COMPETITION COMMISSION OF INDIA

Case Nos. 03, 11 & 59 of 2012

Case No. 03 of 2012

In Re:

M/s Maharashtra State Power Generation Company Ltd. — **Informant**

And

1. M/s Mahanadi Coalfields Ltd. — **Opposite Party No. 1**

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

WITH

Case No. 11 of 2012

In Re:

M/s Maharashtra State Power Generation Company Ltd. — **Informant**

And

1. M/s Western Coalfields Ltd. — **Opposite Party No. 1**

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

WITH

Case No. 59 of 2012

In Re:

M/s Gujarat State Electricity Corporation Limited — **Informant**

And

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

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

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Mr. S. L. Bunker
Member

Appearances: Shri Sanjay Sen, Senior Advocate with Shri Matrugupta Mishra, Ms. Shikha Ohri, advocates for the informant in Case Nos. 03 and 11 of 2012

Shri Jayesh Bhairavia, Shri Gaurav Mitra, Shri Kantik Nagankutti and Shri Samreen, advocates for the informant in Case No. 59 of 2012

Shri Ramji Srinivasan, Senior Advocate with Ms. Pallavi S. Shroff, Shri Harman Singh Sandhu, Shri Yaman Verma, Shri Toshit Shandilya, Ms. Shwetha Shroff Chopra, advocates for the opposite parties in Case Nos. 03, 11 and 59 of 2012

Order under Section 27 of the Competition Act, 2002

This common order shall govern the disposal of Case Nos. 03, 11 and 59 of 2012 as similar issues are involved in these cases.

Facts

2. Shorn of details, facts - as stated in the informations - may be briefly noted.

Case No. 03 of 2012

3. The information in this case was filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by M/s Maharashtra State Power Generation Company Ltd. (MAHAGENCO) against M/s Mahanadi Coalfields Limited (MCL) and M/s Coal India Ltd. (CIL) alleging *inter alia* contravention of the provisions of section 4 of the Act.

4. The informant appears to be aggrieved by the fact that MCL instead of signing/ executing coal supply agreements/ fuel supply agreements as required under the Coal Distribution Policy, 2007 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, it is the case of informant that it received a model Coal Supply Agreement (CSA) proposed to be executed between it and MCL. It is alleged that the clauses of this agreement amongst others clearly 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 the new Coal Distribution Policy 2007 ('NCDP'). It is alleged that 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 further averred by the informant 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. It is the case of the informant that the draft MoU attempted to further dilute the obligations of MCL to supply coal under the proposed CSA.

Case No. 11 of 2012

5. The information in this case was filed under section 19(1)(a) of the Act by MAHAGENCO against M/s Western Coalfields Limited (WCL) and CIL alleging *inter alia* contravention of the provisions of section 4 of the Act.

6. The informant is aggrieved by certain acts of WCL as also terms of Fuel Supply Agreement dated 21.11.2009 executed by and 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, thereby further limiting generation of coal; 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

7. The information in this case was filed under section 19(1)(a) of the Act by M/s Gujarat State Electricity Corporation Limited against (GSECL) M/s South Eastern Coalfields Limited (SECL) and CIL alleging *inter alia* contravention of the provisions of section 4 of the Act.

8. It is averred that the informant which is the 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. It is the case of the informant that Ministry of Coal, Government of India had notified NCDP on 18.10.2007 mandating a switch-over from the linkage regime of coal distribution to firm Fuel Supply Agreements (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 07.07.2009 with SECL.

9. The terms of this agreement as also the conduct of the opposite parties thereunder are the subject matter of the present information. The basic thrust of the gravamen of the informant centres around the various clauses of the

FSA and the conduct thereunder of the opposite parties. The informant has detailed various clauses of the FSA as also the acts and omissions of the opposite parties which are stated to emanate from the dominant position of the opposite parties in the relevant market. The informant has defined production and distribution of coal in India as a whole as the relevant market.

10. It is further averred that by virtue of the Nationalization Act and the existing legal, regulatory and policy regime, the entire production and distribution of coal is in the hands of the opposite parties. It is averred that CIL directly and through its eight subsidiaries (including SECL) regulates all policy matters relating to production and distribution/ supply of coal. It is also alleged that all contracts *i.e.*, FSAs between the coal companies and procurer/ purchaser are approved by CIL.

11. It is further pointed out that the informant being in the business of generation of electricity, coal is the required raw material. Under the existing legal, regulatory and policy regime, the informant is compelled to purchase most of its coal from SECL and other subsidiaries of CIL.

12. The informant has laid various allegations against the opposite parties. It is 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.

13. It is further alleged that SECL has not acted according to fair business policy as there were vast differences in the Grades/ Bands of the coal supplied by SECL from Korea-Rewa field than shown in bills issued by it. It is alleged that SECL used to issue bills for the higher grades/ bands which were actually

not supplied at any time and due to such acts and omissions, the informant suffered huge losses.

14. Further, referring to the various clauses of the FSA, the informant has alleged that as per condition number 3.11 of the 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. It is the case of the informant that 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 stated to be in contravention of the provisions of section 4(2)(a)(i) read with section 4(1) of the Act.

15. Grievance was also made about the sampling process of coal. It is stated that the present procedure is a departure from the past practices regarding sampling of coal. It is stated that earlier *i.e.*, before 2007, the samples were analyzed both at the loading as well as unloading ends. There was a process of reconciliation 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.

16. Further, grievance is made of the fact that as per clause 4.7 of the FSA, SECL was required to install Augur Sampling Machines (ASM) within 24 months from signing of the FSA, where the loading was to be through silos. It is, however, alleged that SECL failed to install ASM according to 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 which was in violation of the terms and conditions of the FSA. 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 the FSA, neither the 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.

17. 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 and in 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

18. The Commission after considering the entire material available on record *vide* its order dated 24.01.2012 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.

19. In Case No. 11 of 2012, a similar order was passed by the Commission on 06.03.2012. 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.

20. Lastly, the Commission passed a similar order in Case No. 59 of 2012 on 04.12.2012 and also directed that this case may be clubbed with earlier cases for joint investigation.

21. The DG, after receiving the directions from the Commission, investigated the matter and filed a common investigation report in all these cases on 08.02.2013.

Investigation by the DG

22. The DG, to begin with, delineated the relevant market in the present matter. In this regard, 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.

23. 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.

24. In the result, 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.

25. To ascertain the dominance in the present case, it was noted by the DG that the sources of non-coking coal in India are mainly CIL, M/s Singareni Collieries Company Limited ('SCCL') - a joint venture between State of Andhra Pradesh and Government of India and imported coal. The power producers have huge dependency on CIL as it is the largest producer of coal. The share of imported coal in the relevant market depends on the shortage in domestic production of coal. During last few years, it was noted that the

demand of non-coking coal has increased with a greater pace than the production in the country, which has resulted in the gap between the domestic production and demand of coal. Since the distribution of coal is governed by the NCDP, which mandates 100% supply of the normative requirement of coal to the power sector, the power sector is highly dependent upon CIL for its coal supplies.

26. Consequent upon analysis of the factors enumerated in section 19(4) of the Act in the light of the data gathered, it was noted by the DG that the consumers have huge dependency upon the opposite parties as they do not have any other option in the market except the import. However, the import of coal was noted to be not substitutable with domestic coal due to the following factors:

(a) Imported coal is used in small measure to blend with domestic coal so as to achieve the appropriate calorific value.

(b) Design requirements of the boilers (there are some boilers which cannot use imported coal).

(c) Handling capacity of the ports and timing of imported (month) heavily burdened railway network. There is no railway infrastructure to handle imported coal directly.

27. It was further noted that in view of the provisions of the Coal Mines (Nationalization) Act, 1973 production and distribution of coal is entirely in the hands of the Central Government. As a result, CIL and its subsidiary companies have, by operation of law, 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/ monopolistic position in relation to production and supply of coal. The monopoly or dominant

position of CIL is acquired as a result of the policy of the 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 aforesaid position of CIL was also upheld by the Hon'ble Supreme Court of India, noted the DG while making reference to the various Supreme Court judgments in this regard.

28. It was concluded by the DG that CIL is vested with the absolute monopoly in production and distribution of coking and non-coking coal. Therefore, the question of supply-side substitution did not arise, due to the entry barrier imposed by the policy measures of the Government of India and the Coal Mines (Nationalization) Act, 1973. Thus, the opposite parties have no competitive pressure in the market and there is no challenge at the horizontal level against the market power of CIL and its subsidiaries

29. In the result, the DG was of the view that and 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.

30. 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 the 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 the 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 the 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 3 months. In this connection, the DG noted that during the pendency of investigation these provisions have been re-inserted in clause 5.5 of the 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.

31. 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.

Consideration of the DG report by the Commission

32. The Commission in its ordinary meeting held on 28.02.2013 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

33. On being noticed, the parties filed their respective replies/ objections to the report of the DG besides making oral submissions. The parties have also filed written submissions.

Replies/ objections/ submissions of the opposite parties

34. At the outset, it was submitted by the opposite parties that, since there is no case of an abuse or an anti-competitive agreement made out, it is not necessary for the Commission to go into the question of relevant market or the issue of dominance. Without prejudice to this, it was submitted that the DG's conclusion on relevant market being the market for production and supply of non-coking coal in India is incorrect. It was submitted that the relevant market for the purpose of this case should be supply of coal globally. The DG has wrongly confined the relevant market to be the market for production and supply of non-coking coal for thermal power generation in India without any analysis of the relevant geographic market.

35. Furthermore, it is contended 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 *e.g*. the Ministry of Power, the Ministry of Coal, the Central Electricity Authority (CEA), the Planning Commission, National Thermal Power Corporation Limited (NTPC) *etc*., all of whom exert significant influence and are involved in making decisions that impact various aspects of CIL's business.

36. It was submitted that CIL is faced with significant countervailing power exercised by some of its largest customers both directly and through government bodies. It was vehemently contended that CIL does not enjoy any commercial freedom in deciding the customers to whom it should supply coal. It was argued that the Standing Linkage Committee (Long Term) [SLC (LT)] comprising representatives of the Ministry of Coal, CEA and the Ministry of Power collectively decide the linkages for each power utility. Similarly, it is argued that CIL does not enjoy any commercial freedom in the quantity of coal it should supply, which is based on the norms laid down by the Ministry of Power/ CEA. Lastly, it has been argued that price of coal is decided by CIL keeping larger public interest in mind in terms of the directives of the Hon'ble Supreme Court of India given in *Ashoka Smokeless Coal (P) Ltd.* v. *Union of lndia*, (2007) 2 SCC 640 ('*Ashoka Smokeless* case').

37. Conceding that CIL is the largest producer of coal in India, it is argued that it is not the only source of supply of coal. The quantum of imports has been increasing constantly, and the SCCL also caters to the demand of coal consumers in India. Moreover, the status of leading producer of coal has been bestowed upon CIL as a result of nationalization of the coal industry under the Coal Mines Nationalization Act, 1973. Therefore, the position of largest

producer of coal is not because of CIL's commercial behaviour but as a result of the operation of law.

38. Based on the above, it is sought to be urged that CIL does not operate in a free market, it consequently does not have any commercial freedom in deciding its market conduct; and hence the question of dominance does not arise.

39. Before joining issues on the findings of abuse, a preliminary objection is raised to the maintainability of the present proceedings on the grounds that the informants are indulging in forum shopping. It is sought to be canvassed by the opposite parties that the instant case arises out of the terms of a negotiated and signed agreement between CIL on one hand and the informants (and other power utility companies, as the case may 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. It is submitted that, in the presence of proper and adequate remedies available in the contract, it is inappropriate on the part of the informants to have come to the Commission for addressing what is essentially a contractual dispute. It was pointed out that the informants had/ have also approached local courts/ arbitral tribunal seeking redressal on these issues and are therefore indulging in forum shopping.

40. Adverting to the clauses of FSAs, it has been submitted that over the course of 2012, beginning with the Presidential Directive, CIL has addressed all the concerns raised by the power sector and amended any allegedly unfair clauses in the FSAs to incorporate suggestions and observations given by stakeholders including Ministry of Coal, Ministry of Power and the CEA. CIL has consciously undertaken a fair, participative and balanced approach in

negotiating the FSAs, the terms and conditions of which are fair and non-discriminatory to all parties involved.

41. Demonstrating fairness in the process of drafting of FSAs, it was submitted that while a first draft of each of the 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 the FSAs for existing power plants were finalized. In relation to the new power plants (that were to come into existence after 31 March 2009), CIL continued to receive comments, observations and objections from various stakeholders in relation to various provisions of the FSAs. CIL has responded positively by accepting a significant majority of the comments from various stakeholders, which clearly indicates that the process of finalization of the FSAs was an ongoing process and CIL has always been open to making amendments to the FSAs. It was also argued that the benefits of the FSA negotiated under the CEA's auspices was made equally applicable to all similarly situated power plants/companies. It was also sought to be argued that the issue that either NTPC or the CEA was not authorized and/ or mandated to negotiate the terms of the FSA has not been raised previously and raising it nearly 4 years after the FSA was signed is nothing but purely an afterthought.

42. Detailed submissions were also made to show the fairness and non-discriminatory nature of clauses of FSAs and the same are not noted herein as the same shall be dealt with while examining the impugned clauses by the Commission. Similarly, the detailed submissions made by the opposite parties to demonstrate the conduct of CIL and its subsidiaries as fair and non-discriminatory shall be taken note of while examining the conduct of CIL and its subsidiaries.

43. 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.

44. In the result, 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. It was alleged that the DG as well as the informants have failed to appreciate the peculiar nature of the supply of coal in India and the facts and circumstances of this case. Grievance was made of the fact that the DG rather unfortunately ignored the fact that CIL has constantly been engaging and working closely with all its stakeholders to modify and finalize the conditions of the FSAs in accordance with their demands, even against its self-interests at times. This simply indicates that the FSAs have been in the process of finalization during the period being alleged by the informants as one during which CIL abused its dominant position. Further, it is submitted that, given the totality of circumstances, including the fact that CIL was faced with significant shortages in production but still being forced to supply coal, the clauses in the FSAs as well as the process followed by CIL, when viewed in totality, are fair, proportionate and balanced.

Replies/ objections/ submissions of the informants

45. MAHAGENCO in its common reply in Case Nos. 3 and 11 of 2012 while substantially agreeing with the findings of the DG, on certain issues, has disagreed with the analysis of the DG as elaborated therein. Subsequently, the informant also filed written submissions on similar lines. A written note by way of a response to the submissions made by the opposite parties was also

filed. The same shall be adverted to while dealing with the issues projected in the cases.

46. Detailed written submissions and rejoinder were also filed by the informant in Case No. 59 of 2012. The same shall also be adverted to while dealing with the issues projected in the cases.

Analysis

47. 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 CIL and its subsidiaries are dominant in the said relevant market?

(iii) If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have contravened the provisions of section 4 of the Act?

Market structure/ legal & regulatory architecture

48. Before adverting to the issues arising in the present batch of cases, it would be apposite to appreciate, in brief, the market structure and the legal/ regulatory architecture obtaining in the coal industry in India.

49. Coal is of immense importance in the development of modern infrastructure in a growing economy such as India. Economic development through advancement of transport, energy, housing and water management infrastructure involves increased use of highly energy intensive materials, such

as steel, cement, glass and aluminium - all of which are users of coal. Apart from the power sector, metallurgical and cement sectors are other major consumers of coal. Of the four major fuel sources – oil, natural gas, coal, and uranium – coal has the largest domestic reserve base and the largest share of India's energy production and consumption. The bulk of electricity generated in the country is based on coal which is our main energy resource and will remain so in the foreseeable future.

50. The Coal Mines (Taking Over of Management) Act, 1973, extended the right of the Government of India to take over the management of the coking and non-coking coal mines in seven States. This was followed by the nationalisation of all these mines on 01.05.1973 with the enactment of the Coal Mines (Nationalisation) Act, 1973.

51. 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 National Coal Development Corporation (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.

52. CIL is a holding company and has the following subsidiaries:

(i) Bharat Coking Coal Limited (BCCL)
(ii) Eastern Coalfields Limited (ECL)
(iii) Central Coalfields Limited (CCL)
(iv) Northern Coalfields Limited (NCL)
(v) Western Coalfields Limited (WCL)
(vi) South -Eastern Coalfields Limited (SECL)
(vii) Mahanadi Coalfields Limited (MCL)
(viii) Central Mine Planning & Design Institute Limited (CMPDI)

53. As noted above, under the Coal Mines (Nationalisation) Act, 1973, coal mining was exclusively reserved for the public sector. CIL and SCCL had the main responsibility of supplying coal to all end-users.

54. The Coal Mines (Nationalisation) Act, 1973 was amended in 1976 to allow captive coal mining by private companies engaged in the production of iron and steel and sub-leasing of isolated small pockets not amenable to economic development and not requiring rail transport. In 1993, the Nationalisation Act was further amended to allow captive coal mining in the private sector for power generation, washing of coal obtained from a mine and such other end uses as may be notified by the Central Government from time to time. Cement production was notified as a specified end-use for the purposes of captive coal mining in 1996. By such amendments, coal mining for captive consumption by companies engaged in generation of power, production of iron and steel, production of cement and washing of coal was allowed.

55. Lastly, to complete the overview of the sector, it may be observed that prior to 01.01.2000 the Central Government was empowered under section 4 of the Colliery Control Order, 1945, as continued in force by the Essential Commodities Act, 1955, to fix the grade-wise and colliery-wise prices of coal. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 was notified with effect from 01.01.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000, the Central Government has no power to fix the prices of coal.

56. In view of the above noted legal and regulatory framework obtaining for coal sector, the allegations contained in the informations under consideration may be examined.

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

57. At the outset, it was submitted on behalf of the opposite parties that, since there is no case of an abuse or an anti-competitive agreement made out, it is not necessary for the Commission to go into the question of relevant market or the issue of dominance. It was further submitted that the same would be in line with the Commission's own prior decisional practice/ European Commission's notice on defining relevant markets and the jurisprudence set out by regulators in other jurisdictions, which state that, in case there is no finding of an abuse, it is not necessary to arrive at conclusive finding over relevant market or that of dominance.

58. The plea appears to be based on the specious pre-supposition that there is no abuse in the present case. In the present case, the DG has found the opposite parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act by imposing unfair or discriminatory conditions in the relevant market. The DG further found the conduct of opposite parties to be exploitative against the consumers. As such, it is futile for the opposite parties to contend that it is not necessary for the Commission to go into the question of relevant market or the issue of dominance.

59. The Commission has also perused the order of the Commission in Case No. 69 of 2012 relied upon by the opposite parties to support the above contention. On a plain reading of the order, it is evident that the Commission defined the relevant market, in order to examine the dominance of the opposite party therein. Thus, no such proposition, as is sought to be adduced by the opposite parties herein, can be gathered from the said order.

60. The scheme of the Act is very clear on this aspect. To determine the alleged abusive instances of an alleged dominant enterprise, the Commission has to first determine the relevant market in terms of the provisions contained

in the Act after considering the various factors prescribed therein. Once the relevant market is defined, the issue of dominance has to be examined by the Commission.

61. In the result, the Commission is of opinion that the plea raised by the opposite parties is thoroughly misconceived and deserves to be rejected.

62. Now, the Commission proceeds to determine the 'relevant market' having due regard to the 'relevant geographic market' and 'relevant product market'

63. As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Further, the term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. And, the term 'relevant geographic market' has been defined in section 2(s) of the Act 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.

64. For determining whether a market constitutes a 'relevant market' for the purposes of the Act, the Commission is also required to have due regard to the 'relevant geographic market' and 'relevant product market' by virtue of the provisions contained on section 19(5) of the Act.

65. To determine the 'relevant geographic market', the Commission, in terms of the factors contained in section 19(6) of the Act, is to have due regard

to all or any of the following factors *viz*., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

66. Further, to determine the 'relevant product market', the Commission, the Commission, in terms of the factors contained in section 19(7) of the Act, is to have due regard to all or any of the following factors *viz*., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

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

68. 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 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.

69. *Per contra*, the informants 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.

70. 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. Further, CIL, by virtue of its dominant status, is in a position where it only supplies 90% (ninety percent) of the Annual Contracted Quantity (ACQ) to Indian thermal power plants under the FSA, thereby forcing the thermal power plants to acquire the balance 10% (ten percent) needed to operate its plants from the import market. It was argued that it is ironical that CIL is seeking to rely on these import figures, which are warranted 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 the FSA which govern the supply of coal to most Indian thermal power utilities, ensure dependence of the utilities on CIL to the tune of about 75% (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 of country of origin *etc*. It was also argued that inadequate handling capacity of the ports and heavily burdened railway network also makes direct handling of imported coal difficult.

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

72. At the outset, it may be pointed out that the contention of the opposite parties to argue that the relevant market for the present purposes has to be global and cannot be confined to India as was done by the DG, is legally

untenable besides being contrary to the stand taken by the opposite parties themselves. From a plain reading of the Explanation 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 affect its competitors or consumers or the relevant market in its favour. Thus, the plea advanced by the opposite parties contending the relevant market to be global is *ex facie* contrary to the express provisions of the Act and has to be rejected.

73. Furthermore, 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. The opposite parties have mutually contradicted themselves on the issue of conditions of competition for supply of coal. On the one hand, it was contended that the relevant market has to be global, on the other hand, it was submitted by the opposite parties as follows:

> *It is submitted that circumstances under which coal is produced and supplied in India is inherently different from coal supply and production conditions in other jurisdictions. For example, (a) coal is sold at market determined prices elsewhere in the world, while pricing of coal in India is done to serve the larger public interest; (b) coal supplied by CIL is 'run of mine' coal unlike the highly processed coal sold in the international market; (c) unlike most other large coal producing countries that are coal exporters, India is a net coal importer; and (d) international players may not be faced with strong countervailing power from customers and other stakeholders including governmental institutions, etc. Therefore, given these peculiar conditions prevalent in India,*

there cannot be any meaningful comparison between coal supplies in India and elsewhere in the world.

74. Be that as it may, in light of the view taken by the Commission rejecting the contention of the opposite parties that the relevant market may be taken as the global market, it is not necessary to dilate any further on this aspect.

75. To determine the relevant product market, the DG took into consideration the demand - side substitutability and supply-side substitutability. Both these aspects of the relevant product market were discussed in some detail by the DG in the report. Considering the physical characteristics of non-coking coal and its use in power plants, it was found by the DG that there is no substitute available of the non-coking coal for the thermal power plants in India. Hence, the relevant product market in this case was marked as non-coking coal, which is used primarily as a raw material for generation of electricity by the thermal power plants.

76. The Commission has perused the DG report and considered the submissions of the parties on the issue under consideration.

77. It may be observed that the demand-side substitutability occurs when consumers switch to other products in response to change in the relative prices of the product. The product under consideration is non-coking coal which is used *inter alia* as raw material for the generation of power by the thermal power plants. This product has no demand-side substitutability as no such other substitute product can be utilized as fuel for generation of electricity through thermal source for the thermal power plants.

78. In this connection, it may be noted that the DG also examined whether imported coal can be considered as a substitute or alternative of domestic coal.

However, it was found that imported coal was not a viable substitute or alternative for the Indian thermal power plants in view of the boilers used by them as well as on account of fact that the imported coal was very costly and the raw material *i.e.*, coal, alone amounts to 60%-70% of the total cost incurred by a thermal power plant. Moreover, the electricity industry is regulated and the tariff at which the electricity so generated is sold, is determined/ regulated by the Electricity Regulatory Commissions. The power plants of the informants are based upon assurances given by CIL to supply adequate quantity of the desired grade of coal. The design of the said power plants is such that only domestic coal *i.e.*, the one produced in India by CIL, can be fired into the boilers. The design of the boilers is based upon certain ash, moisture and other intrinsic qualities of the said domestic coal. Any other coal including imported coal, has qualities which are markedly different to that of the domestic coal, and therefore, the informants cannot use imported beyond a small limit of 15-30%. Resultantly, the power producers have no other option but to purchase domestic coal for their power plants.

79. The Commission has given its thoughtful consideration on the issue. It has not been disputed that boilers of most Indian thermal power plants are designed keeping in mind factors like GCV, ash content, moisture content *etc*., intrinsic in the coal fuel, and as such only domestic coal *i.e*., coal mined and supplied predominantly by CIL in India can be used for firing the said boilers. It has not been denied that any other coal, including imported coal, has qualities markedly different to those of domestic coal, as a result of which imported coal ranging from only 15% to 30% can be used as fuel in thermal power plants at any given point of time, and that too, when blended with domestic coal in the specified proportion to obtain the requisite calorific value suitable to the design/ specification of the boilers used by Indian thermal power producers. It also cannot be disputed that 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*. The pricing aspect is further

accentuated by the fact that the total cost of fuel (coal) amounts to as much as about 70% of the total cost incurred by power plants. Besides, the demand for power is insensitive (inelastic) with relation to the price of coal and the tariff charged by power producers is regulated.

80. So far as the oil/ gas as substitute for coal is concerned, it may be noted that existing plants are mostly designed for coal besides the same are neither easily available nor cost competitive with coal.

81. In view of the above, the Commission concurs with the delineation of the relevant product market by the DG as production and sale of non-coking coal to the thermal power generators.

82. As the condition for supply of coal in the entire country is uniform and homogenous, hence the relevant geographic market is entire India. The DG has also recorded a similar finding on this aspect. For the reasons already stated, it is not necessary to revisit the same for confining the relevant geographic market to India. Suffice to note that 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.

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

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

84. Once the relevant market is defined, the next step is to examine the issue of dominance in the said relevant market. 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.

85. 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.

86. The opposite parties have assailed the finding of the DG holding CIL and its subsidiaries in a dominant position in the relevant market.

87. Before delving further into this aspect, the Commission considers it appropriate to highlight the contrary assertions made by the opposite parties in this regard.

88. It was contended that in 2011, India as a whole produced only 8.35% of the World's non-coking coal which represents a miniscule portion of the total global production. Further, that of the 6,637 MT of coal (including coking and non-coking coal) produced globally in 2011, CIL accounted for only 435 MT, which amounts to approximately 6.5% of the total global production. Given that CIL's market share is less than approximately 7%, it is urged that CIL cannot be considered to be dominant or in a position to either influence its customers or competitors in its favour.

89. The above submissions appear to be in stark contrast to the statement of the Chairman of CIL made in the Annual Report 2011-12 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.*

90. 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. Notwithstanding that, the submissions and

statement of Chairman, CIL have been quoted only to highlight the completely opposite stands taken by the opposite parties.

91. Challenging further the finding of the DG holding CIL and its subsidiaries in a dominant position in the relevant market, it was fervently urged 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 the Ministry of Power, the Ministry of Coal, the CEA, the Planning Commission, NTPC *etc*., all of whom exert significant influence and are involved in making decisions that impact various aspects of CIL's business.

92. Elaborating further, it was contended 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 the Central Government promulgated the NCDP in 2007 wherein it was envisaged that the 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 the CEA, the Ministry of Power, the 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 norms set by Ministry of Power/ CEA. This clearly negates the possibility of any kind of dominance on part of CIL.

93. It was argued that CIL also does not enjoy any commercial freedom in the pricing of coal, which is decided by CIL keeping larger public interest in mind in terms of the directives of the Hon'ble Supreme Court in the *Ashoka Smokeless* case. It was pointed out that the Hon'ble Supreme Court in the

above case observed that decisions with respect to pricing by CIL should be made keeping in mind public interest to sub-serve common good. Therefore, it was submitted 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.

94. While conceding that CIL is the largest producer of coal in India, it was submitted that CIL is not the only source of coal. The quantum of imports has been increasing constantly, and SCCL also caters to the demand of coal consumers in India. It was also argued that the status of leading producer of coal has been bestowed upon CIL as a result of nationalization of the coal industry under the Coal Mines Nationalization Act, 1973. Therefore, it was canvassed that the position of largest producer of coal is not because of CIL's commercial behaviour but as a result of the operation of law. It was submitted that CIL's share of coal supply is gradually decreasing due to increasing imports of coal and the consumers looking to alternative sources to meet their coal requirement, including captive coal blocks in India and acquisitions abroad. In any case, it was submitted that 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.

95. Referring to the countervailing power exercised by various stakeholders, it was submitted that the FSA signed between CIL and the power generation companies in 2009 was a product of detailed bilateral negotiations and discussion processes between CIL, the power utilities and other governmental stakeholders. On 08.04. 2009, a meeting was convened by the chairman of the CEA to discuss various clauses of the 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 the FSAs, as requested by the power sector, which were agreed to

by the state power utilities. Therefore, it was submitted that in the absence of any evidence to the contrary, MAHAGENCO's allegation that these meetings were 'eyewash', is without any basis. A large majority of the changes requested by the power utility companies to terms of the FSA relating to sample collection, tenure, weighment of coal, compensation for oversized stones, compensation for excess moisture, *etc*., were accepted by CIL, as is reflected in the issues statement jointly signed by NTPC and CIL on 27.04.2009. It is important to note that both the meetings *i.e*., 08.04.2009 and 27.04.2009 were chaired by CEA and there was no representative from Ministry of Coal present during these meetings. Therefore, the allegation of the informants that CIL has unilaterally decided terms of the FSA is completely wrong and contrary to the records.

96. In relation to the FSAs for new power plants also, CIL has, at all times, been working closely with all stakeholders to accommodate all their comments/ observations through ongoing discussions. This was sought to be substantiated with help of documentary evidence. Following the discussions at every stage, CIL Board made all the requested changes in the provisions of the FSA for new/upcoming power plants. Further, CIL was even pressurized by the power sector to roll back a reduction in penalty for short supplies proposed by CIL, which was required for protection of its legitimate commercial interests, as permissible under the Presidential Directive. As a result, the FSAs for new/upcoming power plants have ultimately been made comparable to the old FSAs.

97. Another instance of CIL's flexibility and the collective buyer strength of the power utilities is that despite conducting its sampling process in accordance with the standards laid down by the Bureau of Indian Standards (BIS) and the power utilities agreeing to the sampling process, it was decided in a meeting held on 14.06.2012 attended by representatives of the Ministry of

Power, the Ministry of Coal, Department of Financial Services, Joint Secretary (Power) to introduce third party sampling for assessing the quality of coal.

98. It is submitted that arguments of GSECL and MAHAGENCO that the CEA was not authorized to represent their interests is also completely baseless. During the course of the oral hearings, GSECL submitted a letter dated 18.06.2013 written by the Chairman, CEA to the Ministry of Power communicating further objections raised by power utilities even in relation to third party sampling, clearly indicating that power utilities negotiate with CIL through making regular representations to the CEA, which in turn represents their interests.

99. In view of the above submissions, it was argued that as CIL does not operate in a free market, it consequently does not have any commercial freedom in deciding its market conduct. Hence, the question of dominance does not arise. 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. It was further submitted that assessment of dominance under the Act, is essentially an assessment of legal and economic factors. CIL's behaviour is constrained by various factors, including substantial countervailing power exercised by various stakeholders including the Ministry of Power; the CEA, the Ministry of Coal *etc*., the Presidential Directive, significant social costs and obligations, its inability to choose its customers and quantum of coal to be supplied to these customers, pressures faced to roll back price increases, *etc*. All these constraints coupled with an analysis of the factors mentioned under section 19(4) of the Act are sufficient to vitiate the findings of the DG in this regard, contend the opposite parties.

100. *Per contra*, the informants have supported the finding of DG holding CIL and its subsidiaries to be in a dominant position in the relevant market.

101. It was argued 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 the *Ashoka Smokeless* case.

102. It was further pointed out that 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. It was highlighted that the market share (with respect to total coal demand) of CIL in the financial year 2010-11 was 69% (sixty nine percent) as opposed to merely 8% (eight percent) of SCCL, while the market share of the two entities in 2011-12 stood at 63% (sixty three percent) and 8% (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 the 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% (forty percent) than coal obtained under the FSAs. As such, the presence of SCCL as a supplier of coal has absolutely no effect on the dominance of CIL in the market, contend the informants.

103. It was submitted that the contention of CIL to the effect that it does not possess any market power on account of the fact that linkages for supply of coal are decided by the SLC (LT) under the NCDP, is incorrect and misleading. It was further submitted irrespective of the fact that the 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 the SLC (LT). Reliance was also placed upon the findings of the DG in this regard. As such, it was submitted that CIL and its subsidiaries hold a dominant position in the relevant market irrespective of the extent to which its activities are governed by government policy.

104. Assailing the contention of CIL that a significant portion of the demand of power producers is met from 'other sources', it was argued that the same is incorrect in as much as power producers in India depend on CIL and its subsidiaries for approximately 70% (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 fulfil the gap between the requirement of thermal power producers and supply by the opposite parties. It was argued that 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.

105. Refuting the argument of CIL that allocation of coal blocks to power utilities including the informants provides an additional alternative source from where coal could be sourced, it was argued that the said allocation was to serve only upcoming power plants while the existing power plants will continue to procure coal from the opposite parties under the existing FSAs. Further, due to delay in obtaining the environmental clearance from the competent authorities, the supply of coal from the said blocks has been indefinitely delayed, seriously affecting the commissioning schedule of the upcoming power plants. Thus, 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.

106. 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. In any event, it was argued that imported coal is not part of the relevant market and hence acquisition of mines abroad by Indian companies is of no consequence.

107. It was further submitted that power utilities are mandated to purchase coal from the opposite parties only according to the ACQ in terms of the Schedule to the FSA. It is not open for the power utilities to run their power generation plant without procurement of coal from CIL because under the FSA, the opposite parties are to supply 75% (seventy five percent) to 90% (ninety percent) of the coal requirement of the utilities and therefore, the utilities have no real option of procuring coal from other sources. In this regard, it was further submitted that the dominant position of CIL and its subsidiaries is underlined by the fact that purchasers are obliged to receive supplies from the opposite parties/ lift coal even if there is no requirement at a given point of time, on account of discriminatory and unfair provisions in the FSA which provide for DDQ.

108. It was urged that there is no significant countervailing power or influence exercised by customers or other stakeholders on the opposite parties. The contentions that the opposite parties cannot act independently of their customers or influence them in their favour, or cannot independently to determine the terms of the contracts for the supply of coal to their customers; or that the opposite parties do not possess economic strength are contrary to the material on record and the actual situation prevalent in the market.

109. Joining issues on the NCDP, it was submitted that the very fact that the 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 the NCDP has 'imposed' the task of meeting the entire domestic demand for coal under the FSAs on CIL, and that if need arises, CIL is expected to resort to the import of coal to fulfil 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 the 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 the 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 the 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 the FSAs under the 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. It has been further argued that only the linkages under the NCDP are determined by the SLC (LT) of the Government of India, while CIL has a free hand in determining the terms and conditions of the 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 the FSAs, which finds reflection in the terms of the said FSAs drafted by CIL.

110. Adverting to the Presidential Directive dated 04.04.2012, it was submitted that the chronology of events in the issuance thereof reveals that the

same was occasioned on account of the failure of the Board of Directors of CIL to implement the communication of the Ministry of Coal with regard to revision of the trigger levels of supply (for disincentive) in the FSAs, which at that time stood at an unjustifiably low figure of 50% (fifty percent). While issuing the said directive in relation to the trigger levels, the Ministry of Coal communicated to CIL that it was free to incorporate suitable conditions in the FSAs to protect its commercial interest. It was submitted that the issuance of the Presidential Directive, rather than demonstrating the stand of the opposite parties that the said directive was issued in substantial public interest 'overriding' CIL's commercial interest, instead further underlines the dominance of CIL in the relevant market, in as much as despite the obvious unfairness of the provisions of the FSA in question, and further despite receiving instructions to this effect from the concerned Ministry, CIL did not deign to consider the objections of its consumers (as would have been the case had CIL been subject to countervailing power of consumers, as claimed), until it was mandated to act by virtue of the said directive. Further, it was argued that 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 un-modified.

111. The informants also refuted the contention of the opposite parties that the retrospective correction in prices effected in the year 2012 was an indicator that CIL and its subsidiaries are not dominant. It was submitted that pursuant to the shift from the outdated Useful Heat Value (UHV) system of grading and pricing coal to the internationally accepted Gross Calorific Value (GCV) system, with effect from 01.01.2012, the initial pricing determined by CIL was excessively high, resulting in opposition to the same across the user sectors, including power, cement, aluminium and steel. The opposition was centred around the fact that the prices fixed by CIL were excessively high, were not determined by market conditions, and would result in the increase in prices of commodities across the board, fuelling inflation. On account of the adverse

economic impact that the unnaturally high pricing of coal would have at a national level and given the *extant* economic scenario, the Ministry of Coal recognized this an exceptional situation capable of affecting the economic progress of the country justifying extraordinary intervention, and was forced to step in to correct the situation. Accordingly, the downward revision in prices was effected on account of intervention at the Ministry level, and not on account of any initiative by CIL as a result of 'feedback from customers' as is sought to be portrayed.

112. Controverting the submissions of CIL on dominance, 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.

113. On the 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.

114. Besides the above, the informants joined in detail all other points raised by CIL to deny its dominance and the same shall be referred to and analyzed by the Commission while addressing the issue of dominance.

115. The Commission has heard the rival submissions on the issue of dominance, and considered the material available on record with respect to this issue.

116. It is not in dispute 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.

117. CIL is a holding company and has subsidiaries as detailed earlier. The Commission notes that 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. The website of CIL states that the coal companies are wholly owned subsidiaries of CIL.

118. 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.

119. 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.

120. Thus, CIL and its subsidiaries have no competitive pressure in the market and there is no challenge at the horizontal level against their market power.

121. The contention of the opposite party that SCCL is also a player in the market and hence CIL and its subsidiaries cannot be considered as dominant is not tenable. As pointed out by the informants, 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 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 2010-11 was 69% (sixty nine percent) as opposed to merely 8% (eight percent) of SCCL, while the market share of the two entities in 2011-12 stood at 63% (sixty three percent) and 8% (eight percent) respectively. The investigation of the DG has further revealed that the market share of CIL and its subsidiaries in the relevant market is about 70%. As such, the presence of SCCL as a supplier of coal has no effect on the dominance of CIL in the market.

122. The DG has examined in detail the various factors mentioned in section 19(4) of the Act to determine the issue of dominance in the present case. The DG has under taken an elaborate exercise to examine the market share of CIL and its subsidiaries *vis-à-vis* SCCL in terms of production which clearly puts CIL and its subsidiaries in undisputed and unassailable leadership position. In terms of size and resources, as noted by the DG the same of CIL and its subsidiaries are in comparable to the any other player in the market *i.e.*, SCCL. It is not necessary for the Commission to revisit and undertake such

exercise again in view of the statutory architecture operating in the coal sector as highlighted above which confers monopoly upon CIL and the said fact has also been acknowledged by the Hon'ble Supreme Court of India in its judgment noted above.

123. So far as the imported coal is concerned, while delineating the relevant market it has been excluded for the reasons stated earlier. To recapitulate 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. The design requirement of the boilers also makes use of imported coal unsuitable. Besides, handling capacity of the ports and timing of imported heavily coupled with burdened railway network and lack of sufficient railway infrastructure to handle imported coal directly, also rules out of imported coal from zone of consideration. As noted earlier, it also cannot be disputed that 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*. The pricing aspect is further accentuated by the fact that the total cost of fuel (coal) amounts to as much as about 70% of the total cost incurred by power plants. Besides, as already observed, the demand for power is insensitive (inelastic) with relation to the price of coal and the tariff charged by power producers is regulated.

124. The Commission has also considered the submissions made by 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. The plea is thoroughly misconceived. The NCDP like any other policy of the State for various sectors was formulated to regulate the distribution of coal in India in view of the limited resources and dependency of various sectors on coal as a primary source of fuel. Though it is true that the NCDP lays down the policy for the supply and pricing for regulated industries like power, fertilizers, Railways and Defence, yet it does not define or determine the terms and conditions for

supply to curtail the independence of CIL. As rightly observed by the DG, CIL is at liberty to decide the quantity of coal, prices and terms in view of its commercial interest within the outline provided in the NCDP and the condition in the relevant market, therefore, has to be viewed within the NCDP only. If the instant contention of the opposite parties is accepted, the provisions of section 4 of the Act could never be applied in regulated sectors. This would be neither consistent with the scheme or intendment of the law. On the contrary, the Act clearly envisages co-ordination with sectoral agencies which clearly negates the plea of the opposite parties that a regulated sector cannot have a dominant enterprise. In the relevant market, CIL through its subsidiaries enjoys economic strength and also the advantages of monopoly so vested by law. There is sufficient independence conferred upon them which is also exemplified by the fact that CIL has been given the status of a *Maharatna*.

125. As brought out in the DG report, although the NCDP lays down that the power sector is to be supplied 100% of the normative requirement, CIL has been able to decide the quantity as per its commercial feasibility. Further, by deciding the trigger level for penalty at 90% for old power plants and 80% for new power plants, the commitment for quantity is further brought down by it as per its convenience. Thus, NCDP has not tied down the hands of CIL while deciding the quantity of coal. In this connection, it may be pointed out that although NCDP provides that 100% of the normative requirement has to be supplied by the coal companies, the opposite parties have framed FSAs in such a manner that they are eligible for incentives even if supplies are below ACQ. The decisions relating to ACQ are taken only after considering the feasibility of production and constraints of CIL. In such circumstances, it is futile for CIL to contend that it is not able to operate independently in the relevant market. In this regard, the following findings of the DG also demolish the present plea of CIL. It was noted by the DG that CIL has framed the terms and conditions of FSA to safeguard against any penalty for failure to supply

the contracted quantity. It was also noted that the data provided showed that after the implementation of FSA, CIL has not paid penalty for failure to supply, whereas in 2011-12 it was able to earn about Rs.700 crores on account of incentives for supplying coal above the trigger level of ACQ.

126. Even in relation to pricing of coal, no material was placed to show that the prices are not determined by the Board of CIL. Save and except the broader guidelines relating to pricing of coal in terms of NCDP, no control was found by the DG or otherwise shown which can be attributed to Government of India. Admittedly, prices of coal for unregulated sector are market driven and kept at 30% higher than the regulated sector. Further, coal sold through e-auction also yields greater prices. As noted by the DG, NCDP lays down a limit of 10% for e-auction but the opposite parties have been able allocate higher quantity for e-auction in the commercial interest of the companies. Thus, the finding of the DG that the opposite parties have been allowed greater flexibility and independence in deciding the prices of coal for the unregulated sector, stands established. Even in relation to power sector, the power producers are allowed to sign long term FSAs at notified prices which are subject to increase if the buyers are supplied more than 90% of the ACQ. As per the FSAs, it can be raised even up to 140% of the base price if the supplies are above 100% of the ACQ in the form of incentives. Thus, there can be little doubt that the opposite parties enjoy greater flexibility in pricing than what is being contended.

127. To further examine the flexibility of CIL in its commercial transactions, the DG examined some other attended decisions which go on to establish the degree of independence enjoyed and exercised by CIL. In this regard, it may be noted that the DG found that while adopting the GCV mechanism, fixing prices of different grades of coal CIL Board acted without any interference of GoI, which ultimately resulted in generation of higher sales revenue. The minutes of Board meeting were also referred to show that the

Board was well aware that the prices set by it under new mechanism would result in increase in sales revenue by more than 12%, and it went ahead with the proposal which was beneficial to the company. In view of this, it is not in doubt that the Board has absolute authority and flexibility to take decisions regarding pricing, quantity, and terms and conditions of FSAs without any interference from any quarter.

128. On the impact of social responsibility on dominance of CIL, the DG found no material which can have any effect on dominance of CIL. It was rightly observed that merely being a PSU and mention of social objectives in the Memorandum of Association (MoA) cannot be treated as a factor for ignoring other strong factors indicating the dominant position and the concept of CSR, which is now an essential feature in the corporate world and even non-PSUs are fulfilling this mandate, has no impact on the commercial decisions and performance of the companies.

129. It would be instructing to notice from the report of the DG that after the introduction of NCDP and implementation thereof, the net profit of the opposite parties have grown exponentially. In 2008-09, the profits were about Rs.2,000 crores whereas in 2011-12 it has increased to about Rs.14,800 crores. On the contrary, there is not much improvement in terms of quantity of production and sale in commensuration to the growth in profit. Hence, it is a clear indication that the government policies have not affected the commercial interest of the opposite parties. Before concluding on this aspect, it is instructing to note that the objects clause of the MoA of CIL itself encapsulates and signifies the role of CIL in as much as it 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 is clear that CIL is driven by

commercial interests in the supply of coal to the thermal power producing utilities under the FSAs, which finds reflection in the terms of the said FSAs drafted by CIL.

130. 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 market as delineated *supra*.

(iii) If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have contravened the provisions of section 4 of the Act?

131. Now, the allegations made by the informants relating to abuse of dominance may be examined. Section 4(1) of the Act states that no enterprise shall abuse its dominant position. Further, section 4(2) of the Act, *inter alia*, states that there shall be an abuse of dominant position under sub-section (1), if an enterprise: (a) directly or indirectly, imposes unfair or discriminatory- (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service; or (b) limits or restricts- (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access in any manner; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

132. On perusal of the informations under consideration, it appears that while MAHAGENCO has raised various issues arising out of FSAs, the central issue raised by GSECL relates to sampling and process of sampling.

133. Before adverting to the specific issues arising out of FSAs, it would be appropriate to appreciate the chronology of events culminating into FSAs, the clauses whereof are alleged to be unfair and discriminatory in abuse of dominant position held by CIL through its subsidiaries. At this stage, it would also be appropriate to notice the coal distribution policy of the Government.

134. In 2007, the Government approved a NCDP 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.

135. The policy was stated to be evolved based on the extensive discussions held by the Committee headed by Secretary (Coal) with all the stakeholders. The Committee comprised of representatives from the Ministries of Power, Steel, Law, Finance, Small Scale Industries, Department of Industrial Policy and Promotion, Planning Commission, CIL and Coal Mine Planning and Design Institute Limited.

136. The key features of the NCDP may now be briefly taken note of. The existing classification of coal consumers into core and non-core sectors was dispensed with. Presently, the core sector consisted of power, steel, cement, fertilizer, paper, aluminum, defence, loco, central PSUs and exports. Non-core sector comprised of remaining consumers in various types of industries like textiles, rubber, engineering, glass, refractory, lime, jute, copper, foundries, crockery *etc*., besides seasonal consumers like brick sector. Since power and

fertilizer sectors are operating in a price regulatory regime coal to the extent of 100% of the normative requirement of the units in these two sectors was to be made 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% 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.

137. 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 8 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 Fuel Supply Agreements with public sector coal companies for sourcing coal for distribution through their designated agencies which could include National Cooperative Consumers Federation, National Small Industries Corporation, any state government agency and established industrial bodies.

138. 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 promoters in a period of two years in case of power plants and one year in case of other consumers. Consumers granted LoA have to furnish a Bank Guarantee equivalent to 5% 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. Letters of assurance 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.

139. 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.

140. Various provisions of the 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 6 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 6 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.

141. Now, chronology of events culminating into FSAs may be noticed.

142. At the outset, it may be mentioned that subsidiaries of CIL stated during investigation that they have no role in the drafting and finalization of model FSA and the same is done by CIL only.

143. 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 an agency (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% whereas the trigger level for incentive was kept at 90% of ACQ. The term of agreement was kept for a period of 5 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%.

(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%, 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% level.

(g) In 2010-11, when the time of supply of coal and signing the FSA for new power utilities came as they started their production, they objected the terms and conditions of the model FSA, specially the low trigger level for penalty at 50%.

(h) Since no agreement on the 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 continues in 2010-11.

(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% from 50%.

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

(l) MAHAGENCO files information before the Commission against CIL and its subsidiaries alleging the abuse of dominant position by them.

(m) In April 2012, Ministry of Coal conveys a Presidential Directive to raise the trigger level for penalty to 80%. CIL Board while approving the revised FSA models with 80% trigger and 20 years tenure decided, a disincentive of 0.01% for non-fulfillment of 80% trigger level of ACQ, with a 3 years moratorium from the date of signing of FSA.

(n) The power producers did not agree with the penalty of 0.01% 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 the FSA to increase the amount of penalty from 0.01% with certain conditions. Some of other clauses are also modified.

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

144. From the above mentioned chronology of important events, the DG deduced that the FSA was prepared by CIL for different buyers without discussing with them. However, it was noted that 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.

145. This was vehemently denied by the counsel appearing for the opposite parties. It was submitted that the FSA signed between CIL and the power generation companies in 2009 was a product of detailed bilateral negotiations and discussion processes between CIL, the power utilities and other governmental stakeholders. In this regard, it was pointed out that on 08.04.2009, a meeting was convened by the Chairman of the CEA to discuss various clauses of the 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 the FSAs, as requested by the power sector, which were agreed to by the state power utilities. Therefore, it was argued that in the absence of any evidence to the contrary,

MAHAGENCO's allegations that these meetings were 'eyewash', is without any basis.

146. To further substantiate the submissions, the counsel appearing for CIL and its subsidiaries argued that a large majority of the changes requested by the power utility companies to terms of the FSA relating to sample collection, tenure, weighment of coal, compensation for oversized stones, compensation for excess moisture *etc*., were accepted by CIL, as is reflected in the statement jointly signed by NTPC and CIL on 27.04.2009. It was also pointed out that both the meetings *i.e.*, 08.04.2009 and 27.04.2009 were chaired by CEA and there was no representative from Ministry of Coal present during these meetings. In these circumstances, it was sought to be canvased that the allegation of the informants that CIL has unilaterally decided terms of the FSA is completely wrong and contrary to the records.

147. *Per contra*, it was submitted on behalf of the informants in Case Nos. 03 and 11 of 2012 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 different and from a different perspective. It was argued that the CEA is a statutory body and is concerned with coordinating generation, transmission and distribution of electricity from a planning perspective. It is in this context, that the CEA must know what kind of coal supply commitments that CIL is willing to make for generation of electricity to take place. It was highlighted that existence of FSA is fundamental to generation of power. Hence, it was sought to be suggested that CEA held meetings to understand the reasons as to why FSAs are not being signed which have a direct impact on generation of power. It was specifically denied that CEA has any mandate in the exercise of negotiating the terms and conditions of FSAs. It was submitted that both from a legal perspective as well as a factual perspective, it stands established that CEA and Ministry of Power did not at all exercise any countervailing power

on behalf of the powers in relation to pricing of coal as well as in determination of the terms and conditions of supply of coal.

148. Adverting to the role of NTPC, 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 categorically 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.

149. Similarly, GSECL – the informant in Case No. 59 of 2012 – also argued that buyers and other stakeholders were not consulted while making the modifications/ amendments to the FSAs. The argument of the opposite parties that the Ministry of Power, CEA and NTPC took a proactive role in discussing and agreeing to the final provisions of the model FSAs is of no consequence in the present context, in as much as admittedly, the consumers of the coal *i.e.*, the thermal power generation utilities in the present case, were not consulted. This fact was further sought to be substantiated by the statement of Shri Manisankar Mukherjee, General Manager (S & M) of CIL reproduced in the report of the DG wherein no satisfactory response was given to the specific query of the DG with regard to whether meetings were held with representatives of the power producers prior to making amendments in the FSA in April 2012, or whether any meetings were convened by CIL on its own with the stakeholders (including power producers) prior to revision of the FSA model.

150. Furthermore, it was urged that while the decisions relating to drafting of the FSAs were taken by CIL without adequate consultations, the consumers

were required to enter into agreements with the concerned subsidiaries of CIL. Consequently, in the event that the consumer raises any objection to the terms of the agreement, the subsidiary cites its inability to make any modifications on the ground that the model FSA has been finalized by CIL and modifications thereto are beyond their scope of powers.

151. The Commission has carefully perused the rival submissions on the issue. From the chronology of events culminating into FSAs as adumbrated *supra* and on perusal of statements of power producing companies as recorded by the DG, it is inescapable that FSAs – which were envisaged under the new NCDP to bring binding commercial obligations of the parties – were essentially drafted by CIL on its own and without any meaningful consultation with other stakeholders. This is further borne out by the statement of Shri Manisankar Mukherjee, General Manager (S & M) of CIL recorded by the DG during the course of investigation. For felicity of reference, the same is quoted below:

> *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% 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 2011-12 or during the current financial year.

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

152. From a bare reading of the statement, it is self-evident that the process of negotiations essentially involved Ministry of Power and CEA. These entities had no mandate or perspective or authorization to enter into any bilateral engagement on behalf of the power utilities. In fact, Shri Mukherjee of CIL, in a response to a specific query raised by the DG, 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.

153. In view of the above, the Commission has no hesitation in holding that CIL abusing its dominance did not try to evolve the terms and conditions of FSAs through a mutual bilateral process and the same were sought to be

imposed upon the power utilities without seeking much less considering the inputs of the power producers.

154. In the aforesaid backdrop, the impugned terms and conditions of the FSAs along with the conduct of the opposite parties may be examined.

155. It is no doubt true that an FSA is a long term agreement between a buyer and seller but it has to be differentiated from other ordinary long term agreements due to the cascading and systemic effects which may flow from its terms and conditions and their execution.

156. The consumer in an FSA is the power generating company, however, the effect has consequences further down the value chain given that the cost of electricity constitutes between 60-70% of the tariff paid by the end-consumer. Further, while the obligations and responsibility of CIL stop at the FSA, the obligations and responsibilities of the power generating companies extend beyond the power sector in as much as any inefficiency and anti-competitive conduct in one segment of the value chain would have the effect of creating and causing a systemic risk in the entire economy. It is, therefore, imperative that an FSA must address the issue of mutual obligations and responsibilities holistically, than merely from a perspective of ordinary contractual obligations.

157. Accordingly, the Commission is of the view that the obligations and responsibilities enshrined within the FSA for assessment of unfair and anti-competitive call for an integrated and holistic approach that considers not only the anti-competitive effects on power generating companies but also on the entire power sector as a whole.

158. Given the importance of electricity in the growth momentum of a developing and power-deficit economy, it becomes imperative that the

commercial relationship does not adversely affect the entire value chain. In view of this, an FSA must adhere to certain principles that guarantee commercial as well as operational viability to both sellers and buyers of coal. From seller's perspective, it includes timeliness in supply of contracted amount and quality of coal at prices that are agreed upon well in advance. The buyer's responsibility includes timely payment for amount of coal purchased and advanced intimation of their requirement. Any supply/ price shock is undesirable and if it actualises, the same has to be mutually resolved in the best interests of both parties. In addition, FSAs should have deterrent penalties for non-fulfilment of contractual obligations. As far as incentives are concerned, the same may be worked out by the parties in light of the prevailing coal eco-system. In sum, FSAs should consist of three essential characteristics - quality, quantity and delivery schedule/ timeliness, for any deviation from any of these parameters puts power generating companies in adverse operating/ financial situation. Since outcome of an FSA is directly related to the Power Purchase Agreement (PPA) signed between power generators and distributors, any mis-match between FSA and PPA results in a cascading effect affecting the tariffs to consumers.

159. It is important to note that quantity is a very crucial aspect for a power generating company as each plant is designed for a certain minimum plant load factor to be commercially viable. Another important aspect is that of quality of coal in an FSA. Every power plant is built and designed to maintain a specific heat rate. If sub-standard coal is used in furnace then not only coal consumption goes up adding to the input costs ultimately affecting true-up but also the longevity of the boilers shows deterioration. Also, the schedule becomes important as electricity cannot be stored. For thermal power stations, the critical level of coal requirement is 7 days and anything less than that would result in shutting down of the plan.

160. In addition to the above, it is pertinent to highlight the fact that under certain market conditions, some contracts become unconscionable especially when the markets are not functioning in a competitive manner. In such a scenario, the party with superior bargaining power is able to dictate terms that are overwhelmingly one-sided. Then the other party is confronted with 'take it or leave it' proposition.

161. In view of the above, the impugned terms and conditions of FSA besides the conduct of CIL and its subsidiaries may be examined.

Issues relating to quality of coal

162. During the course of investigations, the DG identified the following issues relating to quality of coal supplied:

(i) Procedure for declaration of the coal grades and terms and conditions relating thereto;
(ii) Sampling and testing procedure and related terms and conditions;
(iii) Supply of oversized coal and stones and related terms and conditions;
(iv) The obligation under the FSA on CIL and its subsidiaries to ensure supply of correct quality of coal; and
(v) Charging for supply of ungraded coal.

Grading of coal and procedure for declaration of grade

163. From the records, it appears that the coal companies declare the grades of coal of all seams from all of their mines on an annual basis. However, in certain cases, interim declaration of any new coal seam is also done. All the activities in respect of grading of coal are to be done in line with the guidelines stipulated by Coal Controller, Ministry of Coal, Government of India. For existing and running seams, for which a grade already exists, two

samples are drawn from each seam from two different sites. Based on UHV parameter/ bomb calorimeter, the 'Grade' is determined. This grade list is sent to the Coal Controller, Kolkata for his acceptance. On receipt of acceptance, the grade is declared, and notified to all consumers every year. For a new seam, the same procedure is followed, except that the sample drawn is sent to a government laboratory, preferably CIMFR, for provisional grading. The final grade of the same seam is declared within 6 months from the date of declaration of the provisional grade. In this case also, the grading is sent to the Coal Controller for his acceptance.

164. Though, the buyers have raised diverse pleas relating to process of declaration and verification of grades in the instant informations, yet it is not necessary to dilate any further on this aspect in view of a suitable and independent mechanism provided by the Office of the Coal Controller (CCO). Suffice to note the statement made by Shri R.L.P. Gupta, General Manager (Quality Control), SECL before the DG during the course of investigation. The relevant portion thereof 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 March 31st 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.*'

165. The Commission has also perused the clauses of FSAs (clause 2.4, for the existing and new power producers). For ready reference, the same are quoted below:

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.

166. From the above, it can be noticed that while in earlier FSA, the change could only be made by GoI, in the new FSA, no reference to GoI has been made. However, on comparison and analysis of terms and conditions in respect of grading of coal in both FSAs, the changes brought in the 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.

167. It is not understood as to how such clauses can be termed as unfair or discriminatory when the same only provide for the consequential changes in the contractual obligations due to the changes declared in the grade structure by competent and empowered authorities.

168. 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.

169. In the light of availability of an effective and efficacious independent statutory mechanism to redress the issues arising it declaration of grading of coal and on closer examination of the impugned clauses as noted and explained above, no case has been made out by the informants to contend that the mechanism is unfair or discriminatory in any manner whatsoever.

170. However, on the issue of remedy for grade slippage, the Commission notes that clause 4.7 of the 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 a dual regime is *ex facie* discriminatory and is in contravention of the provisions of section 4(2)(a)(i) of the Act. The opposite parties have not been able to justify the reason for such discrimination between old and new power producers based on any intelligible differentia. The Commission notes that

though in an appropriate case the distinction based on old and new power producers may have some rational justification, yet for the present purposes, it is not readily inferred as to how a distinction in the matter relating to remedy against regular grade slippage may have any justification, leave alone a justification which may satisfy the requirements of law.

171. However, during the course investigations, the anomaly was stated to be removed by CIL. This may be a relevant factor while considering the remedies.

Procedure of sample collection for assessment of quality of coal

172. The Commission has 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 are applicable to the PSUs. On a plain reading and comparison of these two sets of clauses, it is self-evident that there are different provisions in the FSAs for sample collection. 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.

173. The Commission is of the opinion that the provisions for sampling of coal are *ex facie* discriminatory between PSU and private producers. 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 the FSAs governing private producers are also not sufficient to bring any *parity* of treatment between these two sets of producers so as to save the clause from the *vice* of the provisions of section 4(2)(a)(i) of the Act. It is held accordingly.

174. Now the other pertinent aspect relating to the sampling procedure itself may be examined.

175. The investigation revealed that the procedure for sampling and analysis of quality of coal is of great significance to power producers. CIL, being the dominant supplier of coal in the market, is required to take into consideration the quality related issue fairly and in a non-discriminatory manner.

176. The DG found that the FSAs on one side do not obligate the seller to provide for best and fair sampling methods, on the other side they dilute the consequences of poor quality supplies.

177. The issue may now be examined in some detail.

178. Joining issues with the informants on the aspect that coal must be jointly sampled at both the loading and unloading end, it was vehemently contended by the opposite parties that as per clause 4.7.1 of the FSA, there is a requirement to conduct joint sampling at the loading end only, which is being carried out by CIL in a fair and transparent manner. The reason for this requirement is stated to be flowing from the provisions of the Sale of Goods Act, 1930. 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. It was submitted that this position has also been upheld by the Hon'ble Supreme Court of India in several decisions, including *Marwar Tent Factory* v. *Union of lndia*, (1990) 1 SCC 71, where the Hon'ble Supreme Court 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 the 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.

179. Controverting the submissions of the opposite parties, the informants 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*'. It was submitted that while a reasonable amount of pilferage in quantity might occur in transit, it is absurd to suggest that 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, the grade of coal or its GCV cannot change, no matter what distance it is transported for, submitted the counsel for the informants.

180. It was further contended that the argument of CIL that the sampling ought to be done at the loading end because it is there that 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.

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

182. 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 blame, 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 are not being followed.

183. Lastly, it was contended that the allegation that 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', is completely ludicrous. 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 the FSAs are false, as alleged.

184. The Commission has carefully examined the issue after perusing the material placed on record. 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.

185. CIL, however, argued that the allegations regarding the joint sampling method are unfair and unfounded. It was submitted that due to the problems with the previous method of third party sampling raised by the power companies, that the shift to joint sampling took place. Moreover, joint sampling is a fair system as both parties are involved in the sampling process, and allegations of a bias in the third party agency are avoided. Lastly, it was argued that joint sampling at the loading end was the method of sampling agreed upon with the power companies, NTPC and CEA in 2009. Therefore, it was contended that the issue of unfairness or unilaterally changing the same does not even arise.

186. On these aspects, 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 DG did not find anything on record which showed

that the provision of third party was removed at the behest of buyers only. 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 event 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 inter alia 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.

187. At this stage, it would be instructing to notice the sampling procedure adopted by the only other player in the relevant market *i.e.*, SCCL. In this regard, it was noted by the DG that while the 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. Thus, the buyers have been given opportunity for testing of sample to their satisfaction. Thus, compared with another player in the relevant market the procedure of sample collection and analysis adopted by the opposite parties appears to be tilted in favour of seller in CIL's FSA

188. In the result, the Commission concurs with the findings of the DG that the terms and conditions of FSA regarding the commitment of the opposite parties to ensure the quality of coal cannot be taken as fair and is held to be to the prejudice of the consumers. It would not be out of place to mention 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.

189. The Commission notes that as per clause 4.7. (i) of the 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. From the above, it becomes abundantly clear that the purchaser has practically no say in the sampling process and it becomes a spectator as all facilities and infrastructure for the joint sampling are under the effective control of the seller.

190. In the result, the Commission holds that the terms and conditions relating to sampling and assessment of the grade and quality of coal are also unfair and in contravention of the provisions of section 4(2)(a) (i) of the Act.

Supply of ungraded coal

191. Clause 5.2 (clause 4.2 of the old power producers' FSA) of the FSA 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.'

192. In this connection, it was submitted on behalf of CIL that the provisions in the FSAs relating to the payment of freight for ungraded coal by the customer are fair, as payment of freight is always the responsibility of the buyer. Further, it was argued that the customers are not prejudiced as grade slippages due to the heterogeneous nature of coal are adequately compensated

for under the FSA. It was pointed out that under the provisions of the FSA, if CIL supplies any ungraded coal to the customers, it will charge a nominal amount of Rs. 1/ tonne as the sale price and other associated taxes are levied, which are payable by it to the Central Government or the relevant State authorities. As the Government does not stop charging levies even if ungraded coal is mined, it is only fair that the same may be continued to be passed on to the customer. It was submitted that in any event CIL has not supplied ungraded coal and therefore this concern is largely academic. Referring to the allegations of MAHAGENCO giving a detailed list of total rakes that were alleged to be ungraded, it was submitted on behalf of CIL that MAHAGENCO was alleging to have received ungraded coal between 2009 and 2012 and has raised these issues only now. No such claim was raised with CIL when the actual rakes were received. In any event, 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 highlighted 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.

193. On a careful perusal of the FSA, it appears that the same does not impose a strict liability upon the seller to supply only the agreed grades but only mentions about making adequate arrangements to assess the quality and for providing monitoring mechanism to prevent loading of ungraded coal. The agreement merely provides that the seller need only try that the ungraded coal is not loaded, however if the ungraded coal is loaded and transported, there is no provision for compensation and the buyer is to bear all the expenses on transportation, royalty and taxes *etc*.

194. The Commission is of the opinion that the opposite parties have failed to justify or explain as to why the buyer should be saddled with the expenses

for the ungraded coal, which is supplied in breach of the agreed quality of coal in FSA. The finding of the DG in this regard is unassailable and the opposite parties have not been to dislodge the same. Suffice to notice from the record of the DG that any good which is not in conformity with the sale agreement, should not be sent to the buyer, irrespective of the fact that the good 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. The Commission fully concurs with the findings of the DG in this regard.

195. The Commission observes that CIL by imposing such condition in the agreement cannot absolve itself of its responsibility to ensure the supply of coal of agreed or contracted quality. The consumers cannot be forced to pay the cost of ungraded coal. Such condition not only gives an upper hand to the seller but also reduces its commitment to supply right quality of coal. The conduct of the seller is guided by the FSA and if there is no obligation on the seller to assure the supply of only graded coal, the coal companies are not bound to do the same. It is not out of place to mention that such provisions also results in misappropriation or mishandling of the limited resources of railways in supply of rake to the coal industry as well as of the buyer. 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 needs to be incorporated in the agreement to the satisfaction of both the parties.

196. In this regard, it may also be noticed from the DG report that the FSA is meant for supply of only graded coal. In cases of new power producers, even the GCV of the coal to be supplied is mentioned. Yet, 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. 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% 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, if the coal of low grade is supplied, the quantity of coal required and resultantly purchased by the power producer increases.

197. At this stage, the comparison with the only other player in the relevant market on the point may also be alluded to. 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.

198. On consideration of the rival submissions, the Commission notes that the clauses relating to DDQ in FSAs give leverage to CIL to evade and avoid its liability for short supply. In light of the observations of the Commission outlining the three essential characteristics of an FSA, which are *sine qua non*, 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 accentuated and compounded if DDQ is read together with the clauses pertaining to ACQ, ungraded coal and oversized stones. Textually, CIL may as well supply

ungraded coal/ coal mixed with stones to the power producers fulfilling its ACQ requirements to evade penalty in the first place and issue credit notes subsequently, yet such arrangement does not meet the intent of FSA *i.e.*, to ensure timeliness in supply of agreed quantity and quality of coal. In a power-deficit economy, the ramifications are felt all across. Thus, it is evident from the above that these provisions have been decided on account of the dominant position enjoyed in the relevant market. It is also pertinent to note that there is no such practice found in the supply of coal in respect of other players *i.e.*, SCCL or international suppliers of the coal.

199. From the conspectus of facts as narrated *supra*, 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

200. It was submitted by the informants that as per terms of FSA, top size of coal to be supplied by the opposite parties should not be more than +250 mm size. However, it was alleged by MAHAGENCO and other power producers that in a majority of cases, big lumps were supplied by CIL and its subsidiaries to the linked power stations causing an extraordinary delay in unloading of coal rakes, which, in turn, attract demurrage charges. It was alleged 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 is incurred by power producers for arranging manual labour for breaking of big lumps at its unloading site, contended the informants.

201. In this regard, it was submitted by CIL the cap on compensation for stones at 0.75% of the total quantity supplied was applicable to the new power plants as they were sourcing coal from sources other than CIL *i.e.*, captive

mines *etc*. Therefore, since the separation of stones was done at the unloading end and 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% was inserted. It was thus contended that the condition is not only fair but also proportionate.

202. At this stage, it is appropriate to notice that the existing power producers, during a meeting held in April 2009, requested that the compensation of stones should be based on actual quantity and no restriction needs to be put in the FSA. CIL agreed to this proposal and removed the capping of 0.75% for compensation in the case of existing power producer but did not amend the capping in the FSA for new power producers.

203. Before examining this aspect any further, 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% 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.

204. The DG examined the officers of subsidiaries of CIL at great length. From the statements so recorded, the Commission is unable to decipher any rationale behind such a discriminatory regime put in place by CIL. In fact, officers of subsidiaries of CIL were evasive while responding to the queries raised by the DG in this regard. From the statements so recorded, it is revealed that the officers sought to suggest that terms and conditions of FSAs are framed and finalized by CIL, the subsidiaries have no say in the matter.

205. From the depositions of the officers, it appears that factum of supply of oversized, wet and sticky coal as also stones to the power stations was not denied. The issue projected before the Commission lies in a very narrow compass and the same relates to alleged discriminatory regime put in place by CIL in capping the compensation paid by CIL and subsidiaries for supply of stones.

206. It cannot be gainsaid that in the process of supply of coal to the power stations, there are chances of dispatch of oversized, wet and sticky coal besides stones. Thus, 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 on a non-discriminatory manner. It is also noted that CIL agreeing to the proposal of NTPC removed capping of 0.75% for compensation for the existing power producers, in April 2009. However, the provisions for new power producers were kept unchanged. Such a conduct is plainly discriminatory besides being unfair. The Commission notes that the reasons given by CIL for putting such unfair and discriminatory 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 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 also reflects that CIL itself has realized the discrimination in the process.

207. In view of the above, the Commission holds that capping of compensation to 0.75% of the total quantity of coal supplied for oversized coal/ stones is *ex facie* unfair being not based on actual quantity or any other reasonable basis besides being discriminatory between new and existing power producers.

208. In the result, the Commission has no hesitation in holding 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.

209. During the course of investigations, CIL intimated to the Office of the DG *vide* its reply dated 21.01.2013 that CIL Board has proposed to remove the cap with *some conditions*. Be that as it may, nothing turns upon such belated action which only goes on to strengthen the discrimination resorted to by CIL between the existing and new power producers with respect to obligation of CIL to pay compensation for supply of oversized coal/ stones.

*Specific allegations qua **conduct** of CIL and its subsidiaries regarding grade slippage, sampling, testing and poor quality*

210. Apart from the impugned clauses of FSAs as discussed above, the informants have also brought out the conduct of the opposite parties based on and in furtherance of the impugned clauses.

211. From the information collected during the course of investigation, the DG noted that almost all the buyers have complained that the sampling of coal is not to the satisfaction of the buyers. It was complained that the methodology adopted by the coal company is non-transparent. The entire process of sampling, right from sample collection to final analysis is in the hands of seller only and the buyers are not able to participate effectively in this process. All the power producers, be it PSUs or private producers, appeared to be aggrieved by the provisions relating to manual joint sampling and analysis.

212. It was claimed by the buyers that the result of sample analysis at unloading sites reflected altogether different results. The investigation revealed that this problem was not in respect of only GSECL but every power producer has complained about the grade slippage and other quality related issues.

213. The informants and other power producers highlighted the following conditions and conduct of the opposite parties in the sampling process, which according to them, are unfair:

(i) The new GCV system requires better technology and methods to monitor the quality of coal supplied.

(ii) The opposite parties have not mandated mechanical sampling and use of related technology in FSA to avoid any commitment on quality.

(iii) The manual sampling at the loading end only is fraught with practical difficulties.

(iv) Consumers are not permitted to participate in the joint sampling of coal to be supplied. Even though it participates in the joint sampling and analysis,

it has no effective say over the process of sampling and hence feels that the results are not accurate.

(v) The conduct of opposite parties is also not fair as there is selective collection of sample by systematically ignoring stones present in the sample and also in tampering of the sample to improve GCV value.

(vi) Sometimes, rakes are loaded at short notice at odd hours in the night, making it almost impossible for the buyer to witness sample collection in the absence of advance intimation and proper lighting at site.

(vii) The opposite parties do not have adequate joint sampling facilities at the loading end. The question of verification of sampling and analysis of coal does not arise in a true sense.

(viii) The sampling results obtained from the coal companies vary widely when the same are tested in the government approved laboratories. The results of analysis done by the Government laboratories are not accepted by the Coal companies.

(ix) The opposite parties have not installed washeries to supply washed coal to the buyers despite the demand from them to supply the washed coal. In international market only washed coal is supplied.

214. CIL in its reply, however, vehemently denied that its conduct is unfair and discriminatory. It pointed out that the terms of the FSA require that sampling at the loading end should be jointly done in the presence of both the parties. Coal samples which are jointly prepared for quality analysis are jointly sealed and thereafter recorded and kept under joint lock and key before the analysis. It was alleged that the informants wilfully participated in the joint sampling process. It was submitted that CIL provides full cooperation to the

representatives of the customers to be present during the sampling process and when they are not present, CIL continuously writes to them to seek their participation. Customer representatives have full freedom to raise objections about any part of the process at any point of time. It was pointed out that the FSAs provide that, in the event that the buyer is not satisfied with the sample analysis concluded at the loading end, it can require that a referee sample collected be tested at an independent government laboratory. MAHAGENCO has also availed of this contractual remedy. During the course of 2011, MAHAGENCO disputed results of 70 samples and these samples were referred to a government laboratory for tests. The referee independent government laboratory (Mineral Exploration Corporation Limited), following a detailed analysis found that 65 samples were within the grade, one sample was above the declared grade and only four samples were below grade. Similar remedy is available to GSECL also under the provisions of the FSA. However, GSECL has not asked the referee samples to be analysed by an independent government laboratory since the signing of the FSA with SECL.

215. It was fervently urged before the Commission by CIL that despite the fact that the informants' representatives have signed the joint sampling reports without making any protest, they are now seeking to retract from their prior admission/ conduct by arguing that either the coal samples are 'window dressed' and or its representatives are 'coerced/ intimidated' to sign the report. The allegations are baseless and mere bald statements. To the contrary, CIL has actually demonstrated to the Commission that the coal samples are jointly sealed. Further, it was argued that the informants have not produced any evidence to support their alleged claims and therefore, the same ought to be rejected outright.

216. On the impugned conduct relatable to security of samples, CIL denied the allegations of the informants and argued that the samples are sealed by both parties and for the purposes of sample analysis, the seals of the sample

are broken in the presence of customer representative. Therefore, it was argued that the issue of tampering with the sample does not arise. It was also argued that other customers are also buying coal from the same sidings, who have not made such wild allegations. The submissions and arguments by MAHAGENCO do not have any head or a tail and are devoid of any merit, submitted CIL.

217. On the issue of testing of coal samples at accredited laboratories of National Accreditation Board for Testing and Calibration Laboratories (NABL), it was argued by CIL that WCL's Central Coal Testing and Research Laboratory has been accredited by NABL. Additionally, it was argued that 21 mines of MCL are ISO certified. Given that coal analysis laboratories come within the administrative control of respective mines, the coal analysis laboratories are deemed to be considered as ISO certified.

218. The allegations of MAHAGENCO relating to non-receipt of the quality of coal paid for, it was submitted by CIL that MAHAGENCO has been receiving coal within the declared grade in a majority of cases. Further, in cases where the jointly sampled quality of coal is below the declared grade, a credit note is issued to MAHAGENCO and it is charged based on the jointly sampled grade. It was argued that MAHAGENCO'S allegation that it is paying for a higher quality of coal than it is being supplied is based on the tests it has allegedly conducted at the unloading end. It was argued that neither such results have authenticity as the testing is not jointly conducted nor such tests are mandated under FSAs.

219. On the issue of short supplies, it was argued by CIL that the short supplies of coal to MAHAGENCO is because of the lack of evacuation infrastructure and problems associated with non-availability of railway rakes, responsibility of which lies with the Indian Railways, who is an agent of the purchaser given that freight is the purchaser's responsibility. It was also sought

to be suggested that the lower materialization of coal at MAHAGENCO end is because of lower availability of rakes and not because of CIL's actions or omissions. Lastly, it was alleged that despite being offered full ACQ, MAHAGENCO has not been able to lift the coal as a result of its own inefficiencies/ faults.

220. The detailed analysis of the impugned abusive conduct of the opposite parties by the DG has highlighted the following concerns of the informants:

(i) With the introduction of GCV system of pricing at par with international standards, the corresponding changes in quality assessments have not been made by the coal companies in the FSA.

(ii) The sampling and quality assessment provisions in the FSA of CIL give upper hand to CIL.

(iii) The quality analysis and sampling procedure of any product has to be to the satisfaction of buyer and not to the satisfaction of seller only.

(iv) The sellers need to incorporate adequate and sufficient provisions to ensure the supply of quality contracted with buyer.

(v) The seller cannot force the buyers to accept or depend upon the reports declared by sellers regarding quality. Considering the physical characteristics and quantity of handled at various sites, the option of dispute settlement has not been found workable.

(vi) The terms and conditions in FSA regarding sampling have been objected by the buyers but the opposite parties have ignored their requests without any reasonable justification.

(vii) The significance of quality of coal cannot be ignored by the opposite

parties as the prices are based on the quality of coal.

(viii) Further, in cases of existing PSU consumers, CIL has amended the provisions but did not make corresponding amendments in FSAs with other consumers. CIL has imposed different conditions for different consumers, without any cogent reason.

(ix) There is no ground to discriminate between an old and new power producer or PSU and Private producer in terms of quality and sampling.

(x) The terms and conditions do not cast any obligation on the seller on the failure to ensure the supply of contracted grade.

(xi) The terms and conditions are found to be in favour of seller, as the sampling is done only at loading end and the testing is also done by the seller only.

(xii) The investigation revealed that the buyers do not have any aversion on joint sampling at loading end if it is done through mechanical samplers. Their concern is mainly on manual sampling and testing by the seller only. They are requesting the sampling and testing at both ends only in the case of manual sampling.

(xiii) The opposite parties have neither provided in the FSA nor installed a fair and neutral sampling and testing procedure for supply of coal in the relevant market.

(xiv) There are no obligations or penalty for the seller on supply of goods not agreed by the buyer in the FSA.

(xv) The procedure of loading does not allow buyer to stop loading and dispatch of poor quality coal, as the analysis of coal is done after the loading and dispatch of coal.

(xvi) The information provided by GSECL and MAHAGENCO showed that their claims on account of grade slippage were not allowed by the opposite parties for the reason that after the changed provisions in FSA, there is no scope for testing the sample at unloading end.

(xvii) The data provided by GSECL clearly showed that in the earlier sampling and testing procedure the credit on account of grade slippage was quite high and now it has literally been stopped by coal companies. Thus, the change in sampling procedure has benefitted only the seller.

(xviii) The provisions in the FSA of the only other player (SCCL) confirms that the provisions regarding quality assurances in the FSA of CIL are not a market practice but a result of its market power only.

(xix) The investigation confirmed that the opposite parties have acted in unfair and discriminatory manner by imposing the conditions relating to quality and grade assessment coal, sampling of coal, charging for ungraded coal *etc*.

221. The Commission has very carefully examined the rival claims of the issue of alleged abusive conduct of the opposite parties. It is not in dispute that all power producers are aggrieved of the conduct of CIL as highlighted and noted above. Though the investigation could not find any evidence to establish that the opposite parties have *deliberately* supplied poor quality or low grade coal to the power producers, the allegations *per se* cannot be rejected on that count. The Commission, however, is of considered opinion that the impugned conduct of the opposite parties essentially arise and emanate out of the lopsided and unilateral terms and conditions in FSAs relating to quality assurance as highlighted elsewhere in this order which are the trigger and fountain head of all the grievances made by the power producers in these proceedings. As such terms have been found to be in contravention of the

provisions of the Act and in view of the proposed remedy ordering *inter alia* modification of FSAs, the Commission does not deem it necessary and expedient to examine the conduct flowing from such abusive terms in any greater detail and it is sufficient to notice the findings recorded in the report of the DG in this regard.

Other clauses of FSA

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

Review of FSA

223. It was alleged on behalf of the new power producers that the clauses in FSA regarding review of FSA for them are unfair and discriminatory.

224. 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.

225. 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."

226. Moreover, 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.

227. It has been contended by the private producers that this clause provides the Seller with the authority to unilaterally terminate the agreement and thus allows the Seller to be the judge of its own case. It has been suggested by them that any review of FSA or any disagreement/dispute on review should be referred to an independent Committee of members from CEA, MoP, MoC to resolve the dispute fairly .The seller should not have powers to terminate on its own .

228. Keeping in view the statutory monopoly enjoyed by the opposite parties, the buyers are heavily dependent upon the coal companies and insertion of such clause reserving the right to unilaterally terminate the agreement, without having scope for review by any independent agency, can hardly be described as fair in the *extant* regulatory framework operating in the coal sector. In the face of near monopoly enjoyed by CIL through its subsidiaries in the relevant market, such unilateral termination by CIL or its subsidiaries is patently unfair. Besides, 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 overwhelming dependence of the buyer upon the dominant supplier of coal.

229. From the minutes of the meeting dated 27-04-2009 between CIL and NTPC, it was noticed by the DG that earlier the provision for PSUs was similar to the present provision for new private producers. However, after the objections raised by NTPC, the provision for reference to Government of India was incorporated. However, CIL did not make such modifications for the new private players.

230. The Commission is constrained to note that CIL is resorting to unfair and discriminatory conduct by inserting different clauses in FSAs with PSU power producers *vis-a-vis* new private producers. From the clauses noted above, it is apparent that 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 as much as the former gives a unilateral right to terminate the agreement to the seller.

231. 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.

232. Though, during the course of investigation, the Officer of the DG was apprised by CIL 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 while taking notice of the development observes that this aspect may have some relevance while considering the quantum of penalty.

Force majeure

233. 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 be 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.

234. The Commission observes that the term *force majeure* is frequently used in construction of contracts to protect the parties in the event that a segment of the contract cannot be performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care.

235. In the present case, a bare reading of the provisions of *force majeure* events listed in the agreement reveal that the same are so widely worded that the only inference which can be drawn therefrom is that the same were put by a dominant party to the agreement to dilute its commitment for supply of coal. Thus, the apprehension of the power producers that these acts/ circumstances/ events would bring about complacency in efficient management of mining activities and further dilute the commitment made under FSA 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.

236. 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. As pointed out earlier, such aspect may have some relevance while considering the quantum of penalty.

Clause relating to satisfying the Condition Precedent in clause 2.8.3 of FSA for new power producers gives upper hand to seller for waiving the condition precedent at sole discretion of seller

237. The DG found the terms and conditions in clause 2.8.3 of the FSA for new power producers as unfair being in contravention of the provisions of section 4(2)(a)(i) of the Act.

238. In this regard, it may be noted that the opposite parties clarified that the waiver as mentioned was not applicable in respect of Condition Precedent laid down in clause 2.8.1.2 and only related to the imported coal.

239. The Commission takes note of the clarification.

Prices

240. The investigation did not reveal any unfair or discriminatory pricing charged by the opposite parties in supply of coal in the relevant market. Nothing was shown by the informants wherefrom a different finding can be returned. There is no material placed on record which indicates charging of excessive or unfair or discriminatory prices by CIL.

241. In the result, the Commission is of opinion that no case has been made out by the informants on this count.

Terms and conditions relating to quantity and trigger levels

242. The grievance of the power producers on this count may be summarized as follows:

(i) The ACQ for existing power producers was maintained at the level of the 100% of the normative requirement.

(ii) The trigger level for penalty on failure to supply was raised to 90% from proposed trigger level of 60% after discussion with NTPC and CEA.

(iii) However, the ACQ for upcoming power producers was linked to the FSA the proportion of the percentage of generation covered under long term Power Purchase Agreement(s) executed by the purchaser with the DISCOMs. Further, the trigger level for failure to supply was only 50% for them.

(iv) Subsequently, on the objections raised by the new power producers, the coal supply was made though MoU as the terms and conditions of FSA were under dispute.

(v) The MoU was also in favour of coal companies and lacked any commitment from sellers.

(vi) In April 2012, the Ministry of Coal communicated the Presidential Directive to raise the trigger level to 80%.

(vii) ClL revised its FSA accordingly but reduced the quantum to a meager level of .01 from the earlier level of 10%.

(viii) The new power producers again contested this provision on the ground that such a miniscule amount of penalty will have no impact on CIL to fulfill its commitment on ACQ.

(ix) CIL again modified the penalty amount and method of calculation by incorporating the quantity of imported coal up to 15% for its commitment on ACQ and trigger level.

243. The difference in provisions of FSA on ACQ and trigger level for old and new power producers was alleged to be an unfair and discriminatory condition imposed by the opposite parties on the upcoming power producers.

244. CIL filed a detailed reply before the DG explaining different ACQs and penalty trigger levels for different category of buyers *i.e.*, between the existing and new power producers.

245. The Commission notes 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, CIL rightly prioritized its existing buyers over buyers who are setting up their power plants more recently. The Commission has also taken 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.

246. The DG also 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, no contravention was found by the DG on these scores. As nothing contrary was shown by the informants, it is not necessary to delve deep into such aspects where either no contravention is made out or the issue pertains to interpretation and construction of the impugned clause.

247. Before concluding the discussion, the Commission notes that CIL *vide* its letter dated 06.09.2013 sought to bring on record Second Presidential Directive dated 17.07.2013 issued by the Hon'ble President of India under article 37 of the Articles of Association of CIL stating that the obligations set out therein are to be made by CIL in relation to supply of coal to contend that CIL carries out its business not solely with a profit motive but in the larger public interest.

248. The informants have strenuously objected to placing of such additional submissions on record by CIL after conclusion of hearings. On the grounds that though the directive was issued on 17.07.2013, CIL did not file the same alongwith its written submissions which were filed before the Commission by CIL on 08.08.2013.

249. Without going into the merits of these pleas, the Commission is of opinion that nothing turns upon Second Presidential Directive dated 17.07.2013 issued by Hon'ble President of India for the simple reason that the Commission has already rejected the analogues plea of CIL based on Presidential Directives to contend that it does not operate in free market and its business is motivated with larger public interest.

Conclusion

250. 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 market of production and supply of non-coking coal 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 to power producers, as detailed in the order.

251. Rawlsian principles for justice postulate equitable enforcement of contracts, where the rights and obligations of the parties are balanced and do not favour one party to the contract. However, there cannot be a watertight compartment in which fairness of all contracts in the world can be defined or listed. The unequal nature of the contract with CIL exercising its market power in setting the terms and conditions has been outlined in the order. The 'unfairness' emanates from the fact that CIL is in a position to influence the terms and conditions of the contract and has inclined them in its favour, and there has been an attempt to formulate the contract with unequal non-benign effect on the buyer.

252. The Commission holds 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.

253. In sum, the Commission agrees with the findings returned by the DG and holds the following specific instances *qua* terms and conduct of the opposite parties emanating therefrom, as detailed and elaborated above, to be in contravention of the provisions of section 4(2)(a)(i) of the Act:

(i) Clauses relating to the sampling and testing procedure.

(ii) Clauses relating to charging the transportation and other expenses from the buyers on supply of ungraded coal and the clauses relating to DDQ.

(iii) Clauses relating to capping on compensation for supply of stones for new power producers.

(iv) Clauses relating to review and termination provisions of the agreement.

(v) Discrimination between existing and new power producers with respect to review of grade.

(vi) Clauses relating to force majeure for new power producers.

254. 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.

(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. CIL is also directed to ensure *parity* between old and new power producers as well as between private and PSU power producers, as far as practicable. Though varying needs of different classes of producers may require different treatment, yet to pass muster the embargo placed by section 4 of the Act, the differentiation or classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational nexus with the object sought to be achieved by such classification.

(iii) CIL is further directed to incorporate suitable modifications in the fuel supply agreements to provide for a fair and joint sampling and testing procedure.

(iii) CIL may also consider and examine the feasibility of sampling at the unloading-end in consultation with power producers besides adopting

international best practices. CIL may also hasten the process of installing Augur Sampling Machines and washeries to help improve the coal supplied.

255. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. In terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

256. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty as can be noticed from the phraseology employed in the provision noted above.

257. It may be noted that the twin objectives behind imposition of penalties are: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

258. The imposition of penalty would depend upon the mitigating and aggravating circumstances of the case.

259. From the submissions made by CIL, it appears that CIL does not enjoy complete commercial freedom in deciding the customers to whom it should supply coal. It may be noted that SLC (LT) comprising representatives of the Ministry of Coal, CEA and the Ministry of Power collectively decide the linkages for each power utility. Similarly, it seems that CIL does not enjoy complete commercial freedom in the quantity of coal it should supply, which

is based on the norms laid down by the Ministry of Power/ CEA. Furthermore, price of coal is decided by CIL keeping in mind larger public interest including the directives of the Hon'ble Supreme Court of India given in *Ashoka Smokeless* case. Lastly, it would be pertinent to note that conduct of CIL is affected and constrained by directions received from various stakeholders including the Ministry of Power, the Ministry of Coal, the CEA, the Planning Commission, NTPC *etc*., all of whom exert influence and are involved in making decisions that impact various aspects of CIL's business. Hence, the Commission is not oblivious of the regulated environment in which CIL operates.

260. All such factors were considered by the Commission while determining dominance in the present case. The Commission opined that notwithstanding the overarching policy and regulatory environment, CIL has sufficient flexibility and functional independence in carrying out its commercial and contractual affairs. Such factors, however, were not found to detract from CIL and its subsidiaries operating independently of market forces and enjoying undisputed dominance in the relevant market.

261. However, as noted above, while considering the quantification of penalty, the contention of CIL that its behaviour is constrained by various factors, including countervailing power exercised by above noted stakeholders including the Presidential Directive, significant social costs and obligations, its inability to choose its customers and quantum of coal to be supplied to these customers, pressures faced to roll back price increases *etc*., cannot be altogether ignored.

262. In this regard, the Commission notes the key policy change introduced by Government of India in effecting shift in grading and pricing of coal. From the submissions of the opposite parties, it is apparent that the Ministry of Coal, through its letter dated 18.10.2011, directed CIL to take necessary steps in

relation to changing from the UHV system of grading/ pricing coal to the GCV system. This direction was in accordance with the recommendations given in the Integrated Energy Policy (IEP). Further, the letter by the Ministry of Coal was followed by a notification to this effect passed on 30.12.2011, bringing into effect the new system from January 2012. As a result of this policy change, CIL moved from UHV system to the GCV method of grading and pricing coal. From this, it is obvious that this change was brought about through the direction of Government of India and not by CIL on its own motion. CIL has merely implemented the change by amending the FSAs and the price circulars.

263. The Commission has also noted the changes effected by CIL during the course of the investigation and pendency of proceedings in FSAs on certain aspects as mentioned in earlier part of the order. However, it is made clear that nothing stated in this order shall tantamount to an expression of opinion on the changes so effected and the same are left open to be examined in an appropriate case, if required.

264. On the issue of penalty, the Commission notes that the entire impugned conduct in the present proceedings emanate out of drafting and finalization of FSAs by CIL Board and, as such, CIL is the fountain head of this entire anti-competitive conduct. The Commission further notes that although subsidiaries of CIL have no major role in the drafting and finalization of model FSA and the same is done by CIL Board, they are also liable for contravention as they have contributed to and responsible for the violation by implementing the abusive clauses of FSA without any demur or reservation. Thus, for the purposes of imposition of penalty, the Commission deems it appropriate to proceed against CIL by taking into consideration its consolidated accounts.

265. The Commission has bestowed its thoughtful consideration on the issue of quantum of penalty. It cannot be disputed that CIL during pendency of investigations modified some clauses of the FSAs as noted earlier in the order.

266. Considering the totality of facts and circumstances of the present case as discussed above, the Commission decides to impose penalty on CIL by taking into consideration its consolidated accounts at the rate of 3% of the average turnover of the last three years. The total amount of penalty is worked out as follows:

S. No.	Name	Turnover for 2009-10 (in Crores)	Turnover for 2010-11 (in Crores)	Turnover for 2011-12 (in Crores)	Average Turnover for Three Years (in Crores)	@ 3% of average turnover (in Crores)
1.	CIL	52,252. 09	55,101.42	69,952.33	59101.94	1773.05

267. The directions contained in para 254 above, must be complied within a period of 30 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.

268. The Commission further directs CIL to deposit the penalty amount within 60 days of receipt of this order.

269. It is ordered accordingly.

270. Before concluding, the Commission is constrained to note that with over 250 billion tonnes of coal reserves, we are barely able to mine 540 million tonnes a year, and despite the domestic demand for coal growing by 8% annually, our output has been increasing at under half that level. In the last three years or so, CIL's production has virtually stagnated around the 350

million ton mark. In such a scenario, the imports of coking and thermal coal combined are expected to rise sharply.

271. The effects of various anti-competitive factors identified in the coal sector on the rest of the economy are widespread and create systemic risk. The Commission is conscious that some reforms are being proposed/ undertaken by the Government by way of setting-up of coal regulator; introduction of public-private partnership framework with state-owned CIL as one of the partners to increase coal output and; transparent and open bidding process for allocation of captive coal blocks. It is important to bear in mind that the entire value chain of electricity is critical for the end-consumers. The power sector which was an integrated structure as a public utility in India is now unbundled into three or four components, each independent in terms of functionality, corporate structure and contribution within the value chain. Inefficiencies in any one segment are felt in the entire value chain with a cascading impact on the end-consumers. Thus, the Commission has also been guided while assessing the FSAs or issues arising thereunder by examining their impact on the power sector.

272. However, there is an imperative need to carry forward this reform momentum further by restructuring the sector by introducing more number of players so that it can reduce the dominance of any one player and can facilitate competition. Bringing the coal sector under the independent regulatory oversight would only help if there are enough players in the market.

273. A copy of this order may also be forwarded to the Ministry of Coal.

274. 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.N. Dhingra)
Member

Sd/-
(S. L. Bunker)
Member

New Delhi

Date: 09/12/2013