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COMPETITION COMMISSION OF INDIA

Case No. 73 of 2015

In Re:

**Tamil Nadu Power Producer Association
No. 6, Sardar Patel Road,
Guindy, Chennai-600032**

Informant

And:

**Chettinad International Coal Terminal Pvt. Ltd.
Rain Seethai Hall Building,
5th Floor, 603, Anna Salai,
Chennai - 600006**

Opposite Party No. 1

**Kamarajar Port Limited
2nd Floor, (North Wing) & 3rd Floor,
Jawahar Building,
17, Rajaji Salai,
Chennai - 600001**

Opposite Party No. 2

CORAM:

**Mr. Ashok Kumar Gupta
Chairperson**

**Ms. Sangeeta Verma
Member**

**Mr. Bhagwant Singh Bishnoi
Member**

Appearances:

For Informant:

Mr. Anup Kumar, Advocate

For Opposite Party No. 1

Mr. A.N. Haksar, Sr. Advocate

Mr. Udayan Jain, Advocate

Mr. Kamal Sharma, Advocate

Ms. Gunjan Richharia, Advocate

Ms. Sitwat Nabi, Advocate



Mr. Sahil Sharma, Advocate
Mr. Prasad U. Rane, Authorized Representative
Mr. Lalit C. Singhvi, Authorized Representative

For Opposite Party No. 2

Mr. Sambit Panja, Advocate

Order

Introduction

1. The information in the present case was filed by Tamil Nadu Power Producers Association ('**Informant**'/'**TNPPA**') under Section 19(1)(a) of the Competition Act, 2002 ('**Act**') against Chettinad International Coal Terminal Pvt. Ltd. ('**Opposite Party No. 1**'/'**CICTPL**') and Kamarajar Port Limited ('**Opposite Party No. 2**'/'**KPL**'), alleging contravention of the provisions of Section 4 of the Act.

Facts, as stated in the information

2. The Informant, an association of power producers located in and around Chennai, was formed in 2004 with an objective to promote and protect the interests of the power producers in Tamil Nadu. The power producers require coal for power generation as raw material, and procure it from domestic as well as international sources. It has been submitted that the members of the Informant have commissioned their power plants near ports so as to have minimum land logistics, since transportation of coal by sea is significantly cheaper as compared to other modes of transportation.
3. The erstwhile Ennore Port Limited is now called Kamarajar Port Ltd., a port situated on the Coromandel coast about 20 Km north of Chennai Port. Kamarajar Port functions on the 'Landlord Port Model' basis whereby the port constitutes the landlord, which manages the basic port assets and basic infrastructure by leasing land to the port operators.
4. CICTPL/OP-1, is a Special Purpose Vehicle floated by a consortium of South India Corporation Limited (SICL), Portia Management Services and Navayuga Engineering, with equity participation in the proportion of 36%, 32% and 32%, respectively. CICTPL is one of the terminal operators at Kamarajar Port and claims to be the highest revenue sharer to



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its landlord amongst other common coal terminals/ private operators in India, where it shares 52.33% of its total revenue with the landlord, Kamarajar Port. The CICTPL and Kamarajar Port entered into a license agreement on 14.09.2006, which allowed the CICTPL to construct and operate the facility for a period of 30 years from the date of commencement of commercial operations.

5. The Informant, an association of power producers, contended that prior to the commencement of CICTPL in March 2011, its members as well as other buyers of coal in the adjoining areas were importing coal through Chennai Port Trust ('CHPT'). During the period of March, 2011 to September, 2011, both CICTPL and CHPT were operational and buyers had a choice to use the facility of either of these players and the charges levied by CICTPL were less owing to the competitive constraints posed by CHPT. However, pursuant to the orders of the Hon'ble Madras High Court, prohibiting the import of coal from CHPT *w.e.f.* October, 2011, CICTPL allegedly catapulted to the position of dominance and drastically increased its common user coal terminal charges.
6. Further, the Informant contended that CICTPL forced the users/importers to pay a part of the above-mentioned charges in the name of '*charges for coordination and liasoning services*' to third party service providers. Allegedly, these Coordination and Liasoning Charges ('**C&L charges**') were mandated as a condition precedent for availing the coal terminal services of CICTPL, despite the fact that such charges do not form part of the 'Published Tariff' of Kamarajar Port.
7. On consideration of the respective contentions of the parties, the Commission was *prima facie* satisfied that CICTPL had mandated the payment of such a charge to third party service providers as a condition precedent for availing its coal terminal services, in contravention of the provisions of Section 4(2)(a)(i) and 4(2)(d) of the Act. Despite denial by CICTPL and Kamarajar Port, the Commission found it highly implausible for any buyer of services (member of the informant in this case) to pay such a charge to a third-party service provider without their knowledge. Accordingly, *vide* its majority order dated



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04.01.2016, the Commission, under the provisions of Section 26(1) of the Act, directed the Director General ('DG') to investigate the matter and to submit an investigation report.

Findings in the Main Investigation Report

8. The DG submitted its Investigation Report on 23.04.2018 ('**Main Investigation Report**') to the Commission. The DG based its investigation on the information collected from the OPs, the members of the Informant and various third parties (including terminal/ports of Krishnapatnam Port, Income tax department, liasoning and coordinating/logistic companies/firms *etc.*

9. The DG delineated the relevant product market as the '*the provision of common user coal terminal services at sea-ports*'. With regard to the relevant geographic market, the DG found that there were three ports/terminals for importing coal, *namely* CICTPL, Krishnapatnam Port, Karaikal Port, which as per the OPs were substitutable from the point of view of end-users/buyers. Based on the catchment area analysis, the DG was of the view that both Krishnapatnam Port as well as Karaikal Port formed part of the catchment area of CICTPL. However, the DG employed another test to assess the existence of overlapping/common users within these ports. The DG found that out of 46 consumers importing within the catchment area of CICTPL, 20 consumers had used services of both CICTPL and Krishnapatnam Port during the relevant period. The DG recorded the statements of some of these common users, based on which the DG concluded that CICTPL and Krishnapatnam Port formed part of the relevant geographic market. With regard to Karaikal Port, the DG found that the commonality of users between CICTPL, Krishnapatnam Port and Karaikal Port was miniscule indicating that conditions of competition at Karaikal Port were not directly homogeneous to that of CICTPL or Krishnapatnam Port during the relevant period, thereby leaving Karaikal Port outside the ambit of the relevant geographic market. Thus, the DG delineated the relevant geographic market as the area '*in and around Kamarajar Port i.e. Kamarajar Port and Krishnapatnam Port*'. Resultantly, the relevant market was delineated as the market for '*provision of*



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common user coal terminal services at sea ports in and around Kamarajar Port i.e. Kamarajar Port and Krishnapatnam Port’.

10. To ascertain whether CICTPL held a dominant position or not, the DG *inter-alia* relied upon the data of total coal imported at common user coal terminals of ports falling within relevant market and upon the views of the officials of various ports.
11. The DG noted that the coal quantity handled at the common user coal terminal of CICTPL by the Informant’s members was only about 39% of the total coal quantity handled by CICTPL as compared to that handled by other users who were not members of the Informant (61%). Further, during the relevant period (*i.e.* 2011-12 to 2015-16), the Informant’s members procured 76% of their total demand from CICTPL whereas 24% was procured by availing the services of Krishnapatnam Port. Based on this, the DG concluded that a considerable share of coal was procured by the Informant’s members from Krishnapatnam Port as well. The DG further observed that although the total quantity of coal imported at both CICTPL and Krishnapatnam Port has increased over the years, yet the share of CICTPL has declined from 2013-14 onwards, whereas share of Krishnapatnam Port has increased during the same period. Such fluctuations in the share was found to be indicative of the competition between CICTPL and Krishnapatnam Port as also of the fact that ports can gain or lose market shares within relatively short period of time.
12. The DG observed that CICTPL has only one common user coal Berth with an installed capacity of 8 Million Metric Tonne Per Annum (**‘MMTPA’**) whereas Krishnapatnam Port has 9 Berths with a total installed capacity of 40.5 MMTPA.
13. Further, the DG went on to examine the financial strength of CICTPL during the relevant period from 2011 to 2016 and discovered that Krishnapatnam Port in comparison enjoyed a higher degree of size and resources. Further, Krishnapatnam Port held most assets and showed the highest increase in assets each year during the relevant period. Assets of CICTPL slightly declined *i.e.* 0.45 % from 2011-12 to 2015-16 whereas assets of Krishnapatnam Port has increased by 10.59 % in the relevant period. With regard to



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revenue, CICTPL was found to have recorded a higher increase in revenue (33.42%) in comparison to Krishnapatnam Port which showed increase of 27.77%. On Net Income/Profit, the DG observed that CICTPL recorded losses in 2011-12 and afterwards earned profits in the relevant period. However, throughout the relevant period, CICTPL's net income/profits were significantly less than those of Krishnapatnam Port, though Krishnapatnam Port's net income was found to be volatile and fluctuating in the relevant period.

14. Based on the totality of factors, the DG concluded that CICTPL did not enjoy position of dominance in the relevant market.
15. For examining the allegations pertaining to abuse, the DG deposed users/importers of coal (including members of the Informant), officials of the OPs and various third-party service providers. The DG, after examining the depositions given by such users/importers (some of whom said that C&L charges were mandatory in nature), concluded that the coal importers including members of the Informants, voluntarily entered into exclusive agreements on mutually agreed terms and conditions with the C&L service providers and such charges were not mandatory.
16. Thereafter, the DG investigated whether CICTPL charged unregulated and excessive prices for providing common user coal terminal services through proxy billing under the caption 'co-ordination and liasoning charges'. However, the DG could not find any nexus between third party service providers and CICTPL or Kamarajar Port. With regard to the allegation regarding shortage in coal supply as against the agreed quantity, the DG found that the handling loss was much below the agreed quantum of 0.5%, as per the agreement entered into by CICTPL with the parties concerned.
17. The DG also investigated whether Kamarajar Port failed in its duty to take any effective or deterrent action so that no such unauthorized charges/conditions were imposed by the CICTPL on the common coal terminal users. Upon investigation, the DG observed that Kamarajar Port took cognizance of the complaints made by the members of the Informant



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and initiated certain enquiries, which included audit of CICTPL's accounts wherein Kamarajar Port could not find any proxy billing or any head related with the C&L services. Upon preliminary inquiry, Kamarajar Port could not find any instance of violation of the license agreement entered into between CICTPL and Kamarajar Port. Kamarajar Port also published a trade notice stating that coal importers using the common user coal terminal at Kamarajar Port need not pay any amount other than the 'published tariff'. The DG also did not find any connection between CICTPL and the third-party C&L service providers, *namely* Breeze Enterprises Private Limited ('**BEPL**'), Original Innovative Logistics (India) Private Limited ('**OILPL**'), and Futuristic Handling Services Private Limited (earlier known as Elite Coal Terminal Logistics & Services Private Limited) (hereinafter referred to as '**FHSPL**').

18. Therefore, the DG concluded that firstly, CICTPL was not dominant and even otherwise, none of the allegations with regard to abuse could be established. With regard to Kamarajar Port, the DG observed that Kamarajar Port took steps to look into the complaints filed by the members of the Informant to the Ministry of Shipping and the Commission.
19. On the contrary, the DG found the Informant's conduct, during investigation, was unsatisfactory as the cooperation and compliance was unsatisfactory with regard to majority of the directions issued under Section 41 read with Section 36 of the Act by the DG. Further, it was contended that the Informant submitted certain documents whose authenticity/validity was doubtful. The DG was, thus, of the view that the Informant did not approach the Commission with clean hands.
20. On 22.05.2018, the Commission considered the Main Investigation Report filed by the DG and decided to forward an electronic copy of the same to the Informant as well as the Opposite Parties/OPs, so as to enable them to file their respective suggestions/objections to the investigation report. The parties filed their detailed objections/suggestions to the Main Investigation Report and were heard by the Commission on 13.11.2018.



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21. The Informant vehemently opposed the methodology adopted by the DG while delineating the relevant market, and contended that the relevant product market cannot include all sea ports but should be limited to a particular port for use by thermal-power producers. The Informant also argued that the DG has indiscriminately included both traders and fixed plant owners in the catchment area analysis despite the fact that the location of traders in the catchment area analysis is irrelevant as delivery by them might have been taken on another location where the traders' buyers were located. Thus, location of those end buyers was more relevant than the location of the traders, the information regarding which was not collected by the DG.
22. With regard to the imposition of the C&L charges, the Informant argued that *firstly*, the DG has disproportionately relied upon few oral testimonies of interested parties, and disregarded at least five statements, who confirmed that such charges were mandatory for availing the services of CICTPL; and *secondly*, it has been urged that the DG did not adequately investigate the financial linkages between the third-party service providers and CICTPL.
23. The Commission found merit in these objections and directed the DG to reassess the relevant geographic market based on the submissions made by the Informant. Further, the Commission directed that if the delineation of relevant market undergoes a change pursuant to such reassessment, the DG shall also determine the strength of CICTPL in such newly delineated relevant market. The Commission observed that the evidence collected by the DG revealed that during 2011-12 to 2013-14, almost 100% of the coal imported by the members of the Informant through CICTPL was procured after availing the C&L services by the third-party service providers. Further, despite there being cheaper options available, most of the importers were availing the services of BEPL, whose charges were substantially higher than FHSPL (in 2011-12 onwards) and OILPL (January, 2014 onwards). The Commission found it necessary to get it investigated as to why the buyers were going for a more expensive alternative for a product/service when cheaper options were available and whether this has any bearing or indication on the charges being mandatory in nature. Further, the Commission directed the DG to bring out the nature and scope of C&L services



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being offered by these third-party service providers as the same was not clear from the information available on record. Accordingly, order under Section 26(7) of the Act was passed on 21.12.2018 directing the DG to carry out supplementary investigation on these issues.

24. On receipt of supplementary investigation order dated 21.12.2018, the DG identified the following issues for investigation:
- (i) delineation of relevant geographic market and to reassess whether CICTPL holds a dominant position in such newly delineated relevant market, if the relevant market undergoes a change;
 - (ii) nature and scope of ‘coordination and liasoning (C&L) services’ offered by the third party service providers at CICTPL and whether these services were mandatory in nature; and
 - (iii) whether there exist any financial linkages between CICTPL and the third-party service providers.
25. For re-examining the relevant geographic market, the DG circulated a detailed questionnaire to 30 respondents, including the manufacturers (fixed plants) and traders. The DG found that the end-use of coal procured by the most aggrieved members of the Informant was for power generation and production of LAM (Low Ash Metallurgical) coke. The others were found to be using coal as a fuel for Kiln and Boiler, for power generation, and for generation of steam. The DG found that the consumers of coal preferred to avail a facility for import of coal, which is most efficient, viable and cost-effective, as most of the coal is sourced from international markets. The determination of port preference was attributed to the proximity of the plant to the port, as transportation of coal (being a heavy product) contributed substantially towards the cost of coal procurement.
26. The DG observed that as per earlier investigation there was no dispute between the Informant and the OPs as to the definition of the relevant product market, *i.e.*, the Informant and the OPs are of the same opinion that the relevant product market is “*the provision of common user coal terminal services at ports*”. Maintaining the earlier established view, the



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DG defined the relevant product market as “*the provision of common user coal terminal services at sea-ports*” in the supplementary report also.

27. The DG observed that the scope of geographic market depends on the extent to which a consumer can choose between different ports based on various factors such as geographical location of the port, proximity to the port, transportation cost from plant to the port *etc.* Further, the DG noted that the consumer preference, which included distance of plant to the port, along with transportation cost, were the relevant factors for determining geographic market.
28. The preference for a port, for both members of the Informant and non-members, mainly depended on the proximity of the plant to the port. Apart from this, for members of the Informant, efficient control and management of the port was also found to be an important factor for port preference.
29. The DG observed that transportation cost plays a vital role in choosing a port. Transportation of coal was found to be required from origin to final destination and ports that could economically receive or deliver goods from or to these destinations were preferred over others. As per the DG, the total cost of transportation that a consumer/importer incurs in transporting goods comprise the following components: transportation from starting point to the port of origin, port-handling at the port of origin, shipping from port of origin to the port of destination, port-handling at the destination port, and finally, transportation from port of destination to the end point, *i.e.* point of consumption. The DG, thus, observed that the port charges are only one component of several charges that together make up the total cost of transportation and that may be the reason why customers/importers are constrained to remain captive to a port, notwithstanding increase in the port charges. This implies that an increase in port charges alone may not cause a consumer to shift to another port as any consumer is likely to consider shifting to another port only if the total transportation cost is cheaper.



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30. The DG took note of CICTPL's contention that Krishnapatnam port enjoys a 30 Km exclusivity on either side of Krishnapatnam port for the entire License period of 30 years, as against the 5 years exclusivity provided to CICTPL in Coal handling at Kamarajar Port, which ended in March 2016. During this period, the concerned port has an advantageous position because of absence of competitive constraints owing to exclusivity. This, as per the DG, demonstrates that Krishnapatnam Port is a distinct relevant geographic market (than Kamarajar port), as conditions of competition between the two ports are distinctly distinguishable. Further, the DG opined that just as Krishnapatnam port has a *de jure* exclusive area, CICTPL too had been enjoying a *de facto* exclusivity, in the absence of any common user coal berth in and around Kamarajar port over these 5 years ending in March 2016.
31. The DG further drew distinction in consumer preferences for high-value low-volume goods as compared to low-value high-volume goods. It was observed that for low-value and high-volume/ weight commodity such as coal, wherein post landing transportation cost constitutes a very important element in the total transportation cost, the consumers will act rationally, and would only opt for the port from which the cost of transportation is least. Therefore, as per the DG, the consumers (in this case, power producers located at Gummidipoondi) are not likely to import coal from Krishnapatnam Port, which is 176 km and/or Karaikal Port, which is even further away (about 347 Km), unless there are compelling reasons for them to switch to these ports.
32. Further, the DG also collected data on actual imports done by Informant's members and non-members to see which port these users were opting. It was found that members as well as non-members of the Informant depended on the geographical location and the proximity of the plant to the port while opting for a port to import coal. For the aggrieved members of the Informant, 66.67% preferred Kamarajar Port whereas for the other members of the Informant, the preference was Karaikal Port as they were located closer to Karaikal Port than to Kamarajar Port. Similarly, for Non-IPs (fixed plants), the first port preference was Krishnapatnam Port, as they were located near to that port. The Non-IPs (traders) selected the port, whichever was nearest to their point of delivery and 78% of them opted for



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Kamarajar Port emphasizing that the coal is mostly traded or consumed in the area in and around Kamarajar Port.

33. The DG further observed that apart from CICTPL enjoying a locational advantage over other ports being closer to Gummidipoondi, where most of the other plants are located, Kamarajar Port is the most modern and highly mechanised port with less turn-around time for unloading the vessels.
34. To further the analysis on relevant geographic market, the DG found it imperative to ascertain the homogeneity of conditions of competition and establish the territorial boundaries. The DG also collected information on distance between ports from the place of consumption. After closure of Chennai Port, Kamarajar port was closest to the fixed plant users based in Gummidipoondi, around 40 Kms.
35. The DG opined that the geographic area of a port is limited by its foreland and hinterland. In cases where the end users of a port are primarily importers, the hinterland is of greater importance than the foreland, especially when ports have a common foreland. In the present case, as per the DG, the common user coal terminal at Kamarajar Port, and the coal terminals at other ports of Krishnapatnam and Karaikal, have common foreland, since they all seem to be receiving coal from common sources. The competition amongst these ports is primarily determined by the degree of overlap of their respective hinterlands, rather than their forelands. The hinterland of a port is determined by its geographical location, road and rail networks in the area, the connection of the port to these networks, the geographic conditions, *etc.* The DG, however, opined that in principle, a distinction can be made between 'captive' and 'contestable' hinterland. The entire region where one port has a substantial competitive advantage because of lower transport costs to these regions belong to the captive hinterland. Such a port is likely to handle the majority of all cargoes to and from these regions. On the other hand, contestable hinterland is the geographic area of a port where the port faces effective competition from other ports due to similar or comparable transportation cost to the final destination in the hinterland. Competition between ports is more likely to occur in those regions where no single port has a significant



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cost advantage over other ports due to the proximity to the consumers. These ports may, therefore, operate in the same geographic market. Consumers located in the ‘captive’ hinterland of a port have limited economic incentives to switch to a different port while those in a ‘contestable’ hinterland have greater ability to do so. Thus, geographically ports could be considered to be in the same market, only if they share a common captive hinterland.

36. Based on the aforesaid observations, the DG opined that the hinterland of Kamarajar Port is distinct and separate, which is not shared with the other ports. Kamarajar Port was found to be located in the east coast of India at a distance of about 20 Kms to the North of Chennai Port. In terms of the draft prospectus submitted to SEBI, Kamarajar Port was stated to be in a strategic position to serve cargo routed in and around the city of Chennai and the vast hinterland network that extends up to Andhra Pradesh in the north and Karnataka in the west. The DG observed that the other ports to the north and south of Kamarajar Port providing coal terminal services are Krishnapatnam Port (around 176 Kms to the north of Kamarajar Port) and Karaikal Port (around 347 Kms to the south of Kamarajar Port). The investigation further revealed that the captive hinterland of Krishnapatnam Port consisted of the districts of Nellore, Prakasam, Chittoor, Cuddapah, Kurnool and Ananthpur in the state of Andhra Pradesh, while the captive hinterland of Karaikal Port is central Tamil Nadu. Therefore, the DG, based on the information and data collected during supplementary investigation, was of the view that these ports have distinct captive hinterlands. The DG also observed that the fact that the hinterland of Kamarajar port is distinct from other ports can be observed from the list of customers using Kamarajar port to import coal, and their corresponding distances from it. However, as regards the location of the traders, the DG did not take them into account stating that such location is inconsequential for the analysis, as they were not the actual users or consumers, but were importing coal for trading purposes only.
37. The DG further noted that most of the importers of coal situated within a radial distance of approximately up to 60 Kms from Kamarajar Port, preferred it as the port for import of coal over Krishnapatnam and Karaikal ports. It was also found that the importers sourcing coal



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from Krishnapatnam port were similarly located nearer to the Krishnapatnam Port as compared to any other port. These importers incur lower overall transportation cost by sourcing coal from the nearby Krishnapatnam port *vis-a-vis* Kamarajar port. Based on the aforesaid discussion, the DG was of the view that each of the ports namely, Kamarajar Port, Krishnapatnam Port and Karaikal Port had their own captive hinterland exclusive from each other, and accordingly, the relevant geographic market for the present case would be “*area in and around Kamarajar Port, i.e. captive hinterland of Kamarajar Port*”. The relevant market accordingly was delineated by the DG as “*the provision of common user coal terminal services in and around Kamarajar Port.*”

38. In this relevant market, the DG found CICTPL to be dominant *inter-alia* based on factors enshrined under Section 19(4) of the Act, such as market share, consumer dependence, lack of substitutability, comparative size and resources, its commercial advantage over other competitors *etc.*
39. The DG noted that CICTPL is the only provider of the common user coal facility at Kamarajar Port. The total quantity of coal imported by the 30 respondents to whom questionnaires were sent by the DG was 3,76,20,148 MT; out of which 1,72,91,765 MT was imported from the Kamarajar port using CICTPL, which was 46% of the total coal imported. The total coal imported from the Karaikal Port is 96,56,842 MT, which was 26% of the total imports. Krishnapatnam Port, Tuticorin Port and Chennai Port accounted for 18%, 4% and 1% of import of coal, respectively. The rest 5% of coal was imported from other ports like New Mangalore Port, Gangavaram Port, Visakhapatnam Port, Goa Port, *etc.*
40. On substitutability, the DG observed that CICTPL does not face any intra-port competition at present as it is the only provider of the common user coal facility at Kamarajar port. The other two coal berths at Kamarajar port, being operated by TANGEDCO/ TNEB as their captive facility, are not available to others. However, there is potential threat of competition to CICTPL as the Iron ore berth operated by SICAL is likely to be converted into another berth for common user coal handling. The DG carried out a qualitative assessment of the



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port preference of 30 respondents to see which were the 3 preferred ports for import of coal by them. The DG observed that the members of TNPPA, majority of whom are situated at Gummidipoondi, which is only about 40 kms away from CICTPL, marked their first preference as CICTPL as against Krishnapatnam Port, which is located at a distance of around 176 Km or Karaikal Port, which is even further away - about 347 kms. The DG noted that the consumers situated in close proximity of a particular port do not have any meaningful option/ reason of using an alternate port and it is only in rare and exceptional circumstances that such consumers would use the services of an alternative port situated afar. To understand the reasons for such consumers using the services of ports, other than their first preferred port, the DG sought information from some of the users who preferred Kamarajar Port over Krishnapatnam Port, yet imported coal using Krishnapatnam port.

41. In letter dated 01.03.2016 addressed to the Informant, ARS Energy Pvt. Ltd mentioned that due to the difficulties faced by them at CICTPL, like shortage in receipt of cargo quantity, high stevedoring charges, higher rates of storage/ demurrage and quality problem due to sprinkling of excessive water on the cargo, they were compelled to utilize Krishnapatnam Port, though it was located far away as compared to CICTPL. Similarly, in letter dated 01.03.2016, Hemang Resources Ltd. (Formerly Bhatia Industries & Infrastructure Ltd.) also mentioned that due to heavy charges payable to associates of CICTPL as a 'Facilitator' under the pretext of co-ordination, liasoning, watering charges, *etc.*, they were compelled to utilize port services of Krishnapatnam Port, even though it was comparatively far away.
42. There was an increase in coal handling charges at CICTPL after closure of the coal handling facility at the Chennai Port in October 2011. However, thermal power producers situated at Gummidipoondi did not switch to Krishnapatanam port, nor have they done so till date, apart from few exceptions. This fact indicates their dependence on CICTPL for import of coal, as they form the captive hinterland for Kamarajar Port. This is mainly due to low transportation costs being nearer to CICTPL. Therefore, any increase in service charges at the port to the extent that it wiped the arbitrage advantage of transportation cost involved in shifting to Krishnapatnam port would not cause the port user to switch from Kamarajar



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- Port to Krishnapatnam Port. Thus, the inter-port substitutability was found to be limited by the DG.
43. As regards the comparative size and resources, the DG noted that Krishnapatanam and Karaikal ports are located at a distance of 176 km and 347 km, respectively. Thus, any increase in port charges by CICTPL, to the extent that it does not exceed the extra transportation cost involved in shifting to Krishnapatnam Port or Karaikal Port, would not cause the port users to shift from Kamarajar Port to Krishnapatnam Port or Karaikal Port. Therefore, CICTPL was found to enjoy the captive hinterland advantage to that extent. However, the threat of competition from the Iron ore berth to be operated by SICAL, on conversion to common user coal berth in near future, was looming large on CICTPL.
44. Further, the DG observed that CICTPL enjoys significant commercial advantage due to its geographical location. It is strategically located at the east coast facilitating the import of coal from Indonesia, South Africa, Singapore and the USA. It has a well-developed storage and handling infrastructure along with adequate land bank of 2082 acres. Another commercial advantage with CICTPL is regarding fixation of its own tariffs, as against TAMP regulated tariffs for other Major Ports in India, which permits the common user coal terminal to determine its tariffs based on competition and market forces.
45. The DG also observed that there are significant barriers to the creation of an alternate common user coal terminal facility/ port in the relevant market. It may also not be geographically feasible to create another port. Further, CICTPL's users do not possess the ability to exercise any countervailing buying power as they belong to heterogeneous industries such as power, cement, paper, *etc.* and no buyer is individually large enough to affect CICTPL's price for services at the terminal. Besides, the DG also looked into factors such as vertical integration, dependence of consumers *etc.*, which also indicated CICTPL being dominant.
46. Based on all these aforesaid factors, the DG concluded that CICTPL enjoyed a position of dominance in the relevant market, with no intra-port competition during the relevant period,



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- being the only common user coal terminal at Kamarajar, and with vast captive hinterland to cater to.
47. While investigating the alleged abusive conduct, the DG obtained responses *via* detailed questionnaire from various 30 coal importers which included both Fixed Plants (21 fixed plant owners) and Traders (9 coal traders). Out of 21 fixed plants, 9 were aggrieved members of Informant, 5 were non-aggrieved Informant members and 7 were Coal importers other than Informant (Fixed Plants). The 5 power producer plants (members of the Informant) who preferred CICTPL as their port of import for coal deposed that ‘Co-ordination and Liasoning services’ were mandatory. A similar response was also given by 2 power plant producers, *namely* Zuari Cements Yerraguntla Plant and Sitapuram Plant, wherein charges paid to Breeze Enterprises Pvt. Ltd. were stated to be mandatory. Even 5 traders who imported coal stated to have mandatorily paid for the Co-ordination and liasoning services while importing coal from CICTPL.
48. Further, 24 out of the 30 respondents opted for Kamarajar Port as their first, second or third preference during the relevant period, of which 12 said that these ‘C&L services’ were mandatory. The DG confronted CICTPL’s director Mr. V. Palaniappan, Director of CICTPL, with such depositions who communicated that C&L services imply ‘only supervision on behalf of the customers’. CICTPL is under obligation to perform all requisite handling operation required for clearance of imported coal and does not require any supervision. He also expressed that they provide port handling services as per License Agreement and did not engage any third parties for such services. He also cleared that no one was forced to avail these services. C&L services provided by BEPL, OILPL and FHSPL at CICTPL added no value to the services already provided. Such services were subsumed within the port handling services, which CICTPL was obligated to provide to the users in terms of its license agreement with Kamarajar Port. Mr. V Palaniappan admitted that there was no need for importers to appoint third party C&L service providers. Such scope was also examined from third parties, Mr. V.S Ilango, Director, FHSPL, Mr. P Muthu, Director, BEPL, Mr. N Rajesh Kumar, Director, OILPL. These officials expanded



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on the nature of services and highlighted various activities (*e.g.* overseeing loading of coal, watering of coal dumps, providing security to the lorries, *etc.*) included in it.

49. Based on the aforesaid, the DG observed that C&L services rendered by the third parties at CICTPL were mandatory in nature as 50% respondents classified them to be so. The DG also concluded that the scope of such services was supervision of various processes which do not add much value as such services are required to be provided by CICTPL as port cargo handling services at the terminal. Therefore, as per the DG, no prudent importer would engage any third-party service provider to only oversee the services which the port handler is mandated to provide, unless the same is forced upon the importer as a condition precedent for import clearance.
50. Further, the DG found that the three companies providing the C&L services at CICTPL, *namely* BEPL, OILPL and FHSPL were linked to the Chettinad Group through the employees of its group companies.
51. Exchange of several e-mails between Mr. S. Narasimhan (Company Secretary) and Mr. S Ramesh, Company Secretary of South India Corporation Ltd. (SICL), a company belonging to Chettinad Group, on his personal email ID about Memorandum and Articles of Association of BEPL, statement of expenses relating to incorporation of BEPL, consent of the Directors, and appointment and resignations of Directors of OILPL *etc.*, were relied upon by the DG indicating the involvement of Chettinad Group in the operations of BEPL and OILPL. Further, the DG opined that the resignation of three directors under the directions of the Chettinad Group officials clearly highlights the fact of management and control of the affairs of the company. The DG also observed that even if the charges for services are claimed to have been debited to the company accounts, the financial control over OILPL by the Chettinad Group is quite apparent from the said communication. Mr. S. Ramesh also sent an email dated 09.08.2012 to Mr. S. Narsimhan with the subject "Names of the new Company (to be incorporated as wholly owned subsidiary of BEPL), indicating regular management and control of BEPL, in as much as that even for its subsidiary companies (*namely* Elegant Communication Network Pvt. Ltd., Novel Apparels Pvt. Ltd.,



Ms. Pride Packers & Movers), the decision of having such companies was also taken by the Chettinad Group.

52. Further, Mr. S. Narasimhan also sent information to Mr. Amaran, (Assistant Manager Internal Audit, SICL, Chettinad Group Company), *vide* email dated 29.01.2013, with attachments related to Annual Reports and the Annual Financial Statements of OILPL which according to the DG indicated that the Chettinad Group exercised regular and periodical management and control over the affairs of these companies, as the said documents had been prepared and sent to the officials/ employees of the Chettinad Group on their directions.
53. Further, the DG noticed that V Mahesh and Associates sent an email dated 22.01.2013 to Mr. S. Narasimhan with attachments of files of digital signatures based on which the DG concluded that some of the directors were acting as dummy directors on behalf of Chettinad Group company. Mr. Amaran also sent an email dated 15.10.2016 to Mr. Kasi Saminathan, with financial accounts of the companies controlled by Chettinad Group on which Mr. Amaran confirmed before the DG that he had been coordinating and preparing the financials for these companies, including BEPL, FHSPL, and OILPL, amongst others.
54. The DG also referred to the information relating to Directors in MCA21 database which revealed that Mr. P.S.P. Perumall and Mr. V. Chandramoleeswaran, who were shown as Directors of OILPL, were Directors in many of the Chettinad Group companies and Mr. N. R. Ramesh Kanna is the only Director of OILPL, who does not seem to have any direct link with the Chettinad Group. However, the companies wherein he was a Director were also found to be managed and controlled by the Chettinad Group.
55. The DG found that Mr. Kasi Saminathan (Manager (Accounts), Chettinad Logistics Pvt. Ltd.) and Shri. N. Amaran were not employed with any other company and drew remunerations from Chettinad Logistics and SICL, respectively, only for rendering services to the company and other Chettinad Group companies. They acted as a supervisor cum coordinator for preparation of Financial Statements of BEPL, FHSPL and OILPL. The DG



also observed that Mr. Kasi Saminathan along with Mr. Amaran and other employees of the Chettinad Group were instrumental in preparation of the financial accounts, auditing, secretarial work and other compliance related documentation for BEPL, FHSPL and OILPL, amongst other companies, whose affairs were managed and controlled by the Chettinad Group and was also operating the email IDs for all the said companies for carrying out communication on behalf of these companies. Their conduct clearly indicated that he was doing so as part of his employment in the Chettinad Group.

56. The DG confronted Mr. S Ramesh, Company Secretary, SICL and he stated that he knew Mr. S Narasimhan as a professional colleague, who use to send him emails regarding many Chettinad Group Companies including the said companies and he used to forward these emails to either Mr. Kasi Saminathan or Mr. N. Amaran for further action. When further queried as to whether he had taken any action on these emails relating to Breeze, Futuristic and Original Innovative, Mr. Ramesh stated that he only facilitated Mr. S Narasimhan, professional Company Secretary by passing on the emails/ its printouts to the concerned persons/ departments. He stated that he never looked after or taken any other action on such emails personally. He, however, agreed that he might have communicated with Mr. Narasimhan, for these companies including BEPL, FHSPL and OILPL, amongst others on the request of Mr. Saminathan or Amaran. He further stated that he did not know as to under whose directions they worked for these companies. The DG observed that Mr. S Ramesh passed on all the email and other communications from Mr. Narasimhan to Mr. Kasi Saminathan and N Amaran, employees of the Chettinad Group.
57. Mr. S Narasimhan was also confronted by DG and he admitted to regular communication with Mr. N Amaran and Mr. Kasi Saminathan, amongst others on their personal email IDs for preparation and submission of compliance related documents on MCA21 portal and also requisitioned the digital signatures of the Directors of the companies concerned (BEPL, OILPL and FHSPL) for uploading such documents on the MCA21 portal. He agreed with the inferences drawn by the investigation and confirmed the fact that his interactions for these companies were limited mainly to said three employees (*i.e.* Mr. S. Ramesh, Mr. Kasi Saminathan and Mr. N. Amaran) of Chettinad Group only. Before the DG, Mr. Narsimhan



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confirmed that though the said companies officially were not part of the Chettinad Group, their affairs were managed and controlled by the employees of the Chettinad Group and accordingly, they qualify to be 'Shadow Directors' acting behind the veil. Based on these facts, the DG concluded that the affairs of BEPL, OILPL and FHSPL are managed and controlled by the Chettinad Group through its employees.

58. The DG further observed that Mr. P. Muthu, Director of BEPL, looked after business of BEPL on whole-time basis without having direct investment in the company. Further, he also was the director in OILPL without any investment in the said company. Mr. Muthu failed to name any Key Managerial Personnel (KMP) of BEPL and OILPL except Mr. Muthuraman, accountant of the company. He had no prior experience in executing C&L services in 2011-12, when BEPL earned Rs. 39.42 crores from operations. Mr. Muthu stated that Mr. Muthuraman operated the company email IDs of BEPL. Mr. Muthu has stated that BEPL did not have any connection with the Chettinad Group and insisted that BEPL was an independent company, however, he failed to substantiate his answer.
59. Mr. VS Ilango, Director, FHSPL was also investigated by the DG and he stated that he was a practising Advocate and duly registered with the Bar Council of Tamil Nadu since 1994. He had made an investment in Elite Coal (now FHSPL) in 2011-12 in his personal capacity. He stated that Mr. Muthiah, Managing Director, Chettinad Group advised him to make the said investment in equity of the said company. He admitted to the fact that he was not an active director and had no knowledge of the business of the company, though it ran into hundreds of crores at one point of time. The statement of Mr. R.D. Ramasamy, Director of FHSPL till 2017, and Mr. S. Sivalingam, Director of FHSPL appointed in September 2017 as professional director were also recorded. The DG observed that none of the Directors knew anything about the operations of the company and each one tried to escape from details holding the other responsible for operations. The DG concluded that such behaviour only proves that the so called 'operations' (implying rendering of C&L services) were nothing in practical, but only a device to collect charges from the importers in the guise of



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said services, which would also escape the liability of sharing with the mother port (as the same are collected by a third party and not CICTPL).

60. Mr. N. Rajesh Kumar, Director of BEPL as well as OILPL, stated that he had no personal investment in BEPL or OILPL, however, he had received some shares in exchange of his shareholding in M/s Shine Home Appliances Pvt. Ltd., which was merged in OILPL. Mr. Rajesh Kumar stated that he was already in transportation business before joining OILPL. He was not drawing any remuneration or sitting fee from OILPL, but was promised good returns when he brought business to the company. He stated that he was responsible for marketing and operations of OILPL as Director of the company, though he also agreed that he was not an active Director and he did not know why they inducted him as Director. Mr. Rajesh Kumar was able to name the Directors of the companies, BEPL and OILPL but was only able to name two persons as the employees of the companies. Mr. Rajesh Kumar confirmed that email ID of OILPL was operated by Mr. Muthuraman and he had no idea if anybody else also operated it. When confronted to the specific instances of communication with various employees of the Chettinad Group regarding the companies, Mr. Rajesh Kumar was evasive in his replies and generally blamed it on Mr. Muthu feigning ignorance on such communications.
61. The DG went on to depose Mr. Muthiah, Promoter Director of Chettinad Group and MD of Chettinad Cement Corporation, and asked to elaborate as to how he provided directions, steered and managed CICTPL. Mr. Muthiah responded that the company, like any other company of Chettinad Group was run by the professionals and he did not interfere in its day to day operations as he was not even on the board of the company. He claimed that he just participates in the AGM as a shareholder of the company.
62. The DG highlighted that it is on record that some of such companies were engaged in providing 'C&L services' at CICTPL and, in fact, run by namesake dummy Directors, who are habitually accustomed to act under the directions, management and control of the Chettinad Group, acting through its employees. Based on this, the DG concluded that it can be reasonably presumed that the higher management of Chettinad Group not only



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acquiesced with the fact of managing and controlling such companies but also consented for the same. The companies only had namesake dummy directors on their boards to fulfil statutory compliance obligations only and give them semblance of independence.

63. The DG further observed that the question of one company charging higher than the other for these services did not merit consideration. Though, there is no evidence of flow back of finances from these companies to CICTPL, the affairs of these companies are managed and controlled by the Chettinad Group and accordingly, the finances of these companies are also controlled by the Chettinad Group. The DG, accordingly, concluded that C&L charges paid to third party service providers at CICTPL were mandatory and the third parties (BEPL, OILPL and FHSPL) were not providing any service in lieu of such charges. Such services were found to be frivolous and seem to add no value in port handling services.

Replies/Submissions of the Parties

Informant

64. The Informant initially filed a response to the supplementary investigation report on 30.01.2020. Subsequently, on 03.02.2020, the Informant filed an application seeking withdrawal of its response dated 30.01.2020 to the Supplementary Investigation Report, with a request to allow it to file a revised response. The same was allowed by the Commission *vide* order dated 25.02.2020. However, thereafter, the Informant did not file any written response, nor presented any material oral submissions during the hearings held on 24.11.2020 and 27.11.2020.

Submission of Kamarajar Port Limited/OP-2

65. Kamarajar Port submitted that since no allegation has been made against them and no finding has been arrived at by the DG specifically against it, the present information deserves to be closed. Kamarajar Port also highlighted that they took steps to look into the complaints by the members to the Ministry of Shipping and Commission and even



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conducted a preliminary inquiry. However, the inquiry did not reveal any breach/violation by CICTPL of the conditions of the Licence Agreement. Kamarajar Port had stated to have published a 'Trade Notice' on its website to clarify that the importers, exporters, agents were advised not to pay anything more than the notified / published tariff.

66. Kamarajar Port also confirmed that the C&L charges are not part of the notified tariff, also that it was not receiving any share in such third-party charges and no one was supposed to pay over and above the coal handling charges and also argued that they were unaware of existence of any third party in the port. Kamarajar Port also claimed that no third party is allowed to enter its premises without its prior permission as per the Licensing Agreement. However, in their response submitted after the final hearings held on 24.11.2020 and 27.11.2020, Kamarajar Port stated that access to CICTPL's stackyard (situated 2.5 km from Kamarajar Port) may be permitted for third parties.

Submission of CICTPL/OP-1

67. CICTPL submitted that the DG conducted the investigation in a perfunctory manner and selected sample of 30 coal importers is narrow and the questions framed in the questionnaire were of ambiguous nature. Such questionnaires contained certain questions related to third party charges were incorrect as the options provided were 'Yes' or 'No' only. CICTPL also claimed that DG drew wrong inferences from the responses received from coal importers and respondents to the questionnaires sent by the DG.
68. As regards the third-party C&L charges, it was submitted that the DG relied upon the allegations on face value without gathering any evidence in support of the same. Further, the DG's observation that 50% of the 30 coal importers classified the third-party C&L services to be mandatory in nature is alleged to be incorrect as only 12 out of 30 coal importers (40%) found the services to be mandatory. Further, the DG ignored statements of some of the Informant's members (*e.g.* Surya Dev, Tulsyan NEC and ARS Energy), where they clearly revealed that such third-party services were not made mandatory by CICTPL as a condition precedent for availing coal handling services.



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69. CICTPL agreed to the relevant product market delineated by the DG, though it cursorily submitted that such market could have been expanded if the procurement of coal through domestic sources was analysed which could show that customers are not entirely dependent on the coal imports for their requirement and Informant's contention on supply side substitutability can be weakened. However, it objected to the analysis of the DG in delineating the 'relevant geographic market' stating that the DG has disproportionately considered the transportation cost as the relevant factor in the supplementary investigation report based on which it has reported that coal importers are constrained to remain captive to a port notwithstanding increase in port charges. However, the DG ought to have done a detailed analysis of the entire cost of import depending upon the distance of the port of origin, coal handling charges, cost of transport by charges, cost of transport by road and rail for coal importers at Kamarajar Port, Karaikal Port and Krishnapatnam Port.
70. CICTPL has submitted that in the Main Report the total imports by aggrieved members of the Informant was 39% of the total coal handled by CICTPL, whereas in supplementary report, DG analysed that out of the total coal imported from Kamarajar Port around 66% was imported by aggrieved members of the Informant. According to CICTPL, the DG ought to have clarified that the 66% is calculated on the basis of the quantity brought by the 30 respondents at CICTPL out of their own entire imports.
71. CICTPL has argued that the edifice of the information was “ .. *Consequent upon the closure of dumping and handling of coal at CHPT, the coal importers had no other option but to import coal from Kamarajar port ...*” and this allegation was found to be false, as the data collected in Main Investigation Report shows that out of total 10 effective members of the Informant, 7 coal importers were common coal importers of both CICTPL and Krishnapatnam Port and one Kanishk Steel Industries Ltd. (OPG) situated at a distance of 33 kms from CICTPL was using only Krishnapatnam Port for coal import. Further, out of these 7 coal importers, 4 coal importers were importing equal or more amount of their individual total coal import from Krishnapatnam Port in addition to CICTPL.



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72. CICTPL has claimed that wrong inferences have been drawn by DG from the responses received from coal importers/respondents to the questionnaires sent by DG, whereby in many instances the DG has marked Kamaraj Port (where CICTPL is located) as the first preference of such importers whereas many of such respondents did not state so in their responses *e.g.* Sakthi Energy, Yasin Impex India, Dhar Coal Products, India Coke and Power Pvt Ltd, Adam & Coal Resources Pvt. *etc.*
73. CICTPL also challenged the assumption of the DG that traders sell/deliver coal to the end users which are situated around that particular port at which the trader imports the coal, based on which location of traders' was not taken into consideration for delineation of relevant market in the supplementary report also. CICTPL stated that the percentage of traders using CICTPL is 62.96% and percentage of captive users is only 37.03%. Thus, exclusion of traders from the analysis has been argued to be incorrect.
74. Based on these arguments, CICTPL has argued the relevant geographic market to be *the coastline between Krishnapatnam and Karaikal Ports which include 'Ennore Port' in between.* CICTPL also argued that the presence of competitors such as SICAL, Adani and one more common user coal terminal coming up at Kamarajar Port reflect that they are not independent of the competitive constraint in the market.
75. As per CICTPL's delineated relevant geographic market, it is argued not to be dominant, based on the presence of Krishnapatnam Port and Karaikal Port. CICTPL has also stated that members of the Informant are very strong and influential and they also attempted to make the services of CICTPL exclusive for the members of the Informant and are creating pressures through various means including filing this information to get priority in berthing of vessels brought in by their members. Thus, they possess countervailing power to counter any alleged unfair tactic by CICTPL.
76. CICTPL stated that the DG has wrongly concluded C&L service provided by the third parties at CICTPL to be subsumed within the port handling services, which CICTPL was obligated to provide to the users in terms of its licence agreement with Kamarajar Port.



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CICTPL argued that the role of third-party C&L companies is limited to “supervision” of the services provided by CICTPL and many respondents have also clarified this. CICTPL also submitted that the Supplementary Investigation Report wrongly ignored the findings of Main Investigation Report and stated that such C&L services were unique at the CICTPL whereas the Main Investigation Report clearly states (based on the statement of 30 coal importers) that such services are available at other ports too.

77. CICTPL has submitted that an analysis of abuse of dominant position is not liable to be undertaken in the present case as it does not hold a dominant position in the relevant market. Further, it has been claimed that no evidence has been placed by the Informant to substantiate its claim that the C&L charges were mandatory. Further, the fact that some of the aggrieved members did not take these services shows that they were not mandatory in nature. CICTPL stated that the questions framed in the questionnaire during supplementary investigation were ambiguous in nature and does not convey what was intended to be asked. CICTPL also submitted that no liability can be imputed on it, solely on the basis of self-serving statements of few members, which have also been shown to be misleading and contradictory in nature. CICTPL also relied upon the Audit report dated 30.11.2015 produced by Kamarajar Port and referred to income tax returns called by DG in first investigation to establish that the allegation of proxy billing by the third parties has not been proved.
78. CICTPL also provided few instances of wrong inferences being drawn by the DG from the responses received from coal importers and respondents to the questionnaires sent during supplementary investigation. Adani Enterprise Limited (‘Adani’) did not import coal from CICTPL for the years 2013-14 to 2015-16, yet it indicated that C&L services were mandatory for these years. Similarly, Sakthi Energy did not import coal from CICTPL for the year 2015-16, yet it indicated that C&L services were mandatory for this year. Tulsyan NEC Ltd. also did not use third party services for the years 2012-13 yet it indicated that the third party services were mandatory for this year. Zuari Cement Ltd. (‘Zuari’) imported coal for year 2012-13 only and yet mentioned that it has availed the third party services for all the years. Further, though Tamil Nadu Newsprint and Paper Ltd. has provided Karaikal



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Port as first preference, they have mentioned that third party services were mandatory. Further, Zuari imported coal for all the relevant years at Krishnapatnam Port and they had used third party services there also. Moreover, Zuari also informed during the main investigation that the services were not mandatory in nature. Further, Minera Steel and Power Pvt. Ltd. ('Minera') acknowledged that they had availed third party services at Krishnapatnam Port based on which DG ought to have included in his analysis that third party services were compulsory at other ports too. It was also stated that Suryadev Alloys during deposition for main investigation mentioned that the third party charges are not compulsory, but in the response of questionnaire sent during supplementary investigation, they have mentioned otherwise. It was further mentioned that OPG Power Generation Pvt. Ltd. takes the coal handling services of CICTPL without any third party C&L Companies, yet OPG Power Generation in the supplementary report submitted that the said services were mandatory. Highlighting, these contradictions, CICTPL stated that the inferences drawn by the DG are wrong.

79. CICTPL relied upon the statement of its Director, Mr. V. Palanaippan dated 04.10.2019 wherein he stated that under the licensing agreement with Kamarajar Port Ltd., CICTPL is under an obligation to provide services at its terminal and it does not require any supervision by the importer, its employees or any third party on customer's behalf, yet if a customer wishes to employ its own resources or a third party C&L companies, then CICTPL cannot prevent the same. CICTPL objected that this statement was ignored by the DG, who wrongly concluded that such services not being required by a prudent person must have been imposed by CICTPL.
80. CICTPL vehemently denied the linkages drawn by the DG between employees of Chettinad Group companies and third party C&L Companies. CICTPL argued that vicarious liability of a principal for the acts of its agents cannot be used to establish control of Chettinad Group over the third party services providing companies. CICTPL also submitted that conduct of employees of Chettinad Group was outside the scope of their actual and ostensible authority and the employees in question by their conduct have played fraud upon the Chettinad Group as they breached their terms and conditions of the



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employment contract which does not authorise them to work with any other organisation. CICTPL also reported that after receiving the order dated 12.12.2018 passed by the Commission, they came to know about the role of employees and they set up an internal inquiry committee and also immediately suspended them till the conclusion of the inquiry. CICTPL also cited the decision of Hon'ble Supreme Court in the case *State Bank of India (Successor to the Imperial Bank) vs. Shyama Devi, AIR 1978 SC 1263* and submitted that since the employees engaged with the third party C&L companies were working in their personal capacity, the responsibility cannot be attributed to CICTPL.

Observations and Findings of the Commission

81. The Commission has examined the material available on record, including the information, Main Investigation Report, Supplementary Investigation Report, written submissions filed by the parties and the oral submissions made by their respective counsels on 24.11.2020 and 27.11.2020.
82. The primary allegation of the Informant in this case is regarding abuse of dominant position by CICTPL, by way of an imposition of a mandatory C&L charge to be payable to related third-party service provider as a condition precedent to availing the services of CICTPL terminal for importing coal by any importer, in contravention of Section 4(2)(a)(i) and 4(2)(d) of the Act. This, as per the Informant, has adversely affected its members who are the captive consumers of services offered by CICTPL, who had no option but to succumb to the diktats of a dominant player. For examining allegations pertaining to Section 4 of the Act, delineation of the relevant market is essential to ascertain dominance and for analysing the alleged abusive conduct of CICTPL in the present case.
83. Before going into the aforesaid assessment, the Commission notes that though Kamarajar Port Limited/KPL was made a party by the Informant, there was neither any specific allegation nor any investigative finding against it. In its response to the Supplementary Investigation Report, Kamarajar Port has sought exoneration from the proceedings stating that there is no finding against it, which has not been controverted by the Informant.



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- Accordingly, given these facts, the Commission allows the request of Kamarajar Port/OP-2.
84. As regards CICTPL, the relevant market needs to be delineated comprising relevant product market and relevant geographic market. Such market should comprise 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.
85. The Commission observes that as regards the relevant product market, the delineation by the DG in the main as well as supplementary investigation report, *i.e.* ‘*provision of common user coal terminal services at sea-ports*’, has not been challenged by any of the party. Since the end use in the present case is the provision for import of coal for captive consumption in power production/ cement/ steel and other related industries, conversion to coke and/ or trading *etc.*, the relevant product market would consist of market wherein facilities for import of coal are available to the importers which use coal. Further, considering that the dedicated/ captive coal terminal services are not open for all the coal importers and such terminals exclusively deal with the agreement(s) entered into between the port/ terminal operator and that particular users, such dedicated/ captive coal terminal services were excluded and only the common user coal terminal services at sea ports were considered to constitute part of the relevant product market. The Commission finds no reason to depart from this finding of the DG, and hence the relevant product market in the present case is delineated as ‘*provision of common user coal terminal services at sea-ports*’.
86. As regards the relevant geographic market, the Commission observes that the DG has differed in delineation of relevant geographic market in the two investigation reports on record and that CICTPL has offered a much broader geographic market definition. Using the catchment area analysis, followed by an actual user overlap test, the DG delineated the relevant geographic market as ‘*the area in and around Kamarajar Port which includes Chettinad International Coal Terminal and common user coal terminals at Krishnapatnam Port*’ in the Main Investigation Report. In the supplementary investigation report, however, the DG *inter-alia* gathered responses through questionnaire and carried out a qualitative



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preference assessment test, based on which it delineated the geographic market as ‘*area in and around Kamarajar Port, i.e. captive hinterland of Kamarajar Port*’.

87. Alternative delineations of relevant geographic market in the main and supplementary investigation reports have major implications for the dominance assessment in the circumstances of the present case. CICTPL has been found to be dominant in the Supplementary Investigation Report but not as per the Main Investigation Report, mainly on account of the difference in the geographic market delineation.
88. In the Main Investigation Report, the DG carried out a catchment area analysis *i.e.* identifying the area around a firm or a business from which a large proportion of its consumers are drawn. Catchment area is generally defined by competition authorities as region where 80 to 90 percent of the consumers are located. Based on data of coal imported collected from CICTPL and Krishnapatnam Port, the DG found that the catchment area of CICTPL includes a distance of 400 Kms while that of Krishnapatnam Port is around 900-1000 Kms. The distance of Krishnapatnam Port from CICTPL is 176 Kms. Therefore, the catchment area of CICTPL was found to cover Krishnapatnam Port. As a second level test, the DG analysed the actual substitutability between these ports by examining the overlap between consumers of CICTPL and those of Krishnapatnam Port which showed that CICTPL and Krishnapatnam Port were substitutable as consumers were using services of both these ports interchangeably. However, given the limited overlap between CICTPL and Karaikal port, the DG was of the view that the consumers do not consider Karaikal port as a substitute for CICTPL. Thus, although Karaikal port, which is 347 kms away from CICTPL, was found to lie in the catchment area of CICTPL, it was not found to exercise competitive constraint on CICTPL. Based on these, the DG ascertained the relevant geographic market as the area “*in and around Kamarajar Port which includes Chettinad International Coal Terminal and common user coal terminals at Krishnapatnam Port*”.
89. The Informant challenged the DG’s assessment stating that the DG has relied on data of certain common users of CICTPL and Krishnapatnam ports, without analysing as to whether they were traders or fixed-plant thermal power producers, (*i.e.* whether they had



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varying place of delivery of coal based on the requirement of their customers or had a fixed place of requirement based on location of their plants). The Commission, having found merit in the objections raised by the Informant, directed the DG to analyse this aspect while passing the order under Section 26(7) of the Act.

90. In the Supplementary Investigation Report, the DG analysed the captive and contestable hinterland of CICTPL. The DG while analysing the captive hinterland of CICTPL excluded traders noting that the location of the traders was inconsequential for the analysis, as they were not the actual users or consumers, but imported coal for trading purposes only. The DG interviewed 30 consumers through questionnaire, including fixed plant users and traders, and reported that most of these importers were situated within a radial distance of approximately not more than 60 Kms from Kamarajar Port, which according to the DG was the reason for them not preferring Krishnapatnam and Karaikal ports. The DG opined that transportation costs weigh considerably on the mind of the users and, thus, physical proximity to the port influences their choice of port. Further, customers located too close to a port, *i.e.* within the captive hinterland seldom switch to an alternative port and thus, they do not view such farther located ports substitutable to the ones located close to them. Based on this, the DG found that each of the ports *namely*, Kamarajar Port, Krishnapatnam Port and Karaikal Port, had their own captive hinterland exclusive from each other, and accordingly, defined the relevant geographic market as '*area in and around Kamarajar Port, i.e. captive hinterland of Kamarajar Port*'.
91. CICTPL has objected to the conclusion drawn by the DG on the relevant geographic market stating that the exclusion of traders from the analysis is against the mandate of the Commission given under Section 26(7) of the Act *vide* its order dated 21.12.2018. CICTPL countered the assumption taken by the DG that traders sell/deliver coal to the end users which are situated around that particular port at which the trader imports the coal, stating that the DG should have investigated factors which a trader takes into consideration while deciding the port of import as a large number of fixed plant/captive users are importing substantive amount of coal through a port which is situated far from them. CICTPL also provided a list of 8 coal importers which are importing coal in higher quantity from



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terminals which are farther from another port. Further, it was alleged that the percentage of traders using CICTPL is 62.96% and percentage of fixed-plants/captive users is only 37.03%. Moreover, the traders using Krishnapatnam Port was 36.17% and captive users was 63.83%. So, the inclusion of the traders by the DG in the supplementary report for the analysis related to the CICTPL was important, which the DG has ignored.

92. The Commission observes that the DG, in the Supplementary Investigation Report, has primarily relied upon the responses received from 30 respondents through questionnaires. Out of those 30 respondents, 21 were fixed-plant owners while 9 were traders. As per the DG, the location of traders or their buyers was inconsequential for the analysis as they were not the actual users or consumers, but imported coal for trading purpose only. The Commission observes that one of the reasons for sending the matter for supplementary investigation was to identify the location of the buyers on behalf of whom the traders were importing coal. However, during the supplementary investigation, the DG has excluded the traders from the assessment.
93. Be that as it may, the Commission does not find it of much consequence to again direct the DG to look into such data/information, more so because the data and facts which exist on record, including the two investigation reports and objections received from the parties, indicates that CICTPL and Krishnapatnam Port are indeed part of the same geographic market, as is elucidated in the ensuing paragraphs.
94. The 30 respondents questioned by the DG accounted for 50% of the total coal imported at CICTPL, *i.e.* 1,72,91,765 MT of coal out of 3,46,67,603 MT. Further, this quantity of coal imported by these respondents through CICTPL comprised only around 46% of their total consumption/demand. The rest of their demand was imported through Karaikal Port (26%), Krishnapatnam Port (18%) and other ports including Tuticorin Port, Chennai Port *etc.* (10%). Thus, even for these 30 respondents, CICTPL was not the only available option. Further, 21 of the 30 Respondents were fixed-plant owners, 14 of which were members of the Informant and 7 were not. Out of these 14 members of the Informant which were questioned by the DG, 9 were aggrieved and 5 were not aggrieved. Out of the 9 aggrieved



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Informant's members, 7 were importing coal from Krishnapatnam port as well as from CICTPL, though 6 out of 9 stated that their first preference is CICTPL; the remaining 3 respondents which, as per records, were located closer to Kamarajar Port as compared to Krishnapatnam, stated Krishnapatnam port as their first preference. Out of the 5 non-aggrieved members of the Informant, only 1 has stated CICTPL as its first preference, while the remaining 4 categorically stated Krishnapatnam port as their first preference for import of coal. As regards the respondents who were not the members of the Informant, 6 out of 7 stated that they were using Krishnapatnam port and Kamarajar port simultaneously, and only 1 of those 6 stated CICTPL as its first preference. 4 out of 7 of such non-members stated that Krishnapatnam port was their first choice. Further, out of the 30 respondents, the Commission observes that 9 were traders. As per the DG, 7 out of these 9 traders have given Kamarajar port as their first preference. CICTPL, however, has objected to this statement mentioned in the supplementary investigation report by stating that the actual questionnaire circulated by the DG had not specifically sought such information regarding their preference from the traders. The Commission, having verified the records, observes that while the questionnaire circulated to fixed plant owners specifically asked the respondents to fill-in information regarding their first preference, the questionnaire meant for traders neither asked for their port preference, nor their buyers' location. The DG has reached the finding that 7 out of 9 importers preferred CICTPL over Krishnapatnam Port, based on the actual imports being done at Kamarajar Port. However, as highlighted by CICTPL, the possibility of these traders having a preference different from the port of actual import cannot be ruled out, especially given the fact that some of the fixed plant owners have given their port preferences different from the port that they actually used for imports. Based on totality of facts and data on record, the Commission finds it difficult to draw any meaningful conclusions based on a qualitative parameter such as 'preference' for a port, more so when such stated preference is not supported by actual usage of a port for imports by the users. To gauge the competitive constraints faced by any player (port/terminal in the present case) in the relevant market, it is necessary to consider all products/services which are perceived to be substitutable by the consumer. The existence of such substitutes keeps a check on the independent behaviour/practices being adopted by the market players. The fact that 15 out



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of the 30 respondents [7 Informant members, 6 non-members and 2 traders] questioned by the DG, were using both the ports, *namely* Kamarajar Port and Krishnapatnam Port, indicates that at least 50% of the respondents in terms of numbers were substituting Krishnapatnam port for Kamarajar Port and *vice versa*. It is also pertinent to note that many of the respondents from the remaining 15 respondents were not using either of these ports, *i.e.* Krishnapatnam port or CICTPL/Kamarajar Port. In the opinion of the Commission, these facts and existence of alternatives should weigh in the mind of any player/port while deciding its practices/strategies to ascertain the loss of users/consumers to another competitor as a consequence of imposition of exorbitant prices or unfair terms/conditions or any other unfair/abusive conduct *etc.* Having regard to the quantitative data, it seems unlikely that CICTPL would base its decisions on the subjective user preference of it being the port of first choice when the actual coal imports by such users show that they were moving to Krishnapatnam Port in response to the alleged abusive conduct by CICTPL.

95. It has been highlighted in the Supplementary Investigation Report that despite an increase in coal handling charges at CICTPL after closure of the coal handling facility at the Chennai Port in October 2011, thermal power producers situated at Gummidipoondi, apart from few exceptions, did not switch to Krishnapatanam port, nor have they done so till date. This, as per the DG, indicates their dependence on CICTPL for import of coal, as they form the captive hinterland for Kamarajar Port. The Commission notes that the Informant had provided the following information on the prices (in ₹) being charged by CICTPL during August 2011 to July 2014:

Table 1

Particular	Aug 2011	Oct 2011	Dec 2012	May 2013	Sep 2013	Dec 2013	Feb 2014	Jul 2014
Published Tariff	160	160	200	200	250	275	300	300
C&L Charges	20	140	90	125	100	75	50	75
Total	180	300	290	325	350	350	350	375



96. Further, the Informant had provided the following information on the comparative published tariff (in ₹) at different ports during 2011:

Table 2

Time period	CICTPL	Chennai Port	Krishnapatnam Port	Karaikal Port
Before 2011	180	148		
27.10.2011	160 ¹	Coal handling facility closed		
2014-15	375		410	320

97. Undoubtedly, CICTPL increased its published tariff post the closure of coal handling facility at Chennai Port in October 2011. However, if only the published tariffs are considered, such increase was not significant (from ₹ 160 in October 2011, to ₹ 200 in December 2012 and ₹ 250 in September 2015), especially when compared with the published tariff of the other ports, which became the next best alternatives (*e.g.* Krishnapatnam Port) after the closure of Chennai Port. In some situations, the coal handling charges (*i.e.* the published tariff) have been observed to be lower than the coal handling charges at Krishnapatnam Port. The following data on the published tariff, based on the information collected by the DG in the Main Investigation Report, elucidates this point further:

Table 3

(in ₹)

Year	CICTPL (Road)	CICTPL (Rail)	Krishnapatnam Port (Road)	Krishnapatnam Port (Rail)
2011-12	176-216	176-216	301.97	280-455
2012-13	229	229	315.51	280-455
2013-14	224-319	244-269	348.54	280-455
2014-15	319-321	269-271	348.52	280-455
2015-16	321-364	271-264	342.47	280-455

¹ Though the Informant has stated ₹ 300 as the tariff inclusive of C&L charges worth ₹ 140. However, since published tariff cannot ideally include C&L charges, the figure of ₹ 160 has been accordingly calculated.

98. Thus, looking at the comparative prices being charged by CICTPL and Krishnapatnam Port, it appears that though CICTPL may have got some pricing power after closure of Chennai Port, it still seems to have been constrained by the prices charged by Krishnapatnam Port.
99. Moreover, as stated above, 15 out of 30 respondents questioned during supplementary investigation were using both CICTPL and Krishnapatnam port. Also, the data gathered by the DG in the Main Investigation Report regarding the total quantity of coal imported by common users of CICTPL and Krishnapatnam Port and by members of the Informant from CICTPL and Krishnapatnam Port, is relevant in the present context. The same are reproduced below:

Table 4

Quantity of coal imported at CICTPL and Krishnapatnam Port by 20 consumers considering the services at these ports as substitutable				
Years	Total Coal Handled by CICTPL		Total Coal Handled by Krishnapatnam Port	
	Quantity (MT)	% SHARE	Quantity (MT)	% SHARE
2011-12	1764984	41.7	2467994	58.3
2012-13	1415979	34.47	2692375	65.53
2013-14	2072214	59.22	1426757	40.78
2014-15	2181893	40.87	3156151	59.13
2015-16	1766060	34.89	3295981	65.11

Table 5

Total Coal (in MT) handled in respect of IP members at CICTPL and KPCL

Financial Year	Total Coal Handled by CICTPL		Total Coal Handled by KPCL		Total Coal Handled by both CICTPL+KPCL	
	Quantity (MT)	% Share	Quantity (MT)	% Share	Quantity (MT)	% Share
2011-12	747,934	55.08%	610,025	44.92%	1,357,959	100
2012-13	2,152,411	78.97%	573,093	21.03%	2,725,504	100



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2013-14	4,218,101	86.94%	633,725	13.06%	4,851,826	100
2014-15	3,551,489	71.83%	1,392,648	28.17%	4,944,137	100
2015-16	3,162,912	75.03%	1,052,499	24.97%	4,215,411	100
Total	13,832,847	76.45%	4,261,990	23.55%	18,094,837	100

100. The aforesaid data also reinforces the fact that in terms of actual quantities of coal imported by members of the Informant as also the common user, including members as well as non-members, Krishnapatnam's contribution/share was significant during the period of investigation.

101. The Commission notes that the DG has opined that in the present case hinterland is of relevance as the users are mainly importers and since the common user coal terminal at Kamarajar Port, and also since the coal terminals at other ports of Krishnapatnam and Karaikal Port, have common foreland (from where the coal is being imported). However, after drawing a distinction between 'captive' and 'contestable' hinterland, the DG in the supplementary report delineated the relevant geographic market based on the captive hinterland only.

102. This, as per the Commission, does not seem appropriate when seen in the light of aforesaid discussions and actual import data. The imports by fixed-plant owners/users falling within the captive hinterland of CICTPL, constitute less than 50% of the total imports at CICTPL, which means that for the remaining 50% of the market, there is nothing on record to suggest that they were constrained even theoretically to import all their demand from CICTPL. Thus, if such users fall in the contestable hinterland where CICTPL competes with other ports, it is unlikely that CICTPL will decide its policies and conduct independent of the potential loss of such users falling within the contestable hinterland to other competitors due to the impact of such practices/conduct. Further, the fact that 15 out of 30 respondents were using both the ports, negates the basic assumption [customers located too close to a port, *i.e.* within the captive hinterland seldom switch to an alternative port, and thus, they



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do not view farther located ports substitutable to the ones located close to them] based on which the DG in the Supplementary Investigation Report has restricted the relevant geographic market to Kamarajar Port only.

103. The Commission notes that both Kamarajar Port and Krishnapatnam port are on the same coastline and are about 176 kms apart. Further, the distance between Krishnapatnam Port and Gummidipoondi, where the aggrieved members of the Informant are situated, is around 134 kms. Even if some of the users of the port would prefer to avail the services of Kamarajar Port due to their proximity to the port in terms of the distance, convenience or even cost, such factors in the view of the Commission cannot justify defining the market narrowly so as to exclude Krishnapatnam from the ambit. This is particularly so as nothing has come on record to suggest that Kamarajar Port and its services are distinct *vis-à-vis* other ports, either in terms of some special product that is offloaded or onboarded from such port, or that only some special kind of vessels can be catered at such port or that the overall infrastructure it offers places it in some special advantageous position such that consumers would have a natural inertia to explore other possibilities. The Commission in light of the facts and circumstances of this case notes that there is overlap in the hinterlands of both Krishnapatnam and Kamarajar Port, and these ports do put a competitive constraint on each other, which is also evident from the fact that they have common users.

104. Based on the foregoing discussion, the Commission is of the view that the relevant market in the present case would be *‘provision of common user coal terminal services at sea-ports in and around Kamarajar Port which includes CICTPL and common user coal terminals at Krishnapatnam Port’*.

105. In the aforesaid relevant market, the Commission finds that the presence of Krishnapatnam port poses significant competitive constraints on CICTPL, so much so that the latter cannot be held as dominant. From the facts already discussed regarding percentage of common users using Krishnapatnam port, it is apparent that users (including the members of the Informant) have been using both these ports simultaneously. Thus, to say that CICTPL held



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a position of strength so as to enable it to act independent of the market forces, may not be appropriate.

106. Further, as noted by the DG in the Main Investigation Report that although total quantity of coal imported at both CICTPL and Krishnapatnam has increased over the years, the share of CICTPL has declined from 2013-14 onwards, whereas share of Krishnapatnam has increased during the same period. The same is evident from the table below:

Table 6

Comparison of Coal handled at common user coal terminals at CICTPL and Krishnapatnam port and their market shares

Financial Year	Quantity of Coal in MT (Market Share in %)	
	CICTPL	KPCL
2011-12	3488250 (24.00)	11046345 (76.00)
2012-13	5036505 (23.74)	16174865 (76.26)
2013-14	8372902 (29.77)	19751044 (70.23)
2014-15	9241094 (26.79)	25249470 (73.21)
2015-16	8528853 (23.86)	27214510 (76.14)

107. The aforesaid data shows that in terms of total coal handling capacity, Krishnapatnam is much bigger than CICTPL. Of the total coal handled at both the ports during the period of investigation, CICTPL (situated at Kamarajar Port) handled only 23 to 29% of coal and balance quantity of coal was handled at Krishnapatnam. Further, while CICTPL has only one coal berth with an installed capacity of 8 MMTPA, Krishnapatnam has total of 11 berths (2 container berths and 9 coal berths) with a total installed capacity of 40.5 MMTPA.

108. Further, as stated by the DG in the Main Investigation Report, during the relevant period from 2011 to 2016, Krishnapatnam enjoyed a higher degree of size and resources and held considerable assets and showed the highest increase in assets in each year during the relevant period. Assets of CICTPL were found to have slightly declined *i.e.* by 0.45 % from



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2011-12 to 2015-16, whereas assets of Krishnapatnam increased by 10.59 % during the same relevant period. Even on other parameters such as revenue, net income/profit, return on assets *etc.*, the DG in the Main Investigation Report found Krishnapatnam to be ahead of CICTPL. Thus, based on all these factors, the Commission does not find CICTPL to be dominant in the relevant market.

109. In conclusion, based on collective consideration of the facts and data, the Commission is of the considered view that dominance of CICTPL in the relevant market is not established.
110. The analysis in the preceding paragraphs clearly demonstrates that during the relevant time period, CICTPL did not have the ability to act independently in the market. In the absence of CICTPL's dominance, examination of abusive conduct by it is not required under the provisions of the Act. However, for the sake of completeness, the Commission deems it appropriate to briefly touch upon the allegations with regard to mandatory imposition of C&L services charges by CICTPL, through its related entities.
111. It is an admitted position that the C&L charges do not exist as of today at CICTPL. Such charges were first introduced sometime in mid-2011, when the Chennai Port was about to discontinue handling of coal pursuant to Hon'ble Madras High Court's order. Such charges were not part of the published charges and continued to exist till February/May 2015 after which they were not required to be paid, as per depositions given by various persons during investigation.
112. The Commission notes that the DG in its Supplementary Investigation Report has returned a finding based on examination of coal importers (total 30 importers of which 21 were fixed plants and 9 coal traders) of which 12 importers out of 24 who opted Kamarajar Port as their port of first choice, stated that availing of "coordination and liasoning/C&L services" were mandatory in nature. Further, the Commission has also noted the statement given by Mr. V. Palaniappan, Director of CICTPL, to the DG, during the course of the investigation, that C&L services were essentially in the nature of supervision on behalf of the customers and that CICTPL was under an obligation to perform all requisite handling operation



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required for clearance of imported coal, which did not require any supervision from any third-party service provider. He further stated that the CICTPL did not force the coal importers to avail such services, but rather they availed the same voluntarily, being convinced of the high standard of such services. The Commission also notes from the findings of the Supplementary Investigation Report, particularly the statements given by the respective directors of FHSPL, BEPL and OILPL, that C&L services included overseeing loading of coal, watering of coal dumps, providing security to lorries *etc.*

113. CICTPL, in its objections to the investigation report, has stated that the findings of the DG are speculative in nature and based on conjectures. The findings have been assailed on the ground that the DG ought to have firstly enquired from coal importers whether they have availed the C&L services and then ought to have asked whether such services were mandatory or not. In the Supplementary Investigation Report, the DG has not taken break up of coal imported without availing the services of third parties, as was undertaken in the Main Investigation Report. Further, there are contradictions in the sworn statements given by some respondents in the Main Investigation Report and in the response to questionnaire considered in the Supplementary Investigation Report, which are misleading as per CICTPL, as some respondents have stated that third party services were mandatory over certain time period when they had not even imported coal during the said period. Further, the DG, without analysing the relevance of third-party services and without considering that in the Main Investigation Report it was found that such services were also offered at other ports including Tuticorin, Gangavaram and Krishnapatnam *etc.*, termed such services as frivolous in the Supplementary Investigation Report. Also, only 12 out of 30 coal importers stated that such services were mandatory, *i.e.* about 40% coal importers and the DG's finding in Supplementary Investigation Report is incorrect that 50% importers have said that the same is mandatory. Also, the DG has ignored the statement of certain members of the Informant itself *viz.* Suryadev Alloy, ARS Energy *etc.*, where they have revealed that such services were not mandatory.



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114. The Commission, at the outset, notes that the objection of CICTPL as regards the inconsistency in the depositions made by some of the respondents during main investigation *vis-à-vis* their responses to the questionnaires sent by the DG during supplementary investigation is without merit. For instance, Tulsyan NEC. Ltd confirmed in main as well as supplementary investigation that the charges were mandatory. During the main investigation, it reported that “[w]e are not appointing any third parties rather their services are thrust on us by CICTPL since we have no other option except to use the services of CICTPL who enjoys the status of a monopoly. In short, we do not have any choice...[....]... from February, 2016, we stopped paying the third party agencies. As far as improvement in business activities are concerned, liaison and coordination services do not make any impact rather than adding to our overheads.” Further, as regards, Suryadev Alloys, CICTPL has stated that while they deposed during main investigation that there was no compulsion to take third party C&L services, the company’s response during supplementary investigation was contrary to this. However, the Commission notes that during both the investigations, Suryadev Alloys stated that initially, they were availing the services of BEPL and later on when they became thorough with the systems and procedures, they refused to take third party services and engaged their own personnel at Chettinad coal yard to look after those services which fact the DG treated as being suggestive of C&L services being mandatory.
115. The Commission further notes that CICTPL has objected to Tulsyan NEC’s response about C&L charges being mandatory during 2012-13 when it did not import coal. Likewise as regards some other respondents also, CICTPL has stated that they stated the charges to be mandatory during some periods when they were not even importing the coal from CICTPL. The Commission does not find much merit in this objection of CICTPL as a user can comment/know about a charge being mandatory even without using a particular service.
116. The Commission further notes that there are several deponents who confirmed during main as well as supplementary investigation, that the third party C&L services were mandatory during 2011-12 to 2014-15.



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117. Cauvery Power Generation, during the main investigation, stated that “[s]ince we don’t have any other option other than opting for CICTPL terminal, considering the distance we are forced to opt the services of BEPL or OILPL by CICTPL.....CICTPL is a monopoly in handling of coal to our region of Gummidipondi considering the shorter distance to coal plants in that area. So, whatever CICTPL insists we are forced to follow that even though the documents shows that we have appointed them.....Even though we are aware of the charges to be paid for CICTPL as mentioned in the website of Ennore Port but we had to pay third party charges.” Cauvery Power Generation, in the Supplementary Investigation Report also, confirmed that the charges were mandatory.
118. Similarly, OPG Power Generation Pvt. Ltd., during main investigation, reported that they did not avail any services from the third parties but were compulsorily bound to acknowledge and pay as per the invoices raised by them in order to avail the coal terminalling services by CICTPL. It further stated that since 2015, it did not face any problems related to handling of coal at CICTPL without the engagement of third party agencies. During supplementary investigation, they confirmed that the charges were mandatory.
119. Likewise, TCP Ltd., during the main investigation, stated that “[w]e need such liaison and coordination services at the port. CICTPL verbally insists on availing the above services through BEPL only.... we are compelled to avail the services of CICTPL along with BEPL. We have to sign the contract of both CICTPL and BEPL for availing the coal terminal services in one go. Otherwise, the only option left with us is to go to some other nearby port i.e., Krishnapatnam Port, which is expensive.” TCP Ltd. confirmed the same during supplementary investigation.
120. Further, Fossil Logistics Pvt. Ltd, during main investigation, validated that “[w]e are having contract only with CICTPL for handling coal. CICTPL only refers names of BEPL and FEPL for additional services. We have no option but to use their services..... we have to avail the services of CICTPL as Chennai Port is closed down and CICTPL is the only



alternative”. However, Fossil Logistics Pvt. Ltd was not summoned during supplementary investigation.

121. Similarly, Hemang Resources Ltd., during the main investigation, mentioned that “[s]ince CICTPL enjoys a monopoly and private sector, they are not taking our request for waiving third party charges... There is no any such choice for negotiation, as we are compelled to sign the third party agreement also along with CICTPL’s agreement.” However, Hemang Resources Ltd. was also not summoned by the DG during supplementary investigation.

122. The Commission further notes the data collected by the DG during main investigation regarding total coal handled by users, Informant’s members and other users, through the third party service provider as a percentage of their total coal imported at CICTPL. The same is reflected in the two tables (Table 39 & 40, reproduced from the main investigation report) below:

Table 7

Total Coal handled for the Informant’s members by three C&L services providers i.e. BEPL, OILPL & FHSPL cumulatively, at CICTPL

(Qty in MT)

Sl. No.	Particulars	2011-12	2012-13	2013-14	2014-15	2015-16
A.	Total coal imported by Informant’s members at CICTPL Terminal	747,934	2,152,411	4,218,101	3,551,489	3,162,912
B.	Coal handled by three service providers i.e. BEPL, OILPL & FHSPL at CICTPL for Informant’s members	747,934	2,152,411	3,949,851	2,733,107	770,443
C.	Percentage of their coal imports for which Informant’s members availed C&L services of said three service providers at CICTPL	100.00%	100.00%	93.64%	76.96%	24.36%



Table 8

Total Coal handled for only Non-Informant Members by three C&L services providers, i.e. BEPL, OILPL & FHSPL cumulatively at CICTPL

(Qty in MT)

SI. No.	Particulars	2011-12	2012-13	2013-14	2014-15	2015-16
A.	Total coal imported by others (Non-Informant members) at CICTPL Terminal	2,740,316	2,884,094	4,154,801	5,686,605	5,365,940
B.	Coal handled by all third parties at CICTPL for non – Informant members	2,740,316	2,610,213	1,525,772	1,478,926	746,752
C.	Percentage of their coal imports for which such Non-Informant members availed C&L services of said three service providers at CICTPL	100.00%	90.50%	36.72%	25.99%	13.92%

123. The aforesaid data clearly shows that as far as the Informant’s members are concerned, they were using the third-party C&L services during 2011-12, 2012-13 and 2013-2014 for almost all their imports at CICTPL. The Commission notes that many of the members of the Informant have stated that such charges were mandatory and agrees with the findings of the investigation that these services were indeed mandatory in nature and not voluntary, as contended by CICTPL. The Commission further notes that the official of CICTPL have stated that CICTPL had an obligation to provide these services to the importers who were importing coal from the port and such importers were already paying the charges to CICTPL. In view of such statements, there seems to be no reason why users would pay an additional charge to a third party for availing services which ought to have been provided by CICTPL. It is further noted that 7 out of the 12 importers who said that such services were mandatory were not the members of the Informant association and thus their assertion



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can be considered impartial. Even for such non-member, Table 8 above shows that for the years 2011-12 and 2012-13, they were significantly using the services of third party service providers. It makes no economic sense for any importer to pay separate charges for C&L services to third party service providers when such services are subsumed in the services to be provided by CICTPL, as aforementioned. Thus, it is apparent that these charges were imposed upon the users, at least for the period immediately after the closure of Chennai Port/CHPT. To gauge the role of OP-1 in such imposition, the Commission now proposes to examine whether there were any linkages between CICTPL and third-party service providers *viz.* BEPL, OILPL and FHSPL.

124. In this regard, the Commission notes that the DG has brought out such linkages in the Supplementary Investigation Report. These have been established through various emails between Mr. S. Narasimhan (Company Secretary) and Shri. S. Ramesh, Company Secretary of SICL which is a company belonging to Chettinad Group. These emails show the participation of the Chettinad Group in establishing and incorporating these third party service providers. The investigation has also revealed that most of the directors of these companies were the employees of the Chettinad Group and that the payment of the fees for documents, incorporation and effecting statutory filing with the Ministry of Corporate Affairs (MCA) was done at the behest of the Chettinad Group.
125. Further, it has also come on record that certain employees of another group company of Chettinad Group were preparing financial statements of BEPL, FHSPL and OILPL besides rendering, auditing, secretarial work and other compliance related documentation. When confronted by the DG during the course of investigation neither Mr. N. Narasimhan nor Mr. R. Ramesh could effectively deny the linkages. Further, some of these employees were also found to be the shareholders and promoters of these third party service providers.
126. The Commission is, thus, of the view that investigation has successfully established the linkages, even though no flow of funds from these companies to CICTPL was found. CICTPL in its objections to the Supplementary Investigation Report has contended that such employees acted beyond their scope of employment and not at the behest of Chettinad



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Group and that an enquiry has been initiated by the concerned employer. The Commission is not much impressed by such arguments of CICTPL, which at best seems a feeble attempt to cover up. As observed by the DG, many of the directors of these companies had no knowledge about the day to day operations of the company and could not explain even the basic facts during their depositions, which indicates that they were acting only as dummy directors. Further, the evidence suggests that the Chettinad Group exercised regular and periodical management and control over the affairs of these companies. Also, as per Supplementary Investigation Report, these services were availed by users of the port regularly prior to filing of information with the Commission, whereafter some of the users have said that it no more remained mandatory. It appears that CICTPL acted in a manner so as to force the users of its ports, atleast those of whom it perceived as being captive, to mandatorily use these services, to ensure advantages to third-party service providers, who were indirectly related to it. Availing these services thus became a necessary evil, which could not be avoided by some users, even if theoretically it was exhibited as being of some kind of facilitating services.

127. Further, given the fact that charges collected by third-party service providers were not part of the published tariff and as such did not obligate CICTPL to share a portion of the same with the Kamarajar Port under the revenue sharing arrangement that existed between CICTPL and Kamarajar Port, there existed every incentive for CICTPL to allow these third party service providers to enter the port and reap financial benefits through offering such services to users in the port, which were apparently mandatory in nature. Thus, the income arising out of third-party services (which even according to CICTPL could be performed by them) rather than being ploughed back to CICTPL, either directly and indirectly, may have been allowed to be kept by third party service providers, who had an entrenched linkage with CICTPL. Further, the Commission agrees with the observations of the DG that though these companies may not officially be part of the Chettinad Group, their affairs were managed and controlled by the employees of the Chettinad Group.

128. However, given the scheme of the Act, the conduct of CICTPL, regardless of it being opportunistic, cannot be termed as abuse arising out of dominance as CICTPL has not been



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found to be holding a dominant position. Based on the foregoing, given that CICTPL has not been found to be dominant in the relevant market, the Commission directs the case to be closed.

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

-sd/-
(Ashok Kumar Gupta)
Chairperson

-sd/-
(Sangeeta Verma)
Member

-sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 09.04.2021