2017 CompLR 0525 (CCI)*

IN THE COMPETITION COMMISSION OF INDIA

Maharashtra State Power Generation Company Ltd. and Anr.
v.
Mahanadi Coalfields Ltd. and Ors.

CASE NOS. 03, 11 AND 59 OF 2012
DECIDED ON: 24.03.2017

Coram

Devender Kumar Sikri (Chairperson), S.L. Bunker, Sudhir Mital, Augustine Peter (Members) and G.P. Mittal, J. (Member)

Counsel

For Appellant/Petitioner/Plaintiff: Matrugupta Mishra, Nishant Kumar and Saahil Kaul, Advs. alongwith A.S. Lone, EE (FMC) for Maharashtra State Power Generation Company Ltd., Gaurav Mitra, Jayesh V. Bhairavia, Rashmita Roy Chowdhury, Advs. alongwith N.S. Rathod, Law Officer and Nilish Parekh, Junior Engineer for Gujarat State Electricity Corporation Ltd.

For Respondents/Defendant: Ramji Srinivasan, Sr. Adv., Harman Singh Sandhu, Yaman Verma, Toshit Shandilya, Vivek Paul, Tushar, Gauri Mehta, Advs. alongwith Officials, L.K. Mishra, G.M. (S&M), Amit Roy, Sr. Manager (S&M) and G.K. Vashishtha, GM (S&M) for CIL, S. Chandramouli, GM (S&M) and P. Das, Sr. Manager (QC) for MCL, Sunil Kumar Roy, Senior Manager (S&M) for SECL, George Mathew, Sr. Manager (S&M) and T.H. Mohan Rao, Manager (S&M/QC) for WCL, Sunil Rai, Sr. Manager (S&M), SECL and M.G.M. Swamy, Assistant Manager (Q C), SECL for CIL and its subsidiaries

Case referred

Marwar Tent Factory v. *Union of India* MANU/SC/0354/1989: (1990) 1 SCC 71: AIR 1990 SC 1753: JT 1989 (4) SC 307: (1990) 97 (1) PLR 166: 1989 (2) SCALE 1149: (1989) Supp 2 SCR 127: 1990 (1) UJ 200: 1990 (1) WLN 5 (Mentioned)
[p. 0546, para 84 a]

Acts/Rules/Regulations

Coal Mines (Nationalization) Act, 1973 [p. 0531, para 19 d]
Colliery Control Order, 2000 [p. 0545, para 79 c]
Colliery Control Rule, 2004 [p. 0545, para 79 c]
Companies Act, 1956 [p. 0538, para 56 i]
Competition Act, 2002
Section 2(s) [p. 0535, para 40 c]
Section 4 [p. 0529, para 4 a]
Section 4(1) [p. 0530, para 12 c]

* MANU/CO/0028/2017

Section 4(2)(a)(i) [p. 0530, para 12 c]
Section 19(1)(a) [p. 0528, para 4 i]
Section 19(4) [p. 0531, para 19 d]
Section 19(6) [p. 0532, para 23 f]
Constitution of India
Article 19(6) [p. 0539, para 56 b]

Issues and Findings

Abuse of dominant position – Determination of market – What is relevant market in present case?

Held, imports do not automatically imply that, sources of imports or potential sources of imports are to be incorporated to widen the geographical definition of market beyond national borders. Whereas Opposite Parties, on one hand, have contended that, relevant market has to be global, on other hand, it has equally been submitted that, circumstances under which coal is produced and supplied in India is inherently different from coal supply and production conditions in other jurisdictions. Thus, looking at from any perspective, plea of Opposite Parties that relevant market may be taken as global, is not only legally untenable, same is mutually contradictory and is rejected. As condition for supply of coal in entire country is uniform and homogenous, hence, relevant geographic market is entire India and imported coal cannot be considered a substitute for domestic coal on account of several factors including peculiar design and specifications of boilers used in majority of Indian thermal power plants and further considering that imported coal is subject to customs duty and other levies, rendering it more expensive than domestic coal supplied by Opposite Parties. Relevant product market in present case was taken by DG as non-coking coal, which is used primarily as a raw material for generation of electricity by thermal power plants. No serious challenge was made by Opposite Parties on this count. Hence, relevant market in present case is production and sale of non-coking coal to thermal power generators in India.

Dominant position – Determination of dominance – Whether CIL and its subsidiaries are dominant in said relevant market?

Held, CIL is a holding company and has various wholly owned subsidiaries. In view of provisions of Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in hands of Central Government and, as such, CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. In view of statutory and policy scheme, coal companies have acquired a dominant position in relation to production and supply of coal. Dominant position of CIL is acquired as a result of policy of Government of India by creating a public sector undertaking in name of CIL and vesting ownership of private mines in it. Supreme Court of India also in case of *Ashoka Smokeless* case observed that coal companies are monopolies within meaning of provisions of Nationalization Act and they would be deemed to be monopolies within provisions of Clause (6) of Article 19 of Constitution of India. Merely being a PSU and mention of social objectives in memorandum cannot negate the market power exercised by CIL in view of commercial freedom enjoyed by it. Commission is of considered opinion that, CIL through its subsidiaries operates independently of market forces and enjoys dominance in relevant market.

Dominant position – Contravention of provisions – Section 4 of Competition Act, 2002 – Whether Opposite Parties violated provisions of Section 4(2)(a)(i) of Act, by imposing unfair/discriminatory provisions in relevant market?

Held, Fuel Supply Agreement (FSAs), envisaged under New Coal Distribution Policy, 2007 (NCDP) to bring binding commercial obligations of parties, were drafted by Coal India Ltd. (CIL) on its own and without any meaningful consultation with other stakeholders. Credibility of declared grade is always a contentious issue between purchasers (power producers) and coal companies; however, in view of a suitable and independent mechanism provided by Office of Coal Controller (CCO) to redress such grievances, no interference is warranted by Commission in present proceeding on this count. Changes brought in FSA for new power producers do not appear to be unfair or discriminatory. In latest FSA, there is a mechanism for joint review by both parties. In light of availability of such statutory mechanism to redress issues arising out of declaration of grading of coal, mechanism can be described as neither unfair nor discriminatory. However, on issue of remedy for grade slippage, Commission notes that Clause 4.7 of FSA for existing power producers provided that if grade analyzed pursuant to Clause 4.7 shows variation from declared grade consistently over a period of three months, purchaser shall request Seller for re-declaration of grade, which shall be duly considered by Seller. However, investigation revealed that, in model FSA for new power producers this provision of re-declaration was removed by CIL. Such, differential regime, on face of it, is discriminatory and is in contravention of provisions of Section 4(2)(a)(i) of Act. CIL sought to justify new sampling mechanism due to problems with previous method of third party sampling raised by power companies besides arguing that new system is fair as both parties are involved in sampling process. Justifications provided by CIL to adopt new mechanism are not founded on any basis. Neither DG found any material which substantiates CIL's claim that power producers were not happy with third party sampling nor any such material was brought to attention of Commission. Purchaser has practically no say in sampling process and becomes a mere spectator as all facilities and infrastructure for joint sampling are under effective control of seller. Terms and conditions relating to sampling process are unfair and in contravention of provisions of Section 4(2)(a)(i) of Act. Provisions for sampling of coal are *ex facie* discriminatory between PSU and private producers and thus, in contravention of provisions of Section 4(2)(a)(i) of Act. Opposite Parties could not justify as to why buyers were given no choice but to pay for expenses of ungraded coal, which was supplied in breach of agreed quality of coal under FSA. Terms and conditions in FSA regarding supply of quality coal should be guided by strict adherence to desired quality and measures relating to grading, sampling and testing of coal need to be incorporated in agreement to satisfaction of both parties. Provisions relating to sample collection and supply of ungraded coal in FSA are unfair and in contravention of provisions of Section 4(2)(a)(i) of Act. Opposite Parties have imposed unfair and discriminatory terms and conditions regarding compensation of stones in contravention of provisions of Section 4(2)(a)(i) of Act. CIL is resorting to unfair and discriminatory conduct by inserting clauses in FSAs with PSU power producers vis-à-vis new private producers. Clause for review of FSA is disadvantageous to new power producers in comparison to clause for review of FSA in respect of PSU power producers in way that former gives a unilateral right to terminate the agreement to Seller. Opposite Parties have imposed unfair and discriminatory terms and conditions in contravention of provisions of Section 4(2)(a)(i) of Act. Provision of *force majeure* clause in present case, is couched in an extensively wide language, leading to inference that same have

been put by suppliers (dominant party) to agreement. Accordingly, same is held to be in contravention of provisions of Section 4(2)(a)(i) of Act. CIL did not evolve/ draft/finalize terms and conditions of FSAs through a mutual bilateral process and same were imposed upon buyers through a unilateral conduct. Further, Commission holds Opposite Parties to be in contravention of provisions of Section 4(2)(a)(i) of Act for imposing unfair/discriminatory conditions in matter of supply of non-coking coal to power producers. Accordingly, Opposite Parties are directed to cease and desist from indulging in conduct that has been found to be in contravention of provisions of Act.

ORDER

Order under Section 27 of the Competition Act, 2002

1. The Commission in this batch of informations filed by the power utilities (Maharashtra State Power Generation Company Ltd. and Gujarat State Electricity Corporation Limited) *vide* its order dated 9th December, 2013 found CIL and its subsidiaries to operate independently of market forces and thus enjoying undisputed dominance in the relevant markets of supply of non-coking coal to the thermal power producers. The Commission also held the Opposite Parties to be in contravention of the provisions of Section (2)(a)(i) of the Act for imposing unfair/discriminatory conditions and indulging in unfair/discriminatory conduct in the matter of supply of non-coking coal, as detailed in the said order.

2. The aforesaid order of the Commission was put in appeal by various parties before the Hon'ble Competition Appellate Tribunal. Accordingly, the Hon'ble Competition Appellate Tribunal *vide* its common order passed on 17th May, 2016 in a batch of appeals arising out of the orders of the Commission passed on 9th December, 2013, 15th April, 2014 and 16th February, 2015 in C. Nos. 03, 11 and 59 of 2012 (the present batch), C. Nos. 05, 07, 37 and 44 of 2013 and C. No. 08 of 2014 respectively set aside the impugned order and noted as follows:

> *25. In the result, the appeals are allowed. The impugned orders are set aside and the matters be remitted to the Commission for deciding the issues arising out of the informations filed by Maharashtra State Power Generation Company Limited, Gujarat State Electricity Corporation Limited, Madhya Pradesh Power Generating Corporation Limited, West Bengal Power Development Corporation Limited, Sponge Iron Manufacturers Association and GHCL Ltd. afresh.*
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> *26. We hope and trust that the Commission will make an endeavour to hear the parties and pass appropriate orders as early as possible not later than two months of the receipt of this order.*
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> *27. It is made clear that neither of the parties shall be entitled to adduce any additional evidence before the Commission nor the Coal India Ltd. and its subsidiaries shall be allowed to withdraw the amendments/modifications made in the fuel supply agreements or concessions granted during the pendency of the cases before the Commission.*

3. Accordingly, the Commission heard the parties afresh on various dates and decided to pass appropriate order in due course.

Brief Facts

Case No. 03 of 2012

4. The information in this case was filed under Section 19(1)(a) of the Competition Act, 2002 ('the Act') by Maharashtra State Power Generation Company Ltd.

(MAHAGENCO) against Mahanadi Coalfields Limited (MCL) and Coal India Ltd. (CIL) on 16th January, 2012 alleging *inter alia* contravention of the provisions of Section 4 of the Act.

5. The Informant alleged that MCL instead of signing/executing coal supply agreements/fuel supply agreements as required under the new Coal Distribution Policy, 2007 (NCDP) executed/signed MoUs which did not cover all aspects of supply and issues. Aspects like quality control, grade failure, short supply, joint sampling etc. had not been detailed/enumerated in clear terms and conditions. Further, the Informant received a model Coal Supply Agreement (CSA) proposed to be executed between it and MCL. It is alleged that the clauses of CSA demonstrated that the conditions of supply as proposed were onerous and, as such, negated the purpose of securing firm supply of coal on the basis of a contractual arrangement in terms of NCDP. The proposed CSA contained clauses which were burdensome and capable of causing implementation issues imposing additional cost on MAHAGENCO leading to higher cost of electricity which would be eventually passed on to consumers. It is also alleged that while the draft CSA was under negotiation, MCL sent a draft MoU to MAHAGENCO which had to be executed simultaneously at the time of execution of CSA. The draft MoU attempted to further dilute the obligations of MCL to supply coal under the proposed CSA.

Case No. 11 of 2012

6. The information in this case was also filed by MAHAGENCO against Western Coalfields Limited (WCL) and CIL on 22nd February, 2012 alleging *inter alia* contravention of the provisions of Section 4 of the Act.

7. The Informant is aggrieved by certain acts of WCL as also terms of Fuel Supply Agreement (FSA) dated 21st November, 2009 executed between MAHAGENCO and WCL. The same may be summarized as follows: failure on the part of WCL to entertain objections raised by MAHAGENCO before execution of FSA; failure to formulate the joint sampling protocol in FSA as also failure to provide joint sampling at both loading and unloading points; making provisions in FSA whereby MAHAGENCO is deprived of its right to participate in joint sampling of coal or the sampling procedure which could lead to supply of lumpy, wet and sticky coals and also stones/coal of large size which cannot be used; and failure on part of WCL to crush and wash coal which is an integral process of dressing coal before supply.

Case No. 59 of 2012

8. The information in this case was filed under Section 19(1)(a) of the Act by Gujarat State Electricity Corporation Limited against (GSECL) South Eastern Coalfields Limited (SECL) and CIL on 13th September, 2012 alleging *inter alia* contravention of the provisions of Section 4 of the Act.

9. The Informant, which is a power generating utility, is purchasing coal by way of a coal linkage from SECL of 16.4 Million Metric Tonnes (MMTs). It is averred that out of total purchase, 14.4 MMTs from SECL is being supplied through Road-cum-Rail mode from Korba coal-field of SECL and the remaining quantity of 2 MMTs is supplied from Korea-Rewa field of SECL through Rail mode. Ministry of Coal, Government of India had notified NCDP on 18th October, 2007 mandating a switch-over from the linkage regime of coal distribution to firm FSAs between CIL's subsidiaries and their respective consumers with demand greater than 4200 tonnes per annum (TPA). It has been stated that the Informant entered into an FSA on 7th July, 2009 with SECL.

10. The Informant has detailed various clauses of FSA as also the acts/omissions of the Opposite Parties which are stated to emanate from the dominant position of the Opposite Parties in the relevant market.

11. The Informant has alleged that there was vast difference of Gross Calorific Value (GCV) of the coal received from Korea-Rewa field than as shown in billing grade of SECL. It is alleged that the said differences were about grade slippage of about 3 to 5 grades and sometimes more in the quality of coal supplied from Korea-Rewa field.

12. Further, referring to the various clauses of FSA, the Informant has alleged that as per condition number 3.11 of FSA, there is a provision in respect of Deemed Delivery Quantity (DDQ). It is stated that as per this provision, whatever the quality of the coal supplied, the same has to be accepted by the purchaser and even if the purchaser refuses to accept the lower quality, the same is treated as deemed delivery and the purchaser is liable to pay for the coal. SECL is used to supplying lower quality coal from Korea Rewa field with bills of higher quality and the purchaser has no remedy except to pay for the higher quality. This is alleged to be in contravention of the provisions of Section 4(2)(a)(i) read with Section 4(1) of the Act.

13. It is further alleged that the present sampling procedure is a departure from the past practices regarding sampling of coal. It is stated that earlier *i.e.*, before 2007, the samples were analysed both at the loading as well as unloading ends. There was a process of conciliation of discrepancies by working out an average/mean grade or quality. It is, however, alleged that CIL *suo motu* amended the said process in FSAs. It is alleged that at present the sampling is carried out in terms of the agreement at the loading end only within the colliery. This process is stated to be inadequate/inefficient resulting in severe grade/band slippage.

14. Grievance is also made of the fact that as per Clause 4.7 of FSA, SECL was required to install Augur Sampling Machines (ASM) within 24 months from signing of FSA, where the loading was to be through silos. However, SECL failed to install ASM according to the agreed terms and conditions. It is further averred that due to non-installation of ASM, the collection of the samples of coal to be supplied could not be done properly. It has been pointed out that where ASM was not installed according to terms within specified time, in such circumstances, the sample collections were to be done at unloading end. It is alleged that in complete breach of the terms of FSA, neither ASM was installed within the stipulated time therein nor the joint sample collection was permitted at the unloading end. Such conduct has been described as abusive by the Informant.

15. The Informant, accordingly, sought appropriate directions to be issued to the coal companies to crush and wash coal so that Grade/GCV of coal is consistent with the terms contracted, supplied and invoiced. Inquiry was also sought in the matters relating to grading, sampling, testing and analysis of coal.

Directions to the DG

16. The Commission after considering the entire material available on record *vide* its order dated 24th January, 2012 passed in Case No. 03 of 2012 directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report. In Case No. 11 of 2012, a similar order was passed by the Commission on 6th March, 2012. Further, it was also ordered that since the Commission has already directed investigation to be made in Case No. 03 of 2012 on similar facts, the DG shall club the investigation of this case along with the investigation of Case No. 03 of 2012 and submit a consolidated report in respect of both the cases. Lastly, the Commission

passed a similar order in Case No. 59 of 2012 on 4th December, 2012 and also directed that this case may be clubbed with earlier cases for joint investigation.

17. The DG, after receiving the directions from the Commission, investigated the matter and filed a common investigation report in all these cases on 8th February, 2013.

Investigation by the DG

18. The DG noted that the relevant product for the purpose of investigation in the present case was non-coking coal which is used as primary raw material by power producers for the generation of electricity. Further, the DG opined that as the condition for supply of coal in the entire country was uniform and homogenous as there are no barriers in terms of geographic location for the consumers, it was concluded that the relevant geographic market is entire India. Thus, the relevant market in the instant case was determined by the DG as the production and sale of non-coking coal to the thermal power generators in India.

19. On dominance, it was concluded by the DG that CIL is vested with absolute monopoly in production and distribution of coking and non-coking coal, as there was no supply-side substitution, due to entry barriers imposed by the policy measures of Government of India and the Coal Mines (Nationalization) Act, 1973. The Opposite Parties were thus found not to have any competitive pressure in the market as there was no challenge at the horizontal level against the market power of CIL and its subsidiaries. Accordingly, the DG was of the view that CIL and its subsidiaries enjoy a dominant position in the relevant market in terms of the factors mentioned in Section 19(4) of the Act.

20. On analysis of the terms and conditions of FSA, the DG concluded that CIL and its subsidiaries had violated the provisions of Section 4(2)(a)(i) of the Act by imposing unfair or discriminatory conditions in the relevant market. The following terms and conditions were found by the DG to be unfair or discriminatory:

(a) Sampling procedure for existing PSUs and other power producers are different, without any reason for such discrimination. The sampling procedure lacks obligation on the seller to incorporate fair and transparent procedure to match the Gross Calorific Value (GCV) pricing mechanism. The sampling and testing procedure in Clause 5.7 (4.7 for old power producers) FSA were found to be unfair and discriminatory.

(b) Provisions in Clause 5.2 of FSA relating to charging the transportation and other expenses from the buyers on supply of ungraded coal were found to be unfair.

(c) The Opposite Parties have also been found to impose unfair and discriminatory conditions regarding putting a cap on compensation for stones in Clause 4.6.3(e) of FSA for new power producers. In this connection, the DG noted that during the course of investigation the capping was removed subject to some conditions.

(d) The provisions relating to review and termination of the agreement in Clauses 2.5 and 2.6 of FSA were found to be unfair and discriminatory.

(e) It was noted by the DG that the provision relating to satisfying the Condition Precedent in Clause 2.8.3 of FSA for new power producers gave upper hand to the seller for waiving the condition precedent at its sole discretion. Accordingly, the provisions relating to waiver of conditions in Clause 2.8.3 were found to be unfair by the DG.

(f) Discriminatory provisions for new power producers by removing the provisions for review of grade in case of consisting grade slippage for three months. In this connection, the DG noted that during the pendency of investigation these provisions have been re-inserted in Clause 5.5 of FSA.

(g) Incorporating the conditions in *force majeure* clause which are not normally treated as *force majeure* in Clause 17.1 of FSA for new power producers were found to be unfair and discriminatory. These conditions were stated to be modified during the pendency of investigation.

21. The investigation, thus, concluded that the Opposite Parties have violated the provisions of Section 4(2)(a)(i) of the Act by imposing unfair/discriminatory provisions in the relevant market.

Replies/Objections/Submissions of the parties

Replies/objections/submissions of the Opposite Parties

22. The Opposite Parties challenged the maintainability of the present proceedings on the ground that the Informants are indulging in forum shopping. It was contended that the instant case arises out of the terms of a negotiated and signed agreement between CIL on the one hand and the Informants (and other power utility companies, as the casemay be) on the other. In addition to an arbitration clause for resolution of disputes, the agreement contains adequate safeguards (including involvement of the Office of the Coal Controller (CCO) and government coal testing laboratories) for grievance redressal with respect to specific clauses such as sampling and grade declaration. In the presence of proper and adequate remedies available in the contract, it is inappropriate on the part of the Informants to approach the Commission for seeking redressal of purported disputes which are essentially contractual in nature.

23. On merits, it has been submitted that the allegations made in the informations in relation to the alleged abuse of its alleged dominant position are unfounded. In relation to the relevant market, the Opposite Parties submitted that the DG's conclusion on relevant market being the market for production and supply of non-coking coal in India is incorrect and the market should be supply of coal globally. An analysis of the factors mentioned under Section 19(6) of the Act establishes that the relevant market for the purpose of the present case is global. Further, there are no regulatory trade barriers or any specific local requirements or national procurement policies that restrict imports of coal into India in any manner. Further, the DG, in his report has erroneously concluded that the port and railway infrastructure for transporting coal from ports to power generation stations is insufficient to handle large quantities of imported coal in India.

24. In terms of dominance, the Opposite Parties have made detailed submissions to demonstrate that they cannot operate independently within the meaning of Section 4 of the Act. It has been submitted that CIL's commercial behavior is significantly constrained because it does not have the ability to either choose its customers or decide the quantity of coal that it can supply. Further, its pricing is also constrained keeping the larger public interest in mind. It has been servicing the demand of its customers despite them having not paid hundreds of crores in outstanding dues. Therefore, considering all these facts, it has been submitted that the DG's findings that CIL is dominant is incorrect.

25. It was further submitted by the Opposite Parties that even if the relevant market were to be confined to supply of thermal/non-coking coal in India, CIL is not

dominant as it cannot operate independently of competitive forces or its customers. Rather, its conduct is significantly constrained by directions received from various stakeholders such as Ministry of Power, Ministry of Coal, Central Electricity Authority (CEA), National Thermal Power Corporation Limited (NTPC) etc. all of whom exert significant influence and are involved in making decisions that impact various aspects of their business. Therefore, the Opposite Parties do not operate in a free market and their conduct and operations are essentially regulated by the concerned Ministries. As CIL cannot be said to possess any commercial freedom in determining its conduct in market, the question of exercising dominance in the market does not arise.

26. In relation to the impugned terms of FSAs, it has been submitted that FSAs signed between CIL and the power generation companies in 2009 were a result of detailed bilateral negotiations and discussions between CIL, the power utilities, and other governmental stakeholders. Following the implementation of NCDP, CIL was required to produce the first drafts of the model FSAs, whereafter various meetings were held to finalize the model FSAs for existing/old power plants, and wherein the power producers, either directly or indirectly through CEA/MoP, made suggestions and counter-proposals which were accepted by CIL.

27. It was also submitted by the Opposite Parties that while a first draft of each of FSAs was generated by CIL (with help from CRISIL), there were several rounds of detailed discussions and deliberations between CIL and various stakeholders, which were chaired by CEA and attended by power utility companies including MAHAGENCO and GSECL, before FSAs for existing power plants were finalized. It has been submitted that issues in relation to FSAs are now being raised after availing benefits for years under these agreements.

28. In relation to the new power plants (that were to come into existence after 31st March, 2009), CIL continued to receive comments, observations and objections from various stakeholders in relation to various provisions of FSAs. CIL has responded positively by accepting majority of the comments from various stakeholders, which clearly indicates that the process of finalization of FSAs was an ongoing process and CIL has always been open to making amendments to FSAs. It was also argued that benefits of FSA negotiated under CEA's auspices were made equally applicable to all similarly situated power plants/companies.

29. The Opposite Parties also made detailed submissions to demonstrate that the clauses were fair and non-discriminatory.

30. Lastly, it was argued that the clauses being challenged by the Informants or found by the DG to violate the provisions of the Act have never been invoked by CIL and in any event, stand modified pursuant to the negotiations between the parties. Therefore, no prejudice has been caused to the Informants or as a matter of fact to other customers.

31. In light of the above, it has been argued by the Opposite Parties that there is no merit in the findings of the DG or in the allegations of the Informants which hold CIL and its subsidiaries to be in violation of the provisions of the Act. The Opposite Parties have also submitted that the DG failed to appreciate that CIL had been constantly engaged in working closely with all its stakeholders to modify and finalize the conditions of FSAs in accordance with their demands, even against its self-interest at times.

Replies/objections/submissions of the Informants

32. MAHAGENCO in its common reply in Case Nos. 3 and 11 of 2012 has broadly supported the findings of the DG, and prayed to the Commission to reject the objections filed by the Opposite Parties to the DG Report. Subsequently, written submissions on similar lines were filed besides filing a written note by way of a response to the submissions made by the Opposite Parties. Written submissions and rejoinder were also filed by the Informant in Case No. 59 of 2012.

Analysis

33. The following points arise for consideration in the present matters:

(i) What is the relevant market in the present case?

(ii) Whether CIL and its subsidiaries are dominant in the said relevant market?

(iii) Whether the Opposite Parties have contravened the provisions of Section 4 of the Act?

Point No. (i): What is the relevant market in the present case?

34. In the present batch, the DG determined the relevant market as production and sale of non-coking coal to thermal power generators in India.

35. It was, however, submitted on behalf of the Opposite Parties that the DG's conclusion on relevant market is incorrect. It was contended that the relevant market for the purpose of the present cases should be supply of coal globally. It was argued that the DG has wrongly confined the relevant market to the market for production and supply of non-coking coal for thermal power generation in India without any analysis of the relevant geographic market. It was further urged that the DG in the report has erroneously concluded that the port and railway infrastructure for transporting coal from ports to power generation stations is insufficient to handle large quantities of imported coal in India. Lastly, it was submitted that, in case of power plants situated closer to the coast, sometimes it may be more convenient to procure imported coal than to source it from CIL.

36. The Commission notes that the contention of the Opposite Parties that the relevant market for the present purposes has to be global and cannot be confined to India, is misdirected.

37. Also though the geographic market definition is a pre-requisite to calculating market share which is the most important criterion/yardstick in the assessment of dominance, it is not an end in itself but provides a framework for assessing competition.

38. In this regard, the Commission also notes that imports do not automatically imply that the sources of imports or potential sources of imports are to be incorporated to widen the geographical definition of market beyond national borders. It is not the absolute level of imports but the elasticity of imports to any change in market condition that should be referred to for assessing the competitive constraints that imports pose on domestic manufacturers.

39. In this connection, the Informants, while supporting the determination and delineation of market by the DG, argued that the plant design/specifications of most Indian thermal power plants (which are designed for burning domestic coal on account of factors intrinsic in the coal like ash content, moisture content etc.) is such that imported coal can only be used in small proportion, blended with domestic coal to achieve the requisite calorific value. Further, CIL, by virtue of its dominant status, is

in a position where it only supplies 90 per cent (ninety percent) of the Annual Contracted Quantity (ACQ) to Indian thermal power plants under FSA, thereby forcing thermal power plants to acquire the balance 10 per cent (ten percent) needed to operate its plants from the import market. It was submitted that it is ironical that CIL is seeking to rely on these import figures, which are necessitated as a result of its abuse of the dominant position, in order to fallaciously define the market as including imported coal. It was further contended that the terms of FSA which govern supply of coal to most Indian thermal power utilities, ensure dependence of the utilities on CIL to the tune of about 75 per cent (seventy five percent) of their total coal requirement. Lastly, it was submitted that imported coal is substantially more expensive on account of import duty, sea freight, exchange rate, price based on country of origin etc. and inadequate handling capacity of the ports also makes direct handling of imported coal difficult.

40. The Commission notes that in terms of the provisions contained in Section 2(s) of the Act, 'relevant geographic market' has been defined to mean a market comprising the area in which the *conditions of competition* for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. In this regard, it is observed that whereas the Opposite Parties, on the one hand, have contended that the relevant market has to be global, on the other hand, it has equally been submitted that circumstances under which coal is produced and supplied in India is inherently different from coal supply and production conditions in other jurisdictions. Thus, looking at from any perspective, the Commission has no hesitation in holding that the plea of the Opposite Parties that the relevant market may be taken as global, is not only legally untenable, the same is mutually contradictory and deserves to be rejected. As the condition for supply of coal in the entire country is uniform and homogenous, hence the relevant geographic market is entire India and imported coal cannot be considered a substitute for domestic coal on account of several factors including the peculiar design and specifications of the boilers used in majority of Indian thermal power plants and further considering that imported coal is subject to customs duty and other levies, rendering it more expensive than domestic coal supplied by the Opposite Parties.

41. So far as the relevant product market is concerned, the DG, after considering the physical characteristics of non-coking coal and its use in power plants, noted that there is no substitute available for non-coking coal used by the thermal power plants in India. Thus, the relevant product market in this case was taken by the DG as non-coking coal, which is used primarily as a raw material for generation of electricity by the thermal power plants. No serious challenge was made by the Opposite Parties on this count.

42. In the result, the Commission is of the opinion that the relevant market in this case is production and sale of non-coking coal to thermal power generators in India.

Point No. (ii) Whether CIL and its subsidiaries are dominant in the said relevant market?

43. Before adverting to the submissions made on behalf of the Opposite Parties challenging the finding of dominance as noted by the DG, the Commission notes the admissions made by CIL declaring itself to be the largest coal producing company not only in India but in the whole world. This is evident from the following statement of Chairman of CIL made in the Annual Report 2011-2012 which was noted by the DG in the main investigation report (at page 55) and the same is quoted below:

Coal India Limited (CIL) is a Maharatna Public Sector undertaking under the ministry of Coal, Government of India with headquarters at Kolkata, West Bengal. ***CIL is the single largest coal producing company in the world*** *and the largest corporate employer with manpower of 3, 71, 546 (as on 1st April, 2012). CIL operates through 81 mining areas spread over 8 provincial states of India. Coal India has 467 mines of which 273 are underground, 164 opencast and 30 mixed mines.*

44. It was submitted by the Opposite Parties that CIL is not dominant in the market as it cannot operate independently of competitive forces or its customers. Rather, its conduct is significantly constrained by directions received from various stakeholders including Ministry of Power, Ministry of Coal, CEA, Planning Commission, NTPC etc. all of whom exert significant influence and are involved in making decisions that impact various aspects of CIL's business. It was argued that CIL does not enjoy any commercial freedom in deciding the customers to whom it should supply coal and the quantity of coal to be supplied. In this connection, it was pointed out that Central Government promulgated NCDP in 2007 wherein it was envisaged that the Standing Linkage Committee (Long Term) [SLC (LT)] was to continue to decide the linkages for supply of coal to core sectors. As a result, CIL has no role to play in determining who it shall supply coal to and in what quantity, as the decisions of the SLC (LT) are binding on CIL. It was further emphasized that the SLC (LT) comprises of representatives of CEA, Ministry of Power, Ministry of Railways, NTPC etc. and it is SLC (LT) that decides the linkage of coal for source of supply and quantum of coal to be supplied by CIL which is based on the norms set by Ministry of Power/CEA. This clearly negates the possibility of any kind of dominance on part of CIL.

45. Reliance was also placed upon the decision of the Hon'ble Supreme Court in Ashoka Smokeless case wherein it was observed that decisions with respect to pricing by CIL should be made keeping in mind public interest to sub-serve common good. Thus, it was argued that CIL is constantly working under the pricing constraints imposed by the Hon'ble Supreme Court and is constrained from pricing as per free market conditions.

46. It was further argued that CIL's position of largest producer of coal is not because of its commercial behavior but the same is a result of the operation of law *viz.* the Coal Mines Nationalization Act, 1973. CIL's share of coal supply is gradually decreasing due to increasing imports of coal and the consumers are looking to alternative sources to meet their coal requirement, including captive coal blocks in India and acquisitions abroad. Further, Singareni Collieries Company Limited (SCCL) also caters to the demand of coal from consumers in India. The mere fact that CIL has a large share of market for sale of coal in India does not imply dominance, as consumers are not dependent solely on CIL in meeting their coal needs. Reference was also made to the countervailing power exercised by various stakeholders and it was submitted that FSA signed between CIL and the power generation companies in 2009 was a product of detailed bilateral negotiations and discussion between CIL, the power utilities and other governmental stakeholders.

47. Based on the above, it was submitted that as CIL does not operate in a free market and consequently it does not have any commercial freedom in deciding its market conduct. A thorough analysis of various factors mentioned under Section 19(4) of the Act clearly rules out the possibility of CIL being dominant in the relevant market.

48. The Informants, however, supported the finding of the DG holding CIL and its subsidiaries to be in a dominant position in the relevant market and it was contended

that CIL and its subsidiaries are indeed vested with monopolistic powers on account of the provisions of the Coal Mines (Nationalization) Act, 1973, a position which has been upheld by the Hon'ble Supreme Court in *Ashoka Smokeless* case. The mere fact that SCCL-a joint venture between the Government of Andhra Pradesh and the Government of India-also produces coal for commercial sale in itself does not negate the fact that CIL and its subsidiaries constitute a monopoly in the relevant market, in as much as SCCL has a negligible presence in the relevant market. The market share (with respect to total coal demand) of CIL in the Financial Year 2010-2011 was 69 per cent (sixty nine percent) as opposed to merely 8 per cent (eight percent) for SCCL, while the market share of the two entities in 2011-2012 stood at 63 per cent (sixty three percent) and 8 per cent (eight percent), respectively. Further, it was stated that on account of the fact that the production capacity of SCCL is miniscule as compared to CIL, only a few power generation utilities and other consumers have been granted linkages to SCCL under NCDP, on account of which non-linked power generation utilities can only purchase coal from SCCL under the E-auction process *i.e.*, at costs which are higher by approximately 40 per cent (forty percent) than coal obtained under FSAs.

49. It was further submitted that irrespective of the fact that SLC (LT) plays a major role in the determination of linkages under the NCDP, the terms and conditions of the supply for coal *i.e.*, those of FSAs are decided unilaterally by CIL. As such, the dominance of CIL and its subsidiaries in the market is not diminished on account of the role played by SLC (LT).

50. It was also vehemently argued that power producers in India depend on CIL and its subsidiaries for approximately 70 per cent (seventy percent) of their coal requirement. 'Other sources' mentioned by CIL and its subsidiaries predominantly refer to coal imports, which are not substitutes for domestic coal on account of various critical factors, and which are resorted to only to fulfill the gap between the requirement of thermal power producers and supply by the Opposite Parties. Most of the older power stations, on account of extant policies, were designed keeping in mind supplies of coal from indigenous sources, which are predominantly controlled by the Opposite Parties.

51. It was pointed out that the allocation of captive coal blocks to a few power generation utilities has not had any impact on the market share or the dominance of CIL and its subsidiaries. Referring to the issue of acquisition of overseas coal mines by Indian companies, it was contended that this is also not a factor affecting the market position and dominance of CIL and its subsidiaries in as much as the coal obtained from these mines is not a substitute for domestic coal. It was denied that customers or other stakeholders exert any significant countervailing power or influence on the Opposite Parties.

52. Further, it was submitted that the very fact that NCDP has mandated that all supplies of coal are to be regulated through enforceable bilateral FSAs shows that the said policy envisages a market-based structure based on commercial concerns. The mere fact that NCDP has 'imposed' the task of meeting the entire domestic demand for coal under FSAs on CIL, and that if need arises, CIL is expected to resort to the import of coal to fulfill this demand, in no way detracts CIL from operating independently in the relevant market, in as much as it is not the case of the Opposite Parties that the supply of coal under NCDP (including imports) is to be made by the Opposite Parties at sub-market or non-competitive rates. In fact, imported coal to be supplied by the Opposite Parties under FSAs is to be supplied at cost plus price (*i.e.*, higher than the

market price). In reality, the Opposite Parties have never exercised their option to supply imported coal as part of the ACQ under FSA, which only goes to show that imported coal is not treated as a substitute to indigenous coal, even by the Opposite Parties themselves. In fact, the structure of FSAs under NCDP further strengthens the dominance of CIL and its subsidiaries in the market, virtually making domestic thermal power utilities dependent on the Opposite Parties for their operations.

53. It has been further argued that only the linkages under NCDP are determined by SLC (LT) of Government of India, while CIL has a free hand in determining the terms and conditions of FSAs keeping in mind its commercial interests. The objects clause of the Memorandum of Association of CIL encapsulates the role of CIL and provides that it must act *'as an entrepreneur on behalf of the State in respect of the coal industry and plan and organize production of coal as also its beneficiation and the manufacture of other by-products of coal in accordance with the targets fixed in the Five Year Plans and the economic policy and objectives laid down by the Government from time to time'*. As such, it was sought to be suggested that CIL is driven by commercial interests in the supply of coal to the thermal power producing utilities under FSAs, which finds reflection in the terms of the said FSAs drafted by CIL.

54. It was further submitted that the chronology of events leading to the issuance of the Presidential Directive dated 4th April, 2012 reveals that the same was occasioned on account of the failure of the Board of Directors of CIL to implement the communication of Ministry of Coal with regard to revision of the trigger levels of supply (for disincentive) in FSAs, which at that time stood at an unjustifiably low figure of 50 per cent (fifty percent). While issuing the said directive in relation to the trigger levels, Ministry of Coal communicated to CIL that it was free to incorporate suitable conditions in FSAs to protect its commercial interest. The said directive was issued only in relation to the clauses pertaining to the trigger levels, and the clauses relating to sampling/testing remained arbitrary and unmodified.

55. Further, it was argued that the inability to choose its own customers is no ground to hold that an enterprise is not dominant or that it cannot abuse its position of dominance in regard to its customers irrespective of the fact whether such consumers are freely chosen or mandatorily stipulated by government/regulator. On pricing of coal, it was argued that substantially the entire market for coal in India is dominated and controlled by CIL and its subsidiaries, and as such, the argument that the price of coal in India is 'lower than market driven prices' is fallacious. The same is true of the contention that the prices of coal in India is lower than the prices of imported coal, which is a given, considering that imported coal is subject to duty and additional costs of sea freight, exchange rate considerations etc. In any event, it was submitted that imported coal cannot be included in the definition of the relevant market in this case on account of the fact that it is not a substitute for indigenous coal.

56. Having considered the contentions of both the Informants and the Opposite Parties on the issue of dominance, the Commission notes that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies *viz.* CIL which owns and manages all the old Government-owned mines of NCDC and the nationalized private mines and SCCL which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization. CIL is a holding company and has various wholly owned subsidiaries. Although CIL and its subsidiaries are companies registered under the Companies Act, 1956 with their respective Board of Directors, all policy decisions are taken by CIL Board and the coal subsidiaries implement the decisions taken by CIL.

Further, in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of Central Government and, as such, CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. In view of the statutory and policy scheme, the coal companies have acquired a dominant position in relation to production and supply of coal. The dominant position of CIL is acquired as a result of the policy of Government of India by creating a public sector undertaking in the name of CIL and vesting the ownership of the private mines in it. The Hon'ble Supreme Court of India also in *Ashoka Smokeless* case observed that coal companies are monopolies within the meaning of the provisions of the Nationalization Act and they would be deemed to be monopolies within the provisions of Clause (6) of Article 19 of the Constitution of India.

57. The mere fact that SCCL-a joint venture between the Government of Andhra Pradesh and the Government of India-also produces coal for commercial sale in itself does not detract the fact that CIL and its subsidiaries enjoy dominant position in the relevant market in as much as SCCL has a negligible presence in the relevant market. As submitted by the Informants, the market share (with respect to total coal demand) of CIL in the Financial Year 2010-2011 was 69 per cent (sixty nine percent) as opposed to merely 8 per cent (eight percent) of SCCL, while the market share of the two entities in 2011-2012 stood at 63 per cent (sixty three percent) and 8 per cent (eight percent), respectively. The DG has noted that the market share of CIL and its subsidiaries in the relevant market is about 70 per cent.

58. As noted earlier, imported coal is not a substitute which is used in small measure to blend with domestic coal so as to achieve the appropriate calorific value. Further, imported coal is more expensive than domestic coal on account of import duty, sea freight, exchange rate and price based on country of origin *etc.*

59. Further, the plea of CIL that it is not able to act independently as the decisions relating to supply of coal are taken on the basis of recommendations of SLC (LT) and it cannot refuse to negotiate or influence the supply of coal, is misconceived. The Commission notes that NCDP was formulated to regulate distribution of coal in India in view of the limited resources and dependency of various sectors on coal as a primary source of fuel. Thus, even though NCDP lays down the policy for the supply and pricing for regulated industries like Power, Fertilizers, Railways and Defence, it does not determine the terms and conditions for supply and CIL is at liberty to decide the quantity of coal, prices and terms in view of its commercial interest within the parameters provided in NCDP.

60. After bestowing thoughtful consideration on the matter, the Commission notes that CIL through its subsidiaries enjoys economic strength and the advantages of monopoly vested by law. Even in relation to pricing of coal, no material was placed to show that the prices are not determined by the Board of CIL. Prices of coal for unregulated sector are market driven and kept at 30 per cent higher than the regulated sector. Further, coal sold through e-auction also yields greater prices. NCDP lays down a limit of 10 per cent for e-auction but the Opposite Parties have been able to allocate higher quantity for e-auction in the commercial interest of the companies. Moreover, in its commercial operations, there is sufficient independence conferred upon CIL which is also exemplified by the fact that it has been given the status of a *Maharatna*.

61. The Commission further notes that merely being a PSU and mention of social objectives in the memorandum cannot negate the market power exercised by CIL in view of the commercial freedom enjoyed by it.

62. It would be apposite to note that after the introduction of NCDP and implementation thereof, the net profit of the Opposite Parties have grown exponentially. In 2008-2009, the profits were about Rs. 2,000 crores whereas in 2011-2012 it has increased to about Rs. 14,800 crores.

63. In view of the above discussion, the Commission is of the considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys dominance in the relevant market.

Point No. 3 (iii) Whether the Opposite Parties have contravened the provisions of Section 4 of the Act?

64. To appreciate the alleged abusive conduct of CIL and its subsidiaries, it would be appropriate to make a reference to NCDP which necessitated signing of FSAs giving rise to the issues arising therefrom and thereunder which have been projected by the Informants in the present batch of informations.

65. The Government approved NCDP in 2007 which sought to facilitate supply of assured quantities of coal to various categories of consumers in a regime of enforceable obligations on the part of both the suppliers and consumers of coal. The new policy took into consideration the regulatory regimes in which various sectors of the economy were functioning for classification of consumers and prioritization of coal supplies in terms of quantities. This policy also envisaged an enlarged role for State Governments in the supply of coal to a large number of small and medium industries. Under this policy, e-auction sale of coal was re-introduced with certain modified features to encourage emergence of proper coal market in the country. The policy was evolved based on extensive discussions held by the Committee headed by Secretary (Coal) with all the stakeholders.

66. Under NCDP, the existing classification of coal consumers into core and non-core sectors was dispensed with. Since power and fertilizer sectors are operating in a price regulatory regime, coal, to the extent of 100 per cent of the normative requirement of the units in these two sectors, was to be supplied by the coal companies as at present but only under FSAs. In view of the importance of the defence sector and railways, their total requirement will continue to be met. For all other consumers with coal requirement of more than 4200 tons per annum, 75 per cent of their normative requirement of coal would be provided under FSAs. Supply of coking coal to steel plants would be based on FSAs as is done at present. In respect of small and medium sector consumers, the existing cap of 500 tons of coal per year will be increased to 4200 tons per year. It was further provided that since CIL and its subsidiaries cannot deal with a large number of such small and medium sector consumers, State Governments will be required to take up the responsibility of identifying such consumers and arranging supply of coal to them through their designated agencies. To begin with, a quantity of eight million tons of coal per year will be made available to meet the requirements of the small and medium sector consumers. State Governments will enter into FSAs with public sector coal companies for sourcing coal for distribution through their designated agencies which could include National co-operative Consumers Federation, National Small Industries Corporation, any State Government agency and established industrial bodies.

67. An innovative feature of the new policy was the concept of Letter of Assurance (LOA) to be granted by the coal companies to the project developers as against the present system of granting coal linkages. Such LOAs will be converted into FSAs after specific milestones are achieved by the project developers in a period of two

years in case of power plants and one year in case of other consumers. Consumers granted LOA are required to furnish a Bank Guarantee equivalent to 5 per cent of their annual requirement of coal which will be forfeited if the suggested milestones are not achieved within the stipulated period. Bank Guarantee system was introduced to encourage only genuine consumers and to prevent pre-emption of coal linkages without developing the end-use projects in time as has been happening currently. LOAs in case of power (including power utilities, Independent Power Producers (IPPs) and captive power plants), steel (including sponge and pig iron) and cement sectors are to be granted by the SLC (LT) functioning in the Ministry of Coal. For all other consumers, LOA will be issued by CIL. Under the new policy, CIL will be at liberty to import coal to meet their supply commitments to various consumers and in such case necessary price adjustments will be made by the coal companies.

68. Various provisions of NCDP were to be operationalized as per the following time schedules:

(a) All the existing linked consumers shall enter into FSAs with respective coal companies within a period of six months failing which coal supplies can be discontinued.

(b) State Governments shall put in place necessary institutional mechanisms for supply of coal to small and medium sector consumers as envisaged in the new policy within a period of six months.

(c) Provisions of the new policy applicable to the new consumers will be given immediate effect to.

(d) E-auction sale of coal to be introduced within one month and until such time the present scheme of sale of coal under e-booking will continue to operate.

69. In the aforesaid backdrop of NCDP, a summary of the events leading to finalization of FSAs and subsequent modifications may be noted to understand the drafting of FSA and modification process:

(a) In October, 2007, the GoI announced NCDP. CIL nominated CRISIL for drafting FSA for different classes of power producers.

(b) In April, 2008, CIL finalized FSA for existing PSU power producers. The trigger level for penalty was proposed at 60 per cent whereas the trigger level for incentive was kept at 90 per cent of ACQ. The term of agreement was kept for a period of five years.

(c) In June, 2008, Model FSA for new power utilities (those who had not started power generation but LOAs were issued to them up to March, 2009) with trigger level of penalty at 50 per cent was finalized.

(d) In April, 2009, in view of the objections raised by various power producers, a meeting took place between NTPC and CIL with CEA. CIL agreed to modify some of the clauses of FSA for existing power utilities. The CMDs of CIL and NTPC issued a jointly signed document.

(e) In June, 2009, the model FSA for existing private power producers was issued with some modifications. The trigger level for penalty was raised to 90 per cent, at par with the performance incentive and the term was increased to 20 years.

(f) However, no corresponding changes were made in the model FSA for new power utilities. The trigger level for penalty was kept at 50 per cent level.

(g) In 2010-2011, when the time of supply of coal and signing FSA for new power utilities came as they started their production, they objected to some of the terms and conditions of the model FSA, especially the low trigger level for penalty at 50 per cent.

(h) Since no agreement on FSA was reached, CIL proposed to supply coal to new IPPs through MoU as a temporary arrangement. The stand-off on the terms and conditions of FSA for new utilities continued in 2010-2011.

(i) In January, 2012, CIL modified its prices for new grades of coal (G-1 to G-17) in accordance with the notification regarding switching the grading system of coal from UHV to GCV issued by GoI.

(j) In February, 2012, the Ministry of Coal issued direction to CIL for modification in FSA for new IPPs and to increase the trigger level to 80 per cent from 50 per cent.

(k) In March, 2012, CIL deliberated the modification as per the directions of MoC, but unable to take any decision.

(l) MAHAGENCO filed information before the Commission in January/ February, 2012 against CIL and its subsidiaries alleging the abuse of dominant position by them.

(m) In April, 2012, Ministry of Coal conveyed a Presidential Directive to raise the trigger level for penalty to 80 per cent. CIL Board while approving the revised FSA models with 80 per cent trigger and 20 years tenure, decided, a disincentive of 0.01 per cent for non-fulfillment of 80 per cent trigger level of ACQ, with a three years moratorium from the date of signing of FSA.

(n) The power producers did not agree with the penalty of 0.01 per cent for supply below the trigger level. They also opposed other changes made in April, 2012 in other clauses of FSA *viz.* force majeure, condition precedent for seller etc.

(o) In September, 2012, CIL further modified FSA to increase the amount of penalty from 0.01 per cent with certain conditions. Some of other clauses were also modified.

(p) In December, 2012, CIL Board further modified some of the terms and conditions objected by the buyers.

70. It was observed by the DG that FSA was prepared by CIL for different categories of buyers without discussing with them. However, it was noted that whereas for the existing power producers some modifications were made by way of mutual agreement in 2009, no such negotiations were done in the case of new power producers.

71. The Opposite Parties, however, contended that FSAs signed between CIL and the power generation companies in 2009 were a product of detailed bilateral discussions and negotiations between CIL, the power utilities and other governmental stakeholders. It was pointed out that on 8th April, 2009, a meeting was convened by Chairman of CEA to discuss various clauses of FSA which was attended by CIL, NTPC, and also various State power utilities, including MAHAGENCO and GSECL. Various changes were made to the draft FSAs in this meeting including the increase in trigger level and an increase in the duration of FSAs. A large majority of the changes requested by the power utility companies to the terms of FSA relating to sample collection, tenure, weighment of coal, compensation for oversized stones, compensation for excess moisture etc. were accepted by CIL, as is evidenced from the statement jointly signed by NTPC and CIL on 27th April, 2009.

72. The Informants in Case Nos. 03 and 11 of 2012 have challenged the aforesaid by arguing that the Opposite Parties have wrongly projected the role of CEA in

negotiations to draft FSA in as much as the mandate of CEA is from a different perspective. It was denied that CEA has any mandate in the exercise of negotiating the terms and conditions of FSAs. Similarly, it was argued that the role of NTPC has to be segregated in the negotiations for the reason that NTPC had parallel negotiations with CIL. It was submitted that NTPC did not have the mandate to deal with the Opposite Parties on behalf of the power utilities. In any event, the case of *NTPC* was sought to be distinguished from the other power utilities on the ground that NTPC has mostly pit-head plants and therefore, is in a position to exercise control over quality of supply. Even then, it was argued that NTPC had complaints *qua* grade slippage leading to serious disputes with CIL and its subsidiaries. The Informant in Case No. 59 of 2012 also alleged that buyers and other stakeholders were not consulted while making the modifications/amendments to FSAs.

73. On a careful consideration of the rival submissions, chronology of events culminating into FSAs and on perusal of statements of power producing companies as recorded by the DG, it appears that FSAs, envisaged under the new NCDP to bring binding commercial obligations of the parties, were drafted by CIL on its own and without any meaningful consultation with other stakeholders. In this connection, the statement of Shri Manisankar Mukherjee, General Manager (S & M) of CIL as recorded by the DG during the course of investigation may be noted:

Q. 7 The answer given by you shows that the terms and conditions in the FSA for new power plants were not a result of joint negotiation with the power producers. Even the changes made in April, 2012 and September, 2012 were not a result of negotiation process. Why the coal supply agreement should not be prepared jointly in consultation with the power producers?

Ans. FSA models are initially developed by CIL keeping into consideration its production constraints and other commercial issues. The model FSAs have been revised through a process of negotiation when power sector raised reservations on any specific provisions through which the 2009 model with 90 per cent trigger level was evolved for the existing power stations. Since the upcoming power stations have started coming into Commissioning stage in 2011 onwards, their issues have been represented by Ministry of Power, CEA based on which and direction of Ministry of Coal and issuance of Presidential directions, models have been revised and considered by CIL Board in April, 2012 and again in September, 2012 following which 33 power stations have so far signed FSA in the new models.

Q. 8 Whether any discussion with the representatives of power producers has taken place before making the amendments in the model FSA in April, 2012 and September, 2012. If yes, please give details of all such meetings with the power producers.

Ans. Meetings on the issues of new FSA and coal supply sector per se have taken place at various platforms particularly at the ministry level. Most recent discussion in this regard in June, 2012 among Ministry of Power, Ministry of Coal and CIL following which the FSA model was revised in September, 2012.

Q. 9 Whether any meeting has been convened by CIL on its own with the stakeholders including the power producers for discussing the terms and conditions of FSA in 2011-2012 or during the current financial year.

Ans. I have to check the records and revert back.

74. Thus, it can be seen that the process of negotiations essentially involved Ministry of Power and CEA who had no mandate or perspective or authorization to enter into any bilateral engagement on behalf of the power utilities. Shri Mukherjee of CIL

virtually conceded that the meetings convened by CIL did not involve the stakeholders including the power producers for discussing the terms and conditions of FSA.

75. In the aforesaid backdrop of CIL drafting/finalising FSAs unilaterally without any meaningful consultation with the entire spectrum of stakeholders, the impugned terms and conditions of FSA besides the conduct of CIL and its subsidiaries may be examined.

Grading of Coal

76. During the course of investigation, the buyers/power producers raised various issues pertaining to the process of declaration and verification of grades of coal. Such issues may be summarized as follows: (a) the declared grade/GCV of coal by the seller remains unverified since the Coal Controllers do not check it on regular basis. As quality of coal changes with the process of digging/mining, GCV has to be ascertained regularly (b) in the absence of proper grading and sampling procedure, the coal companies are taking advantage by charging higher prices (c) there is no obligation on coal companies to supply the quality of coal as provided in FSA (d) there is no mechanism to address the grievances of consumers regarding slippage of grade of coal (e) the base price of coal is determined based on the declared grade and in case of quality slippage, the purchaser only gets credit of part of the total cost incurred (since while allowing credit, only difference of base prices is paid whereas no credit of the taxes and duties paid due to higher grade declaration is given) and (f) lastly, it was suggested by consumers that declaration of grade of mine/seams should be done with participation of a neutral body.

77. It is, no doubt true that credibility of declared grade is always a contentious issue between the purchasers (power producers) and the coal companies, however, in view of a suitable and independent mechanism provided by the Office of Coal Controller (CCO) to redress such grievances, no interference is warranted by the Commission in the present proceeding on this count. In this connection, the statement made by Shri R.L.P. Gupta, General Manager (Quality Control), SECL before the DG during the course of investigation may be noticed:

> *...[t]he CCO, a government organization, is vetting the proposed annual declared grade and annual grades are declared only then. It is mandatory to grade this annual grade declared on or before 31st March every year, which is applicable for the subsequent financial year.*
>
> *Further, the CCO is continuously monitoring independently coal being supplied from various sources to various consumers. There is a provision in the CCO's guidelines that, in case of any grievance against the grade declaration or quality, consumers can formally lodge a complaint with the CCO for redressal. In such event, the CCO verifies the grievance verified in the presence of both the consumer and the coal company. It is further stated that CCO draws a coal sample independently, in the presence of both the parties, to ascertain the genuineness of the complaint. Since 2010, I have not noticed any such type of complaint.*

78. In this connection, it would be appropriate to note the relevant clauses of FSAs (Clause 2.4, for the existing and new power producers):

> *For existing power producers*
>
> *Clause 2.4 of FSA— Notwithstanding the provisions of Clause 2.2 above, in the event of any change in the Grade structure of Coal declared by the Govt. of India or by any other Authority empowered by the Government, such changed Grade structure shall be binding and complied with by both the Parties and shall come into effect as per such declaration.*

For new power producers

Clause 2.4 of FSA-Notwithstanding the provisions of Clause 2.2 above, in the event of any change in the Grade structure of Coal, such changed Grade structure shall be binding and complied with by both the Parties. The Seller shall within Fifteen (15) days of introduction of such change provide a written notice to the Purchaser calling for a joint review of such provisions of this agreement on which such change in the Grade structure has a bearing, and upon such joint review, this Agreement shall be duly amended in writing to bring it in full conformity with such change.

79. It can be observed that while in earlier FSA, the change could only be made by GoI, in the new FSA, no reference to GoI has been made. Thus, the changes brought in FSA for new power producers do not appear to be unfair or discriminatory. In the latest FSA, there is a mechanism for joint review by both the parties. In this regard, the Commission observes that under the Colliery Control Order, 2000 (now Colliery Control Rule, 2004), the functions of the CCO include *inter alia* laying down procedure and standard for sampling of coal, inspection of collieries so as to ensure the correctness of the class, grade or size of coal, issuing directives for the purpose of declaration and maintenance of grades of a seam mined in a colliery and acting as the Appellate Authority in case of dispute between parties arising out of declaration of grade and size of coal. In the light of availability of such statutory mechanism to redress the issues arising out of declaration of grading of coal, the mechanism can be described as neither unfair nor discriminatory.

80. However, on the issue of remedy for grade slippage, the Commission notes that Clause 4.7 of FSA for existing power producers provided that if the grade analyzed pursuant to Clause 4.7 shows variation from the declared grade consistently over a period of three months, the purchaser shall request the Seller for re-declaration of grade, which shall be duly considered by the Seller. However, the investigation revealed that in the model FSA for new power producers this provision of re-declaration was removed by CIL. Such, differential regime, on the face of it, is discriminatory and as such, is in contravention of the provisions of Section 4(2)(a)(i) of the Act. The Commission, however, notes the submission made on behalf of CIL that during the course of investigations, this anomaly was removed.

Sampling

81. The nub of the dispute between power producers and coal companies in the present batch of informations centres around the sampling procedure. It was submitted on behalf of power producers that prior to the present FSA, sampling was done at both the ends *i.e.* at loading and unloading points by an independent party. CIL, however, while drafting model FSA made changes in the sampling procedures.

82. No doubt, when the price of coal is based on the grade/quality of coal, the buyer has the right to get the grade for which he is paying the price. Hence, the importance of terms and conditions relating to sampling and consequent assessment of grade and quality of coal hardly needs any reiteration.

83. The DG found such terms and conditions to be unfair and discriminatory being in violation of Section 4(2)(a)(i) of the Act.

84. The Opposite Parties, however, strongly justified the requirement to conduct joint sampling at the loading end only, which is stated to be carried out by CIL in a fair and transparent manner. It was submitted that in accordance with the provisions of the Sale of Goods Act, 1930, the title in goods passes on to the purchaser at the point of

delivery of the goods and, therefore, the seller is not liable for any loss or damage to the goods during transit. Reliance was placed upon the decisions of the Hon'ble Supreme Court of India in several cases, particularly in *Marwar Tent Factory* v. *Union of India*[1] (1990) 1 SCC 71, where it was observed that the seller is absolved of its responsibilities for the goods once they are loaded on to the trains. As per the terms of FSA, the title to the coal passes at the point of sale, which in this case is the loading point of coal onto the transportation (which is chosen by and the sole responsibility of the customer). Accordingly, it was argued that CIL cannot be held responsible after the coal is loaded on wagons, as the title has passed.

85. The Informants, however, vehemently submitted that sampling on the loading end is a process that is neither fair nor transparent in view of the dominant position of CIL and its subsidiaries. It was further contended that though the argument that the sampling ought to take place at the loading end in as much as the title of the goods passes over to the consumer at the time the coal is loaded into the rakes appears to be logical, it is incorrect to say that sampling should only be done at the loading end and not at the unloading end as *'CIL and its subsidiaries cannot be held liable for the grade slippage, pilferage or adulteration of coal that takes place when coal is being transported'.*

86. It was submitted that while a reasonable amount of pilferage in quantity might occur in transit, it is absurd to suggest that the declared grade of an entire wagon or train consignment of coal can change during the course of transportation, or that coal by virtue of transit converts into coal of a different grade. In other words, it was submitted that the grade of coal or its GCV cannot change, no matter what distance it is transported for.

87. Similarly, it was contended that the argument of CIL that joint sampling ought to be done at the loading end alone because here both the representatives of the seller and buyer are present is also illogical in as much as the Opposite Parties can very well depute its representatives to the unloading end for the process of joint-sampling, just as the purchasers are expected to do so at the loading end. It was further argued that the fact that the results of the testing on samples taken by some purchasers (of their own initiative) at the unloading end has been grossly different from the results of samples taken and tested at the loading end cannot be attributable to specious explanation that the 'customers themselves are not doing their job properly by failing to control the process of transportation'. It was also submitted that the process of manual sampling and testing at the loading end is fraught with several practical and logistical problems on account of the dominant market position of CIL and its subsidiaries and the attitude displayed by their employees.

88. On testing, it was submitted on behalf of the Informants that contrary to the claims made in the objections, the Opposite Parties neither have adequate technology, nor sufficiently trained staff to carry out the testing in the prescribed manner in their own in-house laboratories. It was submitted that the procedure of testing is most opaque. The provisions with respect to the presence of representatives of both parties are not followed strictly. Further, the established standards and protocols of testing are not followed and there is no mechanism to ascertain whether the results returned by the said laboratories actually pertain to the samples claimed to have been tested. Further, while the Opposite Parties have provided figures for the various testing equipment purchased and expected to be purchased by them, they have failed to state how many

1 Ed.: MANU/SC/0354/1989: AIR 1990 SC 1753: JT 1989 (4) SC 307: (1990) 97 (1) PLR 166: 1989 (2) SCALE 1149: (1989) Supp 2 SCR 127: 1990 (1) UJ 200: 1990 (1) WLN 5

of these equipment are in a proper calibrated and working condition. The lack of adequate technology was compounded by the staunch refusal of the Opposite Parties to bring about fair terms for sampling and testing in FSAs like sampling and testing at unloading port through an accredited independent third party agency.

89. It was further asserted on behalf of the Informants that the claim of the Opposite Parties that if despite joint sampling, customers are not satisfied with the results, they are themselves to be blamed, is another example of the specious reasoning put forth by the Opposite Parties to justify their indefensible insistence on retaining sampling only at the loading end. It was submitted that the process of 'joint' manual sampling and testing as is currently being followed by the Opposite Parties, is farcical, and of nominal value only, and even the prescribed procedures in this regard were not being followed.

90. Lastly, it was contended that the allegation that power producers are raising issues related to quality 'as they do not wish to pay for the correct price of coal under the GCV pricing', was baseless. It was submitted that consumers do not mind paying as long as the contracted grade/quality of coal is supplied by the Opposite Parties. Further, the argument that the Opposite Parties are not receiving quality complaints with regard to coal sold through the e-auction mode cannot in any manner be construed to be an indication that the complaints with respect of coal supplied under FSAs are false, as alleged.

91. On perusal of the records, it appears that prior to the current FSAs, the sampling was done at both ends *i.e.*, loading and unloading points by an independent party. CIL while drafting the model FSA made changes in the sampling procedure without consulting the power producers.

92. The Commission notes that CIL sought to justify the new sampling mechanism due to the problems with the previous method of third party sampling raised by the power companies besides arguing that the new system is fair as both parties are involved in the sampling process. It was also argued that joint sampling at the loading end was the method of sampling agreed upon with the power companies, NTPC and CEA in 2009.

93. The Commission, however, notes that the justifications provided by CIL to adopt the new mechanism are not founded on any basis whatsoever. Neither the DG found any material which substantiates CIL's claim that the power producers were not happy with third party sampling nor any such material was brought to the attention of the Commission. Further, the claim of CIL that the power producers during the meeting held in April, 2009 proposed for joint sampling at loading end only was also found to be false in light of the minutes of the meeting and the chain of events which clearly showed that in the model FSA circulated by CIL in June, 2008, there was only provision for manual sampling at loading end in the joint presence of both the parties. The power producers objected to this clause and when the meeting under the chairmanship of CEA was held, NTPC suggested the inclusion of provisions for mechanical sampling at loading end and where the AMS are not functional with silo loading, the sampling to be done at unloading end. The correspondence exchanged in this regard between the Informant (GSECL) and CIL in this regard was also found to evidence that joint sampling only at the loading end was resisted by the Informant.

94. A reference may also be made to the sampling procedure adopted by the only other player in the relevant market *i.e.*, SCCL to ascertain the industry practices in this regard. The DG noted that while FSA of SCCL provides for sampling at the loading

end only, there is provision for analysis by both the parties at their respective labs and for this purpose three sets of sample (one each for seller, buyer and referee) are prepared.

95. Needless to add that when the price of coal is based on the grade/quality, the buyer has right to get the grade for which he is paying the price. In the aforesaid backdrop and industry practice, the Commission notes that as per Clause 4.7. (i) of FSA, samples of coal are to be collected jointly. Further, as per Clause 4.7.5, all tools required for collection of joint samples, its preparation and all laboratory facilities for the purpose of joint analysis of samples are to be provided by the seller. The Schedule further provides that samples drawn at loading ends shall be analyzed in designated laboratories at loading ends in the presence of seller and purchaser. Thus, it is clear that the purchaser has practically no say in the sampling process and becomes a mere spectator as all facilities and infrastructure for the joint sampling are under the effective control of the seller.

96. In the result, the Commission holds that the terms and conditions relating to sampling process are unfair and in contravention of the provisions of Section 4(2)(a)(i) of the Act.

97. The Commission has also examined the relevant Clauses *i.e.*, 5.7.1 and 5.7.2 which are applicable to the new power producers as well as existing power producers. The Commission has also examined the relevant clause *i.e.*, 4.7 which is applicable to the PSUs. It is, thus, apparent that there are different provisions in FSAs for sample collection for different categories of buyers. For existing PSU power producers, there is provision for automatic mechanical sampling for coal supplied through silos, whereas for existing private producer and new private power producers, it was manual till 2012 when the words 'or any suitable mechanical arrangement' were inserted in the agreements. The Commission is of the opinion that the provisions for sampling of coal are *ex facie* discriminatory between PSU and private producers and thus, in contravention of the provisions of Section 4(2)(a)(i) of the Act.. The changes effected in 2012 to insert the words 'or any suitable mechanical arrangement'— which are abstract and ambiguous besides having the potential to cause conflict of interest- in respect of FSAs governing private producers are also not sufficient to bring any parity of treatment between these two sets of producers.

Supply of ungraded coal

98. Coming to the issue of supply of ungraded coal, the Commission notes that surprisingly the FSA does not impose a strict liability upon the Seller to supply only the agreed grades. Instead, it only mentions about making adequate arrangements to assess the quality and monitoring loading of ungraded coal. Reference may be made to Clause 5.2 (Clause 4.2 of the old power producers' FSA) of FSA which provides that *'the Seller shall make adequate arrangements to assess the quality and monitor the same to endeavour that ungraded coal (GCV of less than 2200 Kcal/Kg for non-coking coal) is not loaded into the Purchaser's containers. If the Seller sends any quantity of such coal, the Purchaser shall limit the payment of cost of Coal to Re. 1 (Rupee one only) per tonne. Royalty, cess, sales tax etc. shall, however, be paid as per the Declared Grade. Railway freight shall be borne by the Purchaser.'*

99. CIL argued that the responsibility to bear the freight charges for ungraded coal is that of the buyer. Further, it was argued that customers were not prejudiced as grade slippages are adequately compensated for under FSA. Further justifying the fairness of the term, it was submitted that the mechanism provided for a nominal amount of

Rs. 1 tonne in case of supply of any ungraded coal. This amount was charged as the sale price and other associated taxes are levied, which are payable by it to Central Government or the relevant State authorities. It was the justification of CIL that the Government does not stop charging levies even if ungraded coal was mined; therefore, it was only fair that the same was passed on to the customer. It was submitted that, in any event, CIL has not supplied ungraded coal and therefore this concern was largely academic.

100. Further, with regard to the allegation of MAHAGENCO on rakes of ungraded coal received between 2009 and 2012, CIL submitted that no such issue was ever raised before it. It was pointed out that a detailed analysis of the coal rakes would reveal that in relation to a vast majority of the rakes which were alleged to have ungraded coal, the sampling results of these rakes were jointly signed by MAHAGENCO's representatives and were within grade. On other occasions, it was contended that since MAHAGENCO voluntarily chose not to participate in the joint sampling process, there was absolutely no basis whatsoever in its claims about supply of ungraded coal.

101. Having perused FSA, it is noted that the term does not mandate the seller to provide the agreed grade and neither any strict liability is imposed in case of failure to do so. It only mentions about making adequate arrangements to assess the quality and for providing monitoring mechanism to prevent loading of ungraded coal. Further, there is no provision for compensation if the ungraded coal is loaded and transported. In case it is loaded, whether the buyers require or not, they have no choice but to pay all the expenses on transportation, royalty and taxes etc.

102. The Opposite Parties could not justify as to why the buyers were given no choice but to pay for the expenses of ungraded coal, which was supplied in breach of the agreed quality of coal under FSA. The finding of the DG in this regard is unassailable and the Opposite Parties could not controvert the same. Suffice to notice from the record of the DG that any goods which is not in conformity with the sale agreement, should not be sent to the buyer, irrespective of the fact that the goods supplied to the buyer may have less or more value than the good contracted for. Charging any amount from the buyer on the ground that it has some value cannot be accepted as fair if the buyers are not willingly to accept the same. The ungraded coal may have some value and CIL may be able to sell such ungraded coal in the open market to the willing buyer, but imposing a condition that if such goods are transported by default, the cost has to be borne by the buyer does not seem to be fair in any circumstances.

103. It may be noted that CIL's conduct to force the buyer to pay for the cost of ungraded coal because CIL failed to make adequate arrangement to avoid such transportation goes on to show how the seller has upper hand on the buyers. The Commission fails to appreciate as to why a customer would be forced to pay for those goods which it does not require at all and was not part of the contract for which purpose it was executed. Further, it is not out of place to mention that such a provision also results in inefficient use of the limited resources of Railways. The ultimate sufferer is the end user of power on whom the increased cost is passed on. Thus, the terms and conditions in FSA regarding supply of quality coal should be guided by the strict adherence to the desired quality and the measures relating to grading, sampling and testing of the coal need to be incorporated in the agreement to the satisfaction of both the parties.

104. It may also be noted that FSA is only meant for supply of graded coal. However, the buyer is required to pay the expenses incurred by seller in production and transportation of goods which are not meant to be supplied as per FSA. In fact, for new power producers, even the GCV of the coal to be supplied is mentioned. Yet, it was further found by the DG that the quantity of such ungraded coal is deemed to be a supply of quantity coal for calculating the ACQ. The power producers stated before the DG that the ACQ is fixed on the basis of PLF @ 85 per cent at the grade of coal meant for the boilers. However, if they receive coal of low GCV or ungraded coal, the power generation would require additional quantity of coal to produce the desired quantity of power. In other words, if 1 Kg. coal of 5000 GCV is required to generate 1 watt, 2 Kg. coal of 2500 GCV shall be required for same amount of power generation. Thus, it can be seen that if the coal of low grade is supplied, the quantity of coal required and resultantly purchased by the power producer increases.

105. The Commission further observes that the payment for transportation for the unwanted goods *i.e.* ungraded coal by buyers does not even seem to be industry practice. It is observed from the report that even the other player in the market *i.e.* SCCL reimburses the freight to the buyer in case of supply of ungraded coal whereas the Opposite Parties do not allow even the reimbursement of transportation cost of ungraded coal.

106. The Commission notes that the clauses relating to DDQ in FSAs gave leverage to CIL to evade and avoid its liability for short supply. It is paramount that an FSA should ensure timely delivery of contracted quantity of coal conforming to the agreed grade. Any supply of coal from alternative sources casts not only financial uncertainty but also uncertainty in terms of calorific value of coal so received. The problem gets further compounded if DDQ is read together with the clauses pertaining to ACQ, ungraded coal and oversized stones.

107. In the result, the Commission is of the considered opinion that the provisions relating to sample collection and supply of ungraded coal in FSA are unfair and in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Oversized coal/stones and compensation

108. It was alleged by power producers that, notwithstanding that the top size of coal should not be more than +250 mm size as per terms of FSA, big lumps were supplied by the Opposite Parties to the linked power stations causing delays in unloading of coal rakes due to which demurrage charges were attracted. It was averred that most of the loading sites of coal companies either do not have coal crushers installed or the crushers remain out of order for long times. Additionally, extra cost was incurred by power producers for arranging manual labour for breaking of big lumps at its unloading site.

109. CIL, however, contended that the cap on compensation for stones at 0.75 per cent of the total quantity was not only fair but also proportionate. It was submitted that this cap was applicable to the new power plants, for they were sourcing coal from other sources apart from CIL *i.e.* captive mines etc. Therefore, stones separation was done at the time of unloading and since CIL has no control over such supplies or what quantity of stones are received from such supplies or of knowing what quantity of the stones found were actually from its supplies, a limited cap of 0.75 per cent was inserted.

110. It is pertinent to note that during a meeting held in April, 2009 existing power producers had requested that the compensation of stones be based on actual quantity

and no restriction needs to be put in FSA. It appears that CIL agreed to this proposal and removed the capping of 0.75 per cent for compensation in the case of existing power producer but did not amend the capping in FSA for new power producers.

111. It would be appropriate to quote the relevant clause of FSA in this regard:

Clause 4.6.3

The Purchaser shall inform the Seller all incidents of receipt/presence of stones in any specific consignment(s) by rail, immediately on its detection at the Delivery Point and/or Unloading Point. The Seller shall, immediately take all reasonable steps to prevent such ingress at his end. The stones segregated by the Purchaser at the Power Station end shall be assessed jointly by the representative of the Seller and the Purchaser at the Power Station end for adjustments pursuant to Clause 9. 1.

Compensation for oversized stones shall be payable by the Seller to the Purchaser month-wise, Power Station wise, in terms of weighted average Base Price of the analyzed Grade of Coal for the equivalent quantity of stones verified/removed, as above provided that the quantity of stones admissible for compensation shall be restricted to 0.75 per cent of the total quantity of Coal supplied progressively in a year by the Seller to the concerned Power Station by rail after accounting for the weight reduction towards destination end, weighment in terms of Clauses 5.2 and moisture compensation in terms of Clause 9.2.

112. The Commission observes that for any agreement to have a semblance of fairness, it must necessarily provide for payment of compensation which is based on mutual negotiations. Further, the clause must operate in a non-discriminatory manner which is not the case here. It is also observed that CIL agreed to the proposal of NTPC and removed the 0.75 per cent capping in April, 2009 but provisions for new power producers were kept unchanged. The question that would arise is whether the new power producers were different from the old ones and, if yes, to what extent and in what manner. If not, what could be the possible reason for CIL to keep the same clause intact for the new power producers and remove the same for the old power producers. Such a conduct is plainly discriminatory besides being unfair. Even the explanation provided by CIL for imposing such conditions for different class of consumers in the same market, are found to be not based on any *intelligible differentia*. The anxiety of CIL that the new power producers are sourcing coal from other sources and hence mixing of supplies, is also not well founded and such an apprehension cannot be a basis for discrimination. Moreover, it appears from the DG report that CIL Board has proposed to remove the cap with some conditions. This shows that CIL itself has realized the discrimination in the process.

113. In the result, the Commission holds that the Opposite Parties have imposed unfair and discriminatory terms and conditions regarding compensation of stones in contravention of the provisions of Section 4(2)(a)(i) of the Act.

114. The Informants, in addition to challenging the clauses of FSAs as discussed above, have also challenged the conduct of the Opposite Parties flowing therefrom. In this regard, the Commission is of considered opinion that the impugned conduct of the Opposite Parties essentially arise and emanate out of the abusive terms and conditions in FSAs relating to quality assurance as highlighted earlier in this order which are the trigger of all the grievances made by the power producers in these proceedings. Since such terms have already been found to be in contravention of the provisions of the Act and further in view of the proposed remedy ordering *inter alia* modification of FSAs, the Commission does not deem it necessary and expedient to examine the

specific conduct flowing from such abusive terms in any greater detail which has been elaborated in the report of the DG.

Other clauses of FSAs

115. During the course of investigation, the Informants and other power producers raised concern about some other clauses of FSAs, which, according to them, were one sided and unfair. In this regard, it was noted by the DG that some of the clauses had already been modified by CIL during the pendency of proceedings. However, an analysis of terms and conditions of FSAs which were alleged to be unfair and discriminatory by all the power producers was undertaken by the DG.

Review of FSA

116. Grievance was made on behalf of the new power producers that the clauses in FSA regarding review of FSA for them are unfair and discriminatory. To appreciate the issue, it would be apposite to quote the relevant clauses:

> *Clause 2.5 of FSA for PSUs and old private Power Producers*
>
> *In the event, the parties are unable to arrive at a mutually agreed position with respect to the subject matter review in terms of Clause 2.3 within a period of three (3) months from expiry of each five (5) year term, the parties shall refer the Matter to the Govt. of India and until a decision from the Government of India is received, the Agreement shall continue to be in force. The decision of the Govt. of India on the subject matter shall be final and binding on both the Parties.*

117. The provision for new private producers is as follows:

> *If the review in terms of Clauses 2.3 does not result in a mutually agreed position with respect to the subject matter of review, this agreement shall nevertheless continue to be in force. However, if despite further efforts the parties are unable to arrive at a mutually agreed position with respect to the subject matter of Review, within a period of nine (9) months from the date of notice in term of Clause 2.3, the aggrieved Party shall have the right to terminate the Agreement subject to a further notice of three (3) months given in writing to the other Party."*

118. The following clauses are also relevant for appreciating the issue under consideration:

> *The Clause 2.6 of FSA is as under:*
>
> *In the event of any material change in the Coal Distribution system of the Seller due to a Government directive/notification, at any time after the execution of this Agreement, the seller shall within seven (7) days of introduction of such change provides a written notice to the Purchasers calling for a joint review. If the Parties are unable to arrive at a mutually agreed position with respect to the subject matter of review, within a period of thirty (30) days from the date of notice, the parties shall refer the matter to the Govt. of India for a decision.*
>
> *Clause 2.6 for new private producers:*
>
> *In the event of any material change in the Coal Distribution system of the Seller due to a Government directive/notification, at any time after the execution of this Agreement, the seller shall within fifteen (15) days of introduction of such change provides a written notice to the Purchasers calling for a joint review. If the Parties are unable to arrive at a mutually agreed position with respect to the subject matter of review, within a period of thirty (30) days from the date of notice, the seller shall have the right to terminate the Agreement subject to a further notice of Thirty (30) days given in writing to the Other Party.*

119. The private producers alleged that the seller has been allowed to be a judge of his own cause as per the clause which provides the seller with Authority to unilaterally terminate the agreement. That power to terminate on its own is unfair and unjust and the same should be opined by an independent committee of members from CEA, MoP, MoC in the case of any review of FSA or any disagreement/dispute on review, as suggested by the private producers.

120. The Commission notes that the empowering clause reserving the right to unilaterally terminate the agreement without any scope of review by any independent agency can hardly be described as fair in the extant regulatory framework operating in the coal sector. Due to the statutory monopoly enjoyed by CIL and its subsidiaries, the buyers are heavily dependent upon the coal companies and insertion of such clause gives CIL through its subsidiaries an overpowering advantage in the relevant market, which is patently unfair. The formal equality in the clause giving the aggrieved party a right to terminate the agreement is also effectively of no consequence in view of the tremendous dependence of the buyer upon the dominant supplier of coal.

121. The DG noticed from the minutes of the meeting dated 27th April, 2009 between CIL and NTPC that earlier provision for PSUs was similar to the present provision for new private producers. Due to the objections raised by NTPC, the provision for reference to Government of India was incorporated. Meanwhile, CIL did not make such changes/modifications for the new private players.

122. From the conspectus of events as narrated above, the Commission is of the considered opinion that CIL is resorting to unfair and discriminatory conduct by inserting clauses in FSAs with PSU power producers vis-à-vis new private producers. The clause for review of FSA is disadvantageous to new power producers in comparison to the clause for review of FSA in respect of PSU power producers in the way that the former gives a unilateral right to terminate the agreement to the Seller.

123. In view of the above, the Commission holds that the Opposite Parties have imposed unfair and discriminatory terms and conditions in contravention of the provisions of the Section 4(2)(a)(i) of the Act.

124. During the course of investigation, the DG was apprised that Board of CIL considered this aspect in its meeting and approved amendment of Clauses 2.5 and 2.6 to make similar provisions for all the buyers. The Commission notes this aspect.

Force majeure

125. It was alleged by the Informants that the *force majeure* clause for new power producers contained different conditions in comparison to the old power producers. It was submitted by the power producers that following additional terms and conditions have been inserted, which cannot fall under *force majeure*. The relevant clauses in FSA for new power producers may be noticed:

Clause 17.1(i) Global shortage of Imported Coal or delays caused by supplier or no response to enquiries for supply of coal or logistics constraints in transportation of Imported Coal;

Clause 17.1(j)

(i) Break-down of equipments and machineries.

(ii) Failure of contractors to deploy equipments and machineries.

(iii) Non-supply/delayed supply of equipments or spare parts by vendors

(iv) Shortage/cut in power supply

(v) Non-supply/short supply of explosives by vendors

(vi) Obstruction in transportation of coal from pithead to sidings by agitations/mob violence riot.

126. From a plain reading of the above clause, it is observed that the provision of force majeure clause in the present case, is couched in an extensively wide language, leading to the inference that the same have been put by the suppliers (the dominant party) to the agreement. This clause seems to dilute the suppliers' commitment for supply of coal. The fear of power producers that since this clause envisages various circumstances/events/acts which gives room to the suppliers to delay or not to perform their part of commitment on time cannot be said to be unfounded. Accordingly, the same is held to be in contravention of the provisions of the Section 4(2)(a)(i) of the Act.

127. It may, however, be noted that CIL appraised the Office of the DG that it has modified the force majeure clause by removing such conditions after considering the objections of consumers.

Prices

128. On the issue of excessive pricing, no such evidence could be found during the course of investigation by the DG that revealed any unfair or discriminatory pricing charged by the Opposite Parties in supply of coal in the relevant market. Also, the Informants have not been able to produce any document to substantiate on this allegation. Therefore, considering the fact that there is no material on record to prove that CIL has charged excessive price on the Informants for the supply of coal, the allegation stands negated.

Terms and conditions relating to quantity and trigger levels

129. The DG examined the aspects relating to trigger levels for performance incentives, conduct relating to quantity and source supply, issues relating to diversion of coal for e-auction, restriction of production etc. and some other clauses of FSA, however, no contravention was found by the DG on these scores. The Informants have also not been able to produce any document to substantiate on this allegation.

Conclusion

130. In view of the above discussion, the Commission is of the considered opinion that CIL did not evolve/draft/finalize the terms and conditions of FSAs through a mutual bilateral process and the same were imposed upon the buyers through a unilateral conduct. Further, the Commission holds the Opposite Parties to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/discriminatory conditions in the matter of supply of non-coking coal to power producers, as noted above.

131. Accordingly, the Opposite Parties are directed to cease and desist from indulging in the conduct that has been found to be in contravention of the provisions of the Act. Further, it is ordered that the fuel supply agreements shall be modified in light of the observations and findings recorded in the present order. For effecting these modifications in the agreements, CIL shall consult all the stakeholders including the Informants herein. CIL is also directed to ensure uniformity between old and new power producers as well as between private and PSU power producers. Specifically, CIL is directed to incorporate suitable modifications in the fuel supply agreements to provide for a fair and equitable sampling and testing procedure. CIL may also consider the feasibility of sampling

at the unloading-end in consultation with power producers besides adopting international best practices.

132. So far as imposition of monetary penalty is concerned, the Commission notes that even though CIL enjoys operational commercial freedom, its conduct is constrained by directions received from various stakeholders including Ministry of Power, Ministry of Coal, CEA etc. all of whom exert influence and are involved in making decisions that impact various aspects of CIL's business. Moreover, pricing of coal is determined by CIL keeping in mind the larger public interest and its social obligations. However, notwithstanding the overarching policy and regulatory environment within which CIL has to operate, it has sufficient flexibility and functional independence in carrying out its commercial and contractual affairs and such factors do not detract from CIL and its subsidiaries operating independently of market forces and enjoying undisputed dominance in the relevant market. At the same time, these aspects cannot be altogether ignored by the Commission while quantifying the penalty.

133. Also, the Commission notes the changes effected by CIL during the course of the investigation and pendency of proceedings before the Commission in FSAs on certain aspects, as noted in the order. In fact, it appears that even during the pendency of appeal before the Hon'ble Competition Appellate Tribunal, CIL has taken steps to improve the process of sampling of coal. Prior to October, 2013, FSAs for new and existing power plants provided for joint sampling and analysis at the loading end. Pursuant to modifications in the sampling procedure made in October, 2013 *i.e.* before the passing of the order by the Commission, CIL appointed independent third parties through an open tendering procedure with a view to bring more transparency in the sampling process. Under this system, the samples were collected and analysed by an independent third party at the loading end, instead of joint sampling by seller and purchaser. In 2015, further modifications were made by CIL whereby both CIL and consumers appointed separate third parties for sampling and analysis. Both the third parties conducted the sampling (collection and analysis) jointly at the loading end. Final laboratory sample was to be divided into three parts: the first part was taken by the power company for analysis at their end; the second part was taken by the respective subsidiary of CIL for analysis; and the third part, which may be used as 'Reference Sample' in case of dispute and would be analysed at a mutually agreed NABL Accredited Laboratory, was jointly sealed and kept in the joint custody at the loading end. The results of the analysis of the referee sample were binding on both parties.

134. It has been further pointed out by CIL that following these changes, as a result of continued demand from the power sector, a meeting was held on 28th October, 2015 under the chairmanship of the Hon'ble Minister for Power, Coal and New and Renewable Energy, which was attended by representatives of Ministry of Coal (MoC), Ministry of Power (MoP), the Association of Power Producers (APP), CIL, and the National Thermal Power Corporation (NTPC) in relation to third party sampling protocol for coal dispatched by CIL's subsidiaries to power producers. Based on the decision in the meeting, the MoC, issued guidelines regarding the revised sampling process. The revised process communicated by the MoC envisages sampling to be carried out by CIMFR (Central Institute for Mining and Fuel Research) at the loading end only. It was also decided in that meeting that for future modification and *inter alia* to facilitate operationalization of the guidelines dated 26th November, 2015, a committee was to be constituted, which would interact at regular intervals. However, it is mentioned that at this stage the Hon'ble Competition Appellate Tribunal through

its order dated 17th May, 2016 set aside the Commission's order and directed for fresh consideration by the Commission.

135. Thus, it cannot be gainsaid that constant steps are taken by CIL to improve the sampling procedure and the Commission hopes and trusts that this process will reach to its logical conclusion to the satisfaction of all the stakeholders.

136. On a holistic consideration of the matter, the Commission decides to impose penalty on CIL by taking into consideration its consolidated accounts at the rate of 1 per cent of the average turnover of the last three years. The total amount of penalty is worked out as follows:

(in crore)

S. No.	Name	Turnover for 2009-2010	Turnover for 2010-2011	Turnover for 2011-2012	Average turnover for three years	@ 1 per cent of average turnover
1.	CIL	52,252.09	55,101.42	69,952.33	59,101.94	591.01

137. The directions contained in para 131 above, must be complied within a period of 60 days from the date of receipt of this order. The Commission further directs CIL to deposit the penalty amount within 60 days of receipt of this order.

138. The Secretary is directed to inform the parties accordingly.