recognized as the leader of the consortium and all notices are to be sent to them on behalf of the consortium under Article 38.1;
- (vi) at the 2nd Management Committee meeting on 26.9.2006 and 28.9.2006, it was noted that you had provided your comments on 25.9.2006 on the proposed JEA for review and were awaiting comments from Prize Petroleum and Hindustan Petroleum;
- (vii) by a letter dated 31.10.2006, you recognized Prize Petroleum as the leader of the consortium;
- (viii) by a letter dated 15.2.2007, you informed Hindustan Petroleum and Prize Petroleum that the roles and responsibilities of the parties had been defined and agreed in the MOU, which remained the basis for the execution of the Service Contract, although Prize Petroleum was in denial of the MOU;
- (ix) at a meeting on 6.3.2007, Prize Petroleum acknowledged receiving a draft JEA from you in January 2007 and agreed to revert with their comments immediately;
- (x) at a meeting on 7.3.2007, the parties agreed to sign off the JEA by 31.3.2007;

- (xi) by a letter dated 27.3.2007, Hindustan Petroleum noted that a final draft of the JEA had yet to be agreed and requested that Prize Petroleum and you ensure that the JEA is signed off by 31.3.2007;
- (xii) by a letter dated 28.3.2007, Prize Petroleum raised various issues in relation to the draft JEA sent by you, amongst them, they claimed that they had been appointed the Executing Contractor under the Service Contract and this had to be incorporated in the JEA;
- (xiii) by a letter dated 28.3.2007, you informed Prize Petroleum that, although the MOU and a meeting in November 2006 recognized joint roles for Prize Petroleum and you in the performance of the Service Contract, you would accept Prize Petroleum as the Executing Contractor provided that the project is jointly executed by the IPMT. You also noted that the draft JEA had been sent by you in January 2007, was discussed on 7.2.2007 and 8.2.2007, with a revised draft provided on 12.2.2007. However, comments were only received from Prize Petroleum on 27.3.2007;
- (xiv) by a letter dated 30.3.2007, you reiterated the position in your letter dated 28.3.2007 to Hindustan Petroleum and added that matrix would need to be approved but as a minimum members of the consortium would need to approve certain matters, which included the IDP;
- (xv) at the Executing Committee meeting between 16.4.2007 and 18.4.2007, it was minuted that:

"The Joint Executing Agreement (JEA) was discussed among the members. The final draft as agreed to among the members was initialed & taken on record. As regards Article 7.3 of the JEA concerning the charging of costs of EC meetings to the JV account, the matter could not be concluded and the members decided & agreed to refer the matter to the Management Committee for a decision. Executing Contractor advised that in the meantime, members may have the initialed document approved at the appropriate level within their organization so as to formally execute the JEA ASAP upon decision of the Management Committee on Article 7.3.

Upon agreement of the members, the "Review & Approval Matrix" & "Level of Authorisation" (AOL) was adopted after discussions and made integral part of the JEA. Executing Committee agreed on the AOL summary with inclusion of Management Committee, Executing Committee, Chairman of Executing Committee, Project Manager (IPMT) and Project Commercial Manager (IPMT) being the authorized parties based on prescribed decision making areas.";

- (xvi) at the Management Committee meeting on 23.4.2007, the parties agreed that Hindustan Petroleum's representative would be the

Chairman of the Management Committee for one year up to 22.4.2008, to be followed in rotation, by you and Prize Petroleum. Further, the Management Committee decided that costs for attending the Executing Committee meetings were not to be charged to the joint account. The parties also agreed in principle to the Review & Approval Matrix and AOL;

- (xvii) by a letter dated 14.5.2007, you set out the terms of the agreement reached and claimed that certain costs should be chargeable;
- (xviii) by a letter dated 15.6.2007, you informed Hindustan Petroleum and Prize Petroleum that it was because Prize Petroleum was unwilling to work together in accordance with the MOU, you had sacrificed your role in the project in March 2007 for the benefit of the project. Further, you said that while you had provided a proposal on the IPMT there had been no response for 2 months. You also said that Prize Petroleum as the Executing Contractor must instigate formation of the IPMT and initial plan;
- (xix) by a letter dated 11.10.2007, you informed ONGC that after the Service Contract was awarded there was no progress as Prize Petroleum refused to work with you in accordance with the MOU. In March 2007, to move the project forward, you agreed to Prize Petroleum being the Executing Contractor. The JEA was accordingly amended and initialed but was not signed off. However, there was still no progress. As a result, you had lost confidence in Prize Petroleum's ability to perform and requested that the MOU be reinstated by amending the JEA to reflect it. You requested ONGC call an extraordinary meeting of the Committee of Grievances Settlement to determine the parties roles, establish a schedule and regular MMC meetings for Prize Petroleum and you to report the progress of the works in the presence of Hindustan Petroleum;
- (xx) by a letter dated 14.10.2007, Prize Petroleum claimed that under the Service Contract and the JEA, they were the Executing Contractor. Prize Petroleum was concerned that, although the JEA had been initialed, you had not signed it. Further, Prize Petroleum claimed that the delay in the project was due to the delayed finalization of the JEA and the controversy on the Executing Contractor. Prize Petroleum expressed concern about you writing directly to ONGC. Prize Petroleum claimed that they could only perform to the extent you met cash calls;
- (xxi) at the 3rd MMC meeting on 22.11.2007, the parties agreed that the JEA would be submitted by 10.1.2008;

- (xxii) by a letter dated 28.11.2007, Prize Petroleum notified Hindustan Petroleum and you that until the Executing Contractor issue was resolved they could not take on further activities;
- (xxiii) at a meeting between 4.12.2007 and 6.12.2007, the parties agreed the Draft Accounting Procedure to be included in the JEA;
- (xxiv) by a letter dated 10.12.2007, you notified Hindustan Petroleum and Prize Petroleum that you had been appointed Executing Contractor at the 3rd MMC on 22.11.2007;
- (xxv) by a letter dated 12.12.2007, you informed ONGC that you had been appointed Executing Contractor and that from the 3rd week of December 2007 the parties would work towards finalizing the JEA to reflect correctly the parties roles and responsibilities;
- (xxvi) by a letter dated 13.12.2007, Hindustan Petroleum informed you that at the time of finalizing the Service Contract, ONGC did not agree to joint operator-ship. Prize Petroleum was accepted as the leader in the Service Contract. Under Article 7, the consortium had to submit the JEA to ONGC specifying the Executing Contractor. In line with the Service Contract, the JEA was discussed and initialed on 18.4.2007 with Prize Petroleum as the Executing Contractor. It was too late to reopen this issue and Hindustan Petroleum was not in a favour of a change to the Executing Contractor. Further, at the 3rd MMC meeting on 22.11.2007, you had not been appointed the Executing Contractor;
- (xxvii) by a letter dated 18.12.2007, Hindustan Petroleum essentially reiterated their letter dated 13.12.2007 and added that you were delaying signing the JEA that had been initialed on 18.4.2007;
- (xxviii) by a letter dated 18.12.2007, Prize Petroleum notified ONGC that they were the Executing Contractor and that all notices were to be sent to them;
- (xxix) by a letter dated 27.12.2007, you informed Hindustan Petroleum that the JEA had to be amended to reflect correctly the parties agreement and commitments;
- (xxx) at the 4th Management Committee meeting on 10.1.2008, the parties agreed, at your request, to seek an extension until 17.1.2008 to submit the JEA to ONGC, as you wished to review the Executing Contractor matter;

- (xxxi) by a letter dated 17.1.2008, you informed Hindustan Petroleum that the MOU must be restated in the JEA;
- (xxxii) by a letter dated 18.1.2008, Prize Petroleum referred to the 4th Management Committee meeting, noted that the extension had been sought from ONGC but they had not heard anything from you on the execution of the JEA;
- (xxxiii) by a letter dated 21.1.2008, you informed ONGC that the parties roles in the MOU should not be changed in the JEA;
- (xxxiv) by a letter dated 23.1.2008, ONGC notified the consortium that an MMC meeting would only be called after the JEA was submitted;
- (xxxv) by a letter dated 24.1.2008, Hindustan Petroleum responded to your contention that the role in the MOU was being denied, by saying that all parties would have a say in Executing Committee and Management Committee meetings;
- (xxxvi) by a letter dated 4.2.2008, you said that your request that the spirit of the MOU be respected had been dismissed by Hindustan Petroleum. You enclosed 4 copies of the JEA initialed and duly signed by you for Hindustan Petroleum and Prize Petroleum's approval and submission to ONGC. The main difference between the draft JEA initial on 18.4.2007 and the draft JEA signed by you and sent on 4.2.2008 is that: (a) Prize Petroleum and you are named as Joint Executing Contractors in Article 4.1, whereas previously Prize Petroleum was named as Executing Contractor; and (b) the Chairman of the Executing Committee will be by rotation in Article 7.2, whereas previously the Chairman was a representative of Prize Petroleum;
- (xxxvii) by a letter dated 1.4.2008, you expressed concern that the project activities were on hold as the JEA had not been signed and noted that you had signed the JEA and sent it on 4.2.2008;
- (xxxviii) by a letter dated 3.4.2008, Hindustan Petroleum informed you that the draft JEA had been agreed and initialed on 18.4.2007, was endorsed by the Management Committee on 23.4.2007 and was to be signed by you. The draft JEA sent on 4.2.2008 changed the roles and responsibilities of the parties, leaving very little role for Prize Petroleum and Hindustan Petroleum, who together hold a 70% interest in the consortium. This needed to be reviewed and resolved so that the project is expeditiously completed;

- (xxxix) at the 4th MMC meeting on 8.4.2008, which you did not attend due to short notice, ONGC noted that the JEA had not been submitted on 10.1.2008 and requested that consortium resolve this issue as it is delaying the project. Prize Petroleum said that the matter would be resolved by end April 2008;
- (xl) at the Management Committee meeting on 18.4.2008, the parties discussed amendments to various important provisions of the JEA, many of them proposed by Hindustan Petroleum. You were requested to revert with your response by 23.4.2008, so that after initialing the JEA could be submitted to ONGC by 30.4.2008;
- (xli) by a letter dated 24.4.2008, you informed Hindustan Petroleum and Prize Petroleum that the JEA must reflect the MOU. You also responded to the various amendments proposed at the Management Committee meeting on 18.4.2008;
- (xlii) by a letter dated 24.4.2008, Hindustan Petroleum responded that the MOU had been superceded by the Service Contract and in any event had expired on 28.6.2007. Hindustan Petroleum reiterated that the draft JEA had been initialed on 18.4.2007 and confirmed by the Management Committee meeting on 23.4.2007. Hindustan Petroleum also responded to your comments on the amendments proposed at the Management Committee meeting on 18.4.2008;
- (xliii) at the 5th MMC meeting on 21.5.2008, it was recorded that the JEA would be signed by 31.5.2008, failing which, the consortium will deemed not interested in the Service Contract;
- (xliv) by a letter dated 28.5.2008, Hindustan Petroleum maintained that the draft JEA initialed on 18.4.2007 was the agreement between the parties. However at a meeting on 21.5.2008, in light of your reservations, Hindustan Petroleum had agreed to sign either the initialed JEA or a JEA that provided for 60% majority for decisions. You had been non-committal about this. Prize Petroleum and Hindustan Petroleum were willing to sign the JEA and requested that you do so;
- (xlv) by a letter dated 29.5.2008, you reiterated your letter dated 24.4.2008 to ONGC;
- (xlvi) by a letter dated 2.6.2008, Hindustan Petroleum reiterated their letter dated 28.5.2008, said that they had offered the alternative as a goodwill gesture but you had rejected the alternatives by your letter dated 29.5.2008. As such, your actions had led to the non-submission of the JEA by 31.5.2008. Further, Hindustan Petroleum

claimed that the initialed JEA reflected the MOU as subsequently negotiated and agreed between the parties. Hindustan Petroleum also responded to your comments on the amendments proposed at the Management Committee meeting on 18.4.2008. Finally, Hindustan Petroleum said the draft JEA you had sent on 4.2.2008 was meaningless as it had been amended without discussion;

- (xlvi) by a letter dated 5.6.2008, ONGC gave notice that the consortium had failed to sign and submit the JEA by 31.5.2008;
- (xlvii) by a letter dated 11.6.2008, ONGC reiterated its letter dated 5.6.2008;
- (xlviii) by a letter dated 23.6.2008, ONGC reiterated its letters dated 5.6.2008 and 11.6.2008;
- (lix) at the Management Committee meeting on 1.8.2008, it was agreed that the JEA initialed in April 2007 would be the final document to be executed and submitted to ONGC. You agreed to sign the document on 5.8.2008 after discussion with your management. The original document was handed to you for your signature;
- (l) by an email dated 6.8.2008, you informed Hindustan Petroleum and Prize Petroleum that due to unforeseen circumstances the JEA signing had been postponed to 7.8.2008;
- (li) by a letter dated 13.8.2008, Hindustan Petroleum referred to the Management Committee meeting on 1.8.2008 and expressed concern that you had still not signed the JEA;
- (lii) by an email dated 13.8.2008, you informed Hindustan Petroleum and Prize Petroleum that, as the issue of the Joint Executing Contractor was being linked to the 60% majority, the matter had to be referred to your board of directors, who were to meet the following week;
- (liii) by a letter dated 24.8.2008, Hindustan Petroleum referred to the Management Committee meeting on 1.8.2008 and expressed surprise that you were reopening issues with regards the JEA;
- (liv) by a letter dated 4.9.2008, ONGC gave 90 days written notice of termination of the Service Contract under Article 31.3(i);
- (lvi) by a letter dated 10.9.2008, you maintained that the JEA must reflect the MOU. However, Prize Petroleum had on 21.4.2008 counter-proposed Exhibit E, which sets out the parties roles and

responsibilities and differed from the Exhibit E you had proposed on 31.1.2008. Under the present Exhibit E of 21.4.2008, Prize Petroleum would take over responsibility for the Well Engineering, Drilling and FEED, which you were not agreeable to;

- (lvii) by a letter dated 25.10.2008, Hindustan Petroleum claimed that the issue with regards to the JEA had been resolved at the Management Committee meeting on 1.8.2008, where you had agreed to sign the JEA initialed in April 2007 and the original had been sent for your signature. A further effort was made by representatives of Prize Petroleum and Hindustan Petroleum coming to Kuala Lumpur to discuss the Roles & Responsibility Matrix, but you took a rigid view on FEED and the matrix could not be finalized;
- (lviii) by your letter dated 31.10.2008, you said that at a meeting in 26.8.2008 the parties had agreed on the final form and structure of the JEA with a follow up meeting to be held to resolve the matrix. Subsequently, a meeting was held on 8.9.2008 and 9.9.2008 in Kuala Lumpur to discuss the matrix. You made major concession in terms of the matrix, with Prize Petroleum assuming tasks not because they had expertise but because Hindustan Petroleum would have better control if Prize Petroleum performed them. However, the FEED could not be resolved, as you were reluctant to allow Prize Petroleum to have control after they had insisted on inexperienced companies being involved in Pre-FEED and had used inappropriate selection criteria for the contractor for FEED. To move forward, by an email dated 21.10.2008, you had proposed that the FEED be a joint effort between Prize Petroleum and you, so you had not taken a rigid view;
- (lix) by a letter dated 10.11.2008, Hindustan Petroleum denied that you had made major concessions and said that from Prize Petroleum being the Executing Contractor, you had now assumed a greater role under the matrix. Further, Hindustan Petroleum explained that Prize Petroleum should do the well engineering and drilling, as they had done the G&G work. Similarly, as Prize Petroleum had done the Pre-FEED, they should do the FEED;
- (lx) by a letter dated 20.11.2008, you informed Hindustan Petroleum that you would do FEED jointly with the other parties and requested that they finalise and sign the JEA; and
- (lxi) by a letter dated 1.12.2008, you informed ONGC that you were urging the other parties to sign the JEA.

❖ Cash Calls

20. In our view, based on the facts set out below, the position may be taken that you did not pay the cash calls immediately in 2007, as insufficient documentary evidence/details were provided and the accounting procedures had not been agreed.
21. A summary of the relevant facts are set out below:
- (i) the MOU dated 29.6.2005, under clause 9, provides that the parties will bear their own expenses in relation to the proposal to be submitted to ONGC, and accordingly does not provide for cash calls. Article 10 of the drafts of the JEA does provide for cash calls, but, as stated above, in our view an agreement was not reached in terms of the JEA;
 - (ii) by a letter dated 31.10.2006, you informed Prize Petroleum that the cash calls should be supported by some form of documentary evidence, by way of purchase order and/or invoice, to process payments. You said that this had been raised at a meeting on 18.10.2006 and Hindustan Petroleum was of the same view;
 - (iii) by a letter dated 16.11.2006, you informed Prize Petroleum that you intended to open an Indian Rupee account for cash calls and had no intention of delaying payments. If necessary, you would pay Tracs your portion directly;
 - (iv) by a letter dated 30.11.2006, you referred to Prize Petroleum's cash call dated 26.10.2006 in relation to Tracs and requested Prize Petroleum's bank account details;
 - (v) by a letter dated 19.12.2006, you informed Prize Petroleum and Hindustan Petroleum that you had transferred the due amount for the cash call into Prize Petroleum's account on 12.12.2006;
 - (vi) by a letter dated 2.4.2007, you informed Prize Petroleum and Hindustan Petroleum that approval and payment of the cash call for the services to be provided by CMG were subject to: (a) the work being performed on time and the report prepared by CMG being adequate; (b) the cash call being supported with documentary evidence showing that a proper bidding process had been followed in relation to CMG; and (c) discussion between the parties at Management Committee level as to the percentage of the software cost to be borne by the consortium, as the software would be used by Prize Petroleum for other projects;

- (vii) by a letter dated 10.7.2007, Prize Petroleum made cash call no 4 and noted that they had not received payment for cash call no 3 from you;
- (viii) by a letter dated 10.8.2007, Prize Petroleum made cash call no 5 and noted that they had not received payment for cash call nos 3 and 4 from you;
- (ix) by a letter dated 10.9.2007, Prize Petroleum made cash call no 6 and noted that they had not received payment for cash call nos 3 to 5 from you;
- (x) by a letter dated 10.10.2007, Prize Petroleum made cash call no 7 and noted that they had not received payment for cash call nos 3 to 6 from you;
- (xi) by a letter dated 14.10.2007, Prize Petroleum informed you that they could only perform if the consortium partners are willing to meet their respective financial commitments through cash calls;
- (xii) by a letter 12.11.2007, Prize Petroleum made cash call no 8 and noted that they had not received payment for cash call nos 3 to 8 from you;
- (xiii) at a meeting between 4.12.2007 and 6.12.2007, you said you were unable to release cash calls due to non availability of details. For example, the final report had not been received from CMG and the purchase order/letter of award for the Pre-FEED conceptual study had not been produced. You were advised to release the pending cash calls immediately for the smooth functioning and progress of the project. Prize Petroleum was asked to provide a satisfactory response, but you were asked to pay the cash calls irrespective. You also requested a more detailed cash call format, which was agreed. The parties also agreed the Draft Accounting Procedures to be included in the JEA;
- (xiv) by a letter dated 12.12.2007, Prize Petroleum made cash call no 9 and do not refer to anymore unpaid cash calls. Further, Prize Petroleum notes that the cash call is lower than previous cash calls, inter alia, due to the signed Accounting Procedure; and
- (xv) by a letter dated 18.12.2007, Hindustan Petroleum noted that you defaulted on cash calls.

❖ Budget

22. In our view, based on the minutes of the Management Committee meeting on 18.4.2008, the position may be taken that you did not agree to the budget for 2008-2009, as there was no clarity in relation to field development and FEED award, and the other parties agreed with this.

❖ Office

23. From the documents handed to us, it appears that, between late October 2006 and early 2007, there was some confusion on the office to be set up, with Prize Petroleum agreeing to set up the consortium's offices in Mumbai and you claiming that offices were to be set up in Delhi and Kuala Lumpur. Much later, at the 5th MMC meeting on 21.5.2008, you agreed to set up an office in India by 31.8.2008.
24. We are instructed that the parties, consensually, did not set up a consortium office in Mumbai, and this issue was never raised by any of the parties. Further, we are instructed that you have had an office in Mumbai since 7.8.2007. The position to be taken in this context is to be based on these instructions.
25. A summary of the relevant facts is set out below:
- (i) Article 26.1 of the Service Contract dated 26.9.2006 provides that the consortium will prepare and maintain an office in India;
 - (ii) at the kick-off meeting on 17.10.2006, Prize Petroleum informed ONGC that the consortium planned to set up a small office in Mumbai;
 - (iii) by a letter dated 14.5.2007, you informed Hindustan Petroleum and Prize Petroleum that, at meetings between the parties in April, May and September 2006, Prize Petroleum and you had been asked to set up offices in Delhi and Kuala Lumpur respectively;
 - (iv) by a letter dated 15.6.2007, you informed Hindustan Petroleum and Prize Petroleum that, from June to September 2006, you had hired and equipped an office; and
 - (v) at the 5th MMC meeting on 21.5.2008, you agreed to set up an office in India by 31.8.2008 and Prize Petroleum and Hindustan Petroleum were to provide the necessary facilities in order to man the office with appropriate personnel.

Summary and Way Forward

26. Briefly, from the documents handed to us, we are of the view that there is sufficient basis for taking the following position:
- (a) the IDP was repeatedly not approved by ONGC due to Prize Petroleum having failed, neglected and/or omitted to prepare it properly;
 - (b) the award for the FEED was delayed because Prize Petroleum failed, neglected and/or omitted to carry out the bid evaluation properly and insisted on appointing Trident, who was inexperienced;
 - (c) the JEA was not agreed and submitted to ONGC because Hindustan Petroleum and Prize Petroleum refused to abide by the framework of the MOU resulting in protracted negotiations;
 - (d) the cash calls in 2007 were not immediately paid as there was insufficient documentary evidence/details and the accounting procedure had not been agreed;
 - (e) the budget for 2008-2009 was not agreed, pending clarity on the FEED award, as agreed between the parties. There was no clarity on the FEED award due to Prize Petroleum, as set out in paragraph (b); and
 - (f) based on your instructions, that the parties to the consortium, consensually, did not set up a consortium office in Mumbai. However, by 7.8.2007, you had an office in Mumbai.
27. Essentially, there are grounds for contending that Prize Petroleum is liable for the delay to the Service Contract and the resulting termination. The main cause for the delay was Prize Petroleum's failure to prepare the IDP properly.
28. We are instructed that Prize Petroleum is 50% owned by Hindustan Petroleum, with the other 50% owned by a Government of India bank. Effectively, both Hindustan Petroleum and Prize Petroleum are Government of India enterprises. Based on this, and some of the documents referred to above, there are grounds, in our view, to contend that Hindustan Petroleum was acting in concert with Prize Petroleum.
29. The matters stated in paragraphs 26 to 28 above are all questions of fact to be determined by the arbitral tribunal. Our views are based on the documents handed to us at present, and may need to be revised if there

are further documents that affect the position set out above. Further, as these are questions of fact, reliable witnesses on your behalf would need to be called to corroborate the documents.

30. Solicitors in India have also provided their views on this memorandum.
31. We will prepare a draft response to Hindustan Petroleum's Notice of Arbitration by 8.6.2008. The draft response will be in accordance with the position set out in paragraphs 26 to 28 above.
32. As to clauses 20.1 and 20.2 of the purported JEA, you are entitled to take the position that the Notice of Arbitration is premature, as the parties should first endeavour to settle the disputes by mutual discussion and negotiation to be held by the Executing Committee. Hindustan Petroleum has taken the position, at paragraph 31 of the Notice of Arbitration, that there is no possibility of an amicable settlement. Your position is that Hindustan Petroleum's claim can be defended and you have a counterclaim. In the circumstance, an amicable settlement at this stage is unlikely, and it would be appropriate to proceed with the arbitration.
33. Further, in the draft response, we will give notice of your counterclaim against Hindustan Petroleum and Prize Petroleum for the loss of profit on the Service Contract and other loss and expense incurred. The amount you have paid towards the bank guarantee recovered by ONGC will be accounted for in the loss and damage counterclaimed.
34. With respect to the arbitration, we will seek Messrs Advani & Co's confirmation that it is an international commercial arbitration under section 2(f) of the Indian Arbitration and Conciliation Act 1996, as you are a body corporate incorporated in a country other than India.
35. Further, we will agree to Messrs Advani & Co's proposal that the tribunal consist of 3 rather than 4 arbitrators, in light of section 10(1) of the Indian Arbitration and Conciliation Act 1996. Particulars of the arbitrators, who in our view you may nominate to the tribunal are set out in the Appendix to this memorandum.
36. We will also seek Messrs Advani & Co's confirmation that the existence of the JEA may be determined by the arbitral tribunal under section 16(1) of the Indian Arbitration and Conciliation Act 1996.
37. We trust our views are of assistance and the foregoing is in order.

Monday, 8th June 2009
ZUL RAFIQUE & partners