
(2025) 01 CCI CK 1545
In the Competition Commission Of India
Case No : Case No. 26 Of 2022

Beach Mineral Producers Association	Vs	APPELLANT
IREL (India) Ltd		RESPONDENT

Date of Decision : 17-01-2025

Acts Referred:

Competition Act, 2002 — Section 2(h), 4, 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(i), 4(2)(c), 19(1)(a), 19(4), 19(6), 19(7), 26(1), 26(2), 57

Citation : (2025) 01 CCI CK 1545

Hon'ble Judges : Ravneet Kaur, Chairperson; Anil Agrawal, Member; Sweta Kakkad, Member, Deepak Anurag, Member

Bench : Full Bench

Judgement

Facts

1. Information in the present matter was filed by the Beach Mineral Producers Association (the 'Informant') under Section 19(1)(a) of the Competition Act, 2002 (the 'Act') against IREL (India) Ltd. (the 'OP'), alleging contravention of the provisions of Section 4 of the Act.
2. The Informant, a society registered under the Tamil Nadu Societies Registration Act, 1975, comprising members involved in beach minerals industries, filed the present Information alleging that the OP, a Mini Ratna, Category I, Central Public Sector Undertaking ('PSU'), engaged in mining and production of certain minerals, rare earths and chemicals, is abusing its dominant position in the relevant market of 'mining and supply of Beach Sand Ilmenite in India'.
3. As per the Informant, post 2018, the OP is the sole producer/ miner of a Beach Sand Mineral ('BSM') viz. 'Beach Sand Ilmenite' in India. The members of the Informant, who are dependent on the OP for Ilmenite and other BSM, are facing a major crisis in the form of shortage of supply of Ilmenite. The OP often does not respond to Expression of Interest ('EoI') issued by domestic consumers of Ilmenite, and rather responds with a Standard Quantity Sales Contract

('SQSC') which contains a pre-determined quantity (most of the time lower than demanded). In the absence of any choice, the domestic consumers are forced to accept the extraneous conditions mentioned in the SQSC. Further, the OP supplies adequate quantity of Ilmenite to foreign companies/ multi-nationals, which also contributes to inadequate supply of Ilmenite for domestic consumers.

4. As per the Informant, such practices of the OP amount to imposition of unfair or discriminatory conditions in the sale of Ilmenite, in violation of the provisions of Section 4(2)(a)(i) of the Act. Further, the act/ policy of OP in the form of restricted/ limited supply to domestic consumers also amounts to contravention of the provisions of Section 4(2)(b)(i) of the Act. Apart from the above, the discriminatory and arbitrary policy/ act of the OP in the supply of Ilmenite also amounts to denial of market access in violation of the provisions of Section 4(2)(c) of the Act. Also, as the OP is giving dissimilar treatment to similarly placed consumers i.e., domestic enterprises and foreign companies, which causes distortion of competition in the downstream industries such as paints, tiles, glazed papers, plastics and cosmetic products, such conduct of the OP is in violation of the provisions of Section 4(2)(a)(ii) of the Act. Lastly, as the OP is the sole producer/ miner of Beach Sand Ilmenite, it also makes arbitrary and exorbitant increase in the price of Beach Sand Ilmenite, from time to time. Excessive pricing is an element of 'unfair price' in terms of Section 4 of the Act and as such, imposition of such exploitative, excessive prices is also in violation of the provisions of Section 4(2)(a)(ii) of the Act.

5. Upon consideration of the above Information filed by the Informant, the Commission sought comments of the OP on the same. Thereafter, upon comments of the OP, the Commission also allowed the Informant to file its rejoinder.

6. In its comments, the OP contested the jurisdiction of the Commission by submitting that as it caters to the supply of key strategic minerals, chemicals etc., meant for the atomic energy program in the country, all its operations are incidental to sovereign functions of the Government of India ('GoI') and hence, it does not fall within the meaning of 'enterprise' defined under Section 2(h) of the Act. Further, it denied its dominant position w.r.t. Beach Sand Ilmenite contesting existence of other players in the market and mentioning its worldwide share as 2-3 percent only, and it also mentioned import of Ilmenite as a competitive constraint. The OP also challenged the mala fides of the Informant as well as tried to justify the prices being charged. The OP also stated that only surplus quantities are exported by it, that too under an Memorandum of Understanding ('MoU') of the GoI, and exports are made only after earmarking the estimated requirements of the domestic customers. As such, there is no case made out against the OP.

7. In the rejoinder, the Informant reiterated the averments made in its Information as well as stated that since marketing or sale of Ilmenite by the OP is purely a commercial activity and has no link to 'atomic energy', its such

function cannot be termed as a sovereign activity to exempt the OP from the jurisdiction of the Commission. Further, the Informant stated that import of Ilmenite cannot be placed in the same market as sale of domestically produced Ilmenite because of price difference. The Informant also reiterated the dominant position of the OP in sale of Ilmenite in India even if the OP is stated to have a few small competitors in this market in India.

8. Upon consideration of the Information filed by the Informant, the comments of the OP thereon, and the rejoinder filed to such comments by the Informant, the Commission formed a prima facie view that – the OP is an 'enterprise' within the meaning of the Act performing commercial activities, the relevant market is 'mining and supply of Beach Sand Ilmenite in India', the OP is dominant in this market, and the conduct of the OP as described by the Informant (preferential treatment, excessive pricing, unfair conditions in SQSC) is in violation of certain provisions of Section 4 of the Act. Therefore, vide order dated 18.10.2022 passed under Section 26(1) of the Act, the Commission directed the Director General ('DG') to cause an investigation to be made in the matter and submit an investigation report.

Investigation by the DG

9. The DG submitted its investigation report on 01.05.2023 finding as follows:

9.1 The relevant market determined by the Commission in its prima facie order is correct i.e. 'mining and supply of Beach Sand Ilmenite in India', as Synthetic Rutile, Rutile, Titanium Slag, Leucoxene and Rock Source Ilmenite are not substitutes of Beach Sand Ilmenite in India;

9.2 As the OP is engaged in mining/ production, storage, supply and distribution of Beach Sand Ilmenite in India, which is an economic activity, it is an 'enterprise' within the meaning of Section 2(h) of the Act;

9.3 In terms of the factors stated under Section 19(4) of the Act, (i) the OP had the largest market share in the relevant market from 2017-18 to 2021-22, which was above 90% in year 2021-22, (ii) its assets as well as aggregate turnover has increased substantially over the years, (iii) its nearest competitor, another PSU Kerala Metals and Minerals Ltd ('KMML'), is very small in comparison to the OP and the OP supplies non-strategic minerals such as Beach Sand Ilmenite through its Manavalakurichi in Tamil Nadu, Orissa Sands Complex ('OSCOM') in Odisha and Chavara in Kerala units, (iv) in spite of continuous and significant increase in prices over the years, sales of Beach Sand Ilmenite by the OP, both in terms of volume as well as value, has increased over the years, (v) the GoI, vide Notification dated 27.07.2019, has granted exclusivity to the OP to control supply of Beach Sand Ilmenite in India, (vi) as per the rules of GoI, no private enterprise is allowed to have operating rights in respect of atomic minerals in any offshore areas in the country, and (vii) there is very less countervailing buying power exerted by consumers upon the OP as they are mainly dependent on the OP for getting Beach Sand Ilmenite for various

industrial uses. Therefore, the OP is in a dominant position in the relevant market;

9.4 The OP adopted a discriminatory approach in the supply of Ilmenite to one V.V. Titanium vis-à-vis another old customer Dharangadhara Chemical Works Ltd. ('DCW'), in contravention of the provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act;

9.5 The allegation that the OP bore freight charges for supply of BSM to DCW but not for other domestic consumers, was found to be untrue, as DCW was found to have been charged prices as per list prices;

9.6 The allegation of price discrimination between exports versus domestic sales was also not substantiated and hence, there is no contravention of the provision of Section 4(2)(a)(ii) of the Act on this count; and

9.7 The DG observed that the price of Ilmenite was raised by the OP twenty-four (24) times between April 2015 and March 2022. Such price rise was examined by the DG based on three criteria viz., (a) price-cost comparison, (b) comparison between prices offered by different competitors, and (c) analysis of profit margin. The DG came to the conclusion that the prices of Ilmenite charged by the OP were not driven by cost of production, However, the OP charges less for the product than its sole competitor KMML. Sale of Ilmenite formed major contributor to the profitability of the OP from 2016-17 till 2021-22 and the profitability of the OP increased substantially during the last five years on account of increased prices of Ilmenite. Thus, the DG concluded that the OP has contravened the provisions of Section 4(2)(a)(ii) of the Act by charging unfair prices in the relevant market of Beach Sand Ilmenite in India.

10. The Commission considered the investigation report submitted by the DG in its ordinary meeting held on 07.07.2023, and forwarded an electronic copy of the same to the parties, giving them an opportunity to file their objections/ suggestions, if any, to the same. Further, the OP was also directed to file its duly audited financial statements including Balance Sheets and Profit and Loss Accounts for the Financial Years 2020-21, 2021-22 and 2022-23 along with details of the revenue/ turnover/ income generated from the sale of Ilmenite during these financial years, before the Commission. The parties were also asked to exchange their objections/ suggestions with each other and given liberty to file rejoinder to each other's objections/ suggestions, if any.

11. Further, on 09.10.2024, the Commission held an oral hearing in the matter wherein, on behalf of the Informant, no-one appeared, and the Commission heard in detail, the submissions made by the learned senior counsel for the OP, including on the quantum of penalty, if any, imposed in the matter. The Commission also allowed the OP to file a brief synopsis of its oral arguments, upon its prayer.

Analysis of the Commission

12. The Commission has perused the investigation report submitted by the DG and the evidence collected by the DG, the suggestions/ objections to the investigation report and the brief synopsis filed by the OP, and also heard the oral arguments made by the learned senior counsel representing the OP.

13. In view of the Commission, the following issues arise for determination in the present matter:

13.1 Whether OP is an 'enterprise', within the meaning of Section 2(h) the Act?

13.2 What is the 'relevant market' in the present case?

13.3 Whether the OP holds a dominant position in the delineated relevant market?

13.4 If yes, whether the OP has abused its dominant position in the relevant market thereby violating any of the provisions of Section 4 of the Act?

14. The Commission shall analyse each of the above issues, based on the evidence collected by the DG, and submissions made by the OP on the same, one by one.

Whether OP is an 'enterprise', within the meaning of Section 2(h) the Act?

15. In its prima facie order dated 18.10.2022, the Commission had formed the prima facie view that the OP is an 'enterprise' within the meaning of Section 2(h) of the Act. The DG has also returned the same finding post its investigation.

16. However, the OP has argued that the OP is engaged in strategic functions on behalf of the GoI. Its activities relating to Ilmenite merit a holistic consideration in view of its overall strategic functions. It does not engage in mining of minerals such as Ilmenite per se but instead mines the BSM ore with the primary objective of extracting Monazite, which is of key importance to the GoI's atomic energy program. It is during the process of ore beneficiation that other minerals such as Ilmenite are also extracted along with Monazite. Thus, all functions and operations of the OP directly relate to GoI's sovereign functions and thus, fall outside the ambit of the definition of enterprise as provided under Section 2(h) of the Act. As per Section 2(h) of the Act, an 'enterprise' does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, defence, currency and space.

17. Further, the OP has submitted that being engaged in strategically important functions in the atomic energy sector, every aspect of its strategic functions is subject to strict regulatory oversight: (i) its board includes Department of Atomic Energy ('DAE') officials of the rank of Additional Secretary/ Joint Secretary and Chief Executive of a flagship organization of the DAE; (ii) though it has an installed capacity to process

10,000 tonnes per annum ('TPA') of Monazite, at present, it is permitted to extract only about 4,000 TPA due to regulatory and other limitations, including

non-grant of mining leases by the state governments, environmental clearances, etc.; (iii) revenue generated by the OP is not invested towards expansion of its capacity or improving its position as a supplier of Ilmenite and is used towards supporting its operations pertaining to its core functions; (iv) the OP has entered into an MoU with the GoI under which it is required to comply with various parameters and (v) the OP is bound by a directive of the Kerala Government to preferentially supply Ilmenite extracted from its Chavara Unit to Kerala-based industries such as KMML, Travancore Titanium Products Limited ('TTPL'), and Cochin Minerals and Rutile Limited ('CMRL'); (vi)

18. The Commission, at the outset, notes that the OP is a PSU designated as a Mini Ratna Category I, engaged, inter alia, in mining and sale of Beach Sand Ilmenite on commercial considerations to domestic as well as international customers. The OP was incorporated as a private limited company on 18.08.1950 and thereafter became a full-fledged GoI undertaking under the administrative control of the DAE in 1963. It has its own Board of Directors for managing its overall affairs and cannot be dubbed as a department of the Government.

19. The Commission further notes that the DG has not examined as to whether the activities carried out by the OP are sovereign in nature or not.

20. The scope of 'Sovereign Function' has been analysed in a number of cases by the Hon'ble Supreme Court of India, Hon'ble High Courts and Tribunals. The Hon'ble Supreme Court in Coal India Limited and Another v. Competition Commission of India and Another, (2023) 10 SCC 345, in paragraph 81, held that:

"81 ... The first appellant is not a Department of the Government. It is a Government Company. In fact, what is excluded from the definition of the expression 'enterprise', is a Government++ Department carrying on ..."

21. From the investigation report, it is noted that in India, the principal source of Rare Earth Elements ('REE') is Monazite which occurs in BSM found in sand deposits and is radioactive in nature due to presence of Thorium. Therefore, mining and extraction of REE is under the control of DAE. During the process of extraction of REE/ economic heavy minerals from Beach Sand Deposits in India, Monazite with the generic formula (Ce,La,Nd,Th)(PO₄,SiO₄) which naturally occurs in traces along with other six economic heavy minerals, is obtained as a byproduct. Monazite containing the prescribed substance (Phosphate or Thorium), radioactive in nature, is used for strategic and atomic purposes, not licensed to private players for producing the same. Therefore, mining, extraction and handling of it falls under the administrative control of the DAE.

22. However, REE in the form of oxides/ compounds, duly liberated from radioactivity, is available under Open General License ('OGL') for all. Any industry (Public or Private) can access and utilise indigenously produced high pure rare earths for further processing or desired end use. Monazite (mineral of Thorium and Uranium, which are radioactive in nature and have been notified as a 'prescribed substance' under the Atomic Energy Act, 1962) has strategic

applications. BSM is listed under Part B (Atomic Minerals) of the First Schedule of Mines and Minerals (Development and Regulation) Act, 1957 ('MMDR Act'). However, REE in the form of oxides/compounds, duly liberated from radioactivity, is available for all including the private sector since 1950.

23. Therefore, as far as the activities connected with mining, extraction and handling of Monazite from Beach Sand Deposits by the OP are concerned, the Commission notes that Monazite is radioactive, contains prescribed substance, can only be carried out by the OP on behalf of the DAE, and is connected with atomic energy which is exempted under Section 2(h) of the Act. Hence, all activities relating to Monazite permitted to be carried out by the OP on behalf of the DAE can be said to be 'sovereign functions' exempted under Section 2(h) of the Act.

24. However, in the opinion of the Commission, as far as Ilmenite (FeTiO_3) is concerned, the product in question, obtained from Beach Sand Deposits as another byproduct, which is mined and extracted by the OP devoid of Prescribed Substance and free of radioactive content, is non-strategic in nature and is available for downstream value addition. Hence, mining and supply of Ilmenite is simply an economic activity performed by the OP. In fact, before the DG, the OP itself has stated that:

"However, while the prices of Ilmenite are set based on global average prices, there are inherent variations on account of the purity of the mineral (i.e., TiO_2 content), amount of impurities, logistics cost incurred to make the material available from production point to the entity, payment terms etc. Therefore, there cannot be a comparison of prices in absolute terms, as that will be subject to various relevant factors, as listed here. The supply of Ilmenite is also based on other commercial factors such as sustainable buyer, sustainable supply, purchase commitment, etc..."

25. Also, with regard to the OP being an 'enterprise', the Commission, in its recent order dated 08.10.2024 passed in Case No. 22 of 2021 titled Kalpit Sultania v. IREL (India) Ltd., observed with respect to another byproduct 'Sillimanite', as follows:

"80. The Commission observes that IREL, the erstwhile Indian Rare Earths Limited is a Public Sector Undertaking and an unlisted Public Company, was incorporated on August 18, 1950. It became a full-fledged Government of India Undertaking under the administrative control of Department of Atomic Energy in year 1963. It has its own Board of Directors for managing its overall affairs. Accordingly, the Commission is of the considered view that IREL is not a department of the Government. The Commission notes that Sillimanite is sold by the OP in the open market for monetary consideration. Thus, IREL does not qualify for an exemption from the provisions of Section 2(h) of the Act with respect to the activity of mining and sale of Sillimanite in India. Based on the above and nature of activities carried on by OP, the Commission finds no reason

to deviate from its prima facie order dated 03.01.2022 where it held OP to be an enterprise under the Act. Accordingly, the Commission finds OP to be an enterprise under extant provision of Section 2(h) of the Act.”

26. Therefore, in the opinion of the Commission, as far as Ilmenite is concerned, the OP is engaged in an economic activity. Consequently, with respect to mining and selling of Ilmenite, the OP is an enterprise under Section 2(h) of the Act and does not qualify for grant of exemption under the garb of engaging in a sovereign function.

What is the ‘relevant market’ in the present case?

27. In its prima facie order, the Commission had delineated the relevant market as ‘mining and supply of Beach Sand Ilmenite in India’. The DG also, in its investigation report, concurred with the prima facie opinion of the Commission.

28. However, the OP has argued that the DG has incorrectly delineated the relevant market as the market for ‘mining and supply of beach sand ilmenite in India’ and the relevant market should be defined as the market for ‘supply of Ilmenite (including Rock Source Ilmenite), and its substitutes (Rutile, Synthetic Rutile, Leucoxene, Titanium Slag) in India (including imports of Ilmenite and its substitutes into India)’.

29. As per the OP, the DG has failed to analyse the relevant product market in accordance with the provisions of Section 2(t) read with Section 19(7) of the Act. In order to delineate the relevant product market, the DG was bound to take into consideration all those products which have a sufficient degree of interchangeability in so far as specific usage of such products is concerned. In the present matter, it is important to note that any other mineral or synthetic product containing TiO_2 than Ilmenite can be used for producing the TiO_2 pigment thereby acting as substitute for Ilmenite.

30. The OP has submitted that in delineating the relevant product market, the DG has, without any basis, excluded such substitutes of Ilmenite without considering the specific submissions of various parties on substitutability. The DG has also failed to consider and place reliance even on submissions of an expert authority such as the DAE, technical resources such as the US Geological Survey, Mineral Commodity Summaries, Indian Mineral Yearbook, and even the submissions of the OP on the substitutability of Ilmenite with other titanium-bearing feedstocks, as well as statements of various consumers of Ilmenite. The DG also failed to reconcile certain contradictory submissions on substitutability made by certain parties and instead placed selective erroneous reliance on an extract from the Indian Minerals Yearbook 2020 which refers to the substitutability of TiO_2 and other titanium alloys (and not of Ilmenite), to erroneously draw a preconceived conclusion on substitutability of other Titanium-based feedstocks vis-a-vis Ilmenite.

31. Further, as per the OP, the DG has also failed to accurately assess the

relevant market by disregarding import of Ilmenite and its substitutes from the relevant product market. The DG has failed to appreciate the observations of the Commission and misapplied the principles from Gujarat State Electricity Corporation Limited v. South Eastern Coalfields Limited ('Coalfields Case') to the present case in excluding imports from the relevant market. Further, the DG has failed to appreciate the absence of any technical barriers in the present case and the fact that Ilmenite and its substitutes available domestically or through imports have the same chemical composition. Furthermore, the DG should have also considered that the customs duty on Ilmenite is a mere 2.5%, and half of this duty is waived off on importing Ilmenite from select countries. The DG has therefore, failed to consider the elasticity of imports, as also observed by the Commission in the Coalfields Case (supra). For instance, in 2019, when private players were barred from BSM mining, the imports of Ilmenite increased by 42% that year to fill in the gap and meet customer demand evidencing high level of elasticity of imports.

32. The DG's analysis of excluding imports from the 'relevant geographic market' is also incorrect. The 'relevant geographic market' must include imports of Ilmenite and its substitutes as the (i) evidence on record indicates that parties readily substitute domestically sourced as well as imported Ilmenite and other minerals; and (ii) an analysis of factors stated under Section 19(6) of the Act indicate that imports must be included. The DG has placed erroneous reliance on the Coalfields Case (supra) to exclude imports from the 'relevant geographic market'.

33. The DG, in this regard, only sought responses from five (5) customers provided by the Informant and failed to consider and seek evidence from hundreds of other customers that procure Ilmenite from the OP. The above-said five (5) customers include DCW, CMRL, V.V. Titanium, Arima Minerals and Metals Private Limited. However, KMML, responses from the DAE and Ministry of Mines, and a deposition from the Chairman and Managing Director ('CMD') of the OP have been ignored by the DG.

34. The DG has also completely overlooked and disregarded submissions through which customers have emphatically submitted that they regularly import Ilmenite to meet their demand and, therefore, the DG has erred in excluding imports from the relevant product market. In fact, the Commission itself, in Case No. 22 of 2021, agreed with the submission of the OP that imports, if any, must be appropriately considered under the relevant product market.

35. Therefore, as per the OP, the DG has erred in excluding substitutes of Ilmenite and imports of Ilmenite and other substitutes, from the relevant product market. Data pertaining to availability of Ilmenite and its substitutes in India, as given by the OP, is produced below as Table 1. It was therefore, submitted that Ilmenite and its substitutes, along with imports, are widely available in the domestic market.

Table 1: Domestic Sales of Ilmenite in India, including imports of Ilmenite

Year (Column A)

IREL Production of Ilmenite (in MT)

(Column B)

Domestic Sales of Ilmenite by IREL (in MT)

(Column C)

Imports of Ilmenite (in MT)

(Column D)

Total annual consumption (in MT) (Column E = C + D)

2015-16

90,991

2016-17

25,121

2017-18

1,35,224

2018-19

70,275

2019-20

1,09,771

2020-21

43,894

2021-22

77,003

36. As per the OP, the DG has incorrectly applied the Hypothetical Monopolist Test ('HMT') to determine the relevant market. Anyhow, HMT is not absolute in evaluating relevant market and the DG should have also examined other evidence on non-price-based factors in determining the relevant market. The DG's application of HMT is incorrect as:

- a. The DG has not quantified the SSNIP to be applied to the Ilmenite prices;
- b. The DG has not identified the response of customers to such an SSNIP;
- c. The DG has failed to adduce any evidence in furtherance of the test; and

d. The DG has not arrived at a conclusion based on the application of the test.

37. On determination of the relevant market, the Commission has noted the arguments made by the OP but is not convinced with the same.

38. The Commission notes that the DG, in order to delineate the relevant product market, sought information from the OP, the Informant as well as several third parties such as competitors and consumers of the OP. Based on the same, investigation found that Synthetic Rutile, Rutile, Titanium Slag, Leucoxene and Rock Source Ilmenite are not substitutes of Ilmenite in India.

39. To further strengthen the findings on relevant market delineation, the DG even carried out HMT to ascertain whether Synthetic Rutile, Rutile, Titanium Slag, Leucoxene, Rock Source Ilmenite form part of similar relevant market or not. The DG mapped the unit wise prices and sales of Ilmenite (Chavra and Manavalakurichi Units) to figure out whether the increase in prices by the OP affected its sales from January 2015 till March 2022. Based on such analysis, the DG observed that the OP was able to increase the price of Ilmenite twenty-four (24) times between April 2015 and March 2022 profitably without losing sales.

40. The Commission further noted that there are no geographical barriers for production as well as sale of Ilmenite in India, and that the conditions of competition for supply of Beach Sand Ilmenite are distinctly homogenous all over India.

41. Therefore, based on the above, the Commission also concludes the relevant market in the present matter to be 'mining and supply of beach sand Ilmenite in India' as delineated by the DG.

Whether the OP holds a dominant position in the delineated relevant market?

42. The DG has, upon analysis of the factors contained in Section 19(4) of the Act, found the OP to be in a dominant position in the relevant market of 'mining and supply of beach sand Ilmenite in India'.

43. However, the OP has argued that it does not have a dominant position i.e. a 'position of strength' in the 'relevant market' which enables it to operate independently of competitive forces prevailing; or affect its customers or competitors in its favour. The OP operates in a highly regulated environment and is under strict oversight of the GoI. It operates to serve the interest of the GoI and its programs of national importance pertaining to atomic energy. Mining of BSM Ores and to that extent, supply of BSM is an area under complete control and vigilance of the GoI and the OP operates as per the mandate and in accordance with the applicable regulations.

44. Further, as per the OP, the DG has failed to make a holistic analysis of the factors set out under Section 19(4) of the Act and made a conclusive observation solely based on erroneous market share figures supplied by the Informant. The Commission has previously held that evaluation of strength cannot be merely on

market shares solely, but involves a host of other factors. The OP's customers can and do avail of imports of Ilmenite to meet their requirements, given the significance of imports and substantial quantities being imported into India by the consumers to meet their demands. It is hence, inconceivable to state that the OP acts independently of such competitive constraints present in the market. The market share must take into consideration: (i) the imports of Ilmenite; (ii) domestic sales of Rutile and other substitutes; and (iii) import of substitutes, produced below as Table 2 and Table 3, which would show that the market share of the OP is significantly lower than the market share figures relied upon by the DG.

Table 2: IREL's Market Share

Year (Column A)

Domestic Sales of Ilmenite by IREL (in MT)

(Column B)

Imports of Ilmenite (in MT)

(Column C)

Total of Columns B and C

Market Share of IREL (%)

(Column E=B/D

x 100)

Market Share of Imports (%) (Column

F= C/D x 100)

2015-16

90,991

2016-17

25,121

2017-18

1,35,224

2018-19

70,275

2019-20

1,09,771

2020-21

43,894

2021-22

77,003

Table 3: IREL's market share (if sale of Rutile by IREL and imports of substitutes were included in the Relevant Market)

Year (Column A)

Domestic Sales of Ilmenite by IREL (in MT)

(Column B)

Domestic Sales of Rutile by IREL (in MT)

(Column C)

Imports of Ilmenite (in MT) (Column

D)

Imports of Substitutes (in MT) (Column E)

Total of Columns B, C, D,

and E

Market Share of IREL (%)

(Column G = $B+C/$

$F) \times 100$)

Market Share of Imports (%) (Column H

$= D+E/F \times$

100)

2015-16

90,991

2016-17

25,121

2017-18

1,35,224

2018-19

70,275

2019-20

1,09,771

2020-21

43,894

2021-22

77,003

45. With respect to dominance, as per Section 19(4) of the Act, the Commission, shall have due regard to all or any of the factors provided therein.

46. In this regard, the Commission notes that the DG has made a holistic analysis of the various factors mentioned under Section 19(4) of the Act and not limited its analysis to the market share of the OP. Further, once the relevant market has been determined to exclude 'imports' and other BSM from the relevant market, market share of the OP to ascertain dominance cannot be determined in their influence.

47. The Commission notes the DG's finding that mining regulations amended by the DAE vide Notification dated 27.07.2019 clearly provides power to the OP to operate independent of competitive forces in the relevant market. As early as in October 2012, the DAE had clarified that '... DAE has not issued any license to any private entity either for production of monazite, or for its downstream processing for extracting thorium, or the export of either monazite or thorium. Export of the beach sand minerals (not monazite), falls under Open General License and does not require any authorization from DAE. Since the other beach sand minerals and monazite (which contains thorium) occur together, companies handling beach sand minerals have to get a license under the Atomic Energy (Radiation Protection) Rules 2004 from the Atomic Energy Regulatory Board (AERB). As per the licensing conditions, the licensee, after separating the beach sand minerals has to dispose of the tailings, which contain monazite, within its company premises or as backfill, depending on the monazite content. These institutions are under strict regulatory control ...'

48. Further, owing to the allegation of illegal mining and clandestine export of Monazite,

"... the Government of India has taken a number of steps to check such illegal mining of Beach Sand Minerals viz;

On 12.1.2015, a new section "11B" has been introduced under the MMDR Act 1957 to empower of Central government to make rules for regulating atomic minerals specified under Part B of First Schedule.

i. On 11.7.2016, Ministry of Mines notified Atomic Mineral Concession Rules 2016 (AMCR-2016) towards protecting and conserving the "Atomic Minerals" by introducing the concept of "Threshold value". "Beach Sand Minerals" (BSM) declared as "Atomic Minerals" under Part-B of First Schedule of the MMDR Act

1957.

ii. Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce and Industry, Government of India issued Notification no. 26/2015-2020 dated 21.08.2018 export policy on BSM under which export of BSM have been brought under State Trading Enterprise and shall be canalized through IREL.

iii. On 20.2.2019, towards ensuring complete government control over "Monazite" and "Zircon" occurring within the "Beach sand Minerals" Ministry of Mines (MoM) amended AMCR-2016- Threshold value of Monazite" for BSM occurring in teri or placer deposits as "0.00% in Total Heavy Minerals (THM)..."

49. From the aforesaid discussion, it is clear that cancellation of rare earth minerals/ economic heavy minerals mining lease granted to private players was a policy decision of the GoI to check Illegal mining. Further, while the GoI had terminated the mining lease of BSM awarded to private players, it had not sought transfer of those terminated mines from State Governments to the OP in the backdrop of policy change. As such, while the said policy decision of the GoI to terminate private miners from mining BSM reduced the availability of six economic heavy minerals i.e., Ilmenite, Rutile, Garnet, Zircon, Sillimanite and Leucoxene on the supply side, the corresponding demand from downstream user industries for these six minerals remained unchanged/ unaffected. Consequently, demand for these six minerals from downstream user industries had to be met either from the OP or by way of imports.

50. Also, upon analysis of the policy changes effected in the rare earth mineral sector and the submissions of OP regarding Ilmenite pricing, it is evident that pricing of Ilmenite is set solely by the OP based on prevailing average global sale price of Ilmenite, and that the pricing formula of the OP was revised/ modified following the policy change by the GoI.

51. The DG has found that there is an absolute regulatory barrier to entry of private players in this market as they are completely banned from mining/ production of Beach Sand Ilmenite, and hence, the OP has the competitive advantage to operate in an independent manner in the relevant market. The Commission also notes that the DAE regulates the permit of extraction of rare earth minerals and even government owned companies have to obtain prior permission from the DAE to mine rare earth minerals as these minerals are associated with Monazite (a phosphate compound of Uranium, Thorium and Rare Earth). The DAE only permits the extraction of six heavy minerals and Monazite. The prescribed substance left in tailings have to discarded as backfills according to the prescribed regulations. It is noted that "DAE has received several proposals from Government of Andhra Pradesh for nominating APMDC as prospective lessee for BSM. DAE has nominated APMDC as prospective lessee in respect of two BSM deposits in 90.15 Ha Bhimunipatnam Deposit, Visakhapatnam District and 1978.471 Ha Machilipatnam Deposit, Krishna District

on 25.03.2021 and 15.04.2021 respectively.” Furthermore, according to the Annual Report 2021-22 of the OP “...IREL is into advanced discussions to form a joint venture company with a state PSE of Tamil Nadu i.e. Tamil Nadu Mineral Limited and the MoU between the two Companies will be inked shortly. The Joint Venture Company will harness the deposits in the state of Tamil Nadu. Similar efforts in the state of Andhra Pradesh are not fructifying due to factors beyond the control of the Company...”.

52. The DG has also compared the prices of Ilmenite sold by the OP to the price of Ilmenite sold by KMML. In this regard, the Commission notes that as per the Indian Minerals Yearbook (various years), while the OP divulged the price charged for Ilmenite from its three units, the price charged for Ilmenite has not been disclosed by KMML. KMML, a producer of Titanium Dioxide and Titanium Sponge is an integrated player, and being a Government owned company, has rights for mining and extraction of rare earth minerals. It appears that the entire production of Ilmenite by KMML is captively consumed by it and it also buys Ilmenite from the OP owing to less availability of Ilmenite in its own mines.

53. Therefore, based on various factors mentioned under Section 19(4) of the Act, including market share, regulatory entry barriers, and limited countervailing buying power of customers etc., the Commission agrees with the DG that the OP is in a dominant position in the relevant market.

If yes, whether the OP has abused its dominant position in the relevant market thereby violating any of the provisions of Section 4 of the Act?

54. As the OP has been found to be in a dominant position in the relevant market, the Commission proceeds to examine the three types of abusive conduct on part of the OP, as alleged in the Information:

I. Imposition of discriminatory conditions in sale of Ilmenite and denial of market access by inadequate supply of Ilmenite in contravention of Section 4(2)(a)(i) and Section 4(2)(c) of the Act

55. The Informant has alleged that the OP exports the bulk of its Ilmenite which leads to inadequate supply in the domestic market.

56. However, the OP has argued that it prioritises domestic demand over exports and only exports surplus material, that too only from the OSCOM unit. Further, as per the MoU entered into between the OP and the GoI, the OP has been given the target to achieve 50% of the sales turnover from exports.

57. In respect of this issue, the DG applied the ‘Essential Facilities Doctrine’ and found that since no Ilmenite was supplied to V.V. Titanium from the OP’s Manavalakurichi Unit from October 2021, but continuous sales were made to DCW Ltd., the allegation that the OP is adopting discriminatory conditions in sale of Ilmenite is found to be true and in contravention of provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act.

58. With respect to the Essential Facilities Doctrine, in the Organisation for Economic Cooperation and Development ('OECD'), Policy Roundtables, the Essential Facilities Concept, 1996 it was noted that "An 'essential facilities doctrine' specifies when the owner(s) of an 'essential' or 'bottleneck' facility is mandated to provide access to that facility at a 'reasonable' price. For example, such a doctrine may specify when a railroad must be made available on 'reasonable' terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of 'essential facilities' requires there to be two markets, often expressed as an upstream market and a downstream market. (The case of two complementary products is logically the same, but confusing in exposition.) Typically, one firm is active in both markets and other firms are active or wish to become active in the downstream market. ... A downstream competitor wishes to buy an input from the integrated firm, but is refused. An EFD defines those conditions under which the integrated firm will be mandated to supply"

59. Further, the Commission notes that in its order dated 11.07.2018 passed in Case No. 76 of 2011 titled East India Petroleum Pvt. Ltd. (EIPL) v. South Asia LPG Company Pvt. Ltd., it observed the following:

"...the Commission is of the view that SALPG has the ability to deny market access to competitors given its monopoly position in operating terminalling infrastructure at Visakhapatnam Port. Further, given its commercial interest in insisting on the use of cavern, SALPG has incentive to foreclose the use of EIPL's storage and the proposed blending services. Its reluctance to undertake an independent study on safety concerns can be construed as a ploy to refuse sharing its terminalling infrastructure. Such a conduct amounts to denial of market access as well as a limitation and/or restriction on the services otherwise being provided by the Informant, in contravention of Section 4(1) read with Section 4(2)(b)(i) and Section 4(2)(c) of the Act. This is more so when VPT has been recommending and directing SALPG to provide tap-out to the Informant.

Further, bypass restriction imposed by SALPG appears to be primarily with the view to protect its commercial interest at the cost of competition. The Commission is of the view that SALPG requiring users to necessarily use cavern and pay higher charges is an unfair imposition in provision of terminalling services; and is likely to discourage imports and restrict the services otherwise offered by the Informant. Thus, the impugned restrictions on bypass of the cavern facility are in contravention of Section 4(1) read with Section 4(2)(a)(i), Section 4(2)(a)(ii) and Section 4(2)(b)(i) of the Act. Since the bypass restrictions were found to have restricted the business volumes of EIPL, without any reasonable grounds, the same is also found to be a denial of market access, in contravention of Section 4(2)(c) of the Act...."

60. Therefore, essential facilities cases are a subset of refusal to deal cases only. Therefore, whether this doctrine would be applicable in the present matter or not, requires examination.

61. To examine the same, the following facts from DG Report may be noted:

"Till 2019, private players namely M/S V Minerals, M/S Trimax and M/S Beach Mineral Sand were also engaged in exploitation of BSM ore and extracting ilmenite from the same.

Kilburn Chemicals, another customer of Ilmenite from IREL, was acquired by V. V. Minerals in 2011 and thereafter, has ceased to procure Ilmenite extracted by IREL.

M/s V. V. Minerals Limited who are reported to be captively consuming some tonnage in their pigment facility.

After amendment of AMCR in February 2019, Ministry of Mines advised the state governments to terminate mining leases of private players owing to Monazite content above the threshold value. OP submitted that however they are not aware as to whether the mining leases have been terminated or not. As far as State PSUs are concerned, they are permitted to mine BSM ore since inception and extract Ilmenite from the same till date. For e.g., KMML in Kerala.

V V Titanium raised request for supply of ilmenite from 2017 their eligibility as a buyer under Slag/SRI TiO₂ producer without mining capability was under examination and they became qualified purchaser and submitted indemnity bond in October 2021 only. In the year 2021-22 IREL Manavalakurichi Unit produced and sold 59,017 MT to DCW. It is seen that although OP submitted that M/s DCW Ltd has been buying IREL ilmenite consistently since around 1970 and their established demand is much higher than what IREL MK is producing as on date, and since V V Titanium became qualified purchaser in October 2021 and though there are exchanges pertaining to supply of ilmenite from MK as well as correspondence exchanged by MK unit as there were indication of getting more mining lease at MK. However, the same did not happen and hence only material from OSCOM unit was offered and since no ilmenite have been supplied to V V Titanium on prorata basis.

IREL's extraction capabilities at the South India units (Chavara and Manavalakurichi) are limited owing to various issues linked to grant of additional mining leases, consent to establish, consent to operate, and surface rights, the Ilmenite extracted as an associated mineral at these units is supplied to those customers who have been sourcing the same from IREL for many decades."

62. Further, the Commission also notes that the OP broadly classifies its customers into three categories (a) Producers in the TiO₂ chain without mining capability; (b) Non-slag/SR/TiO₂ Producers with own mining capability and retail sales; and (c) Export sales. Also, the OP produces three different grades of Ilmenite i.e., 'Q grade' at Chavara unit; 'MK Grade' at Manavalakurichi unit; and 'OR grade' at OSCOM unit. Furthermore, according to the OP, Ilmenite with a high Titanium Dioxide (TiO₂) content is classified as Chloride Grade Ilmenite; and (ii) Ilmenite with a low TiO₂ content is classified as Sulphate Grade Ilmenite.

63. The Commission notes that the DG has not found any evidence of discrimination within the category slag/ SR/ TiO₂ producers with own mining capability in which V.V. Titanium was categorised by OP. There has been no refusal to deal/ supply by the OP to V.V. Titanium. Consequently, the application of essential facilities doctrine and the findings of DG that the OP is adopting discriminatory conditions in sale of Ilmenite in contravention of provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act, are not made out.

64. It is also noted that the allegation that the OP supplies more quantity to foreign companies/ multinationals than what is supplied to domestic consumers is also not substantiated as evidenced from the Annual Report of the OP for 2021-22 and from the MoU copies submitted to the DG.

65. Based on the aforesaid discussion, the Commission is of the opinion that there is no evidence available on record to prove that the OP has contravened the provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act on this count.

II.Excessive Pricing in contravention of Section 4(2)(a)(ii) of the Act

66. To examine the issue of alleged excessive pricing of Ilmenite practiced by the OP, the DG has examined the trend of price revisions between 2015 and 2022 in all the three units of the OP (Chavara, Manavalakurichi and OSCOM), the prices offered by the competitors and looked into price-cost margin. The DG has noted that the price increase was much higher than increase in cost of production in all the three units of the OP. The profits from the sale of Ilmenite formed the major contributor to the profitability of the OP from 2016-17 onwards. Price-cost margin analysis in respect of all three units of the OP revealed that the price-cost margin has been steadily rising. On the basis of above, the DG has concluded that the OP has contravened the provisions of Section 4(2)(a)(ii) of the Act by charging unfair prices in the relevant market of beach sand Ilmenite in India.

67. However, the OP has argued that the DG's analysis based on price-cost comparison, comparison of competitors' prices, and profit margins is incorrect and without an appreciation or understanding of the market, the pricing methodology followed by the OP or the factors considered by the OP in pricing Ilmenite. As per the OP, the DG has erred in considering the cost of production as a basis to determine excessiveness of price of Ilmenite, and the DG has failed to consider the direct and indirect costs incurred in the extraction of Ilmenite, and the 'economic value' associated with Ilmenite. Reliance by DG on the prices charged by competitors is also flawed and the DG has incorrectly considered the profits earned from the sale of Ilmenite.

68. The OP has argued that price revisions of Ilmenite undertaken by the OP were based on market dynamics, international price movements, and market absorption of the prices, as is clearly evident from the *****. The OP's prices for Ilmenite ***** Further, the DG failed in undertaking a comparison of the prices of Ilmenite charged by KMML

and failed to appreciate that in fact, the OP's prices for sale of Ilmenite were lower than the prices charged by KMML, which as per the DG's own observation was a smaller player than the OP (KMML is a captive consumer of Ilmenite since 2016).

69. The OP has also averred that its domestic prices are lower than its export and international prices of Ilmenite and if the OP could truly operate independently of market forces, it would have priced the domestic supply of Ilmenite higher than the prices of imported Ilmenite. Further, the

***** and this trend is also clearly evidenced from the comparison between the OP's domestic and export prices in the Table 4 given below:

Table 4: Domestic, Export and Import prices of Ilmenite

Years

IREL Domestic

prices (INR)*

IREL's Export

prices (INR)

Import prices

(INR)

2016-17

2017-18

2018-19

2019-20

2020-21

2021-22

2022-23

70. As per the OP, its core operation is to extract and supply Monazite to the GoI and it has to continuously dispose of non-strategic minerals like Ilmenite. If the OP were to charge very high prices, customers would readily switch to other substitutes of Ilmenite which are available in the market, which would pile up the OP's inventory. Furthermore, as per the OP, the DG has completely failed to examine the 'effects' of the allegedly excessive prices in the downstream market and there is no evidence on record to demonstrate that any customers of the OP had, in fact, found the prices charged by the OP to be excessive in comparison with its substitutes or imports.

71. Further, w.r.t. analysis of price-cost margin undertaken by the DG, the Commission notes that for both categories of consumers i.e., producers without mining capability and producers with own mining capability, the DG has deducted from the price charged by respective units of the OP, the cost of manufacturing of that unit and has interpreted the same (price-cost difference) as profit margin/ price-cost margin. Further, it is already on record that the prices are determined by the OP based on the prevailing global prices, which practice seems to be in vogue right from the times when the DAE was involved.

72. After considering the arguments put forth by the parties, the Commission is of the considered view that pricing decisions take into account market dynamics, demand-supply equilibrium, other avenues of procurement of the same product, bargaining power between buyer and seller, etc. In the present matter, based on the price comparison of IREL's domestic market price vis-à-vis its export price and import price of Ilmenite, the price of the OP does not appear to be excessive. Sufficient evidence has not been brought on record to establish a case of excessive pricing in this matter.

73. In view of the same, the Commission is in disagreement with the DG and is unable to come to a finding that the OP was indulging in excessive pricing of Ilmenite in contravention of the provisions of Section 4(2)(a)(ii) of the Act.

III.Discriminatory pricing in contravention of Section 4(2)(a)(ii) of the Act

74. With respect to the allegation regarding discriminatory pricing between domestic and foreign consumers, the DG, upon analysis of export and domestic prices of the OP, observed that price discrimination between exports vs. domestic sales is not substantiated by the evidence at hand.

75. In the absence of any contrary evidence put forth by the Informant before the Commission, the Commission is in agreement with the finding of DG. Moreover, in view of the Commission, any such comparison is erroneous as supply and demand conditions for Ilmenite would be distinct within India and outside.

76. With respect to the allegation of preferential treatment and favourable pricing to DCW Ltd., the DG did not find any contravention in the investigation report. In the absence of any evidence to the contrary put forth by the Informant before the Commission on this issue, the Commission agrees with the finding of the DG that no contravention in this regard is made out.

77. Consequently, holistically considering the facts and circumstances of the matter, the material available on record, and based on foregoing analysis, the Commission is of the view that though the OP is covered under the ambit of 'enterprise' prescribed under Section 2(h) of the Act and is found to be in a dominant position in the relevant market of 'mining and sale of Beach Sand Ilmenite in India', no case of contravention of provisions of section 4(2)(a)(i), 4(2)(a)(ii) or 4(2)(c) of the Act is made out against the OP in the present matter.

Accordingly, the matter is directed to be closed forthwith.

78. The Commission also considered the request for confidentiality submitted by the parties under Regulation 35 of the Competition Commission of India (General) Regulations, 2009. After reviewing the grounds provided, the Commission grants confidentiality to such documents, data, or information under Regulation 36 of the Competition Commission of India (General) Regulations, 2024, for a period of five years, subject to Section 57 of the Act. Accordingly, the Commission directs issuance of two versions of this order i.e., public version which will be shared with both the parties, and a confidential version which shall be shared with the OP through one of the members of the confidentiality ring. It is explicitly clarified that any information disclosed in the public version of this order shall not be considered confidential, as it has been used and disclosed for purposes of the Act in accordance with Section 57.

79. The Secretary is directed to forward certified copies of the present order to the parties, in terms of the directions above.