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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 19 of 2019

In Re:

Beach Mineral Producers Association
Ittamozhi Road, P.O.: Nahadevankulam
District: Tirunelveli, Tamilnadu - 627657.

Informant-1

Mr. V.Velmurugan Proprietor of M/s Phoenix Agency
4, A.M.L. Theri Road, P.O.: Keeraikaranthattu Tisayanvilai
District: Tirunelveli, Tamilnadu – 627657.

Informant-2

And

Directorate General of Foreign Trade (DGFT)
Department of Commerce
Ministry of Commerce and Industry
Government of India (GOI)
Udyog Bhavan, New Delhi- 110001.

Opposite Party No. 1

Director General of DGFT, GOI
Udyog Bhavan, New Delhi- 110001.

Opposite Party No. 2

Indian Rare Earths Limited
(A GOI Undertaking – Dept. of Atomic Energy)
Plot 1207, ECIL Building, Veer Savarkar Marg
Opp. Siddhivinayak Temple
Prabhadevi, Mumbai- 400028.

Opposite Party No. 3

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. U. C. Nahta
Member

Ms. Sangeeta Verma
Member



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Order under Section 26(2) of the Competition Act, 2002

1. The present Information has been filed by Beach Mineral Producers Association (**'Informant-1'**) and Mr. V. Velmurugan (**'Informant-2'**) under Section 19(1)(a) of the Competition Act, 2002 (the **'Act'**) against Directorate General of Foreign Trade (**'DGFT'/'OP-1'**); Director General, DGFT (**'OP-2'**) and Indian Rare Earths Limited (**'OP-3'**) alleging, violation of the provisions of Section 4 of the Act (hereinafter, Informant-1 and Informant-2 are collectively referred to as **Informants** and OP-1, OP-2 and OP-3 are collectively referred to as **Opposite Parties/ OPs**).
2. As per the information, Informant-1 is a society registered under the Societies Registration Act, 1860, formed with the objective of protecting the beach mineral industry, particularly its members. It has been in existence to espouse the cause of miners engaged in mining and processing of beach sand minerals (**BSMs**) in the State of Tamil Nadu. Informant-2 is the proprietor of M/s Phoenix Agency and a dealer/ trader in BSMs having an Importer Exporter Code (**IEC**) allotted by Madurai regional office of DGFT in May 2016.
3. As per the website of OP-1, it is an attached office of the Ministry of Commerce and Industry and is responsible for formulating and implementing the Foreign Trade Policy (**FTP**) of the country. It also provides facilitation to exporters about developments in international trade, such as WTO agreements, anti-dumping issues, *etc.* OP-1 is headed by OP-2. As per the Information, OP-3 is a wholly owned public sector undertaking (**PSU**) under the administrative control of Department of Atomic Energy (**DAE**), GOI. Presently, it has mineral processing units in Tamil Nadu, Kerala and Odisha.
4. It has been stated that five coastal states, namely, Tamil Nadu, Kerala, Andhra Pradesh, Odisha and Maharashtra have beach sand deposits available on various beaches. Beach sand deposits, also called as placer deposits, contain associated BSMs such as ilmenite, rutile, garnet, monazite, zircon, sillimanite and leucoxene. BSMs have multiple uses, such as sand blasting, creating



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welding flux, manufacture of refractories, extracting rare earth components, atomic power *etc.* As per the information, Garnet is used for manufacture of abrasives and as an essential ingredient in sand blasting. Rutile and Leucosene are utilised for creating welding flux. Zircon is used as a pigment for ceramics, refractories and abrasives. Sillimanite is used in manufacture of refractories. Monazite, a thorium ore, is used for strategic purposes and for extracting rare earth components.

5. It is further stated that post-independence, under the Atomic Energy Act, 1948 (repealed and replaced by the Atomic Energy Act, 1962) the concept of 'Prescribed Substances' was introduced according to which Prescribed Substances, which included BSMs, could be used only for production or application of atomic energy or research. Further, prior to liberalisation, only two companies namely, OP-3 and Kerala Minerals and Metals Ltd., a state PSU of Government of Kerala, were allowed to mine and process BSMs.
6. Informants have averred subsequently, as per GOI Resolution dated 06.10.1998 issued by DAE, most of the restrictions on private participation were removed and foreign direct investment (**FDI**) up to 74 per cent (subject to prior approval by GOI) for extracting and trading of BSMs was allowed. Further, *vide* Press Note 6/2008 dated 12.03.2008, Government permitted FDI up to 100 per cent in mining and mineral separation of titanium bearing minerals and ores, value addition and integrated activities subject to sectoral regulations and Mines and Minerals (Development and Regulation) Act, 1957 (**MMDR Act**). Specifically, Part B of the First schedule of MMDR Act deals with Atomic Minerals, which corresponds to Prescribed Substances under the Atomic Energy Act, 1962.
7. It is stated in the information that production and export of Ilmenite and Rutile increased tremendously with the entry of private players and exports soared from around Rs. 35 crore in 1997-98 to around Rs. 4000 crore in 2017-18



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which compelled OP-3 to start joint ventures with international players from Australia and Japan *etc.*

8. It is averred that after around two decades of gradual liberalisation of the sector, *vide* notification dated 21.08.2018 issued by OP-1 under the provisions of Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (**FTDR Act**) read with paragraphs 1.02 and 2.01 of FTP for the period 2015-20 (**Notification**), export of BSMs was brought under State Trading Enterprise (**STE**) and consequently, OP-3 was designated as the canalising agent/ STE for export of all BSMs which places it in a dominant position and skews the level playing field.
9. It is also submitted that along with the Notification, a Standard Operating Procedure (**SOP**) in respect of export of BSMs was also published by OP-1. Informants have alleged the following:
 - i. SOP has onerous conditions such as due diligence of foreign buyer by OP-3 and end-user certification by private exporter; fixing of 3 per cent of Free on Board (FOB) value as commission payable to OP-3; sharing of commercial secrets and knowledge (including contract details entered with the foreign buyer, financial health, letter of creditworthiness from banks); indemnity in favour of OP-3; contact details and passport details of exporters; details of cases against directors or partners or proprietors of exporters; information regarding ban, if any, on exporter's business by GOI or any Government Authority or PSU etc;
 - ii. OP-3, being a PSU and a competitor, can ban an exporter on any pretext, making the latter ineligible for export;
 - iii. the purpose of SOP and the appointment of OP-3 as an STE, is to kill competition; and,
 - iv. Notification and SOP not only amount to abuse of dominant position in the form of unfair and discriminatory practices by OP-3 but also create barriers to exporters.



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10. Informants have alleged that aforesaid behaviour of OPs amount to violation of the provisions of Section 4 of the Act.
11. Accordingly, Informants have prayed the Commission to:
 - i. hold that the appointment of OP-3 as STE under Notification issued by DGFT as violative of the provisions of Section 4 of the Act.
 - ii. remove the clauses in the SOP which are anti-competitive.
 - iii. impose penalty as the Commission may deem fit and proper in the facts and circumstances of this case.
 - iv. direct OP-1 and OP-2 to permit export of BSMs regardless of the Notification and the SOP, during pendency of the information.
 - v. pass such further orders as the Commission deem fit and proper in the facts and circumstances of this case.
12. The Commission has carefully perused the information filed by Informants, documents annexed therewith and relevant information available in public domain.
13. The Commission notes that the Informant is mainly aggrieved by the policy of OP-1, which has brought exports of BSMs under STE regime, and allegedly onerous terms of SOP for exporters.
14. In this regard, the Commission observes that STEs deal with export/ import of products in pursuance of government policies in relation to products/ industries considered to have strategic importance. The Commission also notes that BSMs, *inter alia*, have space, defence and atomic applications and have also been specified as Atomic Minerals under the provisions of the MMDR Act and Prescribed Substances under the provisions of the Atomic Energy Act, 1962.
15. The Commission observes that the impugned allegations arise from the policy formulation by OP-1 regarding export of BSMs under the provisions of FTDR Act and FTP and implementation thereof by OP-3. Having looked into the



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nature of allegations raised by Informants the Commission is of the considered view that change in export policy by OP-1 in pursuance of its statutory duties and implementation thereof by OP-3 are not amenable for examination within the framework of Section 4 of the Act.

16. In view of the foregoing, the Commission is of the view that no case of contravention of the provisions of the Act is made out against OPs. Thus, the matter is ordered to be closed forthwith under the provisions of Section 26(2) of the Act.

17. The Secretary is directed to communicate the order to Informants, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(U.C. Nahta)
Member

Sd/-
(Sangeeta Verma)
Member

New Delhi
Date: 25/07/2019