



AD HOC ARBITRATION

YTL POWER GENERATION SDN BHD V. PETROLIAM NASIONAL BERHAD

FINAL AWARD

16 July 2015

Tribunal:

[David Hope](#) (President)

[Mark O. Saville](#) (Appointed by the claimant)

[Nicholas Phillips](#) (Appointed by the respondent)

Table of Contents

Final Award	1
REASONS FOR AWARD	5
Background	6
The Cabinet Decision of May 1997	9
The dispute develops	9
The meeting of 12 July 1999	11
Events since March 2000.....	12
The issues	14
The interpretation issue.....	16
The agreement issue	17
The estoppel issue.....	19
The limitation issue	20
Petronas's Counterclaim	20
Costs.....	21

Final Award

1. This is an arbitration which has been conducted under the UNCITRAL Arbitration Rules at Kuala Lumpur, Malaysia.
2. On 31 March 2014 the Claimant, YTL Power Generation Sdn Bhd ("YTL"), served on the Respondent, Petroliam Nasional Berhad ("Petronas"), a Notice of Arbitration under an Agreement for Sale and Purchase of Dry Gas dated 15 March 1993 ("the GSA"). It gave formal notice to the Respondent that the Claimant deemed it to be in breach of Article 10.9 of the GSA, under which the Claimant was entitled to a discount ("the Paka Discount") of RM 0.94781/GJ on the Respondent's invoices for dry gas supplied to the Paka Power Station. The relief claimed was a declaration that the Paka Discount remains operative and binding on the Respondent, for an account and restitution of payments made under protest of amounts to which that discount had not been applied, and interest thereon and such other specific reliefs or orders as might be necessary.
3. In accordance with Article 19.2 of the GSA Lord Saville of Newdigate ("Lord Mark Saville") was nominated by the Claimant as its nominated arbitrator.
4. On 21 April 2014 the Respondent served on the Claimant its Response to the Notice of Arbitration. On 24 April 2014, having observed that there had been a typographical error in the Response, it served on the Claimant an amended Response dated 24 April 2014. In its statement of the relief claimed the Respondent denied that it was in breach of the GSA and that the Claimant was entitled to any relief claimed in its Notice of Arbitration or any other relief claimed subsequent to that Notice by virtue of limitation. It also gave notice of a Counterclaim which it would particularise in its Defence and Counterclaim.
5. Pursuant to Article 19.2 of the GSA Lord Phillips of Worth Matravers ("Lord Nicholas Phillips") was nominated by the Respondent as its nominated arbitrator.
6. On 14 May 2014 Lord Mark Saville and Lord Nicholas Phillips agreed on the appointment of Lord Hope of Craighead ("Lord David Hope") as Chairman of the Tribunal pursuant to Article 19.2 of the GSA.
7. In clause 13 of the Terms of Reference which were signed by the Chairman on 14 July 2014 the parties confirmed that they had no grounds to object to the arbitration whether by reason of jurisdiction or otherwise, and that they had no grounds to object to the appointment of any of the arbitrators constituting the Tribunal.
8. Pursuant to clause 27 of the Terms of Reference the parties delivered formal pleadings in which their competing versions of the facts are set out. They comprise (i) the Claimant's Statement of Claim; (ii) the Respondent's Defence and Counterclaim; (iii) the Claimant's Reply and Defence to the Counterclaim; (iv) the Respondent's Reply to the Defence to the Counterclaim.

9. In its Statement of Claim the Claimant states (i) that it operates gas-fired power stations at Paka in the State of Terengganu and at Pasir Gudang in the State of Johor for the onward sale of electricity generated there to Tenaga Nasional Berhad ("TNB"); (ii) that by the Agreement of 15 March 1993 ("the GSA") the Respondent agreed to sell to the claimant dry gas for delivery to the Paka Power Station and the Pasir Gudang Power Station; (iii) that in terms of the GSA the Respondent's invoices to the Claimant for dry gas delivered to the Paka Power station were to be set out as a net amount after deduction of the Paka Discount, but that no such discount was to be deducted in the case of the sale of dry gas to the Pasir Gudang Power Station; (iv) that in September 1997 the Respondent was required by the Government of Malaysia to implement its decision that the Respondent fix its selling price of dry gas to all power producers in terms prescribed by the Government ("the Government Gas Price"); (v) that in proceeding to apply the Government Gas Price, the Respondent thereafter improperly sought to take commercial advantage for itself by unilaterally removing the Paka Discount when computing the net amounts payable in invoices raised by it for dry gas supplied to the Paka Power Station.

10. The Claimant seeks the following relief-

A (i) a Declaration that the Paka Discount set out in Article 10.9 of the GSA is binding on the Respondent;

(ii) a Declaration that the invoices raised by the Respondent to the Claimant for dry gas supplied to the Paka Power station at the Government Gas Price had to include a deduction for the Paka Discount;

B. (i) a Direction that the Respondent be directed to issue adjustment credit notes (in terms envisaged by Article 11.2 of the GSA) to reflect the omitted Paka Discount in all previous invoices raised by the Respondent for dry gas supplied to the Paka Power Station;

(ii) a Direction that the Respondent be directed to issue all future invoices for dry gas supplied to the Paka Power Station upon terms of the declarations sought therein;

C. (i) a Direction for payment by the Respondent to the Claimant of such sums as determined in these proceedings and/or reflected in the adjustment credit notes under B (i) above;

(ii) a Direction for payment by the Respondent to the Claimant of interest on such sums at the agreed rate specified in Article 11.8 of the GSA covering the periods that the Respondent has had use of such sums;

D. Further or Other Relief; and

E. Costs.

11. 11. In its Defence the Respondent states that the Claim, as pleaded, is premised on a 'Regulated Price' set by the Government and not on the 'Price' as defined in Article 10.1 of the GSA; (ii) that the decision of the Cabinet of 30 April 1997 that the price of dry gas for the generation of electricity in West Malaysia would be regulated by the Government ("the Regulated Price") made no reference to the Discount; (iii) that the Regulated Price is not contained in the GSA, which refers only to 'Price'; (iv) that the GSA contains an entire agreement clause in Article 25; and (v) that it is not the

Claimant's pleaded case that the GSA has been amended by agreement in writing under that Article.

12. The Respondent contends -

(i) that the Claim as pleaded does not fall within the arbitration agreement in Article 19.2 of the GSA. as it seeks a sum arrived by reference to the Regulated Price which is not agreed or defined nor set out in Article 10 or elsewhere in the GSA;

(ii) that the purported cause of action as pleaded in the Statement of Claim did not accrue within six years of the commencement of the arbitration and is barred, either in part or whole, by section 6 of the Limitation Act 1953;

(iii) that the Claim is barred by laches, acquiescence and/or delay; and

(iv) that the Claim stands to be dismissed with costs.

13. In its Counterclaim the Respondent seeks the following relief

(1) a Declaration that the Claimant is liable to purchase dry gas from the Respondent for use in the Power Stations at the Price as defined in Article 10.1 from the date of the execution of the GSA until its expiry;

(ii) a Declaration that the Discount in Article 10.9 applies only to the Price as defined in Article 10.1:

(iii) General damages for breach of the GSA;

(iv) Interest at such rate and for such periods as the Tribunal deems fit on all past sums due to the Respondent;

(v) Costs;

(vi) Such further or consequential orders as the Tribunal deems fit, necessary or justified in the circumstances.

14. In its Defence to the Counterclaim the Claimant contends -

(i) that the Respondent is estopped from contending that the Paka Discount is no longer available to the Claimant;

(ii) that there is no basis in law or fact for the Respondent now to contend that the Claimant's pleaded claim is outside the arbitration agreement;

(iii) that the defence of limitation is not available to the Respondent having regard to the operative events, including the conduct of the Respondent, from July 1999 to June 2008;

(iv) that the Respondent is estopped from asserting limitation, relying on the Limitation Act 1953 and from advancing its contentions of laches, acquiescence and/or delay.

15. Case management conferences were held by video link on 8 July 2014 and 11 February 2015, following which various procedural directions were made and complied with by both parties. At the request of the Tribunal both parties prepared written opening submissions which were provided to the Tribunal. A hearing then took place in Kuala Lumpur between 2 and 6 March 2015. The Claimant was represented by Kenneth MacLean QC, Mr Logan

Sabapathy, Mr Simon Hall and Ms Carmelia Cheong, instructed by Logan Sabapathy & Co. The Respondent was represented by Tan Sri Clive Abraham, Mr Rishwant Singh and Ms Chuar Pei Yaun, instructed by Zul Rafique & Partners. The Tribunal heard evidence from the Claimant's witness Mr Yeoh Soek Hong and from the Respondent's witnesses Madam Yap Swee Yoke and Madam Hamidah Abd Ghani on 2 and 3 March 2015. Oral submissions were heard on 5 and 6 March 2015. In the course of the hearing Mr Abraham for the Respondent informed the Tribunal that he was no longer insisting on his argument that the Claim as pleaded did not fall within the arbitration agreement in Article 19.2 of the GSA. Mr Maclean for the Claimant informed the Tribunal that he accepted that the Claim, in so far as it related to sums paid on invoices delivered prior to 1 April 2008, was barred by limitation under section 6 the Limitation Act 1953. Mr Abraham accepted that the Claim in so far as it related to sums paid on invoices delivered after that date was not barred by limitation. But he maintained his limitation argument in so far as the Claim related to a sum which the Claimant paid to the Respondent under protest on 3 December 2008. No arguments were addressed to the Tribunal by either side on the issues of laches, acquiescence or delay.

16. Having considered the written and oral submissions for the parties and all the evidence, both oral and documentary, that was placed before it, and for the reasons set out in the Appendix hereto, the Tribunal now makes the following award:

(i) all invoices issued by the Respondent to the Claimant for dry gas supplied to the Paka Power Station had to and must, from the beginning until the end of the Contract Period, include a deduction for the Paka Discount provided for in Article 10.9 of the GSA;

(ii) the Respondent is directed to pay to the Claimant within fourteen days of the date of this Award the sum of RM279,517,366.68 being the amount of the Paka Discount paid by the Claimant to the Respondent on invoices during the period from 26 October 2008 to 14 February 2015 in excess of the Respondent's contractual entitlement;

(iii) the Respondent is directed to pay to the Claimant within fourteen days of this Award the sum of RM 162,268,649.43, being the amount of the Paka Discount for the period from 17 April 2005 to 25 October 2008 which was paid by the Claimant to the Respondent on 3 December 2008 in excess of the Respondent's contractual entitlement;

(iv) the Respondent is directed to pay to the Claimant interest at the rate specified in Article 11.8 of the GSA on the sums referred to in (ii) and (iii) above from 15 February 2015 until the date of payment;

(v) the Respondent is directed to pay to the Claimant within fourteen days of the date of this Award the following further sums, namely

(a) the sum of RM66,351,783.47 being interest on the sum referred to in (ii) above at the rate

specified in Article 11.8 of the GSA from the various invoice payment dates up to 14 February 2015; and

(b) the sum of RM74,090,753.90, being interest on the sum referred to in (iii) above at the aforesaid rate from 3 December 2008 to 14 February 2015;

(vi) the Respondent is directed to account to the Claimant for an amount equal to RM0.94781/GJ (namely the Paka Discount) on the price of all dry gas supplied to the Paka Power Station from 14 February 2015 to the date of the issuing of this Award, together with interest thereon at the rate specified in Article 11.8 of the GSA from the various invoice payment dates until the date of payment;

(vii) the Counterclaim is dismissed;

(viii) the Respondent shall bear the whole of its own legal costs, together with its share of the amount of R M122. 392.68 which has been agreed as the expenses of this arbitration.

(ix) the Respondent is directed to pay to the Claimant within fourteen days of this Award the legal costs that the Claimant has incurred in this arbitration, which the Tribunal has assessed and fixed at RM2.5m.

(x) the Respondent is directed to pay to the Claimant within fourteen days of this Award the Claimant's share of the amount agreed as the expenses of this arbitration, amounting to RM61,196.34.

(xi) the Respondent shall bear the whole of the Tribunal's costs including its fees and expenses, together with all the charges made by the LC1A in respect of the deposits held by it for payment of the Tribunal's costs.

(xii) the Respondent is directed to reimburse the Claimant within fourteen days of the date of this Award for all the sums that the Claimant has advanced towards the costs of the Tribunal, less the amount (if any) returned to the Claimant by the LC1A.

REASONS FOR AWARD

1. YTL Power Generation Sdn Bhd ("YTL") is a company incorporated under the Companies Act 1965. It is a member of the YTL group of companies, and is a licensed independent power producer operating gas fired power stations at Paka in the State of Terengganu and at Pasir Gudang in the State of Johor, both in West Malaysia. Petronas Nasional Berhad ("Petronas") is also a company incorporated under the Companies Act 1965. It was established under the Petroleum Development Act 1974, under which there was vested in it the entire ownership in and the exclusive rights in respect of the carrying on of downstream activities and development relating to petroleum, whether offshore or onshore of Malaysia. Petronas is wholly owned by the Malaysian Government.
2. The dispute between the parties, which has been in existence since 1997, has its origin in steps taken by the Government of Malaysia to meet the increasing public demand for electricity and the

pricing arrangements which were put in place by it to give effect to its initiatives. First, it sought to encourage private organisations to assist it in developing a sufficient number of power stations to meet that demand. In response to an invitation by the Government YTL offered to participate and was in due course licensed to operate two gas fired power stations under an agreement with Petronas. The pricing arrangements which were put in place at the outset, based on the price of gas on the international market, operated for a while without giving rise to any controversy. Then the Government decided in 1997 to peg the price of gas for domestic use. This was in order to prevent inflation in the Malaysian economy due to a rise in the price of gas on the international market. The consequence of this decision was to reduce the price at which gas was to be supplied to YTL, which resulted in a loss of revenue to Petronas. The steps which Petronas then took to try to redress this situation at YTL's expense led to a controversy between the parties which they have been unable to resolve by agreement. So they have referred the matter to arbitration for a final determination of the issues between them.

3. Before dealing with the arguments that were advanced at the hearing the Tribunal must first set out the factual background. It has a long history, which can be traced through its various stages by a study of the documentary evidence. That evidence was supplemented to some extent by the oral evidence of Mr Yeoh and Mrs Yapp. But due to the passage of time the Tribunal has decided, where there was a conflict between what they said and the documents, to rely on the evidence afforded by the documents: see *Eastern Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Another* 1989] 1 M1J 35.

Background

4. In 1992, following a failure of the power supply in about August of that year throughout West Malaysia, the Government of Malaysia adopted a privatisation policy under which the Economic Planning Unit of the Prime Minister's Department ("the EPU") invited proposals from the private sector for the construction and development of new power stations for the generation of electricity. In response to this invitation YTL submitted a proposal to develop two gas-fired power stations in West Malaysia. The gas for generation at these two power stations was to be procured from Petronas. The electricity generated there was to be sold by YTL to Tenaga Nasional Berhad ("TNB"). TNB, which is the largest electricity utility in Malaysia, is to a significant degree controlled by the Malaysian Government.
5. On 15 September 1992 the EPU sent to YTL a counter proposal setting out the terms under which it was prepared to issue licences to YTL to generate and supply electricity to TNB for 21 years from 1995 from the new power stations at Paka and Pasir Gudang. Among other things the supply of gas and its price was to be negotiated between YTL and Petronas. It was also stipulated that the supply of gas to the Paka Power Station was to be sold at RM1.00/mmbtu (RM0.94781/GJ) cheaper than the price at Pasir Gudang to take into account the savings in the cost of the delivery of gas. This arrangement has been referred to throughout these proceedings as the Paka Discount. It reflected the fact that gas from offshore fields was brought to land at or near to Paka on the east coast of Peninsular Malaysia. This meant that, in contrast to the situation at Pasir Gudang which is situated to the south of the Peninsula, Petronas would incur minima) onward capital and operational transportation costs in supplying that gas to the Paka Power Station. The proposal also provided that the total power of electricity to be bought by TNB from YTL was to be subject to a "take-or-pay"

condition. The base price of the electricity was to be fixed for the duration of the 21 year period, subject to the condition that if the price of gas increased beyond RM6.40/mmbtu the additional cost would be added to the price of the electricity ("passed through") and that if the price of gas dropped below RM5.00/mmbtu that price of the electricity would be reduced to the same extent. On 17 November 1992 the EPU wrote to both TNB and Petronas informing them that the Government had decided that the price of gas for the Paka Power station was to be RM 1.00 for every mmbtu less than the price of gas at other locations to take into account the savings in the cost of delivery of gas.

6. On 15 March 1993 Petronas and YTL entered into an Agreement for the Sale and Purchase of Dry Gas ("the GSA") to be used for the generation of electricity at the power stations at Paka and Pasir Gudang. In the Recitals it was stated that YTL was to finance construct own and operate two combined cycle gas fired power stations at Paka and Pasir Gudang. Article X made provision for the price at which the gas was to be sold by Petronas to YTL. They were referred to respectively as "Seller" and "Buyer" in the Agreement. Among its terms were the following:

"10.1 Subject to Article 10.10. the price (the 'Price') of Dry Gas supplied to Buyer at the Delivery Point at Pasir Gudang in any week shall be determined in accordance with the formula set out below and as illustrated by the example attached herewith as Schedule A... [there was then set out a formula for the calculation of Pn, being the invoice price of Dry Gas for each week].

...

10.8 The Price of Dry Gas as provided in this Article shall be reviewed when the price Pn calculated under Article 10.1 exceeds RM7.11/GJ or falls below a level which renders it uneconomical for Seller to deliver the Gas to Buyer.

10.9 Subject to Article 10.10 the price of Dry Gas supplied to the Buyer at the Delivery Point at the Paka Power Station in any week shall be the Price less RM0.94781/GJ.

10.10 The price of Dry Gas shall be increased to include the amount of any tax levied on Seller in respect of the sale and delivery of Dry Gas to Buyer under this Agreement, provided that the Seller will remain responsible for payment of such tax to the relevant authority. "

The illustration of the gas price calculation in Schedule A showed how the price Pn was to be determined by applying the formula for Pasir Gudang and for Paka respectively. In the case of Paka it showed that there was to be a deduction of RM0.94781/GJ (RM1.00/GJ) from the figure produced by the application of the formula.

7. Article XI of the GSA dealt with invoicing and payment. Article 11.1 provided that, in respect of Dry Gas delivered in any week, the Seller was to send to the Buyer an invoice for each power station showing the net sum payable by the Buyer to the Seller. By Article 11.5 it was provided that the Buyer was to settle the full value of each invoice for the Seller's account on or before the fourteenth day following the date of receipt of the invoice. Article XI further provided as follows:

"11.6 If Buyer in good faith disputes the accuracy of any invoice, debit note, credit note or statement in full or in part, Buyer shall first settle the total invoiced amount in full (including the disputed

amount) promptly and Seller shall carry out verification of the discrepancies within seven (7) days or such longer period as the parties may agree (such consent not to be unreasonably withheld) from date of notification of discrepancies. Should Seller not make any necessary corrections within seven (7) days or such longer period as the parties may agree (such consent not to be unreasonably withheld), then Buyer may withhold the next payment to Seller for the unresolved disputed amount until the settlement of the dispute in accordance with the provisions of Article XVIII [determination of the dispute by an expert to be nominated by the President for the time being of the International Gas Union]. After settlement of the dispute any amount agreed or otherwise determined to be due shall be paid within seven (7) days of such agreement or determination.

...

11. 9 In the event that Buyer fails to pay Seller pursuant to Article 11.5 the amount due and payable after fourteen (14) days from the due date for payment thereby, Seller may suspend delivery of Dry Gas until payment of such amount is received by Seller in full by giving Buyer seven (7) days' notice in writing and the suspension shall take effect upon expiry of the said notice."

8. Article XIX of the GSA provided for arbitration in the following terms:

"19.1 Any dispute, controversy claim or disagreement arising out of or relating to this Agreement, or the breach, termination or invalidity thereof which cannot be resolved amicably by discussions between the parties, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in force on the date hereof, provided however, that matters which this Agreement allows the parties to submit to an expert under Article XVIII (whether they are required to do so or not) shall not be subject to arbitration under this article XIX."

9. On 31 March 1993 YTL and TNB entered into a Power Purchase Agreement ("the PPA") setting out the terms on which YTL wished to sell to TNB and TNB wished to purchase from YTL electricity and ancillary services from the power stations at Paka and Pasir Gudang. In Schedule 9 to the PPA, which was headed "Gas Pass Through", it was provided that if at any time the gas price payable by YTL to Petronas under the GSA were to exceed the Upper Limit, or Ceiling Price, of 6.066006 RM/GJ (RM6.40/mmbtu), then for each week there was to be calculated an additional sum payable by TNB to YTL in accordance with a formula set out in that Schedule. The effect of this arrangement was that any increase in the market price in excess of RM6.40mmbtu would be a matter of indifference to YTL, as it was entitled to pass through the dry gas costs in excess of that amount to TNB. Included in the PPA was a provision, in recognition of the commercial benefit to YTL of the Paka Discount, that allowed TNB a discount of 2 per cent on their tariff for electricity supplied to it from Paka.

10. In his witness statement Yeoh Seok Hong ("Mr Yeoh"), who has been a Director of YTL since the date of its incorporation in 1992, stated that Petronas has been aware throughout that, when their invoices exceeded the Ceiling Price, the electricity price payable by TNB under the PPA would increase accordingly by the addition of the Pass Through Amounts. Neither of Petronas's witnesses was in a position to contradict what Mr Yeoh said about this, and he was not challenged about it when he gave his oral evidence. The Tribunal accepts Mr Yeoh's evidence on this point.

11. On 7 April 1993 a Generation Licence was issued to YTL under the Electricity Supply Act 1990. The arrangements provided for in the GSA and the PPA then came into operation.

The Cabinet Decision of May 1997

12. On 13 May 1997 the Ministry of Energy wrote to Petronas to inform it that the Cabinet had decided at a meeting on 30 April 1997 that Petronas should no longer tie the price of petroleum and gas in Malaysia for domestic use to the price in the international market. It was to fix the price of gas to TNB and independent power producers at RM6.40/mmbtu from that date until the year 2000. At a meeting which was held on 14 May 1997 attended by representatives of TNB and Petronas the Minister of Energy explained that the gas price should not be pegged to the Singapore MFO price, as that was tantamount to importing inflation and because of financial difficulties affecting TNB. Responding to comments on this proposal by Petronas, the Minister explained that the government was facing difficulty as to which government agency should salvage the difficulty experienced by TNB and that, since Petronas had been financially very strong, it was the most appropriate agency to save TNB. He said that the Cabinet had decided that with effect from 1 May 1997 the gas price to the power sector was to be capped at the ceiling of RM6.40/mmbtu, and that if the gas price fell below this ceiling price it would be the formula price to the power sector and if it exceeded the ceiling then the price was to be the ceiling. Petronas informed the Minister that this was tantamount to subsidising TNB. TNB said that it was willing to agree a fixed price of RM6.40/mmbtu effective from 1 May 1997 to 31 December 2000, and that it was also agreeable to abolishing the RM 1.00/mmbtu discount for the east coast power stations. Petronas said that it had not agreed to the ceiling as price of RM6.40/mmbtu, but the Minister said that the gas pricing issue was a Government decision.
13. The independent power producers ("the IPPs") were not present or represented at the meeting of 14 May 1997. But on 23 May 1997 the Ministry of Energy wrote to the IPPs including YTL, informing them of the decision of the Government that the price of gas for the generation of electricity in Peninsula Malaysia was to be fixed at RM6.40/mmbtu from 1 May 1997 to 31 December 2000. He said that the purpose of the Government's decision was to avoid the need for the electricity tariff to be increased due to the increase in the price of gas. As Mr Yeoh explained in his witness statement, the effect of the Cabinet Decision was to transfer the burden of the Pass Through Amounts to Petronas rather than to TNB. No mention was made in that letter or in the Cabinet Decision of the RM1.00/mmbtu discount for the east coast power stations. It is common ground that the Cabinet had no power to deprive YTL of its right to the Paka Discount under its contract with Petronas. In recognition of that right YTL deducted RM1.00/mmbtu from the invoiced price of RM6.40/mmbtu for gas delivered by Petronas to its Paka power plant.

The dispute develops

14. In a letter to the Ministry of Energy dated 19 February 1998 Petronas complained that it was being short changed due to the deduction of the Paka Discount by YTL. It said that, as TNB had rejected an alternative solution, it had no choice but to take action to protect Petronas's interest by invoicing YTL for gas supplied to Paka at RM7.40/mmbtu. This would ensure that, after what it described as

the automatic deduction of RM 1.00/mmbtu, Petronas would receive the full payment of RM6.40/mmbtu from YTL. On 23 February 1998 Petronas informed YTL of its decision that the effective gas price for the Paka power plant was to be RM7.40/mmbtu retroactive to 1 May 1997 and that this was to last until 31 December 2000. By letter dated 28 February 1998 YTL wrote to Petronas objecting to its attempt unilaterally to change the gas price for Paka in breach of the GSA, and calling on Petronas to invoice it in accordance with its terms. On 3 March 1998 Petronas wrote to the Ministry of Energy to draw YTL's objection to the Minister's attention, stating that it had no alternative but to invoice YTL's Paka and Pasir Gudang power plants at the formula gas price in accordance with the GSA's terms retroactive 1 May 1997 to 31 December 2000.

15. On 17 March 1998 The Ministry of Energy wrote to YTL expressing the hope that YTL would observe the Government's decision on the price of gas, including that for use at Paka. On the same date Mr Yeoh of YTL wrote to TNB informing it that, as Petronas had decided to implement the Government's decision to fix the gas price to the power sector, it would be issuing invoices to TNB based on Petronas's invoices. On the following date Mr Yeoh wrote to the Minister for Energy expressing surprise at the contents of the letter of 17 March 1998. He drew the Minister's attention to the fact that at the time the GSA was entered into the Government had approved a gas pricing formula which was incorporated into all the gas supply agreements of the IPPs, and that it had also decided that all gas supplied at Paka would enjoy a discount of RM1.00/mmbtu to that gas price. He said that, as Petronas had decided to bill YTL in accordance with the GSA, it was for TNB to cooperate with Petronas to work out how Petronas would reimburse TNB for the gas price charged above RM6.40/mmbtu.
16. During the following months Petronas sought support from TNB and the Government to put pressure on YTL to give up the Paka discount. At a meeting on 2 April 1998 at the Ministry of Energy, Communications and Multimedia attended by representatives of Petronas and TNB it was decided that Petronas should impose a gas price of RM7.40/mmbtu for Pasir Gudang, while maintaining the price of gas for Paka at RM5.40/mmbtu. At a meeting on 30 December 1998 at the Ministry which was attended by representatives of Petronas and TNB it was noted that the suggestion agreed at the meeting of 2 April 1998 could not be carried out, and that the best way to resolve the matter was to maintain RM6.40/mmbtu to all generator stations. It was agreed that the following strategy should be carried out in view of YTL's refusal to carry out the Government's decision on the price of gas for all power stations:
 - "2.2.1 Petronas will bill YTL according to the GSA;
 - 2.2.2 TNB will pay YTL for the electricity taken based on the gas price of RM6.40/mmbtu to comply with the Government's direction. This means that when the formula price of gas based on the GSA is higher than RM6.40/mmbtu, YTL will feel the pinch and be motivated to negotiate; and
 - 2.2.3 The MECM will inform the Minister of the need for YTL to comply with the said decision. YTL's refusal to do so will be brought to the Prime Minister's attention if necessary."
17. On 16 January 1999, in the light of continuing claims made on it by Petronas in breach of the GSA and threats to suspend the gas supply under Article 11.9 of the GSA if its claims were not met. YTL wrote to Petronas insisting that it had no contractual or other liability to pay the amounts demanded by it. But it stated that, in view of the threats that Petronas had made, it had no realistic

option but to take steps to avoid any interruption to the generation of power supply at its power stations. A cheque was enclosed with that letter in settlement of the amount demanded by Petronas. It was made clear by YTL, however, that the cheque was sent under protest in response to those threats and without any admission of liability on its part to pay the amounts that had been demanded. It asked for the cheque not to be cashed without further discussion, otherwise the dispute would be referred to arbitration in accordance with GSA. Notwithstanding that request Petronas encashed the cheque without further discussion with YTL. TNB for its part was now in default of its obligation to pay YTL under the PPA, attributing its default to Petronas's failure to reimburse it for gas costs above the RM6.40/mmbtu price set by the Government. On 4 February 1999 YTL wrote to Petronas asking for confirmation that it had reimbursed TNB for the gas costs above RM6.40/mmbtu paid by YTL to Petronas in response to its demands and passed through to it under the PPA. Petronas replied on 22 March 1999 stating that, as it was not party to the PPA, the PPA had no bearing on its right to retrospectively bill YTL.

The meeting of 12 July 1999

18. On 12 July 1999 a meeting was held at the Ministry for Energy to discuss the issues raised by YTL as to the implementation of the Government's decision to fix the price of gas at RM6.40/mmbtu until 31 December 2000. It was attended by, among others, representatives of TNB, Mr Yeoh for YTL and Yap Swee Yoke ("Madam Yap") for Petronas, who at that time was General Counsel for Gas Business at Petronas. It was noted that, while TNB had also enjoyed a discount on the sale price of gas supplied to it in consideration of the savings in cost for the transfer of gas from Petronas's gas processing plants, it had forgone its rights to the discount in light of the Cabinet's decision on the price of gas. It was also noted that YTL had been requested to follow its example but that it had declined to do so, on the ground that the RM1.00/mmbtu discount for gas supplied to Paka should be viewed as a separate issue from the fixing of the gas price at RM6.40/mmbtu. It was recorded in a minute of that meeting which was circulated to the parties on 17 July 1999 that the meeting reached an agreement as follows:

"(i) All parties were to implement the Cabinet's decision which had fixed the price of gas for power generation at the rate of RM6.40/mmbtu with effect from 1 May 1997 to 31 December 2000. This means that the price of gas for power generation at Paka would also be fixed at RM6.40/mmbtu without YTL deriving the discount of RM 1.00.

(ii) The regularisation of all earlier payments made between TNB, YTL and Petronas must be carried out to reflect the Cabinet's decision on the said gas price. The meeting agreed that TNB would immediately refund to Petronas all payment made to TNB amounting to RM64 million and Petronas would thereafter refund to YTL all payments over and above the price of gas as per the Cabinet's decision and YTL would refund to TNB the excess payment for electricity if the electricity paid by TNB to YTL had incorporated the gas price which exceeded RM6.40/mmbtu.

(iii) The issue of whether the discount of RM1.0/mmbtu respecting gas to power generation in the East Coast of Peninsular Malaysia would be continued or not would be brought to the consideration of the Cabinet as soon as possible by the EPU. In the meantime Petronas and YTL are entitled to raise their respective stands immediately on the issue of the said discount to the EPU and the KTKM."

19. On 22 July 1999 Mr Yeah wrote to Petronas stating that during the meeting on 12 July 1999 it had been decided, with the concurrence of all parties, that the following action would be taken to resolve the dispute: (1) that Petronas would bill YTL for gas supplied under the GSA at a fixed price of RM6.40 mmbtu without reference to the formula price set out in the GSA, (2) that the Rm1.00/mmbtu discount for Paka power station would remain in dispute and that Petronas and YTL would submit their respective cases to the Ministry' of Energy to enable the Ministry to prepare a paper for the Cabinet on that issue, and (3) that Petronas would refund to YTL all amounts billed since 1 May 1997 above the fixed price and that on receipt of the refund YTL would make a corresponding refund to TNB. On the same date he wrote to the Ministry saying that YTL was preparing its case on the Paka discount issue and that it would be submitting it shortly to the Ministry to enable it to prepare the Cabinet paper. On 17 August 1999 Petronas wrote to YTL stating among other things that the meeting had agreed that the question of the discount of Rm1.00/mmbtu for gas supplied to the east coast of Peninsula Malaysia was to be decided by the Cabinet. It said that the question whether YTL was entitled to the Paka discount did not arise, as the price of RM6.40/mmbtu was already a discount and even more so then. Its position was that the Government's directive that the price of gas be fixed for all IPPs in Peninsula Malaysia be adhered to. In a letter dated 14 September 1999 YTL again made the point that the issue about the discount was to be referred to the Cabinet and that it had been agreed that both sides would submit their respective cases to the Ministry.

20. On 31 January 2000 YTL wrote to the Ministry' of Energy to draw attention to continuing problems that it had encountered with both TNB and Petronas in the implementation of the Government's decision to cap the price of gas. It said that at the meeting on 17 July 1999 YTL had disagreed with Petronas's belief that the Government's decision to cap the gas price had included the removal of the Paka Discount, as that would be totally contrary to the Government's letter of award of 15 September 1992 and the terms of the GSA. It also said that, in an attempt to resolve the dispute amicably, YTL had agreed to allow Petronas to temporarily retain the discount of Rm1.00/mmbtu for Paka in escrow account pending the Cabinet's clarification of its decision. It expressed the hope that the Government would assist in resolving the dispute and would not allow Petronas to unilaterally withdraw the discount in breach of the GSA. On 29 February 2000 the Ministry replied stating, among other things, that the Government's position was that the discount would be foregone for the period from 1 May 1997 to 31 December 2000, but that the Government was well aware of the existence of the arrangement between Petronas and YTL on the sale of gas under the GSA. It said that the position under the GSA would be duly considered in reviewing the price of gas that would be introduced after 31 December 2000. In its reply of 28 March 2000 YTL insisted that the decision to remove the discount must be implemented in a manner that was contractually acceptable and correct.

Events since March 2000

21. YTL has accepted, in response to the submission by Petronas that its cause of action for sums paid on invoices during the period prior to six years before the commencement of this arbitration is barred by section 6 of the Limitation Act 1953. So it cannot now recover overpayments for Paka gas which were made before 1 April 2008. For this reason it is not necessary to say much about the events that occurred between March 2000 and 1 April 2008. except that the Cabinet decided to continue the fixed price for the supply of dry gas alter the end of 2000 and that YTL continued to insist that it was being overcharged for dry gas supplied to the Paka power station during this

period by reason of the refusal by Petronas to give effect to its right to the discount under Article 10.9 of the GSA. As YTL noted in its letter to Petronas dated 30 April 2002, it continued as a matter of goodwill to pay Petronas the full amount demanded by it, subject to the understanding that the amount of the excess charged would be held in escrow pending further discussions with the government. In October 2002 the Cabinet decided that the price of RM6.40/mmbtu for the supply of dry gas by Petronas was to remain the same until December 2005. On 14 July 2004 YTL wrote to the Minister of Energy pointing out that a resolution of the matter had become extremely urgent, as it was more than seven years since the dispute with Petronas over the discount had commenced. It appealed to the Government to resolve the matter expeditiously so that legal proceedings might be avoided. On 6 May 2005, following a change of Prime Minister and the appointment of a new Minister of Energy, the Ministry of Finance wrote to the Secretary General of the Ministry of Energy informing him that the Ministry of Finance had agreed that the discount of RM 1.00/mmbtu be given to YTL with effect from 1 January 2002. On 12 May 2005 the Ministry of Energy notified Petronas of the decision that the Paka Discount be given again to YTL.

22. On 30 May 2005 Petronas sent a memorandum to the Prime Minister which was designed to highlight the implications of the instruction which it had received from the Ministry of Energy. It said that it was not in line with the Cabinet's decision of 9 October 2002, that it had serious implications for the power sector and that it would also "not augur well with the Government's efforts to eradicate subsidy and rent seeking." It asked for the letter from the Ministry of Finance to be revoked. On 25 January' 2006 Petronas wrote to YTL informing it that, as the deadline of December 2005 set by the price announcement in October 2002 had passed, it would continue to apply the price of RM6.40/mmbtu on a provisional basis until a new gas price was fixed.
23. On 30 January' 2008, in response to a request for advice by the legal adviser to the Ministry of Energy, a senior federal counsel in the Attorney-General's Department expressed the opinion that the supply of gas by Petronas to YTL was still subject to the GSA, that Petronas could not impose a price fixed by the Government unilaterally even though it was decided by the Government, as the Government was not a party to the GSA. He said that, if Petronas was still imposing the price fixed by the Government, unilateral action might be challenged by YTL. On 4 February 2008 the Minister of Energy wrote to the Prime Minister enclosing a copy of that opinion and recommending that the discount in the price of gas given to YTL be continued. Notwithstanding that recommendation, on 15 May 2008 the Ministry of Finance wrote to the Minister of Energy informing him that the Ministry of Finance had decided to withdraw its approval to grant the discount to YTL with effect from 1 January 2002. That decision was communicated to Petronas on 23 May 2008. On 5 June 2008 Petronas informed YTL that the decision in respect of the discount had been withdrawn, and called on it to take immediate action to remit the amounts due to Petronas together with interest.
24. On 26 June 2008 Petronas wrote to YTL informing it that the Government had decided to increase the price of dry gas from RM6.40/mmbtu to the prevailing market price as set out in the formula in Article X of the GSA, subject to a discount of 70 per cent in the first year which was to be reduced by 5 per cent annually thereafter. Invoices issued after 1 July 2008 were to reflect that gas price mechanism. On 25 August 2008, in the light of YTL's insistence that it was still entitled to the Paka discount, Petronas issued a demand for immediate payment of the amount charged by it on its invoices. It reminded YTL of the remedies available to the seller under Article X in the event of the buyer's failure to pay a dry gas invoice in full. It said that, failing payment, legal proceedings would be instituted to recover the amount due. On 9 September 2008 YTL wrote to Petronas denying that

any sums were due and owing to it under the GSA. In response to this letter Petronas wrote to YTL on 28 November 2008 asking it to take note that unless the amount demanded by it was paid in full by 5 December 2008 the supply of dry gas to its Paka plant would cease until a mutually acceptable solution was reached. In response to that threat YTL's solicitors wrote to Petronas's solicitors on 3 December 2008 slating that YTL would effect payment by the close of business on 4 December under protest and strictly without prejudice to its rights under Article X of the GSA.

The issues

25. Something must be said at the outset about the ground of action on which YTL bases its Claim. Mr Abraham did not seek to challenge YJK's entitlement in principle to recover the sums claimed if his various defences to them were not successful. But the Tribunal must nevertheless be satisfied that the claims which YTL makes against Petronas have a sound basis in law and that they are within the scope of the arbitration agreement.
26. In paragraph 8 of its Amended Statement of Claim YTL states that Petronas "is obliged to make good the breach of the Gas Supply Agreement and/or account for the sums received under such over-invoices". When he was asked to explain the basis of the Claim, Mr MacLean said at first that it was claim of damage for breach of contract. The breach was the failure by Petronas to allow the discount to which YTL was entitled under the GSA. The measure of damages was the extent of the amounts by which it had been overcharged by Petronas. He said that he was not claiming an accounting exercise. When it was put to him that what he was really claiming was the recovery of money paid under duress, as Petronas had made it clear that if the invoices were not paid in full it would exercise its right under Article 11.9 to suspend delivery of the dry gas until payment was received in full, he agreed that that this was one way of putting it. He provided the Tribunal with a document headed "Claimant's Formulation of Proposed Relief for Tribunal's Consideration" in which the claim was for the Petronas to account to YTL for the amount paid by it to Petronas during the period from 1 April 2008 to 14 February 2015 in excess of its contractual entitlements. When Mr Abraham was asked whether he had any objection to the way Mr MacLean was now putting his case, the only point he raised was that the claim for recovery of the whole amount paid under protest on 3 December 2008 was not possible in view of the provisions in the Limitation Act (Transcript, 5 March, p 122).
27. This alternative way of expressing the basis of the Claim is consistent with what YTL said in its Notice of Arbitration. It was stated in that document that what YTL was seeking was restitution of the amount of the agreed Paka Discount, including restitution of the protest payments. This ground of claim has a basis in the common law of restitution as it has been developed in England in the leading cases of *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. In the *Woolwich* case the House of Lords held that, although the previous law had only admitted recovery of money exacted under an unlawful demand where the payment had been made under a mistake of fact or under limited categories of compulsion, there was prima facie a right of recovery based solely on the payment of money pursuant to an ultra vires demand by a public authority. In the *Kleinwort Benson* case that development of the law was taken a step further. The House of Lords held that the rule that had previously precluded recovery of money paid under a mistake of law could no longer be maintained and that recognition should be given to a general right of recovery of money

paid under a mistake whether of fact or law.

28. In this case the money which YTL seeks to recover was not paid under a mistake. The money was paid, as in the *Woolwich* case, in the belief that it was not due. That was made clear by YTL's repeated assertions that it was entitled to the Paka Discount and by the terms of its solicitors' letter of 3 December 2008 which made it clear that the payment that was made on that date was being made under protest. If Petronas had no right under the GSA to demand payment of the invoiced sums in full, it must follow that it has no right to retain them in answer to a demand for their repayment. For these reasons the Tribunal is satisfied that the Claim has a sound basis in law as a claim for restitution of moneys paid to Petronas which, according to YTL's argument, it has no right to retain under the GSA.
29. Two of the other issues before the Tribunal were resolved during the hearing. First, Mr Abraham for the Respondent accepted that the Claim as presented fell within the scope of the arbitration agreement in Article 19.2 of the GSA (Transcript, 5 March, pp 7-8). So there is no longer any challenge to the Claim on the ground that the Tribunal does not have jurisdiction to deal with it. Secondly, the parties are now agreed that the Claim in so far as it seeks to recover sums paid by YTL on invoices delivered to it by Petronas prior to 1 April 2008 is barred by limitation under section 6 the Limitation Act 1953, but that the Claim in so far as it seeks to recover sums paid on invoices delivered after that date is not open to that objection. The Respondent's argument that the Claim is barred by laches, acquiescence or delay was not developed in argument by Mr Abraham, who concentrated instead on estoppel.
30. That being so, the following are the issues that arise for determination by the Tribunal:
 - a. in regard to YTL's claim for restitution of the amount of the Paka Discount element of sums paid by it on the invoices delivered to it by Petronas since 1 April 2008:
 - (i) whether, on a true interpretation of Article X of the GSA, the effect of the departure by Petronas from the formula for determining the "Price" of dry gas supplied to Pasir Gudang under Article 10.1 was to deprive YTL of its entitlement to the Paka Discount under Article 10.9 (*"the interpretation issue"*);
 - (ii) if not, whether YTL agreed at the meeting on 17 July 1999 that the issue as to its entitlement to the Paka Discount was to be decided by the Cabinet and that it would give effect to that decision (*"the agreement issue"*);
 - (iii) if it did not so agree, whether YTL is barred by estoppel by reason of its conduct since 17 July 1999 from recovering the Paka Discount element of the sums paid by it on those invoices (*"the estoppel issue"*).
 - b. in regard to YTL's claim for restitution of the sum paid by it to Petronas under protest on 3 December 2008, whether its claim to recover that sum is barred to any extent by limitation under section 6 of the Limitation Act 1953 (*"the limitation issue"*).

Mr Abraham accepted that, if points (i) to (iii) were to be decided against Petronas, YTL was entitled to restitution of this sum also, subject only to his limitation argument (Transcript, 5 March, p 122).

c. whether Petronas is entitled to any relief under its Counterclaim (*"the Counterclaim issue"*).

The interpretation issue

31. The Respondent submits that, on a proper construction of Article 10.1 of the GSA, the Paka Discount is expressly and solely tied to the Price as determined under the formula set out in that provision, and not to any other price. So YTL's right to the discount was no longer available when in 1997 Petronas gave effect to the Government's decision that the price of gas for the generation of electricity in Peninsular Malaysia was to be fixed at RM6.40/mmbtu from 1 May 1997 to 31 December 2000. Its departure from the formula had the inevitable effect of depriving YTL of the Paka Discount. This was because the words "the Price" in Article 10.9 must be read as referring to the Price as determined under the formula and not to a fixed price which had been arrived at on a basis that was not provided for in Article 10.1. Madam Yap put the point succinctly when she said, on being referred to the minute of the meeting that was held on 12 July 1999, that Petronas believed that the \$1 discount was attached to the formula price and that when the price became regulated the discount was not applicable any more. It was very clear, she said, in the GSA that the discount only attached to a formula price, and that the price with a capital P meant that price as defined by the formula (Transcript, 2 March, p 122). She added that this had always been Petronas's position, although it has to be said that the documentary evidence does not entirely bear this out as there was no mention of this argument in the early stages of the dispute. As Mr MacLean pointed out, it is not mentioned in the minute of the meeting of 17 July 1999. Nevertheless, it is issue of law and Mr Abraham was entitled to advance the argument as a key part of his defence.

32. At first sight there something to be said for his argument. But it loses much of its force when account is taken of the provisions in the following Articles which set out circumstances in which the formula as set out in Article 10.1 may be departed from. Articles 10.3 to 10.7 deal with circumstances in which the formula set out in Article 10.1 may require to be adjusted. Should that be necessary, the Price would still be a price determined by a formula. But Article 10.8 is of a more fundamental character. It provides that the Price shall be reviewed if, when calculated under Article 10.1, it exceeds RM7.1 l/mmbtu or falls below a level which renders it uneconomical for the seller to deliver dry gas to the buyer. The effect of that Article is that, should either of those events occur, the formula set out in article 10.1 will be departed from. The Price is then to be determined on some other basis. But there is no indication in Article 10.8 that, should that happen, the discount provided for in Article 10.9 is to come to an end. This tends to show that it was not the intention of the parties that the word "Price" where it appears in article 10.9 was to be tied irrevocably to a Price that had been determined according to the formula set out in Article 10.1. That approach to the interpretation of Article 10.9 would be defeated if it was not possible to read Article 10.1 in any other way. But, as Mr MacLean pointed out, it is possible to read the word "Price" as it appears in parenthesis in the opening word of that Article as referring simply to the price "of Dry Gas supplied to Buyer at the Delivery Point at Pasir Gudang". That interpretation can encompass all the various ways in which the price of dry gas at that delivery point is to be determined. In the Tribunal's view

it makes more sense of Article X as a whole and must be taken to be what the word Price was intended to mean when it appears in Article 10.9. In other words, on a proper interpretation of the Article, the Paka Discount is available to YTL irrespective of the way in which the price of dry gas supplied to Pasir Gudang is calculated.

33. In the course of her evidence, when she was explaining Petronas's presentation of its position for submission to the Cabinet. Madam Yap said the formula price was intended to capture the cost of the gas and also the transportation part of it, while the fixed price of RM6.40 had no transportation element in it against which to give a discount (Transcript, 2 March, p 145). No mention was made of this point in the pleadings, and Mr Abraham did not advance it as part of his argument as to how Article X should be construed. It does not in any event stand up to examination, for at least two reasons. The first is that Madam Yap was not able to point to anything in the formula that made provision for the cost of the transportation of the dry gas to the delivery point at the Pasir Gudang power station. It is made up of elements which are directed solely to the price of the gas itself. The second is that, even if it did include an element for its transportation to the delivery point, it would not alter the fact that the purpose of the Paka Discount was to allow for the fact that the transportation costs for delivery to Paka were lower than for delivery at Pasir Gudang. That would continue to be so even if a fixed price were to be substituted for a price determined by the formula.
34. Had there been any doubt as to the proper interpretation of Article X, it would have to be resolved in favour of the Claimant by the application of the principle of construction that a party in default cannot take advantage of his own wrong: *Alghussein Establishment v Eton College* [1991] 1 All ER 267, per Lord Jauncey at p 273. As Serutton LJ said in *blew Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] 1 AC 1. a party is estopped from alleging the invalidity of that of which his own breach is the cause. Petronas was bound by its contract with YTL to determine the price for the supply of dry gas to Pasir Gudang by the application of the formula. That is the effect of Article 10.1. Its decision to substitute the fixed price for the formula as it was directed to by the Government had the inevitable result that it was in breach of that obligation. If as Petronas contends, the true meaning of Article X was that the substitution had the effect of depriving YTL of its right to the Paka Discount, it must follow that Petronas cannot take advantage of that interpretation. It would have been plain that this result was brought about by its own breach of the contract. In the event, however, for the reasons given above, the Tribunal holds that its breach of contract did not have that effect. So there is no need for the Claimant to rely on this principle.

The agreement issue

35. Petronas contends in its opening brief at para 142 that the parties, by conduct, by the exchange of correspondence and minutes of meetings, agreed to accept the Government regulated price of RM 6.40/mmbtu without the Paka Discount. This is said to have been agreed at the meeting on 12 July 1999, and in any event in the course of correspondence that followed upon that meeting. This contention raises two issues: (i) did YTL agree to give up the Paka Discount at the meeting on 12 July 1999: and. if not, (ii) does the subsequent correspondence show that it agreed to do so thereafter.
36. The two witnesses who were present at this meeting were Mr Yeoh and Madam Yap, who had been asked to attend it in her capacity as General Counsel. Mr Yeoh said in paragraph 53 of his witness

statement that the meeting did not resolve the issue of the Paka Discount. In paragraph 59 he said that the only agreement was as to a billing adjustment exercise which involved substituting the ceiling price of RM6.40/mmbtu for the formula, with the issue of the Paka Discount unresolved. When he was cross-examined on this point he said that he stood by what he had said in his statement (Transcript, 2 March, p 51). Madam Yapp said that it was the understanding at the meeting that YTL would accept whatever was decided by the Cabinet (Transcript, 2 March, pp 119-120). But she acknowledged that, as the meeting took place some 16 years ago, she had no precise recollection of what was said (Transcript, 2 March, p 117). As these witnesses differed in their recollection, and in view also of the lapse of time which must render their recollection of what was said unreliable, the Tribunal must base its decision as to what was decided at the meeting on what the minute of the meeting says. It was prepared five days after the meeting and when it was circulated to the parties neither of them took objection to what was recorded in it. It must be taken to be the best evidence as to what was said and what was agreed: see paragraph 18, above, where the relevant passages are set out.

37. The last sentence of paragraph (i) in the minute of that meeting, if read by itself, suggests that it had been agreed that YTL was no longer to derive the discount. But that interpretation cannot stand with what was recorded in paragraph (iii), which makes it clear that the issue about the Paka Discount remained a live issue as to which each party was to be entitled to raise its respective position in future discussions with the government. Read as a whole, it is clear that what paragraph (i) refers to is the agreement that was reached as to what was to be done about the period from 1 May 1997 to December 2000. This provided the basis for the billing adjustment exercise for that period referred to in paragraph (ii). The words "without YTL deriving the discount of RM1.00" at the end of paragraph (i) must be taken to refer to that period and to that period only. There is no indication in either of the remaining paragraphs that YTL's agreement to forego the discount went any further than that. Nor does the wording of paragraph (iii) support Petronas's argument that YTL agreed at that meeting to accept whatever the Cabinet decided. All it says is that the parties were entitled to raise their respective stands on the issue to the Government agencies.
38. Mr Yeoh made YTL's position clear in his letter to the Ministry dated 22 July 1999, in which he said that YTL was preparing its case on that issue and would be submitting it shortly to the Ministry to enable it to prepare the Cabinet paper. In a letter of the same date addressed to Petronas he said that during the meeting it had been decided with the concurrence of all parties that, among other things, the RM 1.00/mmbtu discount for Paka power station would remain in dispute and that Petronas and YTL would submit their respective cases to the Ministry to enable it to prepare a paper for the Cabinet on that issue. Petronas for its part said in its letter to YTL of 17 August 1999 that the meeting agreed that the question of the Paka Discount "shall be decided by the Cabinet". But that is not what the minute says, and as Madam Yap acknowledged in her evidence, as did Mr Abraham, the Government was not in a position to alter YTL's contractual entitlement under the GSA to which it was not a party.
39. For these reasons the Tribunal finds that, while YTL agreed provisionally to forego the discount for the period up to December 2000 pending the decision of the Cabinet (which is of no significance for these proceedings as this date is outside the limitation period), its agreement to do so went no further than that. Thus the agreement to forego the discount that was reached on 12 July 1999 did not extend beyond the end of 2000. The Tribunal also finds that there was no agreement at the meeting of 12 July 1999 that YTL would accept a decision of the Cabinet that it must give up its

contractual rights under the GSA. Furthermore, it can find nothing in the correspondence between the parties following upon this exchange, the essential elements of which are set out in paragraphs 21-24 above, that indicates that YTL ever departed from its position that it remained entitled to the benefit of the Paka Discount under the GSA.

The estoppel issue

40. The parties were agreed that the law to be applied to determine this issue was to be found in the Federal Court's judgment of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 33] which was followed and applied by the Court of Appeal in *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 693. In his careful analysis of the doctrine in *Boustead Trading* Gopal Sri Ram JCA at pp 347-348 set out the essential requirements in this way. All that a representee (in this case Petronas) has to do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings, it being sufficient that it would be unconscionable for the representor (in this case YTL) thereafter to enforce his strict legal rights. In other words, all that need be shown is that in the particular circumstances of the case it would be unjust to permit the representor to insist upon his strict legal rights. This may, but need not in all cases, include the determination of the question whether the representee had altered his position, although such alteration need not be to his detriment.
41. The question then is whether YTL's conduct during the period since the meeting of 12 July 1999 was such that it would be unjust to permit it to insist on its claim for the recovery of the Paka Discount. The answer to this question must be found for the most part in an analysis of the documentary evidence. But there are some indications as to where the answer lies in the evidence of Mr Yeoh and Madam Yap. Mr Yeoh insisted that YTL never agreed that the Cabinet had the power to decide the issue as to whether it was entitled to the discount. When challenged in cross-examination about a passage in his witness statement where he said that YTL never agreed with Petronas to give up the Paka Discount, he said that he stood by that statement (Transcript, 2 March, p 51). Madam Yap accepted during her cross-examination that it had always been YTL's position that it was entitled to the discount, despite the change to regulated pricing (Transcript. 2 March, p 116). An examination of the correspondence confirms the accuracy of their evidence. In its letter of 22 July 1999, written just a few days after the meeting on 12 July 1999, YTL said that its entitlement to the Paka Discount would remain in dispute. Mention was made of the parties' intention to submit their respective cases to the Ministry to enable it to prepare a paper to the Cabinet on the issue. But, contrary to the assertion by Petronas in its letter of 17 August 1999 that the meeting agreed that the question "shall be decided by the Cabinet", that was never YTL's position. In its reply of 14 September 1999 YTL said it was unable to understand Petronas's contention that there were no disputed amounts, as it had been agreed that the issue was to be referred to the Cabinet. But there was no indication here or in any of the following letters that YTL would treat its decision as applicable after the end of 2000. All that it was seeking to do was to find out whether it had been the Cabinet's intention that it should forego the Paka Discount for the period up to the end of 2000.
42. Mr Abraham submitted, in support of his argument on estoppel, that YTL had failed to pursue its remedy under Article 11.6 of the GSA which provides for settlement of a dispute as to the accuracy of an invoice in accordance with the provisions of Article XVIII. But the procedure for the

settlement of a dispute under that Article involves its determination by an expert appointed by the President for the time being of the International Gas Union. That provision casts light on the kind of disputes that remedy is designed to resolve. A dispute about the correct application of the formula would plainly be appropriate for resolution by this means. But that is not what the present dispute is about. It would seem entirely inappropriate for it to be referred to an expert appointed by the President of the International Gas Union. The fact that YTL did not seek to take advantage of this system is of no significance in the context of this case.

43. For these reasons the Tribunal has concluded that there is no substance in Petronas's argument that YTL is estopped from insisting on its right under the GSA to recover the amount of the Paka Discount from the sums paid on invoices rendered to it by Petronas during the period from 1 April 2008. It follows that YTL is entitled to recover from Petronas the amount of the Paka Discount element of sums paid by it on all the invoices delivered to it by Petronas since 1 April 2008

The limitation issue

44. This issue arises only in relation to YTL's claim to recover the amount paid under protest on 3 December 2008, as the limitation objection to the claim to recover the sums paid on the invoices prior to 1 April 2008 was conceded by Mr Maclean. It raises a very short point.
45. Mr Abraham submitted that for the purposes of section 6 of the Limitation Act 1953 YTL's cause of action arose when each of the invoices were rendered to YTL that made up the amount for the payment of which Petronas issued its demand for payment on 25 August 2008. The Tribunal cannot accept that this is so. YTL's claim is for repetition of the sum which was the subject of that demand. It had no claim for its repetition until the sum in question was actually paid. Up to that moment it not suffered any loss for which it needed to, or was entitled to, assert a remedy. So far as this claim is concerned, the cause of action arose on 3 December 2008 when the payment was made, which is well within the limitation period. It follows that YTL is entitled to recover the full amount of its claim under this head of the Claim.

Petronas's Counterclaim

46. Under its Counterclaim Petronas seeks a declaration that YTL is liable to purchase dry gas for use in its power stations at the Price as defined in Article 10.1 of the GSA from the dates of its execution until its expiry, a declaration that the Paka Discount applies only to the Price as defined in Article 10.1, general damages for breach of the GSA and interest on such damages. In its defence to the Counterclaim YTL points out that it would be unable to pass through any retrospective adjustment to the invoices rendered to it by Petronas by increasing the price in accordance with the formula without the consent and concurrence of TNB, which had appropriated the benefit of the fixed price in the application of its electricity tariff with its customers.
47. Hardly anything was said about the Counterclaim in the course of the argument. Mr MacLean said that he would deal with it in his reply to the submissions to be made by Mr Abraham. Mr Abraham made two short points, one about interest and the other to draw attention to its argument that if

there was not agreement to a fixed price the formula must apply. He also acknowledged that, as the Counterclaim was not served on YTL until 26 September 2014, he could not ask for a declaration that related to any period prior to 27 September 2008. He made no attempt to answer the point made by YTL in its Defence to the Counterclaim. Mr MacLean did not in the event say anything about the Counterclaim in his reply.

48. The Tribunal has concluded that YTL's objection to the Counterclaim on the ground of estoppel is unanswerable. It is plain that if it were to be required to pay the formula price for periods in the past it would have to bear the entire costs of that price increase, as TNB would have an unanswerable defence to any attempt by YTL to pass through the increase to it under the PPA. TNB in its turn would be unable pass on that increase to its customers. It would, for this reason, plainly be unjust to permit Petronas retroactively to reinstitute the formula price: *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*, pp 347-348. As Robert Goff LJ put it in *Amalgamated Investments and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at p 105, that would be unconscionable. The reality is that Petronas, YTL and TNB have all acted upon the basis that it was open to Petronas to adjust its price in accordance with the Government's directions. This was independent of the issue as to whether or not YTL was entitled under the GSA to the Paka Discount. The Counterclaim must be dismissed

Costs

49. The parties are agreed as to the amount of the expenses incurred by YTL in connection with this arbitration, and that those expenses are to be shared equally between them. As to YTL's legal costs, the parties are also agreed that costs should follow the event (Transcript, 6 March, p 45). As success in these proceedings lies entirely with YTL, the Tribunal finds that YTL is entitled to recover its costs from Petronas, which the Tribunal assesses as between party and party at RM2.5m. It finds that YTL is also entitled to recover the whole of the sums advanced by it to the LCIA towards the costs of the Tribunal, less the amount (if any) returned to it by the LCIA. Petronas must bear the whole of the Tribunal's costs, together with all the charges made by the LCIA in respect of the deposits held by it for payment of those costs.