COMPETITION COMMISSION OF INDIA

Case Nos. 05, 07, 37 & 44 of 2013

Case No. 05 of 2013

In Re:

M/s Madhya Pradesh Power Generating Company Limited Informant

And

1. M/s South Eastern Coalfields Ltd. Opposite Party No. 1

2. M/s Coal India Ltd. Opposite Party No. 2

WITH

Case No. 07 of 2013

In Re:

M/s Madhya Pradesh Power Generating Company Limited. Informant

And

1. M/s South Eastern Coalfields Ltd. Opposite Party No. 1

2. M/s Coal India Ltd. Opposite Party No. 2

WITH

Case No. 37 of 2013

In Re:

M/s West Bengal Power Development Corporation Ltd. Informant

And

1. M/s Coal India Ltd. Opposite Party No. 1

2. M/s Eastern Coalfields Limited Opposite Party No. 2

3. M/s Bharat Coking Coal Limited Opposite Party No. 3

4. M/s Mahanadi Coalfields Limited Opposite Party No. 4

WITH

Case No. 44 of 2013

In Re:

Sponge Iron Manufactures Association Informant

And

1. M/s Coal India limited Opposite Party No. 1

2. M/s Central Coalfields Limited Opposite Party No. 2

3. M/s Eastern Coalfields Limited Opposite Party No. 3

4. M/s Western Coalfields Limited	**Opposite Party No. 4**
5. M/s South Eastern Coalfields Limited	**Opposite Party No. 5**
6. M/s Northern Coalfields Limited	**Opposite Party No. 6**
7. M/s Mahanadi Coalfields Limited	**Opposite Party No. 7**

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Appearances: Shri Vivek Tankha, Senior Advocate with Shri Varun Kumar Chopra and Shri Kartikey, advocates for the informant in Case Nos. 05 and 07 of 2013.

None for the informant in Case No. 37 of 2013.

Shri Abhishak Khare, advocate for the informant in Case No. 44 of 2013.

Shri Ramji Srinivasan, Senior Advocate with Ms. Pallavi S. Shroff and Shri Harman Singh Sandhu advocates for the opposite parties in Case Nos. 05, 07, 37 and 44 of 2013.

Order under Section 27 of the Competition Act, 2002

This common order shall govern the disposal of the informations filed in Case. Nos. 05, 07, 37 and 44 of 2013 as similar issues are involved in these cases.

Facts

2. Facts, as stated in the informations, may be briefly noticed.

Case No. 05 of 2013

3. The information in Case No. 05 of 2013 has been filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by M/s Madhya Pradesh Power Generating Company Limited against M/s South Eastern Coalfields Ltd. ('the opposite party No. 1'/SECL) and M/s Coal India Ltd. ('the opposite party No. 2'/ CIL) alleging *inter alia* contravention of the provisions of sections 4 of the Act.

4. The informant has stated that that the SECL being the monopoly supplier was neither willing to negotiate the terms of coal supply agreement nor ensuring the supply obligations and therefore the terms and conditions of SECL were not fair and according to the object for which the informant was acquiring coal.

5. The informant also stated that the boilers of the power plant at Sanjay Gandhi Thermal Power Station (SGTPS) were designed for calorific value of

around 3700 kcal/kg of coal whereas CIL was supplying coal of higher calorific value *i.e.* 5800 kcal/kg which was not only economically unviable for the company but also caused various technical problems to the power plant. As per informant, in the GCV mechanism, the price of coal up to G5 band was too high and supply of higher GCV coal increased the cost of electricity generation.

6. It is further averred that SECL increased the price of grade A and grade B coal by more than 155% *vide* notification dated 26.02.2011 resulting in huge financial burden and thereby impacting the price of electricity being produced and supplied by the informant with the higher grade of coal. It was also stated that after hike in price by the opposite parties, buying 1000 kcal in GCV band G2 to G5 (equivalent to grades A to C) was costing the informant more than double while buying the same heat in G6 to G12 band (equivalent to grades D to F). It was also alleged that CIL increased the supply of grade A and B coal from 2010-11 after price hike. After changing the pricing mechanism, it was stated that the supply of G3, G4, G5 band coal was increased to 47% in 2011-12 and 62% in 2012-13 (up to October) of the total supply.

7. It is the case of the informant that letters were written repeatedly to CIL intimating that it required coal of a lower grade and that the supply of grade A and B coal be reduced and that of lower grade coal be increased. Further, the informant alleged that the joint sampling process provided for in the coal supply agreement was totally redundant and asymmetrical process which otherwise was a very important process for assessing the quality of coal being supplied. In the absence of proper protocol of joint sampling, there were chances of degradation of the quality of coal including the size of coal and physical quality of the coal. It was pointed out that prior to present coal supply agreement, joint sampling was provided for at both loading and unloading points and further provision was made for reconciling the results and coming to a conclusion by using mean method.

8. Lastly, it was averred that clause 3.11 of the coal supply agreement provided for a deemed delivered condition i.e. whatever be the grade of the coal supplied, the informant/purchaser was supposed to accept the same and in case, the purchaser refused to accept the coal, it would be treated as deemed delivery and the purchaser would be liable to pay.

Case No. 07 of 2013

9. The information in Case No. 07 of 2013 has also been filed under section 19(1)(a) of Act by M/s Madhya Pradesh Power Generating Company Limited against M/s South Eastern Coalfields Ltd. ('the opposite party No. 1'/ SECL) and M/s Coal India Ltd. ('the opposite party No. 2'/ CIL) alleging *inter* alia contravention of the provisions of sections 4 of the Act.

10. The informant submitted that prior to 2007, a procedure of sampling of coal supplied was being followed by the parties under which sampling was done both at the loading and unloading ends. This procedure helped in reconciliation of discrepancies and working out an average/mean grade or quality. It was also submitted that clause 4.7.1 of the coal supply agreement provided for installation of Augur Sampling Machines (AMS) but CIL had not been following the sampling procedure as per this clause. Currently, sampling was being done only at the loading end within the colliery. CIL even excluded the informant from participating in the testing process and it was turned into a spectator having no say in the method adopted for collection, testing and analysis of samples.

11. It was further averred that under clause 4.3 of the coal supply agreement, CIL was supplying oversized coal containing big lumps and stones which had potential of damaging the plant and machinery thereby affecting the generation of electricity. The informant wrote several letters to CIL in this regard but received no reply. It was also submitted that coal supplied by CIL was quite

different from the quality that it agreed to purchase under the coal supply agreement. Further, the quality of coal for which CIL was billing was also different from what was actually being received by the informant at the unloading end.

Case No. 37 of 2013

12. The information in Case No. 37 of 2013 has been filed under section 19(1)(a) of the Act by M/s the West Bengal Power Development Corporation Ltd. against M/s Coal India Ltd. ('the opposite party No. 1'/ CIL), M/ s Eastern Coalfields Limited ('the opposite party No. 2'/ ECL), M/s Bharat Coking Coal Limited ('the opposite party No. 3'/ BCCL), M/s Mahanadi Coalfields Limited ('the opposite party No. 4'/ MCL) alleging *inter alia* contravention of the provisions of sections 4 of the Act.

13. The informant has stated that it entered into FSA for coal supply as per the New Coal Distribution Policy (NCDP). The FSAs are standard agreements and contain identical terms and conditions. No negotiations were/are allowed to the informants with regard to the terms and conditions of these FSAs by CIL subsidiaries. The FSAs were drafted by CIL subsidiaries on their own without involving the informant. The period of these agreements are necessarily for a term of 20 years with no meaningful supply-side substitutability available to the informant. An agreement which has a long lock-in period with express inability to negotiate by one of parties to it is sufficient to attract prohibitory provisions of section 4(2)(a) of the Act against CIL subsidiaries.

14. It is further averred by the informant that these FSAs executed with CIL subsidiaries are one-sided. Clauses 3.1.2, 3.2 and 3.5 of the FSAs indicate separate fixed quotas of the Annual Contracted Quantity (ACQ) of coal have been earmarked in respect of CIL subsidiaries for the informant as a whole.

However, CIL subsidiaries short-supply to some of the power plants of the informant and over-supply to other power plants of the informant, causing serious difficulty in stocking the coal as well as the management of the raw material.

15. Further, clause 10.1 of the FSAs stipulates that penal freight for overloading as imposed by the Indian Railways is to be borne by the informant whereas the overloading happens at the seller's end. Such penal overloading charges of Railways are two to four times of the normal freight charges. This clause clearly shows unfair and discriminatory conditions of FSAs. In terms of clause 3.3.1 of FSAs, CIL subsidiaries shall endeavour to supply coal from its own sources. In case CIL subsidiaries are not in a position to supply coal through its own sources then it shall have the option to supply the balance quantity of coal from the alternate sources. It is stated that in case CIL subsidiaries supply coal through an alternate source, the additional cost of supply through the alternate source is forced/ liable to be borne by the informant. Further, such supply from the alternate source can be at any delivery point, at the sole discretion of CIL subsidiaries. This Clause of FSAs is highly arbitrary, unfair and discriminatory to the informant and reflects the abuse of dominant position by the CIL subsidiaries, alleges the informant.

16. The informant has also raised the issue of deemed delivery clauses in FSA. It is stated that clauses 3.6, 3.11.1 (iii) and 12 of the FSAs indicate that the quantity of coal not supplied by CIL subsidiaries i.e. the seller owing to purchaser's failure to pay dues is considered as 'Deemed Delivered Quantity' (DDQ'). Such DDQ shall also be considered for calculation of penalties for short lifting as well as for calculation of the quantity supplied for ACQ. In addition to this, not only the interest will be payable for the delayed payment, but also, in terms of clause 14 of the FSAs, CIL subsidiaries shall also be entitled to suspend further delivery of coal in case the informant fails to make any due payment by

the due date. The supply of coal shall remain suspended till such time the payment along with interest remaining unpaid. Therefore, as a result of such onerous provision in the FSAs, the power plants which have not been able to get the allotted quota of coal for delayed payments yet they have to pay the interest amount as well as the value of the coal being considered as DDQ, which according to this informant is 'double jeopardy'.

17. It was further averred that clauses 3.6, 3. 11.1 (iii) and 3.12 provided for calculation of performance incentive for proper supply and compensation for short lifting.

18. The incentives were being calculated by the opposite parties not only on the basis of actual quantity of coal supplied to each plant but also on the basis of deemed supply under the agreement. Thus, even when total quantity of coal supplied to the informant fell below total ACQ, BCCL claimed performance incentive for plants which received coal over its individual ACQ in this manner and compensation for plants which received lesser then individual ACQ. As a result, performance incentive of 2.17 crores for year 2009-10, Rs.132 crores for 2010-11 and Rs.5.77 crores for 2011-12 was claimed. ECL claimed a compensation of Rs.52.16 crores, despite the fact that it also failed to supply the total ACQ.

19. Further, clauses 4.1, 11.2.2, 4.6.2 and 9.1 of the FSAs provided for issuance of credit notes in the event of deviation by the opposite parties from declared grade of coal and for stones of more than 250 mm size. Since the quality of coal blocks supplied had oversized coal blocks mixed with huge boulders, (which caused a lot of damage to different equipments *i.e*. unloading and conveyor systems, power plants *etc*.), the opposite parties were supposed to issue credit notes but no credit notes were issued in favour of the informant as per the agreement.

20. The information in Case No. 44 of 2013 has been filed under section 19(1)(a) of the Act by Sponge Iron Manufactures Association against M/s Coal India limited ('the opposite party No. 1'/ CIL), M/s Central Coalfields Limited ('the opposite party No. 2'/ CCL), M/s Eastern Coalfields Limited ('the opposite party No. 3'/ ECL), M/s Western Coalfields Limited ('the opposite party No. 4'/ WCL), M/s South Eastern Coalfields Limited ('the opposite party No. 5'/ SECL), M/s Northern Coalfields Limited ('the opposite party No. 6'/ NCL) and M/s Mahanadi Coalfields Limited ('the opposite party No. 7'/MCL) alleging *inter alia* contravention of the provisions of sections 4 of the Act.

21. The informant is a registered association of sponge iron manufacturers in India which was stated to be formed with a view to promote and protect the interest of the Indian sponge iron industry. The informant has alleged various anti-competitive practices e.g. one sided/onerous FSAs and MoUs, short supply of coal despite an assured quality under FSA or under NCDP, diverting coal mandated to be supplied under FSA to sale through e-auction to earn super normal profits; poor/inferior quality of coal sold and supplied under FSA, differential pricing of coal *etc*.

22. The informant has further alleged that the Captive Power Plants are subjected to differential treatment in respect of prices and terms and conditions for supply of coal in comparison to Independent Power Producers and state-owned Power Producers. All these, as per the information, resulted in anti-competitive effects leading to constraint on national growth; massive wastage of manpower and resource involved in production of sponge iron leading to enormous energy loss. Poor quality of coal supplied lead to lesser production of sponge iron consequently resulting in lesser production of steel *etc*., avers the informant.

Directions to the DG

23. In Case Nos. 05 and 07 of 2013, the Commission after considering the entire material available on record *vide* its common order dated 21.03.2013, after consolidating the two matters, directed the Director General (DG) to cause an investigation to be made into the matters.

24. In Case No. 37 of 2013, the Commission *vide* its order dated 05.07.2013 directed the DG to cause an investigation into this matter as well.

25. In Case No. 44 of 2013, the Commission *vide* its order dated 23.07.2013 directed the DG to investigate into the matter. The Commission *vide* the said order further clubbed the investigation in this case with the pending investigations in the three previous cases *viz.* Case Nos. 05, 07 and 37 of 2013.

26. The DG, after receiving the directions from the Commission, investigated the matters and filed a common investigation report in all these cases on 23.12.2013.

Investigation by the DG

27. The DG, to begin with, delineated the relevant product market in the present matter. In this regard, the DG noted that considering the physical characteristics and the use of non-coking coal, there is no substitute of the non-coking coal available for the thermal power plants and sponge iron manufacturers in India. Therefore, the relevant product market for the purpose of investigation in this case was delineated as '*supply of non-coking coal to the consumers including the thermal power producers and sponge iron manufacturers*'.

28. Further, the DG opined that as the condition for supply of coal in the entire country was uniform and homogenous since there are no barriers within the territory of India in terms of geographic location for the consumers, the relevant geographic market was taken as the whole of India.

29. In the result, the relevant market in the instant case was determined by the DG as the supply of non-coking coal to the consumer including the thermal power producers and sponge iron manufacturers in India.

30. The DG found the opposite parties to be in a dominant position as per the provisions of the Act. CIL and its subsidiaries were found to fulfil the criteria provided in the explanation to section 4 of the Act defining the dominant position. It was also noted by the DG that there are no competitive forces against the opposite parties and CIL and its subsidiaries are absolutely in a position to affect consumers/ the relevant market in their favour.

31. 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:

(i) CIL by virtue of its dominance and on account of lack of competitive process in the relevant market has not tried to evolve/draft/finalize the terms and conditions of FSA by way of mutual or bilateral process. The FSA was drafted by CIL for all the consumers according to its own priorities and convenience without giving consideration to the interest of all the stakeholders.

(ii) The terms and conditions relating to review of declared grade are found to be discriminatory. There is no provision for non-power sector for review of grade and the terms and conditions in this regard are discriminatory in nature.

(iii) The investigation revealed that the procedure for sampling and analysis of quality of coal in FSA on one side does not obligate the seller to provide for the best and fair sampling methods and on the other side it also dilutes the consequences of poor quality supply. The opposite parties have also discriminated between consumers on the issue of sampling and analysis of coal without any satisfactory reason and hence opposite parties are found to be imposing discriminatory terms and conditions.

(iv) The provisions in FSA relating to oversized coal and stones are found to be unfair as the opposite parties are not obligated to ensure the quality of coal supplied to its buyer. Further in the event of supply of oversized coal or stones the provisions relating to compensation are also found to be unfair and discriminatory.

(v) The terms and conditions of MoU which are meant for the new consumers are found to be tilted in favour of the coal companies and indicate exploitative conduct of the opposite parties. The conduct of the opposite parties regarding MoU is found to be unfair in violation of the provisions of section 4(2)(a)(i) of the Act.

(vi) The clauses relating to compensation for short supply and performance incentive are found to be unfair to the extent that while calculating the Delivered Quantity (DQ) for this purpose the ungraded coal and stones are included in DQ *i.e.* Actual Delivered Quantity and therefore, the terms and conditions of FSA in this regard are found to be in contravention of the section 4(2)(a)(i) of the Act.

32. The investigations, 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.

Consideration of the DG report by the Commission

33. The Commission in its ordinary meeting held on 10.01.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections to the report of the DG. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on various dates.

Replies/ Objections/ Submissions of the parties

34. On being noticed, the parties filed their respective replies/ objections to the report of the DG besides making oral submissions. The opposite parties filed a common reply in all the cases. The common informant in Case Nos. 05 and 07 of 2013 has filed replies/ written submissions. The informant in Case No. 44 of 2013 has also filed its reply/ written submissions. The informant in Case No. 37 of 2013 has not filed any reply/ written submissions.

Replies/ objections/ submissions of the opposite parties

35. At the outset, CIL submitted that the allegations against it in relation to the alleged abuse of its alleged dominant position are unfounded and hence denied. It was submitted that CIL has not engaged in any anti-competitive activities in violation of the provisions of the Act. CIL has always acted fairly and in the best interests of its customers and is a law abiding corporate citizen.

36. On relevant market, it was submitted that the DG's findings that the relevant market is supply of non-coking coal to thermal power plants and sponge

iron manufacturers is incorrect and contradictory to the findings of the Commission. Contrary to the findings of the DG, on the basis of recent import data, given the fact that significant quantities of coal are imported into India from other countries (especially by the sponge iron manufacturers and the power producers), the market for the supply of non-coking coal is global and should not be restricted to India only.

37. Further, it was submitted that CIL is not dominant in the global market for supply of non-coking coal, as there are a large number of players significantly active in this market, in addition to the fact that its share is much less than 10% on global level.

38. It was submitted that, contrary to the findings of the DG and submissions made by the informants, the process of drafting and finalization of the FSAs was fair, for the reasons set out below:

(a) Even though the first draft of each of the FSAs was generated by CIL, the process of finalization of the FSAs involved detailed discussions and deliberations with various stakeholders (including various power utility companies, Central Electricity Authority (CEA), non-power stakeholders, *etc*.

(b) The process of finalizing the terms of the FSAs was fair. Significant changes were made by CIL to the FSAs for existing power plants on the insistence of CEA and the power producers who were present during the course of various meetings with CIL under the chairmanship of CEA in 2009.

(c) In fact, MPPGGL had, through its letter dated 19 September 2008, specifically requested the intervention of Ministry of Goal, Ministry of Power and Ministry of Railways to finalize the issues.

(d) Between 2010 and 2013, there were continuous discussions between CIL and the CEA/ Ministry of Power (MoP) to resolve various issues in relation to the FSAs for new power plants, consequent to which CIL amended various clauses of these FSAs.

(e) CRISIL engaged in detailed discussions with various stakeholders and produced at least five versions of the FSAs for non-power customers. Later versions clearly note that the comments of the non-power customers were incorporated before finalizing the FSAs.

39. It was urged that the process of joint sampling and assessment of quality of coal was fair and transparent, contrary to the conclusions drawn by the DG and submissions of the informants. The entire process of sampling is done jointly and a documentary record of the samples collected is kept. The samples are jointly sealed (and kept under joint lock and key) and jointly analysed and full cooperation is accorded to representatives of the customers. Customer representatives have full freedom to raise objections about any part of the process at any point of time.

40. It was submitted that the primary claim of the informants to impose an obligation on CIL to provide sampling and analysis at the unloading end, is grossly unfair, as it would lead to shifting of burden of ensuring safe transit from customer to the seller, which is not provided for in the contract. As in any commercial relationship, the goods are inspected at the time of purchase and transfer of title, and not at the time of delivery. Further, there are number of problems associated with sampling at the unloading end.

41. Without prejudice to the above, it was submitted that CIL has changed its sampling process and introduced an independent third party sampling at the loading end to further increase transparency in the process. In this regard, it was

submitted that the DG, without even analysing the new sampling process, has rejected the same. It was pointed out that both MPPGCL and WBPDCL are also participating in the third party sampling process and signing the sampling reports.

42. Further, non-power customers consuming above 4 lac tonnes of coal, are entitled to and provided similar third party sampling and analysis as the power sector consumers. The DG failed to appreciate this fact. CIL always tries to ensure that no stones are dispatched when coal is being transported. However, given the nature of the mining process and because, at times, thin bands of shale, stone and shaly coal are present in coal seams, there are chances that stones are also mined along with coal. With a view to minimize the supply of stone to the extent possible, CIL takes various steps. The DG's finding that CIL should compensate for all stones supplied, apart from being practically not possible would also constitute double compensation and therefore ought to be rejected.

43. It was submitted that the process of grade declaration by various subsidiaries of CIL is done in compliance with the rules laid down by the Office of the Coal Controller (CCO) and in accordance with the Colliery Control Rules, 2004. Further, the gradation process provides that, where a customer is not satisfied with the quality of coal being supplied through a particular coal mine and is not satisfied with the declared grade, it may institute a statutory complaint requesting the CCO to assess the grade of coal being supplied. In fact, the Commission has, in its order dated 09.12.2013 in relation to MAHAGENCO/GSECL matters, recognized that CCO provides an independent, effective and efficacious remedy to the customers.

44. It was also submitted that the provisions in the FSAs related to the charging of freight and other taxes for ungraded coal are fair. Given the heterogeneous nature of coal, slippages in grade of coal supplied cannot be

completely ruled out. Adequate compensation is provided to the customers for such grade slippages.

45. It was highlighted that the supplies of coal through MoU is a temporary arrangement and only relates to a waiver of the condition in relation to imported coal. This is imperative and in fact in customer's interest because, if the waiver on imported coal is not given, even the domestic component of the supply will not commence. Therefore, to ensure that the customers at least start getting the coal from domestic sources, the MoU have been entered with minimal obligations.

46. Besides, detailed para wise reply was given to the various findings/ conclusions of the DG.

Replies/ objections/ submissions of the common informant in Case Nos. 05 and 07 of 2013

47. The common informant supported the investigation conducted by the DG to the limited extent that it delineates the relevant market as 'supply of non-coking coal to consumers including thermal power producers and sponge iron manufacturers in India.' It was argued that the opposite parties are in a dominant position in the said relevant market. The informant also contended that terms and conditions of FSAs have been drafted by the opposite parties unilaterally without any opportunity of consultation or negotiation to the informant. The opposite parties have violated the provisions of section 4(2)(a)(i) of the Act.

48. Besides, the common informant, after making submissions, disagreed with the observations of the DG made in Point 8.13.4 and conclusion in Point 9.4(iv) of the report and it was prayed that the Commissions may seek grade wise production and distribution data of the opposite parties and thereafter consider the allegation raised in Point 8.13. It was concluded by the DG in Point

8.13.4 that in a situation where the production of coal is much below the demand of coal, the opposite parties cannot be blamed for not accepting the request of specific purchaser for supply from specific mine only. The purchasers have to consider the position of actual demand and production and other constraints relating to transportation of the coal. It was further noted therein that the quality of coal mined from the earth cannot be controlled by the coal companies. Thus when there is some specific request from the buyer to supply from a particular mine or of a particular grade, the coal company may not be able to change the supplies of other buyers unless it is mutually agreed by both the buyers to change their sources of supplies. Accordingly, in Point 9.4 (iv), the DG recorded its conclusion that the allegations relating to sources of supply and supply of higher grade coal to MPPGCL have not been found to be in contravention of the provisions of section 4(2) of the Act.

Replies/ objections/ submissions of the informant in Case No. 44 of 2013

49. The informant has argued that the report of the DG is flawed on certain key aspect and is based on certain assumptions and erroneous facts provided by CIL rendering the report fundamentally flawed and contrary to well-established market principles in the power sector on pricing and quantity.

50. Supporting the conclusion of the DG on relevant market, it was submitted that coal is an essential raw material for the preparation of sponge iron. That natural gas can also be used as a raw material for production of sponge iron, however the capital cost for setting up of a coal based project is much cheaper than gas based project and that gas is not fully explored and is not abundant. Hence, effectually gas or any other resource does not qualify to be a perfect substitute for coal and therefore, the relevant product market would only be the non-coking coal.

51. It has also been stated that the informant appreciates the finding of the DG in pages 23 and 24 of the investigation report wherein, the DG had stated that imported coal is not an alternative or substitute in view of the fact that the imported coal is very costly and the raw material *i.e.* non-coking coal alone amounts to 60-70% of the total cost incurred by a thermal power plant.

52. It is also the finding of the DG that the design of thermal power plant in India is such that only the coal of low CGV can be fired into the boilers. Imported coal has qualities which are markedly different to that of the domestic coal and therefore the existing thermal power plants in India cannot use imported non-coking coal beyond an approximate limit of 15-30%. Therefore, the consumers have no other option but to purchase domestic coal for its power plants. On relevant geographic market, it was contended that India as a whole would be the relevant geographic market. The undertaking/ the opposite party is based in the territory of India and is involved in the mechanism of demand and supply of products and services in India. Moreover, the conditions of competition remains homogeneous and uniform, hence, it can be rightly concluded that 'India' is the relevant geographic market.

53. Without prejudice to the above, it was submitted that some of the sponge iron manufacturers have imported coal from other countries. If the reason for such import is analysed, it can be seen that such an eventuality has arisen only because CIL has short supplied the coal to the extent of 75% of the ACQ. The short supply of coal by CIL and the very high price of e-auctioned coal/ open market coal has compelled the sponge iron manufacturers to import some quantity to continue with the production, to sustain in the market.

54. Besides, the submissions have been made to substantiate the allegation that the customers were forced to sign one sided FSAs. Submissions on pricing were also made by the present informant.

55. No reply/ written submission was filed by the informant in Case No. 37 of 2013.

Analysis

56. On a careful perusal of the informations, the report of the DG and the replies/ objections/ submissions/ rejoinders filed by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:

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

(ii) Whether the opposite parties are dominant in the said relevant market?

(iii) If finding on the issue No.(ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

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

57. In the present case, the DG determined the relevant market as *supply of non-coking coal to the consumers including the thermal power producers and sponge iron manufacturers in India*.

58. It was 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 without any analysis of the relevant geographic market.

59. The informants on the other hand supported the determination and delineation market by the DG. It was vehemently contended that imported coal

being no substitute for domestic coal, cannot even be considered for inclusion in the definition of relevant market.

60. Elaborating the factors, it was 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*., as a result of which imported coal can only be used in small proportions, blended with domestic coal to achieve the requisite calorific value.

61. The Commission has carefully perused the rival submissions on the point.

62. It may be pointed out that the issue of determination of relevant market in the almost similar set of factual matrix arose before the Commission in Case Nos. 03, 11 & 59 of 2012 wherein similar pleas including the suggestion to take the relevant geographic market as global, were advanced by the opposite parties. All such pleas were considered in detail by the Commission in its common order passed on 09.12.2013 deciding those set of informations. As such, it is not necessary to revisit the same herein again in this order.

63. Accordingly, in light of the order passed by the Commission in M/s Maharashtra State *Power Generation Company Ltd. etc.* v. *M/s Mahanadi Coalfields Ltd. & Ors*. *etc*. in Case Nos. 03, 11 & 59 of 2012 decided on 09.12.2013, it is held that in respect of Case Nos. 05, 07 and 37 of 2013 where the consumers of non-coking coal are thermal power producers, '*supply of non-coking coal to the thermal power producers in India*' is the relevant market. Further, it may be noted that the DG has categorically returned a finding of lack of demand side substitutability of the product under consideration by sponge iron manufacturers as well. Accordingly and in light of the discussion noted above, the Commission is of opinion that in respect of Case No. 44 of 2013 where the consumers (members of the association) of non-coking coal are sponge iron

manufacturers, '*supply of non-coking coal to the sponge iron manufacturers in India'* is the relevant market.

(ii) Whether the opposite parties are dominant in the said relevant markets?

64. By virtue of explanation (a) to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or to affect its competitors or consumers or the relevant market in its favour.

65. Further, the Commission, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the Act, is required to have due regard to all or any of the following factors *viz*. market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

66. The opposite parties have assailed the finding of the DG holding CIL and its subsidiaries in a dominant position in the relevant market whereas the informants have supported the conclusions of the DG in this regard.

67. At the outset, it may be noted that the Commission while determining the relevant market has already rejected the plea of the opposite parties whereby it was sought to be suggested that the market has to be global.

68. Further, it is also not in dispute that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies *viz*. Coal India Limited (CIL) which owns and manages all the old Government-owned mines of National Coal Development Corporation (NCDC) and the nationalized private mines and Singreni Colliery Company Limited (SCCL) which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization.

69. Thus, it is evident that in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. As a result, 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.

70. Thus, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the opposite parties.

71. The Commission has considered in detail the various submissions (imported coal, countervailing power exercised by customers and stakeholders, social costs and obligations, lack of freedom in deciding the quantity of coal to be supplied to the customers *etc.*) advanced by CIL in the previously decided cases. The same were rejected after a thorough examination of the merits of the pleas. Hence, no useful purpose would be served by reproducing the submissions made by CIL again in this order.

72. In view of the above, following the finding of the Commission in Case Nos. 03, 11 & 59 of 2012, it is held that CIL and its subsidiaries enjoy undisputed dominance in the relevant markets, as defined above.

(iii) If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant markets?

73. In the present case, the allegations relating to abuse of dominant position by the opposite parties essentially centre around the terms and condition of FSAs as well as the conduct arising therefrom, which are stated to contain unfair and discriminatory conditions.

74. At the outset, it may be pointed out that most of the instances of abuse by the opposite parties stand covered by the order of the Commission passed in M/s Maharashtra State Power Generation Company Ltd. *etc*. v. M/s Mahanadi Coalfields Ltd. & Ors. *etc*. in Case Nos. 03, 11 & 59 of 2012 decided on 09.12.2013. Further, it may be pointed out that in the present case, informations have been filed against CIL and all seven of its production subsidiaries (SECL, ECL, BCCL, MCL, CCL, WCL, NCL) whereas in the previous case informations were directed against CIL and its three production subsidiaries *viz*. MCL, WCL and SECL.

75. Now, a seriatim analysis of the allegations made in the informations in light of the conclusions of the DG may be undertaken.

76. To begin with, it may be noted that in the present batch of informations, it has been found by the DG that CIL by virtue of its dominance and on account of lack of competitive process in the relevant market has not tried to finalize the terms and conditions of FSA by way of bilateral process. Further, it was noted by the DG that the FSAs were drafted by CIL for all the consumers according to its own priorities and convenience without giving consideration to the interest of all the stakeholders.

77. In this regard, it may be pointed out that in the previous cases, the Commission has already held that CIL in abuse of its dominance did not try to evolve/ draft/ finalize the terms and conditions of FSAs through a mutual bilateral process and the same were sought to be imposed upon the buyers without seeking, much less considering, the inputs of the power producers.

Grading of coal and procedure for declaration of grade

78. In the previous case, it was held by the Commission that in light of availability of an effective and efficacious independent statutory mechanism (Office of the Coal Controller) to redress the issues arising out of grading of coal, no case of unfair or discriminatory conduct was found.

79. In the present case also, it was found by the DG that there is a mechanism for remedy in the case of thermal power producers in case the declared grade is not found to the satisfaction of buyers. However, there is no similar provision for non-power sector for review of declared grade, the terms and conditions in this regard were noted to be discriminatory in nature.

80. It may be pointed out that in the present case sponge iron manufacturers have complained stating that there is no similar provision for non-power sector buyers for review of grade. *Ex facie*, it appears that there is a contravention of the provisions of section 4(2)(a)(i) of the Act on the issue of grade review for non-thermal power buyers as the terms are discriminatory in nature. The coal companies were not able to justify the discrimination.

Sample collection and assessment of quality of coal

81. The issue was thoroughly examined by the Commission in the previous case and it was held that that the terms and conditions relating to sampling and assessment of the grade and quality of coal were found to be unfair and in contravention of the provisions of section 4(2)(a) (i) of the Act.

82. During the present investigations, the opposite parties submitted that the provisions relating to sampling and analysis have been modified. The opposite parties agreed to incorporate the third party sampling at loading-end for power producers and high demand non-power producers.

83. Without prejudice to the merits of the changes effected by the opposite parties, it may be pointed out that the same do not extend to small and medium non-power coal consumers. The informant in Case No. 44 of 2013 *i.e.* SIMA has alleged that its members are treated unfairly.

84. No rationale was advanced by the opposite parties and none can be deciphered otherwise for such discrimination between two sets of consumers on the issue of procedure for sample collection and assessment of quality of coal. In the result, the Commission agrees with the findings of the DG that the opposite parties have imposed discriminatory terms and conditions in FSAs in contravention of the provisions of section 4(2)(a) (i) of the Act.

Oversized coal/ stones and compensation

85. In the present case, the DG has found the opposite parties to be imposing unfair and discriminatory terms and conditions regarding oversized coal and compensation for stones in contravention of the provisions of section 4(2)(a)(i) of the Act.

86. It may be pointed out that in the previous cases the Commission has held that the opposite parties have imposed unfair and discriminatory terms and conditions regarding compensation for stones in contravention of the provisions of section 4(2)(a)(i) of the Act.

Analysis of Determination of Annual Contracted Quantity (ACQ) for different categories of consumers and Provisions related to penalties for short supply and performance incentives

87. On this aspect, it may be noted that the Commission in the previous cases noted that the reasons given by CIL to differentiate between old and new power plants for ACQ and trigger levels for penalties appear to be founded on intelligible differentia and cannot be said to be unfair or discriminatory. The differentiation between old and new power plants on this count was based on rational criteria in as much as the existing power plants were customers of CIL before FSA model came into existence and therefore were logically entitled to a higher quantity commitment. In light of the availability of the commodity and its demand, the Commission noted with approval the priority accorded by CIL to existing buyers over buyers who are setting up their power plants more recently. The Commission also took note of the submissions of CIL that pursuant to the Presidential Directive in April 2012, the trigger level for penalties for new power plants was increased to 80% and the penalty level was also stated to be enhanced in favour of the consumers pursuant to the 282nd meeting of CIL Board.

88. In the present cases, SIMA alleged that the sponge iron manufacturers have been treated unfairly in comparison to other players. It was alleged that the ACQ in FSA and the supply through MoU are a result of abuse of dominance of CIL.

89. The DG did not find any discrimination on this count.

90. The Commission is of opinion that power generating companies are differently situated from other customers in as much as, the power sector has been accorded a priority status by CIL in accordance with the New Coal Distribution Policy. This also appears to be reinforced by the interventions of the Ministry of Power, the Ministry of Coal and the Presidential Directives received by CIL urging it to provide coal to the power sector to meet its entire requirements, despite the reality of the adverse coal availability scenario.

91. In the result, the differential treatment between two sets of consumers appears to be founded upon intelligible differentia and accordingly, the Commission is of opinion that the conditions imposed by CIL regarding ACQ and penalty trigger level cannot be said to be discriminatory in terms of the provisions of section 4(2)(a) (i) of the Act.

Issue of supply through MoU

92. It was alleged by SIMA that CIL and its subsidiaries have been insisting on consumers for executing additional Memoranda of Understanding (MoUs) in addition to the FSAs. These MoUs *inter alia*, provide that:

(i) They will form an integral part of the FSA executed by the consumer;

(ii) The quantum of supply of indigenous coal under the respective FSA shall be at the sole discretion of the coal company from time to time, but shall not exceed 50% of the ACQ in any case;

(iii) The MoUs framed provide that for calculation of compensation for short-supply or short-lifting, the ACQ under the FSA shall be reckoned as being reduced by 50%. MoUs framed contain different wordings which also operate to reduce the quantity of supply below which compensation becomes payable or alternatively are worded to ensure that no compensation is being paid in spite of there being short supply of an agreed ACQ.

93. Based on the submissions of the parties, it was noted by the DG that the clauses of MoUs show that the purchaser has no option but to accept the terms and conditions of MoUs as there is no scope for negotiation giving upper hand to the seller. Further, by incorporating the clauses relating to reduction in supply of indigenous coal by 50% and also linking the MoUs with penalty on short-supply, it has diluted the obligation of seller on commitments of supply of coal.

94. Furthermore, it was noticed by the DG that the coal companies presumed that the share of imported coal will be 50%, although there is no such provisions in the FSA. There is no data of past supply to show that the share of imported coal is about 50% which may necessitate the reduction in indigenous coal by 50%. The information gathered during the investigation showed that on average not more than 20-30% imported coal is used by the consumers.

95. In view of the above, the Commission is of the opinion that the terms and conditions of MoUs are favourably disposed towards the coal companies and the consumers do not have any option except appending signatures thereon. No justification for restriction in the indigenous coal in the MoUs by the coal

companies can be gathered. The impugned conduct appears to be unfair being in contravention of the provisions of section 4(2)(a) (i) of the Act.

Diversion of coal for e-auction

96. In the previous cases, the Commission did not find any contravention on the allegations relating to diversion of coal for e-auction. In the present case also, the DG found that the conduct of CIL and its subsidiaries did not indicate that the coal meant for supply through FSA was diverted to e-auction. The investigation did not find any evidence to show that there was a deliberate short-supply by the coal companies.

97. In view of the finding of the Commission in the previous case and in the absence of any new material, the Commission is of opinion that CIL and its subsidiaries are not found to be restricting the supply by means of diverting the coal to sale through e- auction. No contravention of the provisions of section 4 of the Act is made out on this count.

Supply of coal of higher grade or from specific mine/source

98. The common informant in Case Nos. 5 and 7 of 2013 *i.e.* MPPGCL has alleged that the opposite parties manipulate the quantity and quality of coal in order to maximize profit and exploit the dependency of the consumers. MPPGCL further stated that after hike in price, SECL increased the supply of grade A and B coal to make extra profit. After changing the pricing mechanism, the supply of G3, G4, G5 band coal was increased to 47% in 2011-12 and 62% in 2012-13 (up to October) of the total supply. It was further submitted that letters were written repeatedly to SECL intimating that it required coal of a lower grade and that the supply of grade A and B coal be reduced and that of lower grade coal be increased.

99. From the replies of the opposite parties, it may be observed that the coal companies may not accommodate demand of all the buyers for supply of coal from a particular mine only and therefore in the FSAs there is option with CIL to supply coal from any mine and of any grade. From the replies, the Commission notices that increase in supply of coal from Korea-Rewa was also a result of less materialization of coal dispatches from Korba coalfields which was attributable to unavailability of sufficient number of railway rakes. It appears that the Railways have not been able to supply/allot sufficient number of rakes required at Korba coalfields to facilitate evacuation of coal.

100. In the result, no contravention can be found against the opposite parties on this score.

Manipulation in supply of coal to maximize the profit

101. In Case No. 37 of 2013, the informant *i.e.* WBPDCL has alleged manipulation of the quantities of coal by the subsidiaries of CIL to maximize the profit.

102. In this regard, it may be noted that the DG did not find the allegations levelled by WBPDCL on the issue of manipulation in supply and differential treatment substantiated and accordingly, found no contravention of the provisions of section 4(2) of the Act by the opposite parties.

103. From the report of the DG, it appears that no evidence was led to establish the allegations. On the issue of differential treatment, the same stood negated in light of the reply furnished by WBPDCL.

Provisions of deemed delivery

104. It was alleged by WBPDCL that clauses 3.6, 3.11.1 (iii) and 12 of the FSAs dealt with deemed supply of coal *i.e.* quantity of coal though not supplied

by CIL subsidiaries to the informant due to failure of the informant to pay dues, but counted as supplied. The deemed delivery quantity was also taken into consideration by the opposite parties for calculation of penalties arising due to short-lifting and ACQ. Clauses 3.6, 3.11.1 (iii) and 3.12 provided for calculation of performance incentive for proper supply and compensation for short-lifting.

105. Further, it was alleged that the incentives were being calculated by the opposite parties not only on the basis of actual quantity of coal supplied to each plant but also on the basis of deemed supply under the agreement. It has been also alleged that clauses relating to deemed delivery are one-sided resulting in 'double jeopardy' to the consumers.

106. Before adverting to the issue, it may be pointed out that in the previous case, while discussing the issue of supply of ungraded coal it was noticed by the Commission that the ungraded coal and stones were also considered in deemed delivered quantity for the purpose of calculating ACQ. It was held by the Commission that provisions relating to supply of ungraded coal in FSA are unfair and in contravention of the provisions of section 4(2)(a)(i) of the Act.

107. In the present case, the provisions related to deemed delivered quantity, as defined in clause 3.11, is for the purpose of computing the compensation for short deliver/lifting (clause 3.6), calculating the level of delivery (clause 3.7) and the level of lifting (clause 3.8). It may be noted that deemed delivered quantity differs from actual delivered quantity with respect to the quantity of coal ready for delivery on part of seller but inability to lift the coal on part of the purchaser on account of the conditions as enumerated in clauses 3.11.1 and 3.11.2.

108. Such provisions appear to safeguard the interest of purchaser and seller in case there is short delivery or lifting on account of certain conditions which may not be in the control of either parties and as such do not appear to be abusive.

109. Further, the allegation that the DDQ is included for claiming performance incentive by the CIL does not stand substantiated on the basis of plain language of clause 3.12.3 of FSAs which makes it clear that the performance incentives are payable on the basis of actual quantity physically delivered.

110. However, on perusal of clause 3.7 of FSAs (which provides calculation formulae for level of delivery), it was observed by the DG that the ungraded coal or stones supplied to the purchasers are not reduced from the delivered quantity. The FSAs provide for supply of graded coal and therefore ungraded coal or stones should not be considered while calculating the actual delivered quantity for the purpose of compensation for short-supply or the performance incentives.

111. The Commission does not find any infirmity in the findings of the DG that the clauses relating to compensation for short-supply and performance incentive are unfair to the extent that while calculating the delivered quantity the ungraded coal and stones need to be reduced therefrom *i.e.* Actual Delivered Quantity. To this extent, the terms and conditions of FSAs in this regard appear to be in contravention of the provisions of section 4(2)(a)(i) of the Act.

112. Lastly, it may be noted that the DG did not find the provisions in FSAs relating to transportation charges or the diverted/ missing rakes payment as not unfair or discriminatory. The Commission observes that CIL cannot be held responsible for the conduct of Railways as under the FSAs the transportation is the responsibility of the purchaser. On the issue of pricing, the Commission in the previous case found no contravention whatsoever. Same was the finding of

the Commission on the issue of restriction of production of coal by the coal companies.

Conclusion

113. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant markets of supply of non-coking coal to the thermal power producers and sponge iron manufacturers in India. The Commission also 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 and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal, as detailed in the order.

ORDER

114. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order.

(ii) The fuel supply agreements are ordered to be modified in light of the observations and findings recorded in the present order. For effecting these modifications in the agreements, CIL is further directed to consult all the stakeholders including the informants herein.

115. The above directions must be complied within a period of 60 days from the date of receipt of this order. The opposite parties are also directed to file an undertaking to this effect within the said period.

116. It is, however, made clear that the above direction shall not be applicable *qua* the clauses and conduct which were also subject matter of order passed by the Commission in Case Nos. 03, 11 and 59 of 2012. It may be pointed out that the opposite parties preferred an appeal before the Appellate Tribunal being Appeal No. 01 of 2014 wherein the Hon'ble Tribunal ordered *status quo vide* its order dated 13.01.2014 which has been continued from time to time. In these circumstances, the directions relatable to the clauses and conduct which were also subject matter of order passed by the Commission in earlier case would abide by the further orders of the Hon'ble Tribunal.

117. In view of the directions contained in this order, no further or other orders are required to be passed in the application of SIMA seeking interim relief in Case No. 44 of 2013 and the same stands disposed of accordingly.

118. Before concluding, it is made clear that in the facts and circumstances of the present case, the Commission refrains from imposing any penalty upon the opposite parties as a penalty of Rs. 1773.05 Crores was already imposed upon them in the previous batch of informations with respect to the substantially similar conduct. It is not the case of the informants that the opposite parties have indulged in the abusive conduct post the passing of the order by the Commission in the earlier cases.

119. It is ordered accordingly.

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

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. L. Bunker)
Member

New Delhi
Date: 15/04/2014