

**Competition issues in regulated
industries: Case of Indian transport
sector**

Railways and Ports

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ABBREVIATIONS

AADA	Asia-Australian Discussion Agreement
ACCC	Australian Competition and Consumer Commission
ACTO	Association of Container Train Operator
BAF	Bunker Adjustment Factor
B-O-T	Built-Operate-Transfer
BRIAS	Bid Rigging Indicator Analysis System
CAF	Competition Assessment Framework
CAF	Currency Adjustment Factor
CAG	Comptroller Auditor General
CAGR	Compounded Annual Growth Rate
CCEA	Cabinet Committee on Economic Affairs
CCI	Competition Commission of India
CER	Community of European Railway and Infrastructure Companies
CLW	Chittaranjan Locomotive Works
CONCOR	Container Corporation of India
CPTA	County Public Transport Authorities
DFC	Dedicated Freight Corridor
DFCCIL	Dedicated Freight Corridor Corporation of India Limited
DGS&D	Director General, Supplies & Disposals
DLB	Dock Labour Board
EC	European Commission
ECEC	Empowered Committee on Environment Clearances
ELAA	European Liner Affairs Association
EU	European Union
FMC	Federal Maritime Commission
GDP	Gross Domestic Product
GMB	Gujarat Maritime Board
Gol	Government of India
GTI	Gateway Terminals India
ICDs	Inland Container Depots
IPBCC	India Pakistan Bangladesh Ceylon Conference
IR	Indian Railways
JNPT	Jawaharlal Nehru Port Trust
KFTC	Korean Fair Trade Commission
KONEPS	Korean electronic procurement system
MCA	Model Concession Agreement
ME	Member Engineering
MM	Member Mechanical
MoF	Ministry of Finance
MoST	Ministry of Surface Transport
MPA	Maritime and Port Authority
MPTA	Major Ports Trust Act
MSDC	Maritime States Development Council
MT	Million Tonnes
MTPA	Million Tonnes per Annum
NCR	National Capital Region
NSICT	Nhava Sheva International Container Terminal
OSRA	Ocean Shipping Reform Act
PETS	Preliminary Engineering cum Traffic Survey
POL	Petroleum Oil and Lubricants
PPP	Public Private Partnership
PRCL	Pipavav Rail Corporation Ltd
PSA	Port of Singapore Authority
PSP	Private Sector Participation

PSUs	Public Sector Undertakings
RPUs	Railway Production Units
RDSO	Research Designs and Standards Organization
RRI	Rate Restoration Initiatives
SCI	Shipping Corporation of India
SCL	Safmarine Container Lines
SPV	Special Purpose Vehicle
TAMP	Tariff Authority for Major Ports
THC	Terminal Handling Charge
TPA	Trade Practice Act
TRAI	Telecom Regulatory Authority of India
VDC	Vendor Development Cells

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EXECUTIVE SUMMARY

Transport Sector is the lifeline of any developing economy. The growth and development of any nation truly rests on the growth of its transport sector. Transport provides access to people, supports economic activities, and facilitates social interactions. India's transport sector is large and diverse and caters to the needs of about 1.03 billion people.

In terms of modal share, road sector is much ahead of other forms of transport for both passengers as well as freight movement. In terms of passenger movement (passenger kilometre), the share of roads, railways and air is 86.70%, 12.90% and 0.40% respectively. The shares in freight movement (tonne kilometre) for roads, railways, air and water transport is 61.20%, 38.60%, 0.02% and 0.20% respectively.

This study aims to discuss the competition issues in the two of the most important transport sectors- the Indian Railways and the Ports Sector. To identify and understand the competition issues completely, the study has referred to the Competition Assessment Framework (CAF) developed by DFID.

ES.1 Indian Railways and Competition Issues

Indian Railways (IR) is one of the largest and busiest rail networks in the world and is of vital importance to the economic development and social welfare of the country. Planning, management and operations of railway in India is governed by the Railway Act, 1989. IR functions under the Ministry of Railways headed by the Minister for Railways, assisted by two Ministers of State for Railways. The management and policymaking powers are vested with the Railway Board.

ES 1.1 Inter Modal Competition

Other modes of transport (roads and waterways) can be effective substitutes for rail services in both freight and passenger markets. Given the existence of intense inter modal competition; railway may be termed as a natural monopoly without monopoly power, as consumers can switch to alternative modes if railways are unable to meet their expectations.¹ In many European countries, inter-modal competition is significant in all except a few rail markets and the degree of inter-modal competition is such that little or no regulation of the rail sector is required at all. The presence of inter-modal competition has been the dominant force behind the deregulation of rail freight tariffs in Western Europe and the United States over the past twenty-years. However, there has been a continuous decline in the share of rail (both in passenger and goods traffic) in the total traffic. Between 1970-71 and 2004-05 share of railways in freight movement declined from 70% to 39% and in passenger from 36% to 13%.

Roadway has inherent advantages of convenience, flexibility, and adaptability and in many cases is qualitatively superior to the rail mode; nonetheless, its dominance may not imply a socially desirable and environmentally friendly modal split. Considering the higher rate of utilisation of capacity rail is more energy efficient, less polluting and more economical mode of transport, particularly, in movement of freight traffic over long hauls, it may be desirable to raise the share of railways in the total traffic.

Several factors have contributed to the decline railways in both passenger and freight segment. First, there has been substantial development of motorized road transport both for passenger and freight movement. The greater share of the road mode in transport demand is explained by inherent advantages in terms of accessibility, convenience, and door-to-door delivery.

The decline of the market share of railways vis-à-vis roadways in freight can also be explained

¹ Internationally there are certain goods (hazardous material, chemicals etc) are mandated by law to be transported by railways, there is no such legislation in India.

through the ratio of its freight fares to its passenger fares. Large scale cross-subsidisation of passenger services by overcharging certain categories of freight diverts freight traffic towards road thus preventing the railways from performing according to their comparative advantage.

As highlighted in the Rakesh Mohan Committee Report, due to lack of customer oriented services the railways has been loosing market share to roadways. Transport models over the last few decades have been driven by cost reduction and increased speed of freight movement. The average speed of a freight train was 17.4 km per hour in 1950-51 and this has increased to 22.7 km per hour in 1989-90. At present a goods train's average is 24 km per hour as compared to 47 km per hour in case of passenger trains which are very low as compared to other developing countries.

Although as the theory suggest the pressure created by inter modal competition would be able to bring efficiencies in the railways sector, however, all around the world, more often than not, railways has been unable to compete with other modes owing to low efficiency, social obligations, political interventions and lack of commercial outlook. Thus, a broad consensus has emerged that in such railway markets; the introduction of intra-modal competition (between different railway competitors) might prove useful to increase efficiency and customer satisfaction.

ES.1.2 Private Participation in Indian Railways and Competition Issues

In the past, Indian Railways has made several attempts to encourage private participation in areas such as catering, wagon ownership and leasing and joint ventures for rail infrastructure projects. These efforts were, however, limited in scale and scope. Railways budget (2008-09) plans to invest Rs.2, 50, 000 crores in various projects in coming five years.

ES.1.3 Container Cargo Segment

Nearly about a year back Indian Railways opened the container movement sector to private sector participation. Prior to this, it was exclusively reserved for Container Corporation of India (CONCOR). The Indian Railways granted licences to 15 private companies to handle container transport operations (including CONCOR). Presently, 146 trains of CONCOR and 44 container trains of other container operators are functional. The number of trains run by other operators is expected to increase to 50-55 by the end of 2008. Presently 60 container depots are operational including 3 constructed by private parties. The total container traffic is expected to be 26 million tonnes in 2007-08 including 2 million tonnes contributed by new operators.

ES.1.3.1 Barriers to Entry

Although, a total of 15 players have got the licence for operations in the container sector, only 7 have started operation. The sector has been recently opened for private participation and it may be too early for an exhaustive study with respect to entry barriers. Based on detailed discussion with stakeholders and response of perception survey conducted by TERI a number of issues have been identified, which have been limiting the scope of operations of private sector in this sector. Few of them are as follows:

ES.1.3.1.1 Spiralling prices of Land

Despite having the requisite license to operate container trains, eight participants have been unable to start operations primarily due to lack of terminal facilities and rail-linked Inland Container Depots (ICDs). Stakeholders have expressed concern that cost of procuring land for operations has become a major entry barrier for these private players. These ICDs have to be rail linked and therefore land is required at strategic locations and often such areas belong to Indian Railways. Private stakeholders stressed upon the need for Government/Railways help in acquisition of land on the same terms as it is given to CONCOR.

ES.1.3.1.2 Competitiveness and Transit Time Guarantee

One of the key concerns of the private players is the competitive pressure applied by the roadways on the railways container movements. The scope of profitability (at least for the initial period) for the private players in the container market is dependent on their ability to win back the lost share in the freight movements. In the absence of transit time guarantee private players are finding it difficult to compete with roads. Private stakeholders expressed their concern over Indian Railways not giving them the guarantee of transit time. Transit time guarantee is the assurance by the railways to deliver the container within the stipulated time since the IRs' locomotives within their systems pull the container wagons. Furthermore, private stakeholders have claimed that although there is no transit time guarantee in the agreement, CONCOR due to its relationship with Railways has been able to ensure the timely delivery of their containers. However, this could not be verified due lack of information and access to relevant data.

ES.1.3.2 Lack of level playing field

CONCOR, since its inception, benefits from a close relationship with the Indian Railways:

- Indian Railways owns 63% of CONCOR's equity.
- Indian Railways has provided land for construction of terminals.
- The Railways maintains CONCOR's wagon fleet.
- Officers on deputation from the Indian Railways hold senior and middle management positions in CONCOR.

This close relationship between the management levels of both the organizations can unevenly benefit CONCOR as operations in this sector depend on the level of services provided by the Railways. From the discussions with the stakeholder the following areas have emerged where the present mechanism lacks a level playing field:

ES.1.3.2.1 Payment mechanism

During the stakeholder discussion, private operators were of the opinion that payment mechanism followed by the IR lacks a level playing field and gives an undue advantage to CONCOR with respect to convenience, flexibility and time efficiency. At present, CONCOR pays its haulage charges to the Railways in advance, on a fortnightly basis or has the option to raise a credit of 15 days. On the other hand, new container operators have to follow a longer process and pay haulage charges on a per train basis. It is suggested that the Indian railways may consider adopting the same process for account settlement.

Officials from Indian Railways have stated that given the long relationship with CONCOR the risk of default with latter is less. Moreover, they have assured ACTO that discussion is going on with the new operators to improve the payment mechanism.

ES.1.3.2.2 Allocation of Land

Several of CONCOR's terminals are situated on leased railway-land, which was granted to CONCOR on its inception and owing to old lease agreement, is at a very nominal cost compared to current real estate prices. The new entrants in the sector have to pay a much higher price if they are to procure land given the current real estate prices. Given this tremendous cost advantage it is very hard for the new operators to compete with CONCOR in terms of operational cost. Railways has stated that in future it would give preferential treatment, vis-à-vis other land uses, to new container operators while allotting land, so that the entrants can compete with CONCOR in operating cost.

ES.1.3.3 Abuse of Dominance

ES.1.3.3.1 Pricing and Discounts

CONCOR with 95% market share and is only company with prior experience in container cargo business in India. Most of the existing ICDs and Terminals used for container purposes belong to CONCOR. Given the enormous infrastructure base of CONCOR, private players feel that it is hard for them to compete with CONCOR in prices of the final services, until they build a sound infrastructure base. Stakeholders who were interviewed claimed that as CONCOR owing to wider scale of operations can undercut prices (to retain its customer base) where it feels the competitive pressure and compensate the loss by hiking prices in the market segment where private cannot efficiently compete with the former. Also CONCOR, in order to capture higher volumes, deter competition and gain market share, has been increasing discounts on the high traffic routes of National Capital Region (NCR) to JNPT/Mundra Port/Pipavav Port. The study could not determine whether the pricing policy by CONCOR is 'predatory' as such an enquiry requires extensive data and cost audits of the incumbent.

ES.1.3.3.2 Access to infrastructure

New entrants in transportation markets often require access to key infrastructure. Public policies about infrastructure access can, therefore, be a critical component of entry conditions. At present, if the new container operators want to use CONCOR-owned ICDs for running container trains, they have to pay access charges. The level of access charges, as decided by CONCOR (even for the ICDs on strategic places built upon Railways land), is considered high. A fair access policy for all the ICD's developed by the incumbent on railways land can promote competition where duplication of such infrastructure may be not feasible.

ES.1.3.4 Conclusion

Above-mentioned issues highlight that there are certain factors that are limiting the level of competition in the container movements. The sector is still developing and it is early to assess future market dynamics of the market. Removal of mere legal entry barriers may not be enough to promote private sector participation in the sector. Given the close relationship between CONCOR and Indian Railways, ensuring a level playing field for the policy planners might be a demanding task. However, these problems are not new to an infrastructure sector opened to private participation. An independent regulator can through regulations create an enabling environment promoting level playing field. The establishment of independent authorities, operating outside the chain of command of executive power in the strict sense, is essential as far as ensuring a level playing field.

ES.1.4 Dedicated Freight Corridor

Owing to high congestion on busy traffic routes and in an initiative to increase the average speed of Indian freight movements Indian Railways decided to take up the task of constructing Dedicated Freight Corridors (DFCs) connecting Mumbai-Delhi and Howrah-Delhi routes. DFCs aim to support the growing Indian economy and to promote Indian Railways share in freight traffic, bringing in the much desired inter modal balance. The Task Force designed to look at the functioning of the DFCs gave the following recommendations with reference to the organization structure, which will have a bearing on level of competition, once DFC is operational:

- Setting up Special Purpose Vehicle (SPV), jointly owned by the Indian Railways and the users of bulk freight services under the administrative control of Ministry of Railways. SPV would own and maintain the tracks and other infrastructure and will be responsible for movement of trains on its system.
- To ensure non-discriminatory access, it recommended that the SPV would neither own/lease any rolling stock nor would be involved in freight business other than haulage of freight trains.

Given that the project has just been started and bids have been called recently, it is premature to identify anti-competitive practices. The Task Force in their report suggested structure of SPV and stated that SPV should ensure non-discriminatory access to infrastructure. However, no mechanism has been devised to ensure that all operators on the DFC are provided level playing field and non-discriminatory access. The fact that Indian Railways has a major stake in the SPV and the SPV is under the Ministry of Railways raises concern with reference to level playing field and non-discriminatory access to the players when DFC will be operational. However, the study cannot conclusively comment on the future dynamics of DFCs and the level of competition can only be assessed once DFCs is fully operational.

ES.1.5 Procurement in Indian Railways

ES.1.5.1 Stores Procurement

Indian Railways procures store items for a variety of requirements such as track materials, fuel and construction, manufacture of rolling stock, operations, repairs and maintenance. Given the monolith size of Indian Railways cost of these goods form a considerable part in the Indian Railways expenditure. During 2006-07, the total procurement of stores items by the Railways Board, zonal railways and RPU's were valued at Rs. 18,651 crore.

All around the world, public procurement officials are trying to cope with cartelisation and bid rigging. Procurement in the Indian Railways also suffers from such anti-competitive practises, like any other public procurement. Audit reports by the Comptroller and Auditor General (CAG) of India submitted to Parliament during earlier years have been highlighting anti-competitive practices in Railways procurement (this study primarily draws from Audit report of CAG of India as the relevant data was not accessible). These anti competitive practises manifest themselves primarily in the form of horizontal collusion amongst vendors. Corruption has further aggravated this problem. To address these issues Railways in recent past have initiated a number of corrective steps such as Vendor Development Cells (1999), Decentralizing Stores Procurement (2001), Clause against Cartel formation (2002) and e-Procurement (2005).

ES.1.5.2 Cases of Anti-competition in IR Procurements

From the different cases mentioned in detail in the report, stakeholder discussion and from the available literature on public procurement and competition issues the study has been able to analyse the functioning of cartels in the Indian Railways procurement system. These cartels prevalent in Railway Procurement primarily exploit the procedure in the following ways:

- By illegally coordinating the bids amongst the cartel members whereby the cartel decided ex-ante the winning bidder and the winning bid and other bidders submit bids that higher than the winning bid. Or even if the bids are seemingly competitive in price, then they are unacceptable because of other non-price terms, like not fulfilling any mandatory criteria mentioned in the tender document.
- By agreeing to share markets, whereby public procurement needs/requirements are divided according to type or geographic location and competitors agree to submit higher bids in markets assigned to other firms. Also the cartel members can share a single market by bidding for less than the demanded quantity thereby sharing a single order amongst them.
- Sometimes, one or more cartel members may file fabricated bid protests in order to try to deny an award to non-cartel member.
- Also, these cartels with the help of dubious practises in the public procurement system may use their incumbent power to keep away any new entrants into the market.
- Boycotting any attempts by the Railways to punish the defaulting firm (in case of supply failure) by calling for a new tender.

ES.1.5.3 Policy Recommendations: Maximizing competition in Public Procurement

It is important that the legislative and regulatory framework on public procurement is designed to allow sufficient flexibility in procurement. Carefully devising the procurement mechanism can also reduce the anti-competitive conduct in public procurement.

ES.1.5.3.1 Improved Designing Procurement Tenders

The efficiency of the procurement process will depend upon the design of the tender document, which contain the bidding process and the bidding guidelines.

ES.1.5.3.2 Reducing barriers to entry and increasing bidders' participation

Research Design and Standards Organization (RDSO) is the sole R&D organisation of Indian Railways and functions as the technical advisor to Railway Board, zonal railways and RPU. One of the key roles of RDSO is quality assurance. It involves vendor approval and purchase inspection of these various items. From the stakeholder discussion and questionnaire survey the study has gained that RDSO plays a prominent role in restricting entrants into the railways procurement. Concerns like bureaucratic hassles in RDSO have in many ways assist anti-competitive practises. Complaints such as long approval time periods for any new technology have been reported by some of the stakeholders. Moreover, stakeholders have claimed that over-specification and tedious procedure to get approvals from RDSO has kept away many big vendors. It is important for the policy makers to reduce 'unnecessary' entry barriers as this can directly result in increased competition and reduction in the power of the cartels to control the market.

ES.1.5.3.3 Reducing the frequency of procurement opportunities

As far as the competition theory is concerned, collusion is facilitated when competing firms meet each other frequently in different markets. Frequent interaction facilitates punishment strategies among competing bidders, which is necessary for sustained effective collusion. Therefore, unbundling bulk orders into smaller tenders and holding tenders at short and regular time intervals may favour collusion. In 2001, Railway Board decentralized procurement of 45 stores items. The Railway Audit Report (2006) highlighted wide variations in the rates for the same items in the same year between various zonal railways/ RPU. This indicated the existence of bid rigging. To reduce the power of cartels the procurement officials should reduce the number of opportunities in which these firms meet. This might be achieved by holding fewer, larger tenders, as was the case in the centralized procurement in railways. And also efficient information sharing between different zones and RPU can help in controlling anticompetitive practises in decentralized era.

ES.1.5.3.4 Role of the Competition Commission of India

Competition Commission of India (CCI) can play an important role in controlling the anti-competitive practises in public procurement by educating and training the concerned officials. Training for procurement officials is of paramount importance since procurement officials are best placed to detect signs of anti-competitive activities as they can observe patterns in bidding processes that could indicate such conduct². Around the world many competition authorities are directly or indirectly involved in advocacy efforts to raise the level of awareness of the risks of bid rigging in procurement tenders. Moreover, a number of countries (such as Sweden and the US) have developed checklists to help procurement agencies to spot instances of possible collusion. These checklists play an important role in educating and enabling the procurement officers to detect case of anti-competition by analysing the bidding behaviours. In addition to the above measures, anti-competitive activities and cases of cartelisation can be reduced through strict, effective competition law enforcement.

ES.1.5.3.5 Modernizing Procurement: E-procurement

Another way to put a cap on anti-competitive practises is to modernize public procurements procedures. Indian Railways have implemented e-procurement in the Northern Railways in May 2005 and is planning to expand it to twelve more zones and RPU's in the Railways by end of 2008. It facilitates wider range of participation as the submission of bids is conducted through Internet thereby attracting bidders from far-flung areas and also by reducing cost of bid preparation thereby attracting smaller bidders. It also, limits information available to the cartels. The electronic submission of bids by the vendors restricts ability of cartels to monitor new entrants and deviation by the cartel members. Moreover, due to electronic nature of this medium it is easier to conduct quantitative analysis of the bidding data.

ES.1.5.4 Preference to PSUs: Case of Wagon Procurement

During 2006-07, total procurement of stores items by the Railways was valued at Rs. 18,651 crore³. Out of which Public Sector Undertakings (PSUs) contributed 31% and other industries contributed 69% towards supplies. The study has looked into the wagon procurement, to study for any preference given to PSUs while procuring certain items.

At present Indian Railways execute 100% procurement of wagons through open tender. However, they follow a distribution system of tendered quantity amongst all the established wagon manufacturers both in the public and private sector based on their past performance with a view to make the distribution more broad based. All the wagon builders are required to supply orders at the lowest rate determined by the open tender. The bidder who quoted the lowest price is provided with 25% of the quantity of wagon requirement and the remaining 75% are distributed in the ratio of 60:40 to the PSUs its and private sector respectively.

To analyse the effect of reservation policy on the over all efficiency of the sector study focuses on the Audit of procurement of wagons by the CAG of India. The reports suggest that the aggregate performance of PSUs was below par as compared to the private sector suppliers. Moreover, special treatment (like waving off of penalties and refunding of deposits) was extended to PSUs and not to private sector players emphasising on 'lack of level playing field'. According to the competition theory, such a reservation of orders can adversely affect the level of competition in the industry. Apart from reducing the incentive for the public units to perform better it also reduces competitive pressure on the private firms.

ES.1.6 Advocacy issues for CCI

Following are select areas where CCI can play an important role by advocating and educating the concerned stakeholders. These are enumerated below:

ES.1.6.1 Container Cargo movements

From the aforementioned study it is clear that there exist some apprehensions among the new entrants primarily with respect to the issue of level playing field. Establishing a regulatory body that looks into such matters can be useful in preserving the spirit of competition in the market. Given the importance of autonomous regulator in the international railway reform CCI might like to take up these as advocacy issues with the Railways Ministry and Planning Commission.

ES.1.6.2 Procurement in Railways

Competition advocacy can play an extremely important role in building up a sound railway procurement system. By carrying out the outreach programs CCI can develop close working relationships with Railway procurement officials. In this way CCI can provide direct guidance to Railways' procurement authority. This will educate the concerned officials about the true cost of anti-competitive practises in procurement and also help them to devise measures to reduce the same.

³ Rail Year Book

ES.1.6.3 Preference to PSUs

From the study, it is seen that the policy of reservation towards PSUs is acting against the best interest of the Indian Railways. Moreover, such practises also reduce the level of competition pressure on the other firms in the market. Therefore, it is imperative for CCI to raise the issue with the concerned authorities and advocate for a policy revisit.

ES.2 Ports

Ports are an extremely important infrastructure link for Indian trade as about 95% of India's global merchandise trade is moved through maritime transport. The 12 major ports established by Central Government handle about 74% of the entire maritime cargo. The ports other than major ports handle the remaining 26%. The port sector was opened to private participation with the announcement of the 'Policy Guidelines for Private Sector Participation' in major ports in 1996. This policy outlined the areas within the major port sector where henceforth investment from private sector would be sought.

The government adopted the concept of landlord ports and sought private participation through contractual agreements in the form of 'Build-Operate-Transfer' (B-O-T) scheme. Private players were allowed to bid for facilities and were asked to take over development and management of port facilities (e.g. berth and cargo terminals) for a period not more than 30 years. Various state governments have also allowed private participation in the development of minor ports. Besides bringing in much needed investment, private sector participation was also expected to bring in an element of competition in the working of the port sector.

In the study, the following aspects were studied in order to understand competition related issues in the sector:

1. Inter-port & intra-port competition
2. Combinations: Mergers & Acquisition
3. Agreements in the shipping liner industry
4. Port concessions
5. Port corporatization model
6. Labour issues and competition in ports sector
7. Regulation in Indian ports (covering acts & guidelines, role of tariff authority and pricing issues)

ES.2.1 Inter-port & intra-port competition

There are three categories of port-related competition, inter-port, intra-port and intra-terminal. Inter-port competition is driven by increased containerisation of cargo. A customer, however, has to take into account a number of factors while considering the option of switching port/terminal. These factors include the associated transport cost, availability of infrastructure at the competing port and also price and quality of service offered by the alternative port.

In case of Indian ports, all these factors severely restrict inter-port and intra-port competition. Hinterland connectivity is a major issue with rail and road connectivity inadequate at a number of ports especially the minor ports. It is largely a result of poor hinterland connectivity at other ports that JNPT caters to as much as 55% of container cargo and often experiences severe congestion. Further, not even all the major ports in India can provide similar facilities in terms of draft requirement, storage, etc. Therefore, often shippers have to skip certain terminals or ports, which may otherwise be competitive options.

All the major ports come under the purview of Tariff Authority for Major Ports (TAMP) which fixes tariff ceilings for these ports. Very often port operators shy away from providing customized services, as they cannot raise their prices beyond this ceiling. The only option available to port operators for attracting customers is to offer lower tariffs. However, rigidities in labour practices

often erode any scope for tariff reductions.

Besides these infrastructure bottlenecks, it is also to be noted that port operators do not need to encourage inter-port and intra-port competition as almost all ports in India today operate at full capacity. For instance, JNPT has three container terminals catering to similar cargo and all are operating at full capacity. One of the private terminals GTI has tariffs almost 30% higher than the other two terminals but it continues to get sufficient traffic. This would not have been possible if the other terminals had excess capacity.

In future, one can however, expect intra-port competition to emerge. A second container terminal is coming up at Chennai that would compete with the existing terminal operated by DP Port (earlier P&O Ports). A fourth terminal is expected to come up at JNPT. The government needs to ensure that a single player is not allowed to dominate a port or a coastline as this may encourage possible abuse of dominance by the dominant player.

Besides the possible abuse of dominance by a private entity, there are also concerns of possible abuse by the incumbent, in this case the port operator. At JNPT, the public terminal caters to the same cargo as the two privately owned terminals. As a port trust, JNPT also provides basic services to the three terminals and is in a position where it can deny access to some of these basic services to the rival terminals. It can also discriminate in terms of the quality of services provided to competing terminal operators. It should be noted that the conditions for provisions of basic services are generally agreed under the concession agreement and in case of dispute the provision of arbitration is available. However, it maybe difficult to prove discrimination in the provision of services (under the arbitration route) and therefore CCI may need to explore the possibility of enforcing the essential facility doctrine in case discriminatory practices are reported to it against the port trust.

Clearly both inter-port and intra-port competition is at a nascent stage in India. Inter-port competition is hindered by insufficient hinterland connectivity and also because not all ports can offer similar facilities. Further there are rigidities in pricing as a result of which traffic of nearby ports cannot be enticed through value added services or reduction in tariffs. A few of TAMP's decisions have also left little incentive for ports to vie for traffic from nearby ports. These issues need to resolved to promote inter-port competition.

In the future one can expect inter-port to emerge once the ports being developed by state governments, particularly in Gujarat and Andhra Pradesh come up.

Intra-port competition will emerge once the new container terminals planned at the existing ports come up. The fact that the central government is taking a considered decision to not allow a particular player to dominate a port, should promote intra-port competition in the future.

ES.2.2 Combinations: Mergers & Acquisition

The maritime industry requires large investment and frequent technology up-gradations. Players in the sector often consolidate their positions through mergers and acquisitions to meet these challenges. A vertical merger could be in the form of a freight forwarder merging with a shipping company to provide door-to-door service, a terminal operator merging with a freight forwarder, a shipping liner merging with a port terminal, etc. The intention behind vertical integration generally is better co-ordination and lowering transaction costs. It must be noted, that the merger may not intentionally try to drive out competition. Therefore, any competition promotion authority needs to carefully examine mergers case by case and scrutinize and monitor for anti-competitive behaviour (both pre-merger and post-merger). The possible anti-competitive practices in case of a vertical merger are market foreclosure, predatory or discriminatory pricing and bundling of services (in upstream and downstream segment).

Horizontal mergers (or acquisition) take place between companies offering the same services, i.e. shipping company merging with another shipping company, a port or terminal merging with another port or terminal. Horizontal mergers are generally undertaken to benefit from economy of scale of production, whereby the fixed costs can be spread over a substantial turnover. In case of a

horizontal merger, the most probable anti-competitive practice is an increase in price with increased market power post merger. The merger can also act as an entry barrier for new entrants as they are rarely in a position to offer rates that are competitive vis-à-vis a merged entity, which benefits from economies of scale.

International experience brings out that most jurisdictions do evaluate M&A (beyond a threshold level) for anti-competitive behaviour. The threshold level differs from country to country based on the specific characteristics of its industry. However, countries try to see that the anti-competitive laws are not too intrusive so as to stifle economic growth. Generally only a few cases of proposed mergers and acquisitions are disallowed by the authorities. More often remedial action is suggested to check possible anti-competitive behaviour.

International experience also brings out that in some countries, the sector regulator has competition related powers, which can be used to ensure that the merged entity is not able to abuse its dominant position. In Peru for instance, the transport regulator used the provision of 'Essential Facilities Doctrine' to provide open access to basic port infrastructure subsequent to the merger of a shipping liner and a port terminal in the country.

In India, most of the private terminal operators in Indian ports are consortium comprising a global terminal operator and an Indian entity. The maritime industry has not seen any merger or acquisition within the Indian market but has been affected by global mergers & acquisition. The most important development for the Indian ports was the acquisition of the assets of P&O Ports by DP World in 2006. This acquisition has made DP World a dominant player in India, with terminals both on the east and west coast of India. The issue before the competition authority is to examine whether DP World is or can abuse its dominant position in future.

This study examined the powers of the various regulators in the sector, i.e. the tariff regulator, port trust and the competition authority to understand the options available for regulating mergers and acquisitions in the port sector.

The CCI (once empowered) will have the power to investigate mergers and acquisitions. However, it is mandated to evaluate mergers or acquisition only above a threshold level. Smaller companies, falling below this threshold level can therefore evade ex-ante scrutiny under the existing competition law. This is certainly a gap in ex-ante regulation of M&A. Post merger, CCI can intervene in case of abuse of dominance by the merged entity, either suo motto, or on receiving a complaint. The Competition Act, 2002 classifies abuses into two broad categories, (excessive or discriminatory pricing) and exclusionary (denial of access). In case of the latter, CCI has the mandate under Section 4(2) (C) of the Act to pass a remedial order under which the dominant enterprise must share an essential facility with its competitors. This is commonly known as the Essential Facilities Doctrine (EFD).

Unlike the sector regulator in electricity, the port sector regulator does not have any competition related powers. The role of TAMP is limited to only tariff. TAMP can only regulate anti-competitive behaviour of the merged entity to the extent that its tariff related powers allow. Since it fixes the tariff ceilings at the major ports, it can regulate any arbitrary hike in prices. However, in case the merged entity indulges in predatory pricing, TAMP will not be able to intervene.

Similarly the Port Trusts in India do not have any specific competition related powers. They may be able to intervene only in case a possible M&A infringes on any clause of the Concession Agreement. Their intervention is however not from a competition perspective.

Clearly, law provides only CCI the power to intervene ex-ante in case of M&A in ports sector. However, CCI can only scrutinise mergers and acquisitions over a certain threshold level. There is therefore a need to analyse whether CCI should be allowed to examine all mergers and acquisition (irrespective of the size) or should the sector regulator be given powers to examine M&A as is case of electricity sector.

ES.2.3 Agreements in the shipping liner Industry

Liner services have a long history of cooperative behaviour, organized in the form of conferences. For long public policy exempted shipping firms from the general prohibition on collective price setting, as it was believed that unrestricted competition in shipping markets would be destructive. In recent years however, conferences have come under the scrutiny of competition authorities, and shipping liners are now moving towards other forms of operational agreements such as consortia and alliances. The main difference between shipping conferences and other forms of agreement is that the former allows for price fixing while the latter are limited to sharing of vessels and routes.

Consortia are also exempted by most jurisdictions under general exemption applicable to conferences. The European system unlike other jurisdictions provides a separate block exemption for consortia.

In India, the major conference that has operated till recently was the India Pakistan Bangladesh Ceylon Conference (IPBCC) which operated on the Indo-UK route and to which the Shipping Corporation of India was party. The IPBCC has ceased to exist from October 2008, as per the European Commission order, which has repealed the antitrust immunity given to Conferences from and into Europe. India's Competition Law does not provide any exemption to Conferences and therefore they will qualify as cartels and the penalties applicable on cartels will apply on any price fixing agreement between shipping liners.

Shipping companies in India are now considering cooperating amongst themselves through alliances and consortia as is now being done in other countries. However, Indian Competition Law does not provide exemption to consortia's. A detailed examination has to be undertaken to assess whether and how consortia can be exempted from anti-trust scrutiny in India.

ES.2.4 Port concessions

A detailed Model Concession Agreement (MCA) was issued in FY 2006-07 by the government to spell out the policy and regulatory framework to be followed for building and operating port terminals on B-O-T basis.

Concessions become important from the perspective of promoting competition in the sector. If not carefully designed, they may create entry/exit barriers, private monopoly or lead to dominant position of the concessionaire, which is prone to be abused. Also if not kept away from the collusive process, concessions may affect the competitive environment. There are at least two important aspects to be considered while designing and granting concessions. The first is the concession granting process and the second one is the implementation of concession agreement.

ES.2.4.1 Concession granting process: Competition issues

ES.2.4.1.1 Restricting number of bidders for the Stage 2 of bidding

For privatization of berths and terminals, a two-stage bidding procedure is followed. Stage one involves qualification based on experience and financial strength. Stage two requires qualified bidders to submit technical proposal and the price bid. The government policy on bidding criteria for cargo terminals recommends that the number of bidders for large infrastructure projects be restricted to six. The stakeholders in the port sector are of the opinion that short-listing only five to six bidders based on their financial strength and past experience would limit competition in the sector. Players, who are small in comparison to some of the bigger international operators, may find it difficult to get short-listed for the second stage, which will prevent them from entering the in terminal operation business.

ES.2.4.1.2 Collusive behaviour of bidders

According to the stakeholders, there have not been any reported cases of collusion between players during the bidding process. Stakeholders are however concerned that there is no established mechanism in the bidding process to check collusive behaviour in future.

ES.2.4.2 Concession conditions: Competition issues

ES.2.4.2.1 Employment of existing labour: Entry barrier

The present policy of taking over the port labour is a major deterrent in attracting private investment in major ports. The concessionaire has to employ the existing personnel/ labour as per the given conditions. The concessionaire has to ensure compliance with all labour laws. Also, private investors at major ports cannot implement their own employment policies; the labour conditions in the concession agreements, therefore, discourage entry of private players in terminal operation business.

ES.2.4.2.2 Expertise of shipping companies not considered during bidding: Entry barrier

Shipping companies have raised concern that their past experience in marine activities is not acknowledged and considered during the bidding procedure. According to them, this poses an entry barrier for their admission into terminal operation business.

ES.2.4.2.3 Other possible entry barriers:

1. The traffic risk is with the concessionaire and the concessionaire needs to unconditionally guarantee annual cargo handling of the levels set out in the concession agreement.
2. At the end of the concession period, the terminal facility reverts to the port trust free of cost. This clause could deter few private players from entering.
3. Few government decisions may also act as entry barriers. As a case, the government intervened during the bidding of JNP's third container terminal. P&O Ports was not allowed to bid for the third private terminal, the reason being that any player who has won the last bid in a port shall not bid for the next terminal so as to prevent occurrence of its monopoly in that port/region. Fundamentally this argument is pro-competition; however, the manner in which it was done limited competition during bidding. This decision taken with the intention of avoiding monopoly situations at ports/regions should have been a policy decision built into the RFQ document that should have been followed in subsequent bidding of terminals.

The government needs to revisit some of the clauses of the MCA in light of their impact on competition in the sector. It may also need to oversee that the process of awarding projects is transparent and fair to all.

ES.2.5 Port corporatization model

Most Indian ports traditionally operated under a service port model wherein all operations, services and facilities were provided by the port authority. After 1996, the government has gradually tried to transform port management from service port model to landlord model. The landlord model encouraged by the government envisages that the port authority will be responsible only for the regulatory functions and infrastructure while private enterprises will perform all operational and cargo-handling activities, generally operating under leases.

Recognizing that port operations cannot be made efficient or cost effective unless ports are encouraged to operate on commercial lines, GoI as part of the 1996 policy guidelines, substantially increased financial and other powers of the port trusts. It also took a decision that all new ports will be set up as companies under the Indian Companies Act and the existing port trusts will also be gradually corporatized. Accordingly, the 12th Major Port at Ennore has been set up as a company under the Companies Act, with the conservancy functions being exercised by the Madras Port Trust. However, corporatization of existing port has not been undertaken so far. The Bill to convert

the other 11 major ports into corporate entities has been stuck in Parliament for more than a decade as lawmakers are divided over the issue. The corporatization model for Indian ports holds a lot of potential in improving the overall performance of the sector. It should hence be pursued and adopted by the government. CCI may like to take up it as an advocacy issue and hold discussions with the Department of Shipping to promote the corporatization model for Indian ports.

ES. 2.6 Labour issues and competition in ports sector

There are a number of labour related issues in the port sector.

Typical problems include overstaffing, outdated and inefficient work rules, poor skills and training, inflated pay scales, and unreliability, which contribute to high costs and inefficient operations in many ports. The issue of port labour becomes relevant for competition in ports sector from two perspectives. First, to see if current labour laws and institutions create a barrier for private sector entry in terminal operation and oppose the privatisation/corporatization of terminal operations. Second, if the ports/terminals serving the same hinterland and already facing competition are affected by efficiency/ inefficiency of labour in their ability to compete.

ES.6.1 Labour practices: Entry barriers for private players

ES.6.1.1 Entry barriers and opposition to privatisation/ corporatization

The provisions of the Dock Workers (Regulation of Employment) Act 1948 are highly protective of rights of workers and are considered to be a roadblock from the standpoint of both corporatization and privatisation of ports. Moreover, the protection provided to dockworkers has led to various malpractices such as speed money, over manning, low productivity, idle time, etc. The present policy does not provide for an exit policy for labour at the existing terminals and therefore, acts as a disincentive for private investment. Further, the unions at the ports are strong and attempts to privatise are opposed by them.

The private operator's liability to absorb existing labour is an entry barrier for private players (also established through stakeholder interactions). According to a few stakeholders, the requirement that privatized Indian port operations must function within the existing labour laws alone is a major detractor for prospective bidders.

ES.6.2 Labour inefficiency: Impact on inter-port and intra-port competition

The main issue in Indian ports with respect to labour inefficiency relates to the difference in manning scales at different ports. The manning scales evolved through negotiations with labour unions decades ago have not changed, though modern cargo handling techniques have been introduced during this period. Current manning scales at ports also bear no relationship with need and work output, thereby severely affecting port productivity. The difference in manning scales between various ports/terminals affects the ability of the ports/ terminals to compete in their relevant geographical/ product market.

There is an urgent need to revise the norms of output and the manning scales so as to optimise deployment of labour. This requires extensive manpower training to enhance skills and managerial capabilities. CCI may like to organize discussions with the Ministry, port authorities, state port departments, private operators, labour unions, DLBs etc. and take this as an advocacy issue as it has significant bearing on competition in the ports sector.

ES.2.7 Regulation in Indian Ports and competition

ES.2.7.1 Identifying regulatory barriers in the Port Acts and guidelines

In India, the major ports are governed by the Major Port Trust Act, 1963 and the non-major ports by the Indian Ports Act, 1908. The Major Port Trust Act has been amended to allow private participation. A review of the provisions of these Acts does not bring out any specific clause that would go against the competition in sector.

Under the 1996 policy guidelines, the government adopted the concept of landlord ports, and gradually secured private participation in the provision of port services. The guidelines identified areas where private sector participation would be allowed within the port sector. The guidelines themselves do not impede competition but the reform model that has emerged subsequently does not fully agree with the intention of creating a level playing field. Although, the port trusts were expected to work on a landlord port model under the MPTA Act, the same has not been implemented completely. Many port trusts still operate one or more terminals at the ports and compete with private terminal operators. This could eventually lead to a situation where the landlord port could refuse access to basic infrastructure to competing terminals.

ES.2.7.2 Regulatory Agencies in the sector: Competition related powers and functions

The existing regulatory mechanism in Indian ports comprises of the following agencies:

1. Port trusts/authorities;
2. State Maritime Boards/ State Port Departments;
3. Department of Shipping, Ministry of Shipping, Road Transport and Highways; and
4. Tariff Authority for Major Ports (TAMP)

None of these regulatory agencies have a specific mandate to promote competition in the ports sector though some of their decisions may have a bearing on competition indirectly. TAMP was set up as an independent tariff regulator after the decision to privatize port terminals was taken. The aim was to move towards competitive pricing and provide a level playing field to all the players at least on matters of pricing. However, TAMP has not proven to be effective in ensuring the same.

ES.2.7.2.1 Powers and functions of TAMP on competition related issues

TAMP's mandate is restricted to tariffs for port services at the major ports, but the government retains the right to invalidate TAMP's tariff rulings. There are no provisions for enforcing TAMP orders. In terms of role and functions, following issues become important from the perspective of competition in the Indian ports sector:

Scope of TAMP

1. TAMP can regulate only tariff issues. It has no other regulatory powers, which makes its role very restrictive.

Jurisdiction of TAMP

1. TAMP's purview on tariff issues is limited to ports covered by the Major Port Trust Act.
2. Limited jurisdiction of TAMP raises issue of level playing field between major ports and minor ports, and between corporatized ports and port trusts.

TAMP's decisions: Issue of level playing field and rewarding efficiency

1. NSICT case: It has been alleged that TAMP decisions led P&O extract inadmissible returns (over 100%) on its equity as against the permissible levels (20%). The decisions put P&O in an advantageous position where it could extract very high levels of returns, thus raising the issue of level playing field (Salhotra B, 2007).
2. The three terminals at JNPT i.e. the terminal owned by the trust, Gateway Terminals India (GTI) and DP World, have different tariffs (Source- Stakeholder interactions).
3. TAMP is also affecting the working of private terminals. For instance, the public terminal at JNPT is allowed a lower minimum number of days of storage while Nhava Sheva International Container Terminal (NSICT) has to accommodate goods for storage for a longer duration (Source -Stakeholder interactions).
4. Tuticorin case: There is no incentive for the operator to increase the throughput. In the case of Tuticorin port, TAMP reduced the tariffs after the operator managed a higher traffic (Source- Stakeholder interactions).

ES.2.7.2.2 Gaps in the regulatory framework in Indian ports sector

The regulatory framework in Indian ports sector lacks a single independent agency that:

1. is responsible for regulating all relevant issues in the sector including competition issues;
2. has a jurisdiction over all major and minor ports; and
3. ensures a level playing field to all players in the sector.

ES.2.7.2.3 Regulatory framework with a focus on promoting competition

The regulatory framework of the ports sector should aim at eliminating barriers to competition and allow market forces to impact behaviour of the players. This can be achieved through two regulatory mechanisms, access regulation and price regulation. In the former, the access of firms to the facilities essential for competing in the market is regulated. In the price regulation mechanism, prices along with the quality of services are regulated so as to control the behaviour of private investors.

There have been different practices and approaches for port competition and regulation in different countries. For example, in Mexico, the Ports Law states that the Federal Competition Commission shall determine when to establish tariff regulation. If the Commission deems competition inadequate, it may stipulate rate of return regulation or price controls to prevent monopolistic exploitation. The World Bank Port Reform Toolkit also calls for a regulatory framework in the ports sector that focuses on promoting competition.

ES.2.7.2.4 Regulatory options for Indian ports sector

The port regulation should ideally promote competitive environment. This is currently missing in Indian ports sector. There are different regulatory agencies with different jurisdictions and no specific mandate for competition regulation. TAMP regulates only tariffs and its jurisdiction is limited to the major ports. It does not have any competition related powers. The gaps in the current regulatory set up in Indian ports sector raise the following two issues:

1. Should there be a newly formed independent sector regulator for the ports sector or TAMP's scope and jurisdiction should be increased to make it responsible for overall port regulation?
2. In either of the above cases, should this independent regulator be entrusted with competition related powers?

From the competition perspective, this study deliberates only on the second issue i.e. should the regulator in Indian ports sector (either TAMP with increased power or newly formed sector regulator) be entrusted with competition related powers. "The legalists argue that competition law covers the entire economy and that the competition issues should only be addressed by the authority set up for the purpose. It is further argued that the sector regulators have a narrow technical focus and their proximity to the industry being regulated makes them more vulnerable to capture" (Anant T.C.A and Sundar S 2005). "Pragmatists, on the other hand, argue that the sector regulators are best equipped to address competition issues in the regulated sectors as they have a better understanding of the sector. Sector regulators also tend to act on the principles of public interest rather than on the guidelines and rules that bind the competition authority and introduce an element of rigidity, say, M&A issues" (Malik S et.al, 2007).

Ideally, it should be left to the competition authorities to promote and maintain competition across the entire economy. However, in most jurisdictions including India, competition authority has only ex-post powers to enforce and maintain competition i.e. after there has been a violation of competition provisions. Also promotion of competition by the competition authority is restricted to only advocacy. In emerging economies like India where infrastructure services were traditionally provided by public utilities or government departments, it is necessary for a regulator to introduce competition and create a level playing field for new entrants; this needs to be done ex-ante. A sector regulator who has a better understanding of the sector issues is perhaps best equipped to

introduce competition in this sector as in other infrastructure sectors. There could always be a 'sunset' clause that provides for the withdrawal of competition power from the sector regulator once competition is well established in that sector.

However, in adopting this approach every effort must be made to see that interface between the sector regulator and competition authority is clearly defined and the relevant laws provide for structured collaboration between the two.

ES.2.8.Tariff regulation: Competition issues in pricing

The port tariff structure has historically varied from port to port and was not based on rational principles. TAMP, which was set up in 1997 tried to remove some of these anomalies by coming out with uniform principles of tariff fixation and modalities, which would be, followed at all the major ports. The cost plus method is used for determining port tariffs.

Cost plus method, it is argued, does not reward efficiency. Under the cost plus approach, TAMP has the power to not allow those costs which were a result of port inefficiency. However, there were no prescribed standards of efficiency and performance standards related to various cost. These concerns were partly rectified under the revised Tariff Guidelines of 2005 where it is decided that cost reduction due to efficiency improvement would be shared between users and operators.

A second tariff related issue with a bearing on competition is the issue of revenue share. It was decided by the Ministry of Shipping, that from 2003 onwards, revenue share (with the landlord port) would not be considered a pass through in tariffs. Maximum revenue share is the basis of selecting the winning bid amongst private players for developing a terminal/port. Players are competing aggressively on the revenue share to win projects and are trying to sustain this high level of revenue share by increasing costs (through unnecessary investment). This has implications on tariff and perhaps in order to address the anomaly the Ministry of Shipping has now come out with new bidding guidelines, under which tariffs would be set upfront before bidding. This tariff would be a cap, based on normative costs and bidders would then be invited on the basis of revenue share.

Port tariffs in India are not comparable across ports, primarily because of the cost plus method adopted for tariff. Tariffs have a direct co-relation with inter-port and intra-port competition. Since end users do not have much choice in switching terminals, they are bound to pay the price asked by the port operator. Consumer demand in a way is a "captured" and restricted at a port.

Another important competition issue with respect to tariffs is the issue of predatory pricing. In India, the tariff regulator sets the tariff cap based on the cost plus method. The terminal operator is free to charge below this cap and the regulator does not intervene in such cases. A dominant player can indulge in predatory pricing in order to drive out competition and the tariff authority will not be able to intervene. In such a scenario only the Competition Authority can intervene.

Predatory pricing is a possibility for not only private players but is in fact a greater possibility for landlord ports. The landlord ports in India that provide access to basic infrastructure all terminal operators is also a terminal operator in some instances, competing with the private terminal operators (as in JNPT). It is in a position where it can hike up prices for basic infrastructure and use it to cross-subsidise lower tariffs for its terminal operations business.

In the existing scenario, where demand far exceeds capacity, players do not need to lower tariffs to attract customers. However, in future, as capacity increase and there is greater competition amongst players, predatory pricing may become an issue. In the long run, tariff trends would have to be analysed for possibility of predatory pricing. It could also be deliberated whether CCI should retain its authority to examine cases of predatory pricing, or should the tariff regulator be given powers to examine such issues.

ES.2.9 Advocacy issues for CCI

Based on our analysis of the competition issues in the India port sector, following are some of the advocacy issues that can be pursued by the CCI with policy makers and the industry for encouraging competition in this important sector.

ES.2.9.1. Inter-port and intra-port competition

In order to encourage inter-port and intra-port competition it is necessary to keep in check any possible dominance by one player at a port or on a coastline. The government should be careful while awarding projects such that a single player is not granted too many concessions at the same port or on the same coastline. CCI may take up this as an advocacy issue with the Ministry of Shipping.

Inter-port competition requires strengthening of rail and road connectivity as well as infrastructure availability at the other ports, especially the minor ports. CCI can organize meetings with port authorities, rail and road developers, and policy makers in order to emphasise on these needs.

Intra-port competition may be affected by the advantage that the landlord port has over infrastructure, which it may use to the benefit of its own terminal rather than that of the competing private player. It may be necessary to advocate that the landlord port moves away altogether from terminal operations business. Alternately CCI needs to explore the possibility of imposing 'Essential Facility Doctrine' in the future at ports in order to provide open or equal access to infrastructure facilities to all operators.

It is generally agreed that service and efficiency levels at all the terminals has improved at JNP after the introduction of more players. CCI should undertake/commission a study to assess whether and to what extent services have improved at the three JNP terminals. Thereafter, it can advocate the need for promoting intra-port competition at ports.

ES.2.9.2. Port concessions

There are a few issues related to the port concession granting process and provisions in concession agreements, which may create entry barriers for private players. The condition of limiting the number of bidders in the second stage of the bidding process may prove to be an entry barrier for small players with the result that the large players get selected over and over again establishing their monopoly.

The concession agreement also sets a condition for absorbing the labour of an existing terminal and offering them wages not below the existing standards. This may deter investment in the sector. Further the clause on termination of concession, whereby at the end of concession period the terminal facility reverts to the port trust free of cost, may also deter investment.

There is a need to revisit these issues in the process of granting concessions and in the concession agreements in order to ensure that all players have an equal opportunity to enter into port activities. CCI may like to take up these as advocacy issues with the port trusts/ministry.

ES.2.9.3. Corpportization model for ports

The corpportization model for Indian ports holds a lot of potential in improving the overall performance of the sector; the government should hence encourage it. CCI may like to take up it as an advocacy issue and hold discussions with the Department of Shipping, MoSRTH to promote the corpportization model for Indian ports.

ES.2.9.4. Labour issues

There are issues of uncompetitive manning scales at some of the ports as a result of which tariffs

become uncompetitive. The existing labour policies are protectionist and exit of labour is not possible. These tend to make the sector unattractive for private players. CCI may like to organize discussions with the Ministry, port authorities, State port departments, private operators, labour unions, DLBs etc. and take up these issues

CHAPTER 1

TRANSPORT SECTOR IN INDIA : AN OVERVIEW

For the last quarter of a century, the Indian economy has grown at an average rate of about 6% per annum. The momentum has further accelerated since 2002-03 as the Gross Domestic product (GDP) growth has averaged 8.10% and the economy grew at 9% and 9.20% in 2005-06 and 2006-07 respectively. This growth has led to a spatial shift in the concentration of economic activity, resulting in a higher demand for transportation services. Simultaneously, there has been a qualitative improvement in the transport facilities with the expansion of multi-modal system and greater private sector participation.

Transport is the lifeline of any developing economy. The growth and development of any nation truly rests on the growth of its transport sector. Transport provides access to opportunities, supports economic activities, and facilitates social interactions. India's transport sector is large and diverse and caters to the needs of about 1.03 billion people (Gol, 2001).

Transport sector can be classified under three broad categories depending upon the lead distances, namely urban and sub-urban; regional and national; and international transport. The transport system in the country comprises of a number of distinct modes and services including roads, railways, air, inland water transport, coastal shipping, and pipelines.

The transport sector's contribution to India's GDP⁴ was 6.6% in 2006-07. Out of which, share of railways stands at 1.2% for the period and has remained unaltered for the last decade. Transport by other means (road, air and water) constitute 5.4% of the GDP. Road sector has emerged as the most dominant sector amongst all the modes (National Account Statistics, 2007). The sector has registered an impressive growth in the last few decades, however this growth is far from adequate. Following are some of the challenges facing the Indian transport sector as highlighted by the Task Force on Integrated Transport Policy:

- The net ton kilometres per route kilometre for the railways is 4.21 million in India whereas for China the figure is 23.4 million.
- The Indian road network is seemingly very large. However only 46% of the roads are paved and only 20% of the paved roads are estimated to be in good condition.
- The transport system of the country is currently saturated on both the main rail and road links and capacity shortages are a serious constraint for overall growth.
- The high-density corridors of rail and road linking metro cities and ports are completely choked. Out of the total route kms. identified for four laning, around 50% is already carrying traffic that is more than twice its capacity.
- About 14000 kms of National Highway requires four laning, while 10000 kms requires widening from single lane to two lane to facilitate normal flow of existing road traffic.
- The average productivity of a truck is 200 kms a day as against 350-400 kms that would be possible through reduction of congestion.

In terms of modal share, roadways have a lion's for both passenger as well as freight movement. In terms of passenger movement (passenger kilometre), the share of roads, railways and air is 86.70%, 12.90% and 0.40% respectively. The shares in freight movement (tonne kilometre) for roads, railways, air and water transport is 61.20%, 38.60%, 0.02% and 0.20% respectively. Figures 1.1 and 1.2 give a graphical representation these shares.

⁴ Total GDP at factor cost (at 1999-2000 prices) for the year is Rs. 2604532 Crore. Share of transportation stands at Rs.170044 Crore (Railways at Rs. 30154 Crore and "transport by other means" stands at Rs139890 Crore. (Source: National Account Statistics, 2007))

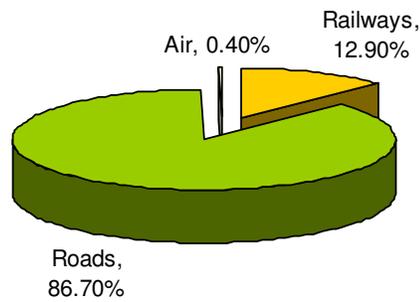


Figure 1.1: Share of roads, railways and air in passenger movement (passenger kilometre)
 Source: Planning Commission (2007), Working Group documents on transport

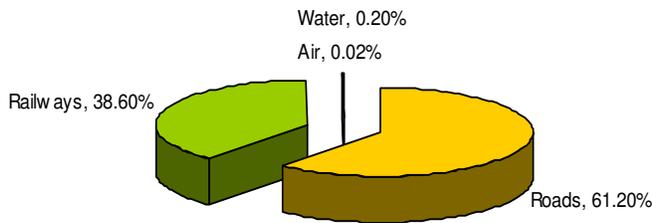


Figure 1.2: Modal share freight movement (tonnes kilometre)
 Source: Planning Commission (2007), Working Group documents on transport

The modal-mix has changed significantly over the years with the share of Railways declining consistently and that of roadways increasing. Figure 1.3 and 1.4 shows the change in trend in passenger movement and freight movement respectively.

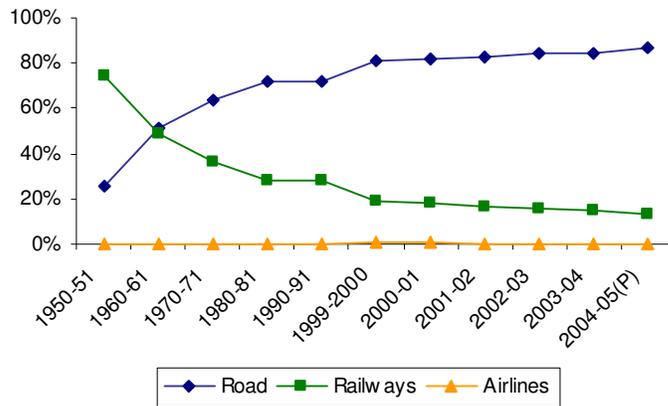


Figure 1.3: Trend in change in mix of modal share in passenger movement
 Source: Planning Commission (2007)
 P: Provisional

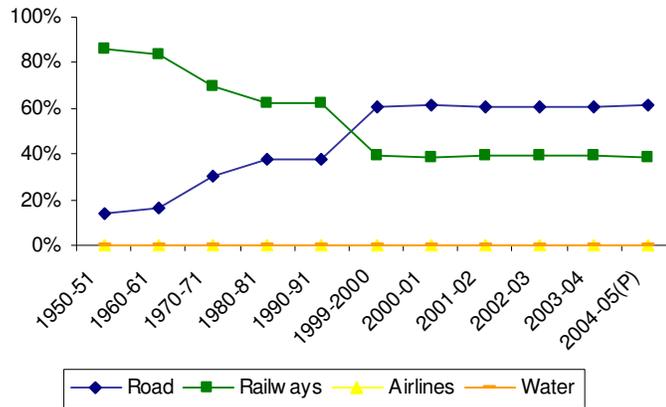


Figure 1.4: Trend in change in mix of modal share in freight movement

Source: Planning Commission (2007)

P: Provisional

The above figures clearly show that the share of railways in transport sector is reducing and that of roadways is increasing. The Railways sector has witnessed unmet customer expectations and lack of adequate services in both passenger and freight and at the same time competitive servicing from other sectors. Railways have failed to meet customer demands of door-to-door movement (and not just station to station), just-in-time deliveries and value added services like storage, handling, insurance etc. A similar trend of decline in the share of railways has been recorded in the India Infrastructure Report 2008: Business Models of the Future, according to which the Indian Railways had 35% of the non-bulk, higher value trade in 1974-75 which has decline to only 11% in 2005-06 and only 8.5% in 2008. Therefore, it is necessary to study if there are any issues that inhibit the use of railways as a mode of transport and if introduction of competition in some areas can enhance its use.

In the case of ports, it must be understood that demand for ports is derived demand (i.e., derived from the demand for trade) and cost reduction usually has a beneficial effect on trade. Indian ports face issues like pre-berthing delay, high vessel turn around time, low equipment utilization, low labour productivity and high manning scales. In the case of ports, it is imperative to study if there is any inefficiency that add to the overall transaction costs and can be reduced by introduction of competition.

1.5 Methodology

The methodology adopted for identifying and analysing competition issues in the railways and ports sector is a combination of literature survey, interaction with stakeholders and interest groups, peer reviews and analysis of findings.

The literature review involved in-depth study of the sectors, relevant government policies and regulations, potential competition issues and international experience.

To verify the competition issues identified through the literature review interactions with the concerned stakeholders such as senior officials in relevant ministries, private sector players and other stakeholders such as local chambers and industry-specific bodies were held.

At the interim stage of the Report a Consultative workshop was organized by the Competition Commission of India (CCI). Comments were received in the workshop have duly incorporated.

To ensure that the competition issues identified are of relevance to the concerned stakeholders and to maintain consistency across both the sectors the Report has referred to the Competition Assessment Framework (CAF) developed by DFID's Investment Climate Team.

CHAPTER 2 COMPETITION ISSUES IN THE INDIAN RAILWAYS

Indian Railways (IR) is one of the largest and busiest rail networks in the world and is of vital importance to the economic development and social welfare of the country.

Railways traverse through the length and breadth of the country covering 63,332 route kms, comprising broad gauge (45,099 kms), meter gauge (14,776 kms) and narrow gauge (3,265 kms). As the principal constituent of the nation's transport system, IR owns a fleet of 2, 16, 717 wagons (units), 39, 236 coaches and 7,739 locomotives and operates 14, 444 trains daily, including about 8,702 passenger trains. During 2006-07, it transported 6,219 million passengers registering a volume increase of 8.6% over the previous year. In the same period, IR loaded 727.75 million tonnes of revenue earning traffic and achieved 481 billion net tonne kms of freight output.⁵

Planning, management and operations of railway in India is governed by the Railway Act, 1989. IR functions under the Ministry of Railways headed by the Minister for Railways, assisted by two Ministers of State for Railways. The management and policy-making powers are vested with the Railway Board, which comprises the Chairman, Financial Commissioner and five Functional Members. The Railway Board supervises and controls the functioning of zonal railways, metro railway (Kolkata), the production units, construction organizations and other railway establishments.

The IR system is managed through zones and operating divisions. For administrative purposes, IR is divided into seventeen zones⁶. For day-to-day management, the zones are further divided into 67 operating divisions each under a Divisional Railway Manager. There are six production units⁷ under IR engaged in manufacturing rolling stock, wheels and axles and other ancillary components to meet IR's requirements. These production units are managed directly by the Ministry of Railways and the general managers of these production units report to the Railway Board.

2.1 Inter-Modal Competition

According to theory, Inter-Modal competition can effectively induce railways to bring in efficiencies and customer orientation in their services as other modes of transport (roads and waterways) can be effective substitutes for rail services in both freight and passenger markets. Given the existence of intense Inter-Modal competition, railway may be termed as a natural monopoly without monopoly power in many goods segment⁸, specifically for high value non-bulk commodities, as consumers can switch to alternative modes if railways are unable to meet their expectations. Also, the competition from alternative sources can be severe, as both roads and water sectors tend to have relatively low barriers to entry and therefore structured fairly competitively. In many European countries, inter-modal competition is significant in all except a few rail markets and the degree of inter-modal competition is such that little or no regulation of the rail sector is required at all (*even though the nature of railways industries monopolistic*)⁹. Moreover, during rail reforms in select OECD countries little attention was given to the creation of competition within the rail sector because it was thought that inter-modal competition was sufficient. The presence of inter-modal

⁵ Source: Rail Year Book 2006-07

⁶ Namely, Northern Railway, North Eastern Railway, Northeast Frontier Railway, Eastern Railway, South Eastern Railway, South Central Railway, Southern Railway, Central Railway, Western Railway, South Western Railway, North Western Railway, West Central Railway, North Central Railway, South East Central Railway, East Coast Railway, East Central Railway, and Konkan Railway

⁷ The Production Units are:

1. Chittaranjan Locomotive Works, Chittaranjan
2. Diesel Locomotive Works, Varanasi
3. Diesel-Loco Modernisation Works, Patiala
4. Integral Coach Factory, Chennai
5. Rail Coach Factory, Kapurthala
6. Rail Wheel Factory, Bangalore

⁸ However, in goods segment that requires bulk transport (like coal) over long distances railways may turn out to have a monopoly.

⁹ Railway Reform in China, Promoting Competition
Seminar on Rail Reform in Beijing 28-29 January 2002, Summary and Recommendations of an OECD/DRC

competition has been the dominant force behind the deregulation of rail freight tariffs in Western Europe and the United States over the past twenty-years¹⁰. In New Zealand, the rail sector was privatised as an integrated monopolist without any regulation to control market power.

In the decade after independence, rail mode occupied a dominant position in the Indian transport sector with 78% share in freight and 60% share in passenger services (1950-51). Since then, absolute traffic on both rail and road has increased significantly owing to a number of factors such as steady economic growth. However, there has been a continuous decline in the share of rail (both in passenger and goods traffic) in the total traffic. Between 1970-71 and 2004-05 share of railways in freight movement has fallen from 70% to 39% and in passenger from 36% to 13%.¹¹

No doubt, road mode has inherent advantages of convenience, flexibility, and adaptability and in many cases it is qualitatively superior to the rail mode; nonetheless, its dominance may not imply a socially desirable and environmentally friendly modal split. Considering that rail and road are the major modes of transport and given the higher rate of utilisation of capacity rail is more energy efficient (*this is highlighted by the fact that the energy consumed by railway for freight movement is about 440 Joules/KgKm, which is only about a quarter of energy consumed by trucks (1,836 Joules/KgKm) to transfer the same freight*¹²), less polluting and more economical mode of transport, particularly, in movement of freight traffic over long hauls, it may be desirable to raise the share of railways in the total traffic¹³. Therefore, railways are a cleaner mode of transport and promoting its share aids in addressing environmental concerns often raised against the transport sector. Moreover, India's dependence on imported crude oil to meet this demand is around 75%, expected to increase to 93% by 2030.¹⁴ This has severe implications on the ever-growing energy security concern of the country. Efforts need to be made to decrease the dependence of the transport sector on petroleum products; and increasing usage of railways vis-à-vis roadways would definitely facilitate in meeting the above objective.

From the perspective of policy planning, the transport system must be viewed as an integrated structure in which various modes complement each other; interface appropriately and where ever possible pose healthy competition to each other. This competition must be conducted within the framework in which each mode is able to operate on a "level playing field" so that comparative advantages and economic efficiencies are reflected in the user costs.

Several factors have contributed to the decline of railways in both passenger and freight segment. First, there has been substantial development of motorized road transport both for passenger and freight movement. The greater share of the road mode in transport demand is explained by inherent advantages in terms of accessibility, convenience, and door-to-door delivery. Other factors such as under-investment in rolling stock and line haul capacity on the rail mode, along with the lack of a customer-oriented approach led to an increasing shift towards the road mode. According to a nation-wide survey of users of rail freight services conducted in 1997, the results of which are mentioned in the Rakesh Mohan Committee Report, the Indian Railways was rated below roadways on many parameters like, reliability, availability, price, time, connectivity, suitability, damages, information sharing, adaptability, cost-friendliness, negotiability, access to officials, ease of payment and claim time. Also, the development of expressways and six lane highways have only led to an increase in the level of competition posed by the road sector.

The decline of the market share of Railways vis-à-vis roadways in freight can also be explained through the ratio of its freight fares to its passenger fares, which is one of the highest in the world. Much of the profit generated by the railways is through freight movement, which goes towards the subsidising passenger transport. Large scale cross subsidisation of passenger services by overcharging certain categories of freight diverts freight traffic towards road thus preventing the

¹⁰ Railway Reform in China, Promoting Competition

Summary and Recommendations of an OECD/DRC Seminar on Rail Reform in Beijing 28-29 January 2002

¹¹ TERI Energy Data Directory & Yearbook 2007

¹² www.indiabudget.nic.in, accessed on 1st of Jan 2008

¹³ Planning Commission (2001) report of the Task Force on INTEGRATED TRANSPORT POLICY

¹⁴ PSA/2006/3, "National Energy Map for India, Technology Vision 2030", Study by TERI for Office of the Principal Adviser to the Government of India.

railways from performing according to their comparative advantage¹⁵.

Transport models over the last few decades have been driven by cost reduction and increased speed of freight movement. The average speed of a goods train was 17.4 Km/hr in 1950-51 and this has increased to 22.7 Km/hr in 1989-90. At present goods trains- average is 24 km/hr compared to 47 km/hr in case of passenger trains which are very low as compared to other developing countries¹⁶. Moreover, there has been an enormous development in multi modal system of transport involving containerisation of freight. In this segment road transport has proved to be more flexible than rail transport in adapting to the needs of the economy, thereby, specializing in the transport of high-value, non-bulk products. The neglect of containerisation of freight in the past decades has also led to the railways losing its share in the market.

As highlighted in the Rakesh Mohan Committee Report, due to lack of good customer oriented services the railways has been losing out to roadways. The issue of quality of service is more crucial in the freight segment because it is one area in which the railways seem to have a greater environmental and financial advantage over roadways than in passenger transport. From our discussion with the users of Railways freight service the study has found out that these users are dissatisfied with the level of service provided by the Railways. Therefore, in addition to improvement in efficiency, it is also necessary to strengthen the customer service. There have been improvements during the past years; the stakeholders perceive that Railways has a lot to do in this segment.

A number of studies have found that the externalities of rail transport are lower than those for road transport¹⁷. Thus, attention should be given to ways of internalising these externalities of road transport so that each mode of transport is made to bear the social costs. The pricing of transport services should take into account the costs of such factors as pollution and congestion. Such a pricing mechanism can expose the market to fair prices, which include the social costs and therefore can help railways gain its lost share.

Although as the theory suggests the pressure created by Inter-Modal competition is enough to bring efficiencies in the railways sector, however, all around the world, more often than not, Railways has been unable to compete with other modes owing to low efficiency, social obligations, political interventions and lack of commercial outlook. But for certain bulk goods (such as coal, steel) owing to the nature of these products, railways may be the only transportation option available to customers, especially over long distances. These commodities are required in huge quantity by the consumer and given the long distance of travel, Railways may turn out to be the only mode of transport, hence, creating a monopoly situation.¹⁸ Thus, a broad consensus has emerged that in such railway markets; the introduction of intra-modal competition (between different railway competitors) might prove useful to increasing efficiency and customer satisfaction. Competition acts as a process in increasing efficiency in the sector. Increasing private sector participation, decoupling operations and infrastructure construction and increase in number of players in the market would lead to better customer service, delivery and improved quality of service which may lead to a shift of consumers from road to railways.

2.2 Private Participation in Indian Railways: Case of Container Movements

With the economy growing at a robust growth rate in the last few years, there is tremendous pressure on current infrastructure. The railways being one of the key modes for passenger and freight movements, requires substantial investments in order to keep pace with the high growth rate

¹⁵ Task Force on Integrated Transport Policy, Planning Commission

¹⁶ www.indiansteelalliance.com accessed on 18th August 2008

¹⁷ Government of Australia (1995). Greenhouse Gas Emissions from Australian Transport: Long-term Projections, Report 88, Bureau of Transport and Communications Economics. Government of New Zealand (1996). Land Transport Pricing Study: Safety Externalities, Discussion Paper, Ministry of Transport.

¹⁸ For the Financial year 2006-07, Coal held the major share of 39% out of total freight earnings. Total share of heavy bulk goods is 90%. Source: Rail Year Book, Indian Railways

of the economy. Also, extensive competition with the road and aviation sectors is driving IR to improve their infrastructure and efficiency. Recognizing the need for substantial financial capital and better managerial implementation and execution in infrastructure building, IR has taken steps to encourage private sector participation in the sector.

In the past, Indian Railways has made several attempts to encourage private participation in areas such as catering, wagon ownership and leasing and joint ventures for rail infrastructure projects. These efforts were, however, limited in scale and scope. Railways budget (2008-09) plans to invest Rs 2,50,000 crores in various projects in coming 5 years. Of this, Indian Railways plans to raise Rs 1,00,00 crore through Public Private Partnership (PPP). These will include projects for provision of world class facilities at metro stations, setting up state of the art rolling stock production units and construction of multi-modal logistics parks.

Indian Railways has recently opened container movement in India for private sector participation. Earlier, it was exclusively reserved for Container Corporation of India (CONCOR). CONCOR, a public sector enterprise under the Ministry of Railways, Government of India, started operations in 1989, and was set up with the objective of developing modern multimodal transport logistics and infrastructure to support India's growing international trade as well as to encourage containerised cargo movement within the country.

2.2.1 The model

Under the mechanism introduced for container segment, applicants have to pay a registration fee while applying. All the entrants including CONCOR are required to sign a Model Concession Agreement (MCA) with Indian Railways. The notable features of the MCA are as follows:

- Interested companies can take route-specific or all-India permission by making a one-time payment of Rs 10-50 crore depending upon the extent/scope of service.
- Operating permission would be granted for 20 years, which can be further extended to another 10 years to transport export-import (EXIM) and domestic traffic.
- The private operator will have to make their own arrangements for a rail-linked Inland Container Depot (ICD) by leasing it from ICD owners or by creating their own.
- The private operators also have to procure flat wagons for transporting containers, whereas Railways would provide locomotives.
- Final freight tariffs for the containerised traffic will be left to the individual operator.
- Players can exit operations by transferring the permission to another eligible operator.

The primary earnings for the Railways would be through haulage charges that the parties would have to pay on a per-container basis.

2.2.2 Current scenario

It has been just over a year since the Indian Railways granted licence to 14 private companies to handle container transport operations (including CONCOR)¹⁹. In early 2008, one more company joined in adding the total number to 15. Presently, 146 trains of CONCOR and 44 container trains of other container operators are functional. The number of trains run by other operators is expected to increase to 50-55 by the end of this year. Presently 60 container depots are operational including 3 constructed by private parties. It is expected that eight container depots by Container Corporation and 40 by other operators would be developed in the coming years²⁰.

Since the entry of private operators in the market, the dynamics and market share has started to change. The private firms compete with CONCOR mostly for cargo meant for exports or imports, and the railways segment of container movements has increased pressure on the roadways for a higher share in domestic cargo movement. The total container traffic is expected to be 26 million

¹⁹ January 4, 2007

²⁰ Source: Railways Budget. 2007-08,

tonnes in 2007-08 including 2 million tonnes contributed by new operators²¹.

The railway sector's share in transport vis-à-vis roadways' is also expected to change as a result of private container expansion. Rail transport currently accounts for nearly 25 per cent of the container market, which the planners and IR aims to increase to 50 per cent²² in future. To achieve this goal, IR has invited private players to enter the business. Out of the total freight market the railways, including CONCOR and the private players, account for 35 per cent or 794 million tonnes. According to the Railways Budget, this is expected to go up to 40 per cent by the end of this year²³.

2.2.3 Entry Barriers

A barrier to entry does not have to prevent firms from entering a market forever in order to affect competition and consumer welfare, sometimes merely retarding the arrival of new firms is enough to limit competition. Although, a total of 15 players have bought the licence for operations in the container sector, only 7 have started operation after more than a year of opening up of the sector²⁴. Therefore, it is necessary to analyse the factors that are limiting the scale of operations for these private entrants. The sector has been recently opened for private participation and it may be too early for an exhaustive study with respect to entry barriers. Based on detailed discussion with stakeholders and response of perception survey conducted by TERI a number of issues have been identified, which have been limiting the scope of operations of private sector in this sector. These are discussed below:

2.2.3.1 Land

Despite having the requisite license to operate container trains, 8 of the participants have been unable to start their operation primarily due to lack of terminal facilities and rail-linked ICDs (Inland Container Depot). The Ministry of Railways, in its policy mentions that the operators should build their own ICDs within the first few years. However, stakeholders have expressed concern that cost of procuring land for operations has become a major entry barrier for these private players. According to the estimates of a private operator, it takes roughly about Rs 300 crore²⁵ to set-up and start operations in the container cargo business, at current real estate prices land constitutes the major proportion of this sum. Some stakeholders have also mentioned that with land prices spiralling at strategic places, it is hard to set competitive prices for their services. These ICDs have to be rail linked and therefore land is required at strategic locations and often such areas belong to IR. Private stakeholders stressed upon the need for Government/Railways help in acquisition of land on the same terms as it is given to CONCOR. In a capital-intensive sector such as railways where starting operations require huge capital investment, upfront; facilitating entry into the sector is of vital importance for the policymakers, than to just remove legal barriers to entry.

Association of Container Train Operators (ACTO) has raised the issue with MoR. Officials from IR in their reply to have assured that in future IR will give preference to the container operators while allocating land over other land uses on strategic locations.

2.2.3.2 Competitiveness and Transit Time Guarantee

One of the key concerns of the private players is the competitive pressure applied by the roadways on the railways container movements. The players feel that the scope of profitability in the market will primarily depend on the competitiveness of railway with respect to roads. Private stakeholders expressed their concern over IR not giving them the guarantee of transit time. Transit time guarantee is the assurance by the railways to deliver the container within the stipulated time since

²¹ Railway Budget, 2008-09

²² Study of the operation of container trains on Indian Railways, RITES

²³ Hindu business line, March 21, 2008

²⁴ Figures have been provided by the Association of Container Train Operators (ACTO)

²⁵ This includes setting up one inland container depot unit (ICD) with one lakh standard sized container handling capacity (20-feet equivalent unit or TEU), wagons for 15 rakes to offer daily service, operating costs and handling equipment charges, according to official Pipavav Rail Corporation Ltd (PRCL), Source: Hindu Business Line

the IRs' locomotives within their systems pull the container wagons. Timely delivery of the service is essential to compete with the roadways. The scope of profitability (at least for the initial period) for the private players in the container market is dependent on their ability to win back the lost share in the freight movements. In the absence of transit time guarantee private players are finding it difficult to compete with roads. Private stakeholders also highlighted that they have raised this issue with IR in the past and have even offered a mechanism of 'incentive' for timely delivery of the containers, however IR has not been able to guarantee the same owing to congestion on the trail tracks.

Furthermore, private stakeholders have claimed that although there is no transit time guarantee in the agreement, CONCOR due to its relationship with Railways has been able to ensure the timely delivery of their containers. However, this could not be verified due lack of information and access to relevant data.

IR is of the view that given the congestion on tracks presently transit time guarantee can be given only after the construction of Dedicated Freight Corridors (DFCs).

2.2.4 Lack of level playing field

CONCOR, since its inception, benefits from a close relationship with the Indian Railways.

- Indian Railways owns 63% of CONCOR's equity.
- IR has provided land for construction of terminals.
- The Railways maintains CONCOR's wagon fleet.
- Officers on deputation from the Indian Railways hold senior and middle management positions in CONCOR.

As noted above many of its key operating personnel are on secondment from IR or have previously been employed by the IR. This close relationship between the management levels of both the organizations can unevenly benefit CONCOR as operations in this sector depend on the level of services provided by the Railways. From the interviews with the stakeholders the private players stressed upon the fact that this deep association of both the organization at the manpower level allows CONCOR to have an added advantage while availing the services of IR.

Given the aforementioned facts it is important to raise the issue of 'level playing field', in the absence of which, it is very hard to ensure competition in the market. From the discussions with the stakeholders the following areas have emerged where the present mechanism lacks a level playing field:

- Payment mechanism
- Allocation of land

2.2.4.1 Payment mechanism²⁶

During the stakeholder discussion, private operators were of the opinion that payment mechanism followed by the IR lacks a level playing field and gives an undue advantage to CONCOR with respect to convenience, flexibility and time efficiency. At present, CONCOR pays its haulage charges to the Railways in advance, on a fortnightly basis or has the option to raise a credit of 15 days. On the other hand, new container operators have to follow a longer process and pay haulage charges on a per train basis. As they do not know the precise weight of their goods that has to be carried, they cannot decide on the total amount for which the draft has to be made. Hence, new container operators get their containers weighed in the presence of the Railways' goods clerk and pay the required amount through demand drafts. Such long process for settling accounts is expected to lead to time and resources loss for the affected parties, and may affect their competitiveness vis-à-vis the incumbent. It is suggested that the Indian railways may consider adopting the same process for account settlement.

²⁶ As claimed by the private players in the stakeholder interviews and questionnaire

Officials from IR have stated that given the long relationship with CONCOR the risk of default with latter is less. Moreover, they have assured ACTO that discussion is going on with the new operators to improve the payment mechanism.

2.2.4.2 Allocation of Land

Several of CONCOR's terminals are situated on leased railway-land, which was granted to CONCOR on its inception and owing to old lease agreement, is at a very nominal cost compared to current real estate prices. The new entrants in the sector have to pay a much higher price if they are to procure land given the current real estate prices. Given this tremendous cost advantage it is very hard for the new operators to compete with CONCOR in terms of operational cost. The entrants feel that the Railways should provide them land on the same terms that it extends to CONCOR, which is not the case presently.

Railways has stated several times that it would give preferential treatment, vis-à-vis other land uses, to new container operators while allotting land, so that the entrants can compete with CONCOR in operating cost.

2.2.5 Abuse of Dominance

2.2.5.1 Pricing and Discounts

CONCOR with 95% market share is no doubt in a dominant position²⁷. Most of the present of the built ICD/Terminals used for container purposes belong to CONCOR. Given the enormous infrastructure base of CONCOR, private players feel that it is hard for them to compete with CONCOR in prices of the final services, until they build a sound infrastructure base. At present, private players are simply following CONCOR's lead in setting prices. Stakeholders who were interviewed claimed that as CONCOR owing to wider scale of operation can undercut prices (to retain its customer base) where it feels the competitive pressure and compensate the loss by hiking prices in the market segment where private cannot efficiently compete with the former. Also in order to capture higher volumes, deter competition and gain market share, CONCOR has been increasing discounts on the high traffic routes of National Capital Region (NCR) to JNPT/Mundra Port/Pipavav Port²⁸.

The study could not determine whether the pricing policy by CONCOR is 'predatory' as such an enquiry requires extensive data and cost audits of the incumbent. However, with CONCOR having a considerable advantage in the initial stages with respect to lower operating cost, it is imperative for the policymakers to protect the new entrant from the ill affects of predatory pricing, if adopted by CONCOR.

2.2.5.2 Access to infrastructure

In a sector such as Railways, where new entrant is to access the incumbent's infrastructure (atleast in the initial stages) regulation with respect to access rights may have a substantial impact on the scope of private entry in an industry. New entrants in capital-intensive transportation segment often require access to key infrastructure. Public policies about infrastructure access can, therefore, be a critical component of entry conditions. The appropriate design of access charges is essential and should not give undue advantage to the incumbent.

CONCOR also enjoys a distinct strategic advantage by virtue of its (ICD) locations, which have railhead connection and which therefore eliminates multiple handling and transportation. Majority of CONCOR terminals are rail-linked, with rail as the main carrier for haulage. Given current level of land prices, it would be difficult and in some cases unnecessary, to duplicate infrastructure.

At present, if the new container operators want to use CONCOR owned ICDs for running container

²⁷ The Economic Times, 15th of April 2008

²⁸ Source: Press releases by CONCOR and news reports

trains, they have to pay access charges. The level of access charges, as decided by CONCOR (even for the ICDs on strategic places built upon Railways land), is considered very high. In the stakeholder interviews some private container operators pointed out that the access charges determined by CONCOR are high to the extent of being "prohibitive". MCA states explicitly that new operators have to build their own ICDs/terminals or will have to lease the existing ones. However, a fair access policy for all the ICD's developed by the incumbent on railways land can promote competition where duplication of such infrastructure may be not feasible²⁹.

2.2.6 Conclusion and Recommendations

Above-mentioned issues highlight that there are certain factors that are limiting the level of competition in the container movements. The sector is still developing and it is early to assess future market dynamics of the market. Removal of legal entry barriers may not be enough to promote private sector participation in the sector. However, these problems are not new to an infrastructure sector opened to private participation. Available literature on railways and private participation suggests certain measures, which can promote competition.

An independent regulator can through regulations create an enabling environment promoting level playing field. The establishment of independent authorities, operating outside the chain of command of executive power in the strict sense, is essential as far as ensuring a level playing field. The goal is to ensure independent regulatory decision-making that is protected from specific private interests and short-term political considerations. For this purpose, independent regulatory authorities have been established for many sectors in network industries such as telecommunications, energy and transport across the world.

2.3 Private Participation in Indian Railways: Dedicated Freight Corridor

Owing to high congestion on busy traffic routes and in an initiative to increase the average speed of Indian freight movements, Indian Railways decided to take up the task of constructing Dedicated Freight Corridors (DFCs) connecting Mumbai-Delhi and Howrah-Delhi routes. DFC aims to support the growing Indian economy and to promote Indian Railways share in freight traffic, bringing in the much desired inter modal balance. Ministry of Railways has planned to construct a DFC covering about 2762 route kms on two corridors, Eastern Corridor from Ludhiana to Sone Nagar and Western Corridor from Jawahar Lal Nehru Port Mumbai to Tughlakabad/Dadri along with interlinking of two corridors at Khurja.

In the Railway Budget 2008-09 speech, Railways Minister mentioned that work on the Eastern and Western DFCs would get underway during the 2008-09.

In April 2005, Indian and Japan made a joint declaration for feasibility and possible funding of the dedicated rail freight corridors. Thereafter, RITES was asked to conduct the feasibility study of both eastern and western corridors. In May 2005, Committee on Infrastructure (CoI) constituted a Task Force, (chaired by Shri Anwarul Huda, Member, Planning Commission) with an aim to prepare a concept paper on Delhi-Mumbai (Western) and Delhi-Howrah (Eastern) Dedicated Freight Corridor projects, and to suggest a new organizational structure for planning, financing, construction and operations of these corridors.

The task force gave the following recommendations with reference to the organization structure, which will have a bearing on level of competition, once DFC is operational³⁰:

- The task force recommended for setting up Special Purpose Vehicle (SPV), jointly owned by the Indian Railways and the users of bulk freight services, which will be responsible for planning, construction and maintenance of infrastructure. The Ministry of Railways would be the administrative Ministry for the SPV.

³⁰ Report of the Task Force, Planning Commission

- SPV would own and maintain the tracks and other infrastructure and also will be responsible for movement of trains on its system and operation of the DFCs.
- To ensure non-discriminatory access, the task force recommended that the SPV would neither own/lease any rolling stock nor would be involved in freight business other than haulage of freight trains. The Indian Railways and other qualified operators would run goods trains on the tracks of the corridors and would be given non-discriminatory access for this purpose.

RITES, in January 2006, submitted the Feasibility Study Report of both the corridors to Ministry of Railways. Cabinet Committee on Economic Affairs (CCEA) gave "in principle" approval to the report and subsequently RITES undertook Preliminary Engineering cum Traffic Survey (PETS) for the two corridors, to estimate the costs of the project and work out the financing options. In consonance with the recommendation of the Task Force of Col, a SPV, named "Dedicated Freight Corridor Corporation of India Limited (DFCCIL)" was incorporated under Companies Act in October 2006. RITES submitted the PETS report based on which the project was approved at a cost of Rs. 28,181 Crore.³¹ In July 2008, DFCCIL floated tenders for preliminary work on both the corridors. The tenders precede the first round of tenders for the corridor between Kanpur and Khurja. The bids will be opened by March 2009 and the work is scheduled to begin by June 2009.

Given that the project has just been stated and bids have been called for recently, it is premature to identify anti-competitive practices. The task force in their report suggested the structure of SPV and stated that SPV should ensure non-discriminatory access to infrastructure. However, no mechanism has been devised to ensure that all operators on the DFC are provided level playing field and non-discriminatory access. The fact that Indian Railways has a major stake in the SPV and the SPV is under the Ministry of Railways raises concern with reference to level playing field and non-discriminatory access to the players when DFC will be operational. However, the study cannot conclusively comment on the future dynamics of DFC and the level of competition can only be assessed once DFC is fully operational.

2.4 Procurement in Indian Railways

Indian Railways procures store's items for a variety of requirements such as track materials, fuel and construction, manufacture of rolling stock, operations, repairs and maintenance. Given the monolith size of IR, costs of these goods form a considerable segment in IR's expenditure. During 2006-07, the total procurement of stores items by the Railway Board, zonal railways and RPU were valued at Rs. 18,651 crore. Since the decentralization of procurement in 2001, the Railway Board has the powers to procure 'high-value' items, while the General Managers (GMs) of the zonal railways and Railway Production Units (RPU) can procure various other items as per the powers delegated to them. Some of the items are also procured through Director General, Supplies & Disposals (DGS&D). For items delegated to zonal railways and RPU the users/consignees analyse their annual requirements of stores items, which are then consolidated and procured by respective Controllers of Stores. The approval of the Railway Board is required where the amount involved exceeds the financial powers of GMs.

Member Mechanical (MM) is the overall incharge of procurement in the Railway Board assisted by Additional Member/ Railway Stores. Around ten directorates of Railway Board are involved in the process of tendering and finalising contracts for procurement of stores of different types and the concerned Directors/Executive Directors report to Additional Member/Railway Stores. Some of the items such as track, track fittings and track machines are procured by Track Directorate which functions under Additional Member/ Civil Engineering who also reports to the Member Engineering (ME).

Out of the total goods procured, 51% was done by zonal railways and production units, 44% by Railway Board and the balance 5% through DGS&D and other sources. For the same year stores worth Rs.756 crores were bought from small-scale sector and khadi and village industries. Contribution of Public Sector Undertakings (PSUs) was 31% for the same period while rest going to

³¹ www.dfccil.org

other industries³².

2.4.1 Competition Concerns in Public Procurements

All around the world, public procurement officials are trying to cope with cartelisation and bid rigging. Procurement in the Indian Railways also suffers from such anti-competitive practises, like any other public procurement. Audit reports by the Comptroller and Auditor General (CAG) of India submitted to Parliament during earlier years have been highlighting anti-competitive practices in Railways procurement. These anti competitive practises manifest themselves primarily in the form of horizontal collusion amongst vendors. Corruption has further aggravated this problem. To address these issues Railways have initiated a number of corrective steps and issued directives for streamlining the procurement processes to bring about efficiency in material management. Some of these measures are in the subsequent sections.

2.4.1.1 Decentralizing Stores Procurement (2001)

Railway Board decentralized procurement of 45 stores items and gave powers to GMs of zonal railways and RPUs to procure items at their level. Also, centralised procurement of a few other items was delegated to other identified field units. Before the decentralization, the advantages (of centralized procurement system) such as cost effectiveness of bulk purchase were overshadowed by the long time taken in processing and finalization of tenders at the apex level and inability to monitor vendor performance and behaviour at the delivery level. The primary aim of decentralisation was to expedite the procurement process and ensure timely availability of material by bringing the procuring authority closer to the end user (zonal railways/RPUs). Decentralised procurement was aimed to give the zonal railways/ RPUs better control over the procurement process resulting in reduced lead-time, timely availability of material and better management of supplier's performance.

2.4.1.2 Vendor Development Cells (1999)

In September 1999, the Railway Board issued directives to establish Vendor Development Cells (VDC) in all zones/RPUs to carry out vendor rating for assessing the technical and financial capability of firms both in terms of quality and quantity and to strengthen the control over vendors and suppliers. In addition to this the source approving authorities were required to maintain files containing records of quality and delivery performances of the vendors. These files were to form inputs to the tender accepting authorities at the time of consideration of future tenders.

2.4.1.3 Clause against Cartel formation (2002)

To deal with cartelisation in the procurement procedure Railway Board issued instructions (5th August 2002) to include the following conditions in all tender documents:³³

- Wherever all or most of the approved firms quote equal rates and cartel formation is suspected, Railways reserve the right to place order on one or more firms with the exclusion of the rest, without assigning any reasons there for.
- Firms are expected to quote for a quantity not less than 50 per cent of tendered quantity. Offers for quantity less than 50 per cent of tendered quantity will be considered unresponsive and liable to be rejected in case cartel formation is suspected. Railways, however, reserve the right to order on one or more firms any quantity.
- The firms that quote in cartel may be warned that their names are likely to be deleted from list of approved sources.

These conditions were incorporated to give the Railways Board flexibility in awarding orders to control cartelisation/bid rigging.

³² Annual Report, Indian Railways, 2006-07

³³ Indian Railway Standard Conditions of Contract and General Conditions of Contract govern stores contracts awarded by Railways.

2.4.1.4 e-Procurement (2005)

To deal with inefficiencies and anti-competitive practises Indian Railways adopted e-procurement. The pilot project was implemented in Northern Railways in May 2005. By the end of year 2008 there will 12 more units (7 zonal railways and 5 production units) where e-procurement will be implemented. Total of these 13 units make annual purchases valued at about Rs 12,000 crore (2006-07). Railway Board plans to procure 75% of this quantity through electronic medium.

2.4.2 Cases of Anti-Competitive Practises in Railway Procurements

In spite of the above mentioned reforms there have been cases mentioned in the audit reports, which clearly reflect the incidence of anti-competitive conduct by the vendors. Interaction with stakeholders during the course of the study has also given certain inputs to help analyse how these cartels operate. The exact magnitude to which these cartels have been eroding Indian Railways of public funds is beyond the scope of this study but the severity of the problem can be assessed by the following cases:

2.4.2.1 Reports of the Comptroller and Auditor General of India, 2006 (Bid rigging and market sharing by cartels)

Audit by the CAG of India for the year 2006 conducted a comparative study of the procurement and inventory management systems during 2000-01 to 2004-05 covering both pre and post decentralisation period. The procurement and inventory management in respect of a selected set of 19 items³⁴ was examined at Railway Board as well as the Zonal Railways and RPU. The sample of 19 items belonging to various departments covered sixty-three per cent of the total cost of these 45 items decentralised in 2001. Two out of the 19 items were those for which centralised procurement was delegated to Central Organisation for Railway Electrification.

Audit report states nine tender³⁵ cases out of 31 cases (examined for pre-decentralisation period) bidding firms quoted similar high rates thereby indicating the existence of cartels. Moreover, cases of cartel formation were also mentioned in 47 tender cases issued by Zonal Railways/ RPU for the same items after decentralisation. Importantly, out of these, in seven cases the special conditions regarding cartel formation were not incorporated.

2.4.2.1.1 Cartels in risk procurements

Certain statutory requirements set to prevent preferential treatment, may in turn limit the options for the procurement authority to react strategically when confronted with anti-competitive practises. Railway procurements are restricted to suppliers registered with the RDSO³⁶ even in the cases of risk³⁷ and cost purchases, often the vendors may take advantage of railways policy of bulk quantity procurement only from approved sources. Stakeholders in interviews mentioned that these set of approved sources sometimes form a cartel and any attempt by the railways to penalize the defaulting cartel member by cancelling its order and calling out a new tender is boycotted by the cartel members. The audit report brought out 27 cases in respect of five items³⁸ where RDSO approved suppliers failed to supply material and railways were forced to procure the items against risk-purchase tenders. In 5 out of the 27 cases railways could not procure the risk and cost items

³⁴ These 19 items were procured through 31 tenders and 505 contracts valuing Rs.717.79 crore of which audit reviewed 30 tenders and 332 contracts.

³⁵ Loco batteries, train lighting batteries, VRLA batteries, air brake kits, brushless alternators, 4-Quad cables, optic fibre cables, elastic rail clips and draft gear.

³⁶ RDSO is the sole R&D organization of Indian Railways and functions as the technical advisor and consultant to the Indian Railway Board, regional railways and rolling stock works.

RDSO's primary activities involve development of standards for materials and products especially needed by Indian Railways, any vendor who wishes to bid for stores procurement in Railways needs a statutory clearance from RDSO which is given after testing and technical.

³⁷ When the supplier is unable to supply as per the contract

³⁸ Underground signalling cables, elastic rail clips, grooved rubber sole plates, draft gears, electric point machines and HDGCC wire

eventually, as the risk purchase tenders did not materialize. In five other cases risk-purchase contracts were placed on the defaulting firms themselves at the same price, in effect extending their initial delivery period.

2.4.2.2. Case of Cartelisation in the procurement of High Speed Cast Steel Bogies³⁹

Railway Board floated a tender for procurement of 2,326 (later revised to 2,194) fully assembled CASNUB⁴⁰ High Speed cast steel Bogies, required for manufacture of wagons in Railway workshops during 2004-05. The clause against cartel formation was not incorporated in the tender document. Out of the nine firms (eight Part-I and one Part-II firm)⁴¹ participating in the tender, seven firms quoted for less than fifty per cent of the quantity at a uniform price of Rs.99, 638 per bogie, which was a clear indication of cartel formation. Another Part-I firm M/s HEI Ltd. quoted for the full quantity at a rate of Rs. 1,05,000 per bogie. RDSO approved Part-II firm M/s Raneka Industries Ltd quoted the lowest rate of Rs.87, 000 per bogie for the full quantity.

Railway Board's failure to incorporate the necessary conditions in the tender documents to prevent cartel formation by the approved firms forced the Railway Board to negotiate with the firms in the cartel. Negotiations held with the seven firms (April 2004) were not successful in bringing down the rates therefore Railway Board decided to place an order for 550 bogies on Chittaranjan Locomotive Works (CLW) on 29 April 2004 at book price. The only Part-II firm M/s Raneka Industries Ltd. was given an order for 50 bogies at Rs.87, 000 per bogie. Orders for 1,644 bogies were distributed among 3 Part-I firms at Rs.98, 642 per bogie as the remaining firms reduced their quantities still further during negotiations.

To deal with the cartel the Railway Board decided to place orders on CLW for manufacture of 550 bogies at book rate. Railways also had to place orders on three firms of the cartel at a rate much higher than the updated last purchase rate, which was worked out to Rs.86, 936 per bogie. The audit reported that due to non-incorporation of cartel clause Railways could not reject the offers of the firms restoring to anti-competitive practises and consequently incurred an excess expenditure of Rs.2.32 crore as compared to updated last purchase rate.

2.4.2.3 Cartels using unfair practise to restrict competition

The Standing Committee on Railways (2004-05) pointed that in certain cases, existing manufacturers had formed cartel to secure orders by unfair means or tampered with procedure and simultaneously kept new competitors out of the race. Open tenders were invited for manufacture and supply of 160 lakhs BG PSC line sleepers to cover the requirement of 2 years (2003-05) of the Zonal Railways. A total of 95 bids (71 from existing sleeper manufacturers and 24 from new firms) for open tenders were received. However, when the tenders were finalized only the existing sleeper plants were awarded orders to supply the sleepers and no orders were awarded to new firms. The committee demanding a high level inquiry commented that existing manufacturers have formed cartels amongst themselves and are using unfair means to secure orders⁴².

Similarly, in another case, cartels used corrupt practises to avoid participation by new entrants⁴³. In one of the Zonal Railways, an open tender was invited for the work of "revamping/replacement and safety works on distribution system at EMU workshop"⁴⁴. A tenderer complained to vigilance board that tender form for the above tender was not being issued to him although he had deposited the required cost of tender form with the Cash Office as required. Tender documents pertaining to the above tender were also not uploaded on the website. Moreover, the tender notice was also not displayed on the notice board

³⁹ This section is based on Reports of the CAG of India 2005-06, Report No.6 of 2006 (Railways)

⁴⁰ CASNUB bogies-Cast steel bogies with friction damping arrangements (CAst steel SNUBer equipped)

⁴¹ Part-II (new firms cleared for educational orders). RDSO approved list covers two type of firms-Part-I (regular firms cleared for bulk supplies) and Part-II (new firms cleared for educational orders). Part-II firms are upgraded to Part-I firms on the basis of good performance reports during 18 to 24 months.

⁴² Standing Committee on Railways (2004-05)

Fourteenth Lok Sabha, Ministry of Railways

⁴³ Vigilance bulletin 2007, Indian Railways

⁴⁴ There was a practice in the workshop that the tender forms were to be issued to the tenderers only after the endorsement by an officer on the application of the tenderer requesting for issue of tender form.

provided in the office for this purpose. The tender documents were made available to Office Superintendent only one day before the scheduled date of opening of tender; in violation of laid down instructions that the tender documents should be available for sale not less than 15 days prior to due date of opening of tenders.

On the intervention of vigilance department, the opening of the tender was postponed. The estimated cost of this work was previously shown as Rs 70.37 lakh and when re-tendering was done with wide publicity and ensuring availability of tender forms as per rules, the work was awarded at the cost of Rs 45.57 lakh only. The report by the Vigilance Department highlighted how few firms creating a cartel were taking advantage of the procurement procedure to restrict orders for themselves.

From the above-mentioned cases, stakeholder discussions and from the available literature on public procurement and competition issues the study has been able to analyse the functioning of cartels in Railways procurement. These cartels prevalent in Railway Procurement primarily exploit the procedure in the following ways:

- By illegally coordinating the bids amongst the cartel members⁴⁵ whereby the cartel decided ex-ante the winning bidder and the winning bid and other bidders submit bids that are higher than the winning bid. Or even if the bids are seemingly competitive in price, then they are unacceptable because of other non-price terms, such as not fulfilling any mandatory criteria mentioned in the tender document.⁴⁶
- By agreeing to share markets, whereby public procurement needs/requirements are divided according to type or geographic location and competitors agree to submit higher bids in markets assigned to other firms. Also the cartel members can share a single market by bidding for less than the demanded quantity thereby sharing a single order amongst them.
- Sometimes, one or more conspirators may file fabricated bid protests in order to try to deny an award to non-conspirators. This is undertaken to punish the deviating cartel member/non-conspirators.
- Also, these cartels with the help of dubious practises in the public procurement system may use their incumbent power to keep away any new entrants into the market.
- Boycotting any attempts by the Railways to punish the defaulting firm (in case of supply failure) by calling for a new tender.

2.4.3 Policy Recommendations: Maximizing competition in public procurement

As seen in the case of 'risk purchases' in Railways where even in the cases where the vendors fail to supply the contracted quantity, the procurement authority are forced by rules to procure items from the same approved sources. With such rigid rules it maybe very hard for the procurement officials to act appropriately to stop such behaviour; therefore it is important that the legislative and regulatory framework on public procurement be designed to allow sufficient flexibility on the purchasing side. By enhancing flexibility of procuring authorities (for example introducing new and different procurement procedures or allowing the procurement entity to adapt the standard procurement procedures according to the market situation with which it is confronted) may have a positive bearing on the outcome.

Carefully devising the procurement mechanism can also reduce the anti-competitive conduct in public procurement. Limiting the extent of participation by excess of standardization or unnecessary over-specification may also facilitate growth of cartelisation. On the basis of literature review and discussions with experts, following measures are suggested as means to reduce the incidence of anti-competitive practises in public procurement.

⁴⁵ "Complementary bidding" (also commonly called "protective" or "shadow" bidding) occurs when some firms Bid suppression.

⁴⁶ Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. In "bid-suppression" or "bid-limiting" schemes, one or more firms who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winner's bid will be accepted. This enables the designated winning competitor's bid to be accepted when the agency requires a minimum number of bidders.

2.4.3.1 Improved Designing Procurement Tenders

The efficiency of the procurement process will depend upon the design of the tender document, which contain the bidding process and the bidding guidelines. For example, the number of bidders may be less where initial specifications are very restrictive, the tender is not widely advertised or the time for responses is inappropriately short, as seen in the some aforementioned cases in railway procurement in India. In general, following measures may help in reducing the incidence of cartelisation:

2.4.3.1.1 Reducing barriers to entry and increasing bidders' participation

RDSO is the sole R&D organisation of Indian Railways and functions as the technical advisor to Railway Board, zonal railways and RPU. Key operations involve development of standards for materials and products specially needed by Indian Railways, technical investigation, statutory clearances and testing and inspection of critical and safety items.

One of the key roles of RDSO is quality assurance. It involves vendor approval and purchase inspection of these various items. For focussed attention and close monitoring of the vendor, Railway Board has approved the creation of a separate Quality Assurance Organisation at RDSO for all technical disciplines, each headed by executive director. Railways procurements are restricted to only those vendors who belong to the approved list by the RDSO. Given the technical nature of many items required by RPU and zonal railway, RDSO approval is necessary keeping the safety issues in mind. However, from the stakeholder discussions and questionnaire survey the study has gained that RDSO plays a prominent role in restricting entrants into the railways procurement. Concerns like bureaucratic hassles and corruption in RDSO have in many ways assisted anti-competitive practises. Complaints like RDSO taking too long to approve any new technology have been reported by some of the stakeholders. Moreover, stakeholders have claimed that over-specification and tedious procedure to get approvals from RDSO has kept away many big vendors from India as well as from outside⁴⁷.

It is important for the policy makers to reduce 'unnecessary' entry barriers as this can directly result in increased competition and reduction in the power of the cartels to control the market. Therefore, when it comes to designing the procurement process, the selection process itself should not deprive firms from bidding on the basis of criteria which are not directly relevant to the procurement (for example, an experience or financial strength requirement may unnecessarily reduce the number of competitors), neither should the process be tedious⁴⁸ to keep away any of the players in the market.

2.4.3.1.2 Reducing the frequency of procurement opportunities

As far as the competition theory is concerned, collusion is facilitated when competing firms meet each other frequently in different markets⁴⁹. The underlying reason behind this is that repeated, frequent interaction facilitates punishment strategies among competing bidders, which is necessary for sustained effective collusion. Therefore, unbundling bulk orders into smaller tenders and holding tenders at short and regular time intervals may favour collusion.

In 2001, Railway Board decentralised procurement of 45 stores items and gave powers to GMs of zonal railways and RPU, earlier to which stores procurement was in the hands of Railway Board. In the centralized procurement regime, Zonal Railways and RPU sent their requirements to the Railway Board, which consolidated the requirements and floated tenders for the consolidated requirements, thus resulting in fewer interactions between the competing firms in the market. Though the tendering process in the decentralized period had been expedited, the benefits of the time gained have been eroded by the lack of information sharing by the Zonal Railways and RPU. The Railway Audit Report (2006) highlighted wide variations in the rates for the same items in the same year between various zonal railways/ RPU indicated the existence of bid rigging⁵⁰. In 10 out

⁴⁷ The stakeholders have expressed these views. Given the technical nature of these items the study could not conclusively verify their claims.

⁴⁸ Stakeholders claimed that the long time taken by the RDSO for approval with many bureaucratic hassles turns out costly for the prospective entrants.

⁴⁹ OECD, Procurement and Competition

⁵⁰ Para 5.2, Reports of the CAG of India 2005-06, Report No.6 of 2006 (Railways)

of the 19 items reviewed in the Railway Audit 2006, the variation between the maximum and minimum rates finalised over various zonal railways/ RPU's ranged between 97 per cent and 171 per cent over pre-decentralized period prices⁵¹. The same vendors bidding for different zones and RPU's quote different prices. To reduce the power of cartels the procurement officials should reduce the number of opportunities in which these firms meet. This might be achieved for example, by holding fewer, larger tenders, as was the case in the centralized procurement in railways or by devising mechanism of efficient information sharing between different zones and RPU's.

2.4.3.2 Role of the Competition Commission of India

CCI can play an important role in controlling the anti competitive practises in public procurement by educating and training the concerned officials. Based on literature review and the measures adopted by competition commissions of various countries to mitigate anti-competitive behaviour, following are some of the issues where CCI can help the procurement officials

2.4.3.2.1 Raising Awareness amongst procurement officials

Training for procurement officials is of paramount importance since procurement officials are best placed to detect signs of anti-competitive activities as they can observe patterns in bidding processes that could indicate such conduct⁵². Around the world many competition authorities are directly or indirectly involved in advocacy efforts to raise the level of awareness of the risks of bid rigging in procurement tenders.

Mostly anti-competitive agreements are prepared with only the cartel members having knowledge of the agreement therefore bid rigging is tough to detect. However, officials can detect such cases by monitoring constantly the bidding activities and perform quantitative analyses, to check for patterns that might indicate bid rigging, on the bidding data. Therefore, it is crucial to examine the bids that have been submitted in the past to determine if there are patterns that indicate collusive behaviour. This kind of monitoring is easier if the procurement activities is centralised and the procurement process is electronic as in the case of Korea⁵³.

This is an area where CCI can play an extremely important role through associating with the Indian Railways at all stages of the procurement process and expand their awareness on anti-competitive measures under their advocacy role.

Moreover, a number of countries (such as Sweden and the U.S.) have developed checklists to help procurement agencies to spot instances of possible collusion. These check lists play an important role in educating and enabling the procurement officers to detect case of anti-competition by analysing the bidding behaviours (See Box 2.1).⁵⁴

⁵¹ Reports of the CAG of India 2005-06, Report No.6 of 2006 (Railways)

⁵² "In a case in USA, two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter had the same typographical error (an unnecessary word): "Please give us a call **us** if you have any question." The procurement official was concerned that the companies had colluded on their bids and reported his concerns to the Antitrust Division of the U.S. Department of Justice. The companies and individuals involved were subsequently prosecuted and convicted for bid rigging and other violations." (source: OECD, Procurement and Competition, US experiences)

⁵³ "The Korean electronic procurement system (KONEPS) was introduced in 2002 and all the public organizations are mandated to notice procurement tenders through KONEPS. Today, over 90% of public tenders in Korea are conducted electronically. According to the latest Annual Report of KONEPS, the introduction of the electronic procurement system has increased participation to public tenders and has significantly improved transparency in procurement administration, eliminating all instances of corruption. In addition, the system has boosted efficiency in procurement, increasing the number of transactions and significantly reducing transaction costs. Thanks to the data generated by the electronic tendering process, the Korean Fair Trade Commission (KFTC) is able to screen for bid rigging. The screening program (called BRIAS, Bid Rigging Indicator Analysis System) was introduced by the KFTC in 2006 and automatically carries out statistical and empirical analyses for the possibility of collusive biddings based on the information on bidding for public projects of the state, local governments, and government financed institutions". (Source: OECD, Procurement and Competition, US experiences)

⁵⁴ Public Procurement The Role Of Competition Authorities In Promoting Competition, OECD, 2007

Box 2.1: International experience – procurement

U.S. Guidelines to Procurement Officials⁵⁵

As an example, the indicators of bid rigging, which are contained in a recent pamphlet from the Antitrust Division of the Department of Justice aimed at auctioneers, are summarized below. The pamphlet distinguishes between indicators, which relate to bid and bid patterns, prices and other anti-competitive behaviour.

Bids:

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.
- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- Fewer than the normal number of competitors submits bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

Anti- competitive Behaviour

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendors bid.
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes.
- A company requests a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract (likely a complementary bid).

A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding

2.4.3.2.2 Enforcing competition law rules in public procurement

In addition to the above measures, anti-competitive activities and cases of cartelisation can be reduced through strict, effective competition law enforcement. Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging or considering bid rigging as a per se violation of the competition rules. In India, The Competition Act, 2002, deals with anti-competitive agreements in section 3. The provision specifically deals with cartels and horizontal agreements⁵⁶,

⁵⁵ Public Procurement; The Role Of Competition Authorities In Promoting Competition, OECD, 2007

⁵⁶ Agreement between rivals or competitors is termed horizontal agreement. When rivals or competitors agree to fix prices or share consumers or do both, the agreements are termed as cartel.

and is dealt with under presumptive rule, i.e. appreciable adverse effect on competition is presumed. Most competition authorities around the world rely heavily on leniency or amnesty programmes⁵⁷ for detection of the cartels as proving the existence of collusive behaviours may be very hard. In India, the leniency programme is contained in section 46, which empowers CCI to reduce the penalty. However, there are no criminal sanctions for cartelisation in the Competition Act, 2002. The CCI should take a more proactive role in the detection of such cartels and punishing them as actively enforcing competition rules against bid rigging and ensuring strong publicity to such enforcement activity is an important deterrent against anti-competitive behaviours.

2.4.3.3 Modernizing Procurement: E-procurement

Another way to put a cap on anti-competitive practises is to modernize public procurements procedures. Indian Railways have implemented e-procurement in the Northern Railways in May 2005 and is planning to expand it to twelve more zones and RPU's in the Railways by end of 2008. It facilitates wider range of participation as the submission of bids is conducted through Internet thereby attracting bidders from far-flung areas and also by reducing cost of bid preparation thereby attracting smaller bidders. It also, limits information available to the cartels. The electronic submission of bids by the vendors restricts ability of cartels to monitor new entrants and deviation by the cartel members. Moreover, due to electronic nature of this medium it is easier to conduct quantitative analysis of the bidding data.

Broadly, from the case studies of different procurement agencies, which have adopted e-procurement, across the world following keys benefits have achieved:

- Fall in the average prices
- Rise in the number of participants
- Fall in the cases of anti-competitive practises

The following cases of successful implementation of e-Procurement highlight the aforementioned benefits of the mechanism:

Case Study: Andhra Pradesh⁵⁸, India

In the state of Andhra Pradesh, forty-one municipalities, seven government departments, eleven public sector units, and four autonomous institutions have benefited from the e-procurement system for handling tenders for procuring goods, services and engineering contracts. The e-procurement platform enables online notice of inviting tenders and submission of bid documents and any related drawings. The Internet based software facilitates automatic bid evaluation making the process transparent and fast. For the suppliers the process of submitting the bids has been simplified apart from reducing bid preparation cost.

This e-procurement platform has been implemented right down to the *Mandal* level (a group of 2 to 3 villages constitutes a *Mandal*). Over 4000 department users and over 6000 suppliers have been trained to use the e-procurement system.

The spectrum of procurement over the e-procurement platform has included work contracts, turnkey contracts, and procurement of a wide array of goods like hardware and software, drugs and hospital equipment, pesticides, veterinary drugs, oils, sugar and spices, uniform material, paper and stationery items, and auto spare parts, fuels and lubricants.

Single procurement transactions ranging from Rs 45,000 to Rs 2,800 crores have been made over the system. The tender processing cycle has been brought down from six months to thirty-six days. Following implementation of the solution, the government has witnessed an increase in the average number of bids received from 3.4 to 6.7, empowerment of small and medium suppliers, increased

⁵⁷ A member of a cartel is usually granted immunity from criminal sanction and/or the penalty is either waived or reduced. Practically every major industrialized country has some kind of leniency programme and there seems to be a move towards having criminal sanctions for this offence.

⁵⁸ Saving the Government Crores Annually Through On-Line Procurement by Mr Vivek Agarwal, President & COO, C1 India

transparency, availability of instant MIS, cost savings, and elimination of paper as the bids are filed electronically. Average supplier participation has increased from 3.5 players per tender to 4.75. The financial gains from the new system can be seen from the following table:

Table 2.1: e-Procurement (AP): year-on-year comparison ⁵⁹

	2003-04	2004-05	2005-06
No. of Tenders Processed	564	2215	6700
Value of Transactions (Rs crores)	1982	15600	22000
Savings (Rs crores)	255	1000	1500

Source: http://www.nasscom.in/upload/38464/e_procurement.pdf accessed in August 2008

2.5 Preference to PSUs: Case of Wagon Procurement

During 2006-07, total procurement of stores items by the Railways was valued at Rs. 18,651 crore⁶⁰. Out of which Public Sector Undertakings (PSUs) contributed 31% and other industries contributed 69% towards supplies. The study has looked into the wagon procurement, to study for any preference given to PSUs while procuring certain items.

The wagon fleet of the Indian Railways plays an important role in the day-to-day freight operations of the Indian Railways. As on 31st March 2005, Indian Railway had a wagon fleet of around 4.61 lakh four wheeler units comprising covered, open high sided, open low sided and other types of wagons⁶¹.

2.5.1 Procurement Policy⁶²

Wagon procurement of the Indian Railways is centralised in the Railway Board. Wagon acquisition is a need-based activity, which is dependent upon traffic needs and availability of funds after taking into consideration replacement of wagons due for condemnation etc. Targets for acquisition of wagons for a particular year are fixed on the basis of traffic projections as intimated by Planning/Traffic Transportation Directorate of the Railway Board. The process of procurement of wagons is taken care of by the Stores Directorate of the Railway Board, which functions under the control of Member Mechanical.

The entire procurement of wagons is made through open tenders. There are twelve companies operating in the country for manufacturing wagons. Six companies are in the public sector domain under the Department of Heavy Industries and six companies in the private sector. Besides, three Railway workshops are also manufacturing wagons. The planning and procurement of wagons is done for a five-year plan period. Any revision if required is carried out during the mid term appraisal.

Till 1993-94, Indian Railways used to place orders for wagons directly on member units of Wagon India Limited without calling for tender and prices of wagons were determined on the basis of cost analysis. But this policy underwent a tremendous change after 1993-94. At present Railways execute 100% procurement of wagons through open tender. However, they follow a distribution system of tendered quantity amongst all the established wagon manufacturers both in the public

⁵⁹ Saving the Government Crores Annually Through On-Line Procurement by Mr Vivek Agarwal, President & COO, C1 India

⁶⁰ Rail Year Book

⁶¹ Reports of the CAG of India 2007, (Railways)

⁶² Standing Committee on Railways (2005-06), Fourteenth Lok Sabha, Ministry of Railways (Railway Board), Procurement of Wagons

and private sector based on their past performance with a view to make the distribution more broad based. All the wagon builders are required to supply orders at the lowest rate determined by the open tender. The bidder who quoted the lowest price is provided with 25% of the quantity of wagon requirement and the remaining 75% are distributed in the ratio of 60:40 to the Public Sector Units and Private Sector Units respectively.

2.5.2 Highlights of the performance of the wagon manufacturers⁶³:

To analyse the effect of reservation policy on the over all efficiency of the sector the study focuses on the Audit of procurement of wagons by the CAG of India.

Review of the quantity ordered and received during 2002-03 to 2005-06 revealed that:

- *“Although there was balance of 2922.5 Four Wheeled Units against the previous orders, Railway Board had placed further orders for supply of 28122.5 Four Wheeled Units (42 per cent of the total quantity) on PSUs. As against a total of 31045 Four Wheeled Units, PSUs supplied only 19717.5 Four Wheeled Units (64 per cent). Specific kinds of wagons such as BOBSN, BOSTHS, BRHNEHS, BRNAHS and BBZI have not been supplied at all and there is a hundred per cent default against the supply of these wagons”.*

Thus, the performance of the PSUs was below par as compared to the private sector suppliers.

- *“It was noticed that although M/S Bharat Wagon Engineering Co. Ltd (a PSU) had supplied only 477.5 four wheeled units (16 per cent) as against the ordered quantity of 2990 four wheeled units, the liquidated damages of Rs1.17 crore recovered from the defaulting PSU were waived and refunded. Despite erratic supplies and huge arrears in production, the Railway Board froze the previous orders and placed fresh orders on the PSU for manufacture of 1540 four wheeled units in October 2004. Further an unadjusted advance of Rs.4.17 crore was allowed to remain with the firm without levy of interest.”*

Special treatment (waving off of penalties) is not given to the private sector players emphasising on 'lack of level playing field'.

- *“Despite the extension of such special benefits to the firm the supply against the fresh orders was also erratic as by the due date the firm had supplied only 485 four wheeled units (32 per cent). Thus, the undue advantages in the shape of waiver of liquidated damages and carry forward of unadjusted advance have proved futile and were not justified”.*

Therefore, it is clear that the aforementioned special treatment given to these PSU has failed to produce any positive result.

Thus, the policy of favouring PSUs has worked against the best interests of the Railways leaving them with a shortage in a critical area of operations. According to the competition theory, such a reservation of orders can adversely affect the level of competition in the industry. Apart from reducing the incentive for the public units to perform better it also reduces competitive pressure on the private firms. No doubt every policy has some rationale behind it; however from the highlights of the audit report in the wagon procurement and the performance of PSU, it is evident that the Policy of reservation and special treatment to PSUs is not proving to be fruitful. Moreover, there exists a lack of level playing field as seen by the waiving off the penalties levied on the PSUs. Therefore, it is essential to revisit the policy of reservation of orders towards non-performing PSUs.

2.6 International Experiences (Intra -modal Competition)

In recent decades many countries have introduced rail reforms with the primary aim of creating commercially viable and better-managed railway sector. More specifically, the reforms were aimed

⁶³ This section draws from the analysis given in Chapter 1, Report No.6 of 2007 (Railways), Audit Report (CAG)

at promoting competition in the rail sector, which could in turn improve the financial and operational performance of railways⁶⁴.

Competition in the transport sector can be of two forms. First is **inter-modal competition**, which is quite significant in the goods segment which can be transported through different modes. Therefore, Railways compete with other modes of transport such as roads, waterways that are effective substitutes for Railways. Roads can be used to transport almost all kinds of goods except the heaviest bulk commodities, for which waterways can be the option.

The second form of competition is **intra-modal competition**, i.e. competition within railways. Across countries this was introduced by inviting private sector participation in rail sector, which was otherwise a government monopoly. To identify specific areas where competition can be introduced, it is necessary to understand the structure of the rail industry. The rail industry is basically a cluster of different activities. The most important of these activities are construction and maintenance of rail infrastructure (tracks, signals, depots etc.) and operation of trains. The rail infrastructure involves a large fixed cost and a comparatively small marginal cost of operation. Since track infrastructure is widely taken as a 'natural monopoly' the scope, for competition in this segment is limited. On the other hand, the train operations are limited in economies of scale and are potentially competitive by nature.

The governments across the world have introduced various measures for introducing competition. The major measures include vertical separation, vertical integration with access regulation and vertical integration with horizontal separation. All these measures foster private participation in the sector. These are briefly summarized below.

2.6.1 Pro-competition reforms⁶⁵

2.6.1.1 Vertical separation

It has been seen, from different competition studies (not only in railways) that a vertically integrated operator has a strong incentive to discriminate against other train operators if the service provided by other operators directly compete with service of the integrated operator (for instance, an integrated freight service operator discriminating against a non-integrated freight service operator). Therefore, certain changes maybe necessary to promote new entrants in train operations to encourage competition.

Vertical separation involves separation (in ownership) of track infrastructure and train operations. In this kind of a separation, competition occurs between different train operators on the track, which is provided by an independently owned entity.

One of the main reasons for separating infrastructure from train operations is to eliminate any possible discrimination against other train operators and to provide level playing field to all the operators on the infrastructure. Moreover, vertical separation also leads to transparency in financial flows. Through, creation of two independent organizations, government can better target its subsidies for enhancing infrastructure and other relevant services. This will prevent infrastructure subsidies being utilized for subsidising train operations. Vertical separation can be done either by separating accounting arrangements or through separation of management.

Though such an approach offers scope for competition, it suffers from certain drawbacks. First is the increase in transaction costs. For instance, maintenance of track leads to delays and cancellation of certain services. In such a case the independent track owner may have difficulties in cancelling certain services, as it does not know the true profitability of services. Second, efficient pricing of use of track is not possible in case of vertical separation. This is because, track operator

⁶⁴ Competition also serves public interest through better provision of services, increased efficiency and a wider choice of products/services for the consumers.

⁶⁵ **Railway Reform in China-Promoting competition 2003**, consists of Summary and Recommendations of an OECD/DRC seminar on rail reform in Beijing, 28-29 January 2002

may not be able to price access to track efficiently as it may not know the nature of goods being carried. For eg. Freight operator transporting coal needs to be charged different prices than a freight operator carrying automobiles. Third, there is a loss of economies of scope, which arises from the joint operation of tracks and trains. Therefore, it can be argued that separation is sub optimal and erodes the competitiveness of railways against other modes of transport.

2.6.1.2 Vertical integration with horizontal separation

Under this approach, the rail industry remains vertically integrated but it is divided into several route-based companies that operate in specific geographic markets. Here the scope for competition is limited. More specifically, competition is enhanced in only those cities that are located on the border of two regions.

2.6.1.3 Vertical integration with access regulation

Under this approach, the incumbent remains vertically integrated (although there may be limited amount of horizontal separation), but it is required to provide access to its track to other competing train operators under regulated terms and conditions. In this approach, there is scope for competition between the non-track owning train operators and the vertically integrated incumbent. Here, the incumbent has an incentive to provide non-discriminatory access to the tracks to competing train operators where they do not compete directly with it. On the contrary, if the operators compete directly with the incumbent, it has a strong incentive to limit access. Access charges are monitored by an independent regulator, which ensures non-discriminatory access to incumbent's tracks.

2.6.1.4 Autonomous Regulator

An important aspect that requires due consideration while developing railways sector is the establishment of a railways regulator. Existence of an independent regulator is essential to ensure non-discriminatory access to infrastructure and facilities and to monitor anti-competitive behaviour among the market players. It is important to note that the role of a regulator should not be limited to monitoring access charges, quality standards should also be set and service provided by the operators should be monitored. The presence of a regulator is also important to safeguard interests of the consumers and enhance overall efficiency and performance of the railways.

All the above-mentioned models aid in creating an environment conducive for competition, which may eventually lead to improvements in the performance of railways.

To gain a greater understanding of these reforms, three countries have been studied viz. Sweden, Germany and United Kingdom. The reforms undertaken in these countries are discussed below.

2.6.2 Case Studies

2.6.2.1 Sweden⁶⁶

Reforms in the railway sector in Sweden began in the 1980s. Till 1988 infrastructure and train operations were operated by one public service enterprise, Swedish State Railways (SJ). In 1988, the government initiated rail reforms and introduced a new transport policy. The main feature of the policy was separation of rail infrastructure from rail traffic. The national railway was split into public service enterprise responsible for railway transport, SJ and a government agency responsible for the infrastructure, the Swedish National Rail Administration (Banverket).

Further, the state railway lines were divided into trunk system consisting of existing main lines which carried inter regional traffic and county lines, which usually carried only local traffic. The County Public Transport Authorities (CPTA) was given the responsibility and operating rights for the passenger services on the county lines. SJ was given exclusive operating rights for passenger

⁶⁶ www.oecd.org/dataoecd/7/14/35911008.pdf, accessed on 13th June 2008

traffic on the trunk network as well as for rail freight traffic on the entire railway network.

A key development towards promoting competition, took place in 1996, when the freight services were opened to competition. Subsequently in 2001, the incumbent SJ was split into several limited liability companies. Two independent operating companies were formed – SJ AB, operating passenger traffic, and Green Cargo AB, operating freight traffic. Maintenance, coach cleaning and IT-services were made into separate companies. The division of the state owned railway network into trunk lines and county lines was abolished in 2002 and the operating rights for passenger traffic were given to SJ AB.

From competition point of view, freight rail traffic can be described as fully competitive. The other segment of the rail transport, i.e. passenger traffic comprises of two submarkets operating under different competitive conditions: contract market and market for inter-regional traffic. Contract services, consisting of local and regional public transport and unprofitable inter-regional traffic have been open to competitive tendering since early 1990s. The contracts are offered by Public Transport Agency or CPTAs and the company that wins the bidding is normally given sole rights to the route concerned. In the other sub-market i.e. inter-regional traffic, SJ AB has the monopoly and the only competition is that from other modes of transport like air traffic and road transport etc.

Pursuant to the Railway Act, 2004, the Swedish Rail Agency was set up to serve as the regulatory body and the safety authority in the railway sector. The Agency supervises safety on the railway, tramway and metro systems. The Swedish Rail Agency monitors the charges levied for use of the railway infrastructure to ensure that they are determined in a competition-neutral and non-discriminatory manner. The agency also ensures that capacity on the rail infrastructure is allocated, and services are provided, in a non-discriminatory manner.

The advent of competition in the Swedish rail sector has had positive effects, both in the form of innovation, such as new solutions offered by train operators and in the form of reduced costs due to streamlining of activities. Despite stiff competition, the Swedish state via SJ AB still accounts for the majority of the bulk passenger services. However, it has been observed that SJ AB has misused its monopoly power at times. It classified routes as profitable or unprofitable and enjoyed exclusive rights on the latter. Further, it is not under any obligations regarding service levels, traffic content or prices. Additionally, SJ AB by virtue of its strong financial position is able to set very low prices and thus deter any actual and potential competition.

2.6.2.2 Germany⁶⁷

In Germany, the government initiated the rail reforms in 1994 and since then, the German railway sector has undergone significant changes. Till 1994, two train operators namely; Deutsche Bundesbahn (DB- former West German Railway) and Deutsche Reichsbahn (DR- former East German Railway) were operating in Germany. These were transformed into one single profit-oriented enterprise in the legal form of a joint-stock company (Deutsche Bahn AG). DBAG was split into an entrepreneurial area - responsible for train operations and infrastructure and a public sector area - responsible for other tasks.

The Federal Railway Office (Eisenbahn-Bundesamt, EBA) was also established in the course of the rail reform, to serve as the regulatory authority in the railway sector. It is a higher federal authority responsible to the Federal Ministry of Transport, Building and Housing. The EBA has supervisory functions, particularly in the field of legal procedures for rail track construction, monitoring of compliance with technical safety standards and granting operating licenses to railway companies. In addition, the EBA helps to ensure non-discriminatory access to the railway network.

From the point of view of competition, there are two key developments. First is the rationalization of local passenger services. This process transferred power to determine local rail services, from national level to regional level (to state governments). New competition is arising in the field of local

⁶⁷ www.oecd.org/dataoecd/7/14/35911008.pdf, accessed on 13th June 2008

public passenger transport, still, the majority of the market share is held by DB Regio⁶⁸ (90%) and the rest of the market is distributed between approximately sixty companies.

In freight transport, competition has heightened and currently there are one hundred and twenty railway companies that offer freight rail transport services apart from DBAG. On the other hand, there is only one competitor, the Connex group, in the field of long-distance passenger rail transport.

The second is introduction of open access, under which access is provided by the network operator, which allocates the right of use for individual route sections to the railway companies. For this purpose exclusive operator contracts are concluded for specific infrastructure segments, which do not involve actual transfer of infrastructure, but merely its use. The maintenance and servicing of these infrastructure segments is the responsibility of the network provider.

Though there is complete open access in theory, it has been noted that the nature of access charges (high charges and quantity discount favouring the dominant player) has been a deterrent to entry.

2.6.2.3 United Kingdom 69

The rail sector reforms were introduced in 1994 in Britain. British passenger railway operations were divided into 25 train-operating units, which were later franchised and sold to private operators. One of the main features of the rail reform exercise was the separation of rail infrastructure and train operations. This was not merely an accounting separation but also involved separate management and ownership.

Subsequently in 1996, infrastructure was privatised and handed over to Railtrack, which was later sold to Network Rail. Network Rail owns and operates tracks and associated infrastructure, such as signalling. It also owns most of the stations and depots, which are normally leased to and operated by one of the train operating companies.

An independent rail regulator, namely, the Office of Rail Regulator was created in July 2004. It ensures that Network Rail manages the network efficiently such that it is able to serve its consumers efficiently. It is also responsible for licensing railway assets, setting terms for access by operators to the network and other railway facilities, and enforcing competition law in the UK rail sector.⁷⁰

The restructuring of railways has led to significant improvements in the industry. One of the key deliverables of restructuring is the development of contracts between parties, which include performance regimes. Restructuring has also brought transparency in terms of cost, risks and rewards.

This has also led to private sector investments in the railways sector and has brought new and refurbished trains, upgraded stations and other investments such as car parks. Further, there has been an increased commitment and entrepreneurial drive among many train operators. Innovation led to new economical dedicated tickets, development of better on-board service, special offers etc.

However, privatisation also has its negative aspects. The coordination problems due to fragmentation of the industry and confusion to customers are major issues associated with privatisation in UK. A number of highly publicized railway accidents since privatisation have demonstrated the problems that have been created with the break up of a single rail service provider. Whereas British Railways would admit its liability within hours of an accident and then carry out an open detailed investigation into the cause, post reforms difficulties arise because of the numbers of companies involved and their respective legal advice regarding the liability. The industry does however accept overall liability (based on a joint handling agreement), but individual liability among the organizations takes time to clarify.

⁶⁸ DB Regio is one of the subsidiaries of the incumbent DBAG.

⁶⁹ http://www.rikstrafiken.se/db_dokument/uk_railwayreport_2003.pdf, accessed on 16th June 2008

⁷⁰ <http://www.rail-reg.gov.uk/server/show/nav.75>, accessed on 22nd June 2008

It has been observed that train-operating companies compete in both pricing and service levels but this on-track competition is restricted to very few routes in the UK.

2.6.3 Lessons and policy recommendation

From the international review one can broadly conclude that measures such as separation of infrastructure and train operations have promoted competition in railways but only to a limited extent. This has been found to be true where there was a mere separation of accounting arrangements and not the actual separation of ownership, for e.g. Germany. Even in case of UK the reform process was radical, and there was separate management and ownership of infrastructure and train operations. It has been seen that competition has been restricted only to some routes and has not been effective in the whole of the railway network.

No doubt vertical separation has led to increased efficiency, better management and innovative products, but it has also led to fragmentation of the rail industry. This has further led to coordination problems between the market players⁷¹. Particularly in case of UK it has been observed that privatising infrastructure created a multitude of problems, including the bankruptcy of the infrastructure company. Therefore, there is sufficient evidence that indicates that separation of infrastructure and services has not been very effective.

To quote one of the executive directors of the Community of European Railway and Infrastructure Companies (CER) would further clarify the point

Quote

"..... There is no empirical evidence in Europe that separation between infrastructure and operating services leads to real improvement in the railway system: just the other way around."⁷²

Unquote

One important lesson drawn from these experiences is that the objective of introducing competition can also be achieved without vertical separation. Even with a vertically integrated entity and the provision of open access, environment conducive for competition can be created, which has been the case in Germany. Furthermore, in case of a dominant integrated entity, it is essential to ensure non-discriminatory access to all other operators. Therefore, the provision of effective open access needs to be monitored.

Most importantly, the creation of rail regulator has proved crucial to ensuring non-discriminatory access to the tracks and checking any anti-competitive conduct. Monitoring access charges is necessary so that new entrants do not find themselves at a disadvantage vis-à-vis the incumbent. It is generally seen that an integrated rail company has a tendency to favour its own subsidiaries, which is clear from the international experiences.

The same holds true in India, where IR has a strong incentive to favour CONCOR. A well-framed regulatory framework that defines the rules for access charges is recommended. An independent regulatory authority that looks into compliance issues and safety standards will greatly enhance transparency in the existing railways.

2.7 Advocacy issues for CCI

Following are select areas where CCI can play an important role by advocating and educating the concerned stakeholders. These are enumerated below:

2.7.1 Areas open for Private Participation (Container Movements and DFC)

⁷¹ In case of UK it has been noted that negotiations over access charges are quite complex and time-consuming.

⁷² *The Delhi-Mumbai & Delhi-Howrah Freight Corridors*, report of the Task Force, published by The Secretariat for the Committee on Infrastructure, Planning Commission, GoI

From the aforementioned study it is clear that there exist some apprehensions among the new entrants primarily with respect to the issue of level playing field. Establishing a regulatory body that looks into such matters can be useful in preserving the spirit of competition in the market. Given the importance of autonomous regulator in the international railway reform CCI might like to take up these as advocacy issues with the Railways Ministry and Planning Commission.

2.7.2 Procurement in Railways

Competition advocacy can play an extremely important role in building up a sound railway procurement system. By carrying out the outreach programs CCI can develop close working relationships with Railway procurement officials. In this way CCI can provide direct guidance to Railways' procurement authority. This will educate the concerned officials about the true cost of anti-competitive practises in procurement and also help them to devise measures to reduce the same.

2.7.3 Preference to PSUs

From the study, we have seen that the policy of reservation towards PSUs is acting against the best interest of the Indian Railways. Moreover, such practises also reduce the level of competition pressure on the other firms in the market. Therefore, it is imperative for CCI to raise the issue with the concerned authorities and advocate for a policy revisit.

CHAPTER 3 COMPETITION ISSUES IN THE INDIAN PORTS SECTOR

3.1 Background

India has a long coastline of about 7517 km, which offers an opportunity for large-scale maritime transportation. About 95% (by volume) and 70% (by value) of India's global merchandise trade is moved through maritime transport (Department of Shipping, 2007). The 12 major ports established by Central Government handle about 74% of the entire maritime cargo. The ports other than major ports handle the remaining 26% (Planning Commission, 2007).

The sector is governed by the policies prepared by the Department of Shipping, Ministry of Shipping, Road Transport and Highways, Government of India (GoI). Other than shipping and ports, sub-sectors such as shipbuilding and ship-repair, major ports, and inland water transport also fall under the purview of the Department. The Department has been entrusted with the responsibility to formulate and implement policies and programmes on these sub-sectors.

3.1.1 Major ports

In India, the major ports are placed under the Union list of the Indian Constitution, and are administered under the Indian Ports Act, 1908 and the Major Port Trust Act, 1963 by the GoI. Under the Major Port Trust Act, each major port is governed by a Board of Trustees appointed by the GoI. Of the 12 major ports⁷³, 11 are run by Port Trusts while the Ennore port is a corporation under the Companies Act. For the ports governed by the Board of Trustees, powers of these trustees are limited and bound by directions on policy matters and orders from the Government of India (Sundar, 1998)

The Tariff Authority for Major Ports (TAMP), created under an amendment to the Major Ports Trust Act, is the regulating authority for major ports. Its function, however, is limited to fixing tariffs for only the twelve major ports.

The cargo traffic handled by major ports increased to 463.84 Million Tonnes (MT) in 2006-07 from 423.57 MT in 2005-06. The aggregate capacity of major ports in 2006-07 was 504.75 Million Tonnes Per Annum (MTPA). In terms of cargo composition, Petroleum Oil and Lubricants (POL) had a share of 32%, followed by iron ore and container traffic with 19% and 15% shares respectively in 2006-07 (figure 3.1). The investment made on modern cargo handling equipment has resulted in growth of container traffic by around 14% in the last 5 years (Planning Commission, 2007; Economic Survey, 2008).

⁷³ The twelve major ports are Kolkata (including Dock Complex at Haldia), Paradip, Visakhapatnam, Chennai, Ennore, and Tuticorin on the east coast and Cochin, new Mangalore, Mormugao, Jawaharlal Nehru at Nhava, Mumbai and Kandla at the west coast.

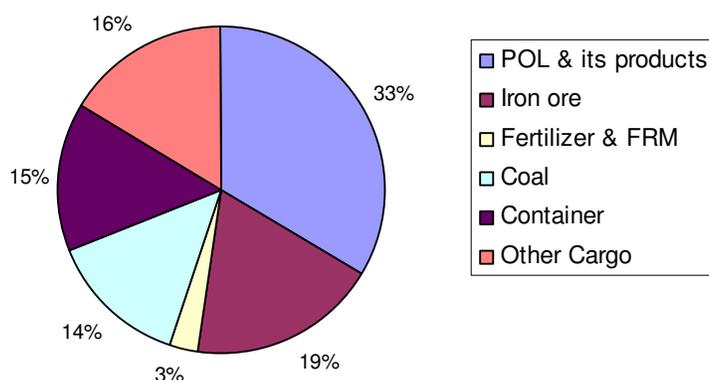


Figure 3.1 Commodity-wise traffic handled by Major Ports (2005-06)
SOURCE Planning Commission, 2007

3.1.2 Non-major ports

There are 187 non-major ports in India. While some of these ports are small and handle limited cargo, there are a few ports such as the Pipavav Port and the Mundra Port, which handle more volume than even some of the major ports. The share of cargo traffic handled by these non-major ports has increased from 23.58% in 2000-01 to 26.30% in 2005-06. The volume of traffic has increased much faster at the minor ports than the major ports in the last 5 years with a Compounded Annual Growth Rate (CAGR) of 11.74% as compared to a CAGR of 8.54% for major ports (Planning Commission, 2007).

The non-major ports are placed in the Concurrent list of the Constitution and are administered under the Indian Ports Act, 1908. The Act defines the jurisdiction of the Central and State government over ports. It lays down rules for safety of shipping and conservation of ports. It regulates matters pertaining to administration of port dues, pilotage fees and other charges. At the state level, the department incharge of ports or the State Maritime Board (created through State legislation as in case of Gujarat), is responsible for formulation of water front development policies and plans, regulating and overseeing the management of state ports, attracting private investment in the development of state ports, enforcing environmental protection standards etc.

Table 3.1 summarizes the structure of the Indian port sector.

Table 3.1: Structure of the Indian Port sector

Port Sector Regulatory Set-up		
	Responsibility	Governing Act
Ministry of Shipping	Coordinates the various activities related to ports, shipping and inland water transport	Merchant Shipping Act 1958
Port Trusts	Managing the daily activities of major ports in the country	Major Ports Trust Act, 1963
State Maritime Boards/ State Government Departments	Governing the non-major ports	Indian Ports Act 1908
Tariff Authority for Major Ports (TAMP)	Regulation of tariff setting in Major Ports	Major Ports Trust Act 1963

3.2 Port sector reforms

The reforms in the Indian port sector were initiated during 1990s. The Indian economy's gradual integration with the global economy and sharp growth in industrial output induced by the liberalization policies made it imperative to improve quality and expand capacity of the country's physical infrastructure for sustaining industrial growth. In 1994, the Ministry of Surface Transport (MoST), GoI, which was the nodal agency overseeing the Indian port sector; published a policy document specifying the broad contours of desired reforms in the sector. The document highlighted intention of the government to create a more conducive atmosphere for privatising key port facilities and amending the governing rules, regulations and procedures accordingly. Private sector participation was being essentially sought in areas where it could offer attractive rates of return on the port assets leased out and also assure no retrenchment of labour over a given period of time.

The first policy guidelines for Private Sector Participation (PSP) (domestic and foreign) in major Indian ports were announced by the MoST in October 1996 (MoST, 1996). The guidelines pertained to clauses regarding collaborations between major ports and foreign ports, minor ports, and other private operators, respectively. The announcement of the guidelines implied that future development of ports would no longer be in the exclusive domain of the public sector. The GoI adopted the concept of landlord ports, and aimed to secure private participation in the provision of port services. The guidelines are discussed in detail in the subsequent sections.

Under the landlord port arrangement the Port Authority owns the basic infrastructure only and leases them out to operators, mostly on a long-term concession basis, while retaining all regulatory functions. Application of the model implies that the government (major port trusts) progressively relinquishes the responsibility of providing operational port services and their management to private developers through various contractual agreements. In Indian port sector, these agreements have been in the form of 'Build-Operate-Transfer' (B-O-T) scheme through open bidding processes, where private players takes over development and management of port facilities (e.g. berth and cargo terminals) for a specified period not more than 30 years.

3.3 Need for competition in ports in India

The demand for transport services is rising at a fast pace. Consequently, heavy dependence on oil and its rapidly increasing consumption are amongst the most challenging transportation-related problems that the planners and policy-makers in the country are confronted with today. The development of water transport and ports, therefore, assumes greater significance both from the perspective energy consumption and also because of the fact that land based modes of transport like rail and road transport are nearing saturation.

In spite of being an important link in the supply chain, the ports sector in the country faces numerous challenges. Ports are unable to handle additional traffic because of delayed evacuation of cargo due to inadequate road and rail connectivity and capacity. Thus, despite having adequate capacity and modern handling facilities, ports are not able to ensure a quicker turn around of ships (present average turn around time at major ports is 3.42 days). This undermines the competitiveness of Indian ports vis-à-vis other ports in the region. The growth in the sector is slow on account of many other factors like high manning scales which increase operational costs, lack of berthing facilities at major ports and inadequate handling facilities at major and non-major ports. The ports sector needs to gear itself to meet these challenges. In this respect, bringing in more competition and creating a competitive environment can certainly help improve the efficiency of the sector.

3.4 Key competition issues

The study focuses on the following key competition issues in ports sector:

1. Inter-port & intra-port competition
2. Combinations: Mergers & Acquisition
3. Agreements in the shipping liner Industry
4. Port concessions
5. Port corporatization model
6. Labour issues and competition in ports sector
7. Regulation in Indian Ports
 - Acts & Guidelines
 - TAMP
 - Pricing

3.5 Methodology

Literature review was undertaken to understand the competition issues in the ports sector. The review focussed on:

- Issue-wise study of identified competition issues in the Indian port sector, and
- International cases to understand how similar issues have been tackled in other countries.

In order to understand the views of stakeholders in the maritime sector on these issues, TERI undertook a questionnaire survey (attached in annex 1). The questionnaire was sent to 30 stakeholders including the Ministry of Shipping, Major Port Trusts, State Maritime Boards and Private Terminal Operators. 7 responses were received.

The research team also interacted with important stakeholders in Delhi as well as Mumbai. Interactions were held with 13 stakeholders in Mumbai and Delhi covering the tariff regulator, private terminal operator at major port and minor ports, freight forwarder, shipping liners, shippers, sector experts, etc.)

3.6 Inter-port & Intra- port Competition

There are three categories of port-related competition, inter-port, intra-port and intra terminal. Inter-port competition arises when two ports in the same or in different countries compete for the same cargo. The scale of inter-port competition often depends on the size of the hinterland of the concerned ports. For example, Rotterdam competes with Antwerp, Hamburg, and Bremen for cargoes destined for Central Europe. Transshipment container trade competition often concerns an entire region; for example, in the South Asian region, the port of Colombo, Sri Lanka is competing with Singapore, Tanjung and Pelepas, Malaysia; , Dubai, United Arab Emirates; Salalah, Oman; Aden, Yemen and possibly in the future with Vallarpadam, India.

Intra-port competition refers to a situation where two or more terminal operators within the same port area compete for the same type of cargoes.

Intra-terminal competition refers to two or more (stevedoring) companies competing within the same terminal. This situation is rare and usually exists only within small ports operating under the service port model with independent stevedores. (WB & PPIAF, 2003)

3.6.1 Inter-port competition

Inter-port competition is possible when a user of port infrastructure has an economically feasible substitute for those facilities in another location. From the consumer's perspective following factors would determine his ability to switch ports (Ministry of Transport, Wellington, 2002):

1. Internal land transport cost: This depends on the distance to the port and the cargo-specific transport costs / tonne / kilometre.
2. Economic margin of the product being transported: Economic margin tends to be lower on an absolute basis for products with a low unit value such as logs and cement. Lower absolute margins limit ability of these products to bear land transport costs, and therefore limit ability of customers to substitute ports.
3. Logistical factors: This includes timing and availability of road or rail connections; and use of product-specific transport and loading infrastructure (e.g. tankers and pipelines); and
4. The relative price/quality mix offered by the individual port: This includes port charges, service quality, and frequency of ship calls, ship capacity, and connections to national and international destinations.

It is important to note that typically exporters and importers focus on minimisation of the total supply chain costs. Therefore, in some cases, it will be more efficient to use a port other than the port in closest geographic proximity.

There are a number of economic factors that drive inter-port competition. These are:

1. High fixed cost of port operations: Low utilisation combined with high fixed costs enhances the potential for competition. More volume would mean that the revenues are far greater than the variable cost and hence more profit would be made. This would incentivise ports to secure additional shipments.
2. Falling internal transport costs: As internal transport costs fall, alternative ports increasingly become economical for port customers, enhancing inter-port competition. For low value products, on which transport costs can quickly become prohibitive, reductions in land transport costs can be especially effective in increasing the range of available port options.
3. Increasing containerization: Standardised containers are inexpensively transported and efficiently stored relative to other methods of cargo carriage. Accordingly, containers are regarded as being highly contestable between ports. Therefore as containerization increases, so will inter-port competition.

3.6.2 Intra-port competition

Intra-port competition occurs between the providers of particular services within an individual port. Like inter-port competition, the level of intra-port competition within a port can affect pricing and service standards of port services and can have an impact on the ultimate choice of customers.

3.6.3 International experience

An important learning from international experience is that while in most cases competition between ports or within ports would enhance the efficiency level of ports; unrestricted and excessive competition can at times be counterproductive.

The example of the concessioning at Port Puerto Nuevo discussed below is a case where excessive competition actually drove out players from the market as they could not survive the price wars between the competing terminals. (WB & PPIAF, 2003):

Box 3.1: Argentine Experience: Case of excessive competition

In 1993, the Argentine Government offered concessions for six terminals in Buenos Aires (Puerto Nuevo). Of these numbers 1 and 2 could be bid as one and this resulted in five operating concessionaires at Puerto Nuevo. The volume of cargo however was not sufficient and as a result one of the operators had to close down within 13 months of operations. From the remaining four operators, one specialized in general cargo and bulk, and the remaining three in container handling.

The main reason behind the failure of this concession was that while intra-port competition itself was more than sufficient, the port also faced competition at the inter-port level from Dock Sud, which was only 8 kms from Puerto Nuevo. Dock Sud came under the state province jurisdiction (while Puerto Nuevo came under the federal jurisdiction) and the state government bid out a 4th terminal Exolgan at this port. The terminal Exolgan at Dock Sud was able to attract cargo originally destined for Puerto Nuevo as it offered better rates and terms. Dock Sud comes under the state jurisdiction and therefore the regulations governing it are much less restrictive and the taxes imposed are also lower.

Impact of excess competition

As mentioned earlier, the operator who won the concession of terminal 6 went bankrupt, mainly as a consequence of lowering tariffs to sub economic rates to retain business. It is reported that since the early part of 1995 there was major competition on prices and as a result the average-per-box revenues plummet from \$400 pre-privatization to less than \$200. The rate-of-return to terminal operators in Buenos Aires was beneath the average long-term cost of provision of the services by segmenting the market into four operators. Each terminal incurred considerably higher costs than the combined average cost of one large operator.

Source: (WB & PPIAF, 2003)

3.6.4 Indian experience

At the outset, it is important to note that it is excess capacity that drives inter-port competition and intra-port competition. In case of Indian ports, however, at present, most of the terminals operate at more than 100% capacity and therefore there is no compulsion for them to compete against each other for cargo. Commenting on lack of excess capacity in Indian ports, a major port user stated that 'though they have flexibility in choosing a terminal, this choice is governed by availability'.

3.6.5 Inter-port competition

As discussed earlier in the chapter, inter-port competition is a function of factors including land transport cost, logistic factors and the relative price quality mix offered by the ports. In this section, factors responsible for the lack of inter-port competition in the Indian port sector are examined.

While bulk cargo cannot easily be moved from one port to another, container traffic is much more mobile and therefore competition between ports is possible for container cargo. In India, given that there are a number of private operators in the container terminal business, it is all the more expected that there will be competition in this segment. This however is not the case. As much as 55% of the total container cargo passing through the Indian coastline is handled by Jawaharlal Nehru Port Trust (JNPT) alone.

3.6.5.1 Hinterland connectivity

According to an Indian Institute of Management, Ahmedabad (IIM-A) study undertaken in 2007 (Raghuram & Gangwar, 2007), the main reason why JNPT scores over other terminals on the Indian coastline is hinterland connectivity. Through a case study, the paper argues that though the ports of Gujarat are closer to the land locked northern Indian states, most of the container traffic still comes to JNPT. This is a result of poor hinterland connectivity for Gujarat ports, as a result of which the traffic from Tuqlakabad (near Delhi) takes almost twice the time to reach Mundra and Pipavav in Gujarat as it takes to reach JNPT. Also, importantly, this study also points out that though inland haulage charges are lower at the Gujarat minor ports, these are still not sufficient to attract traffic to these ports. The delay in container movement to and fro Gujarat ports negates the competitive edge that the minor ports of the state have over other ports.

Table 3.2 shows the distance, rail transit time and inland haulage costs for Tuqlakabad (Delhi) container traffic to JNPT and other ports. This clearly shows that while the distances and haulage costs from Delhi to Mundra and Pipavav are lesser than to JNPT, the rail transit time is almost double at Mundra and Pipavav ports.

Table:3.2 Distance, rail transit & inland haulage from Delhi

Port	Distance from Delhi (Km)	Rail Transit Time (Hrs)	Haulage Costs (Rs/TEU)	
			Rail	Road
JNPT	1388	48	18750	32000
Mundra	1295	80	16650	20000
Pipavav	1333	70	17000	24000
Visakhapatnam	1700	67	22450	66000
Chennai	2100	90	30000	70000

3.6.5.2 Availability of infrastructure

Another significant issue preventing inter-port competition is that not all major ports in India can provide same level of facilities even within the container segment. For instance Kandla port is not able to attract large vessels, as its draft is relatively shallow. On an average, Kandla attracts only four vessels a week while JNPT, which has a deeper draft, attracts upto 45 vessels a week. Kandla in fact is operating at almost half its capacity due to inadequate depth and connectivity constraints⁷⁴.

3.6.5.3 Pricing and quality of service

The third issue is the comparability of pricing and services offered by ports. A terminal can attract traffic of a nearby (competitor) port by offering customised services or by offering price discounts. In the Indian port sector prices tend to be fairly rigid. TAMP fixes the ceilings therefore major ports cannot offer customised and value added services. The minor ports are free to offer differential services to consumers as their prices are not governed by TAMP. But they fear that if their prices are higher than the major ports, they will lose their traffic to the major ports. In all, there is little scope for competition between ports through provision of customised services.

The option to reduce prices to attract more customers is again not a realistic option for ports given rigidities in labour practices. For instance, the Kolkatta Port employs 32 persons for transfer of containers from ships to quay as against 12 at Haldia, 15 at Mumbai, 21 at Chennai and 4 at JNPT (Sundar S, 1998). The Kolkatta Port could have easily brought down its operational costs by reducing its manning scale. However these manning scales have been fixed through negotiation with the labour unions and it would be almost impossible for the port to re-negotiate these scales. Similarly, the private terminal operators have to redeploy the labour at the existing terminal 'at terms not any less favourable than those that were offered to the workers before the privatization'. Hence, even the private players have very little leeway in reducing labour costs.

While looking at pricing, it is also pertinent to understand role the played by TAMP in promoting competition through its tariff decisions. The tariff reductions imposed by TAMP at the Tuticorin Port in recent years shows that there is very little incentive for a terminal to improve the traffic at its terminal. A newspaper report⁷⁵ states that for the year 2007-08, Tuticorin decided to restrict cargo at the terminal to the minimum cargo guarantee of 300,000 TEUs/annum though the terminal handled higher level of traffic of about 377,000 TEU in the previous year. The reason for reducing the scale of operation was that the operator felt that it would not be able to recover even its operating costs for the new year as TAMP brought down its tariff to Rs 980/TEU for 2007-08 from Rs.2100/TEU in September 2006. This example brings out the fact that TAMP instead of incentivising a terminal to improve its traffic may in fact discentivise it by reducing the tariffs that the

⁷⁴ 'JN Port bursting at the seams; others see biz coming their way', Mint, February 20, 2008

⁷⁵ PSA Sical pares operations in Tuticorin Port, Business Line, July 9, 2007

terminal will be able to charge in the subsequent year.

3.6.6 Intra-port Competition

This study tried to examine the extent and affect of intra-port competition at the JNPT where there are three terminals catering to similar cargo. It was found that all the terminals were operating at full capacity. This was despite the fact that the terminal was charging 30% higher tariffs than the other two terminals. Intra-port competition is virtually non-existent at JNPT as there is no excess capacity. Terminal operators do not need to compete with each other for more traffic. Intra-port competition would emerge as more terminals come up at a port.

There is certainly case for promoting intra-port competition. It is generally agreed by shippers that even though prices may not have come down at JNPT after the new terminals came up, the efficiency levels have gone up all the terminals (including the public owned terminal).

The central government is trying to ensure competition in the market by ensuring that one player is not allowed to dominate a port. In the past P&O Ports was not allowed to compete for the third container terminal at JNPT, as it already owned the second container terminal. While this decision at JNPT was a one time intervention by the government, the Ministry of Shipping is now considering⁷⁶ incorporating a clause in the concession agreement that will inhibit dominance of one player at a port and which will apply across ports. The proposal is to restrict one private player to develop a maximum of two container terminals at one port. As per this proposal, if there are a minimum of two private operators in any major port, no restriction would be placed on the existing operators to bid for the subsequent terminals, subject to the condition that a single private operator will not be allowed to operate more than two terminals at the same major port including terminals at an adjacent major port. In case of JNPT, it means that P&O ports can now bid for the 4th container terminal now that there are two different private terminal operators there.

Besides the possible abuse of dominance by a private entity, there are also concerns of possibility of abuse of dominance by the public entity. In case of JNPT, the public terminal caters to the same cargo as the two privately owned terminals. As a port trust, JNPT also provides basic services to the three terminals and is in a position where it can deny access to some of these basic services to the rival terminals. It can also discriminate in terms of the quality of services provided to different user. It should be noted that the conditions for provisions of basic services are generally agreed under the concession agreement and in case of dispute the provision of arbitration is available. However, it maybe difficult to prove discrimination in the provision of services (under the arbitration route) and therefore CCI may need to explore the possibility of enforcing the essential facility doctrine in case discriminatory practices are reported to it against the port trust (landlord port).

3.6.7 Conclusion

Clearly both inter-port and intra-port competition is at a nascent stage in India. Inter-port competition is hindered by insufficient hinterland connectivity and also because not all ports can offer similar facilities. Further there are rigidities in pricing as a result of which traffic of nearby ports cannot be enticed through value added services or reduction in tariffs. A few of TAMP's decisions have also left little incentive for ports to vie for traffic from nearby ports. These issues need to resolved to promote inter-port competition.

In the future one can expect inter-port to emerge once the ports being developed by state governments, particularly in Gujarat and Andhra Pradesh come up.

Intra-port competition will emerge once the new container terminals planned at the existing ports come up. The fact that the central government is taking a considered decision to not allow a particular player to dominate a port, should promote intra-port competition in the future.

⁷⁶ News report, Business Line, 2007

3.7 Combinations: Mergers & Acquisition

3.7.1 Vertical mergers & issues of competition

The maritime industry is characterised by large-scale operations, constant innovation in technology; and therefore requires huge investments. Players in the sector are consolidating their position through various vertical and horizontal mergers in order to enhance efficiency and provide better services. A freight forwarder may merge with a shipping company to provide door-to-door service, a terminal operator may merge with a freight forwarder, a shipping liner may merge with a port terminal, etc.

There are numerous examples of vertical integration in the maritime industry worldwide. A.P. Moller of Denmark owns a shipyard and also the Maersk shipping line. Some liner companies have started to operate their own ports, such as Evergreen in Panama. Some are being assigned dedicated terminals within larger ports, such as Maersk in Rotterdam.

The intention behind vertical integration generally is better co-ordination and lowering transaction costs (a merger between a freight forwarder and a terminal may ensure timely supply of containers and services for evacuation of goods from the terminal, merger between shipping liner and terminal operator would ensure sufficient facilities for unloading and loading at terminals). The merger, it must be noted, may not intentionally try to drive out competition. Therefore, any competition promotion authority needs to carefully examine mergers on case-by-case basis and scrutinize and monitor for anti-competitive behaviour (both pre-merger and post-merger).

Some of the possible anti-competitive activities of a vertically integrated entity in the maritime industry are discussed below.

1. Market foreclosure

A merger between a terminal/port operator and a shipping line may lead to the merged entity denying access and services to competing shipping liners. The efficacy of this market foreclosure will depend on the market share of the merged entity and the competitive alternatives available. For instance if the integrated entity owns the entire capacity at the port (i.e. there is no intra-port competition), then the merged entity can easily deny access to rival companies. In case there is a nearby port offering similar services, this access restriction may again not work because the competitor would then go to the next closest port. In fact, the merged entity, in this case will only lose a consumer.

2. Discriminatory/predatory pricing & cross-subsidisation

A merged entity can offer discounts for one activity by cross-subsidising it with revenues from its other business, especially where it is already established. While this can be of benefit to the consumer, the competition authorities need to watch out for any signs of predatory pricing (wherein, lower prices are offered only till competitors can be driven away). The merged entity can also raise its prices arbitrarily.

3. Bundling of services

The merged entity may bundle its services such that any consumer desiring one service would have to accept the other service as well. For instance, a merged entity may only offer a package service of freight-forwarding and terminal handling. A shipper may need to necessarily use the shipping liner of the entity that is providing him terminal operation services.

3.7.2 Horizontal merger/acquisition & issues of competition

Horizontal mergers (or acquisition) take place between companies offering the same services, i.e. shipping company merging with another shipping company, a port or terminal merging with another

port or terminal.

Horizontal mergers are generally undertaken to benefit from economy of scale of production, whereby the fixed costs can be spread over a substantial turnover. Lower operational cost can also benefit the consumer through reduction in tariffs. Therefore, horizontal mergers have to be assessed carefully and be restricted only if they abuse their dominant position.

Some of the possible anti-competitive activities of a horizontally integrated entity in the maritime industry are discussed below.

3.7.2.1 Effect on prices

As a result of the increase in market power, the merged entity can raise prices. Generally, competition authority tends to examine the market share of the merging entity and often fix a threshold ceiling (say 30%) over which any merger may result in concentration of market power. In a post-merger scenario, the regulator/authority will have to examine the trend in prices, i.e. whether prices have increased post-merger to identify for any signs of anti-competitive behaviour.

3.7.2.2 Entry barrier for potential investor

Horizontal mergers may become an entry barrier for new/potential entrants in the maritime industry. New entrants generally will not be able to offer similar rates as their scale of operation, at least in the initial years, will be much lower.

3.7.3 International experience

The case studies presented below discuss instances of merger and acquisition in the maritime sector in Argentina and European Union (EU). These case studies also briefly describe the process followed by the respective anti-trust authority in examining each case.

3.7.3.1 Vertical merger

Case of Argentina: Port terminal & shipping company

In 2001, the Argentine Antitrust Commission approved the acquisition of terminal 4 at Port Puerto Nuevo by Maersk Sea Land, one of the world's largest shipping companies. In a vertical merger the main competition concerns are market foreclosure (access restrictions) and price discrimination. If a maritime shipping company owns all port capacity as a result of its integration with terminals, it can deny access to rival shipping companies. The Antitrust Commission found that Maersk would not be able to foreclose the market because the terminal it acquired had only a small share (8 percent) of the total capacity in Puerto Nuevo and because nearby ports (especially Dock Sud) offered good alternatives for container shipping companies. Price discrimination can be ruled out by regulating prices. The regulation of Puerto Nuevo sets maximum prices (price caps) for some services, though these are not binding because terminals give significant discounts to shipping companies. As long as the regulatory agency considers the price cap a fair price and market prices are at or below this price, price discrimination by an integrated firm will not hurt competition. (World Bank, 2003)

3.7.3.2 Horizontal merger

Case 1: Hutchison International interest in Europe Combined Terminal

In 1999, the European Commission refused to allow Hutchison International to buy a controlling interest in Europe Combined Terminals (ECT), Rotterdam on the ground that the expansion would have given Hutchison a dominant market position in north-western Europe.

The Commission ruled that the proposed alliance between the Rotterdam Port Authority and the container terminal operators Hutchison and ECT would have led to a significant addition of capacity, given that the first, fourth and ninth largest container terminal operations in northern

Europe would have been brought under the joint control of Hutchison. The Commission's investigation showed that the merger would have created a dominant position for ECT/Hutchison in the market for stevedoring services to deep-sea container ships in northern Europe. As a result of the merger, ECT/Hutchison would have had a market share of 36 percent of this market with the nearest competitors having less than half of the joint market share of the parties. ECT/Hutchison's combined market position would in fact have been much stronger than reflected by their market share, given their strong joint position in transshipment, their leading position in far east cargo and the fact that their terminals are particularly suited to serving larger deep-sea vessels.

The proposed acquisition was abandoned before a formal decision was adopted by the Commission. (European Commission, 1999)

Case 2: Maersk acquiring Safmarine Container Lines (SCL)⁷⁷

This is the case of the container shipping liner Maersk acquiring control over Safmarine Container Lines (SCL) in 1999. SCL at that time operated a fleet of more than 50 owned and chartered liner vessels with a total capacity of 56000 TEU. SCL also operated a wide range of container equipment and it also had a road haulage business providing support to the shipping lines. Maersk, part of AP Moller Group was already considered a very large container shipping company with a worldwide presence.

The European Commission identified the relevant product market as containerized liner shipping services. The relevant geographical market was identified as services by shipping companies between ports in either Northern Europe or the Mediterranean and ports in each of the non-European areas.

The relevance of shipping conferences and consortia was analysed. In this case, two trade routes on which the proposed merged entity would operate as part of conference/consortia were taken into account. These were the northern Europe/South Africa and the northern Europe/Middle East trade routes. It was accepted that the position of the merged entity in the alliances/consortium would be much stronger and it would have greater power than it did as a single entity.

The Commission sought views of users on impact on business due to greater concentration of power with one company in the alliance/consortium. The customers felt that the impact on trade as a result would be limited. Customers also submitted that as such the impact of conferences/consortia itself had decreased during the past few years.

Given these factors the Commission concluded that the proposed merger would not give rise to the creation or strengthening of a dominant position. The Commission therefore did not oppose this merger.

Learning from international M&A case studies

Most jurisdictions have an anti-trust authority which ex-ante looks at any merger and acquisition. Typically most agencies first identify the product and geographical market. Then they examine the market share of the merged entity and assess whether the merged entity can use its market power. Thereafter they examine the countervailing power, probable entrants and the extent of entry barriers. Some jurisdictions will also undertake a cost benefit analysis of the merger for the economy as a whole, and see whether the overall benefit of the merger is greater than the cost.

The threshold levels, i.e., what level of market share can qualify as 'concentration', what level of countervailing power is required, etc are defined by each country based on the specific characteristics of its industry. It should be noted that generally only a small proportion of proposed mergers and acquisitions are disallowed by the competition authority. The authority has to play a balancing act such that it does not impede economic development through stiff control over mergers and acquisition.

⁷⁷ Case no. IV/M.1474-Maersk /Safmarine, 1999, European Commission

3.7.4 Role of sector regulator in M&A

In some countries, the sector regulator has competition related powers, which can be used to ensure that the merged entity is not able to abuse its dominant position. The regulator would generally use this provision in case of a vertical integration between a shipping liner and a port terminal. The main concern of 'abuse of dominance' in case of a vertically integrated firm would be denial of access to port infrastructure for competing shipper liners. This practice can be checked by providing open access (declaring an infrastructure as essential facility) to all shipping liners. The case study given in Box 3.2 describes the open access regulation enforced by the Peruvian transport regulator.

Box 3.2: Case study – access regulation in Peru

Peruvian public ports are operated by two organizations: a state-owned administration (ENAPU) and a vertically integrated private company (TISUR). In 1998, as part of a program of institutional reforms in Peru, OSITRAN was created as the agency responsible for regulation of markets that use public transport infrastructure. OSITRAN was also mandated to supervise concession contracts for seaports, airports, railways and highways and roads in Peru. The regulator focused on ensuring access to the port's essential facilities and promoting competition, wherever possible, and limiting intervention to markets where competition was neither feasible nor desirable.

OSITRAN introduced the Access Regulation in January 2002 with the objective of making competition viable for services that use transport infrastructure as input. The Access Regulation classifies services as 'essential' or 'complementary', differentiating between them according to whether or not they form an essential link in the transport supply chain, and the difficulty of duplicating the infrastructure needed to offer the service. For a service to qualify as essential, the following specific questions must be answered affirmatively:

- a) Is the service necessary to complete the transport logistic chain?
- b) Is it essential to grant access to part of an infrastructure, because there is no technical or economically viable alternative?

Essential Infrastructure: Adjacent maritime area, wharfs, berths, manoeuvring areas inland, fixed cranes, and mobile cranes with location restrictions, weighing machines, conveyor belts, and specialized warehouses for dangerous goods.

Access Charges

In order to determine the access charges, the Regulation presents four basic principles to arrive at the optimal charge, which apply whether the contract is negotiated between the parties, the consequence of an auction, or imposed by OSITRAN:

- a) Maintain the incentives for investment in infrastructure
- b) Minimize the costs of maintaining and operating the infrastructure
- c) Provide incentives for the entry of efficient competitors
- d) Minimize regulatory cost

Access Procedure

The access procedure seeks to use market mechanisms to define access conditions, limiting the OSITRAN's intervention to those cases where access is denied or the parties cannot reach an agreement. The procedure is as follows:

- a) the interested firm presents a request for access permission to the port operator.
- b) If the port operator rejects the request, the interested firm can appeal to OSITRAN's Tribunal for the Settlement of Disputes.
- c) If the port operator accepts the request, or the Tribunal orders it, it is publicized so that other firms can present their requests.
- d) If no more requests are presented, or the port operator can grant access to all of the interested firms, the parties are free to negotiate with transparency the access contract.
- e) If the number of requests is larger than the capacity of the infrastructure, an auction supervised by OSITRAN must be called.
- f) The parties are free to negotiate but if they do not reach an agreement, or if the port operator refuses to sign the contract, OSITRAN can enact a 'Mandate of Access' (an order to grant access).

Impact of the Access Regulation in Peru

- a) Access requests have been presented for towage and mooring services in several ports, as well as for installing cranes at Callao port.
- b) The largest effect seems to be on mooring services. Before the Access Regulation this was an area traditionally reserved for the port operator.
- c) It was observed that the government owned port operator ENAPU was trying to delay or restrict access when faced with an imminent loss of its market power (as in mooring), or when expressed its desire to invest (despite the lack of public funds) as in the cranes for Callao port. (Defilippi, Enzo & Flor, Lincoln, 2002)

3.7.5 Indian experience

Most of the private terminal operators in Indian ports are consortia comprising of a global terminal operator and an Indian entity. The maritime industry has not seen any merger or acquisition within the Indian market but has been affected by global mergers & acquisition. The most important development for the Indian ports was the acquisition of the assets of P&O Ports by DP World in 2006.

As a result of this acquisition and another acquisition of the terminal portfolios of CSX World Terminals in 2005, DP World now has a presence in container handling in China, Hong Kong, South East Asia, Australia, the America's and Europe. It has clearly emerged as a dominant player with global operations.

In India, prior to the acquisition P&O Ports was already a dominant player in the Indian market with terminals at JNPT (Nhava Sheva International Container Terminal), Chennai (Chennai Container Terminal) and Mundra (Mundra International Container Terminal). Dubai Port had a terminal at Vizag (Visakha Container Terminal) and at Kochi (India Gateway Terminal Private Limited). Post merger, on the west coast of the Indian subcontinent, DP World has a presence at Mir Quasim (Pakistan) and at Mundra (Gujarat) and NSICT (Maharashtra). It is also developing an international container terminal facility in Cochin at Vallarpadam. On the eastern coast, DP World now has a presence in Chennai and Vizag and is also developing a multi-product SEZ terminal at Kulpi near Kolkatta. Clearly DP World has emerged as a dominant player. The issue before the Competition Authority is to evaluate whether DP World is abusing its dominant position or is in a position to abuse its dominant position in the future. In this study, the DP World acquisition has been discussed in more detail in Box 3.3.

Box 3.3: DP World: Case study

The acquisition of P&O Ports assets by DP is fairly recent and the operator is at present, only consolidating its position. There are no reported cases or evidence of any abuse of dominance by DP World. However, other private players are certainly apprehensive that DP World may abuse its dominance in future. CCI therefore needs to firstly examine whether DP World is in a position to abuse its dominance. It will need to identify the market share of the various terminals of DP World vis-à-vis competing terminals in the respective geographical market.

Pricing is another area that will need to be closely monitored to see whether DP World is indulging in arbitrary price hikes or in predatory pricing. In this regard, it is to be noted that in one instance, TAMP refused hike in prices at the Chennai Container Terminal where it considered the reason submitted for the hike as unreasonable.

In May 2007, DP World had asked TAMP for an upward revision of tariffs initially by 18% (which was subsequently revised to 11% by the petitioner). DP World argued that the second container terminal being developed by PSA –SICAL would come up and it would soon lose a lot of traffic to the new terminal resulting in losses. TAMP however turned it down on the ground that that the new terminal had yet to come up and the tariff could not be increased in anticipation.

While TAMP, as tariff regulator, might have effectively intervened in case of an arbitrary hike in prices, it will not be able to intervene in case of predatory pricing (as it only sets the ceiling). CCI alone has the power to intervene in case of predatory pricing.

Source: TERI's analysis

3.7.6 Mechanism for regulation of M&A in India

Role of competition authority

The CCI (once empowered), will have the power to investigate mergers and acquisitions. The Competition Act, 2002, clearly states that even if a merger or acquisition takes place outside India but has an impact in India; it will come under the anti-trust provisions of the CCI. However, it is mandated to evaluate mergers or acquisition only above a threshold level. Smaller companies, falling below this threshold level can therefore evade ex-ante scrutiny under the existing competition law. This is certainly a gap in the provision for ex-ante regulation of M&A from a competition perspective.

Post merger, CCI can intervene in case of abuse of dominance by the merged entity, either *suo motto*, or on receiving a complaint. The Competition Act, 2002 classifies abuses into two broad categories, (excessive or discriminatory pricing) and exclusionary (denial of access). In case of the latter, CCI has the mandate under Section 4(2) (C) of the Act to pass a remedial order under which the dominant enterprise must share an essential facility with its competitors. This is commonly known as the Essential Facilities Doctrine (EFD).

Role of Sector Regulator

In case of many infrastructure sectors in India, the sector regulator is given certain competition related powers. The electricity regulator in India, for instance, has powers to examine a combination. The Electricity Act 2003 has made a provision under Section 60 on Market Domination. This section states that *“the appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensees or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry”*.

In the port sector, however, the role of the TAMP is limited to only tariff. It does not enjoy any competition related powers to either examine such mergers/acquisition or to impose access regulations. TAMP can only regulate anti-competitive behaviour of the merged entity to the extent that its tariff related powers allow. Since it fixes the tariff ceilings at the major ports, it can regulate

any arbitrary hike in prices. However, in case the merged entity indulges in predatory pricing, TAMP will not be able to intervene.

Role of the port trust

The port trusts in India also have certain regulatory functions but there are no provisions that specifically empower them to look at competition related issues. They may be able to intervene only in case a proposed M&A infringes any clause of the concession agreement. The Gujarat Maritime Board (GMB), for instance, opposed the transfer of ownership of the Mundra International Container Terminal from P&O Ports to DP World. However, GMB opposed the acquisition not from the perspective of competition but because the proposed acquisition infringed on a specific clause of the concession agreement (The clause laid down that P&O Ports would continue to hold a minimum holding in the Mundra Port for a certain number of years. The DP World acquisition would nullify this clause)

Conclusion

It can be seen that both the port trusts and TAMP have no specific competition related powers. It is only the CCI that can intervene. However, CCI can only scrutinise mergers and acquisitions over a certain threshold level. There is therefore a need to analyse whether CCI should be allowed to examine all mergers and acquisition (irrespective of the size) or should the sector regulator be given powers to examine M&A as is the case in some other infrastructure sectors.

3.8 Agreements in the shipping liner Industry

The shipping liner business, unlike bulk shipping, requires shipping companies to operate with regular schedule irrespective of the demand at a point of time. This calls for major investment even at times when the revenues are not ensured. This characteristic of the industry compels the liners to cooperate in various ways in order to cut cost and stay in business.

Firms supplying liner-shiping services on given routes have a long history of cooperative behaviour dating from the beginning of regularly scheduled international services in the 1880's. Shipping liners came together as conferences and for long public policy exempted shipping firms from the general prohibition on collective price setting as it was believed that unrestricted competition in shipping markets would be destructive. In recent years however, conferences have come under the scrutiny of competition authorities, and shipping liners are now moving towards other forms of operational agreements such as consortia and alliances.

3.8.1 Agreements between shipping lines

Suppliers in the liner shipping market enter into cooperative agreements. These agreements fall into three broad categories

1. Agreements to fix price (conferences);
2. Agreements to exchange commercial information (discussion agreements);
3. Agreements for the joint provision of services (operational agreements).

3.8.1.1 Conferences

A conference is a route specific agreement between carriers to charge common freight rates, pool revenue and costs, pool profits and engage in capacity management. These agreements also establish the sailing schedules, ports of call and minimum service levels. The aim of conferences is to limit competition between members with a view to stabilising market freight rates. Conferences monitor members to ensure compliance. Discipline can be enforced by fines for non-compliance or by expulsion. Conferences may engage in differential pricing structures (typically rates are higher on higher valued cargoes). They may also offer various forms of customer loyalty agreements such as deferred rebates and dual rate contracts under which shippers are charged a lower price if they ship exclusively with the conference. Conferences also indulge in predatory pricing under which

they would initially reduce prices, drive out competition, and subsequently raise prices.

3.8.1.2 Discussion (capacity stabilization) agreements

Discussion agreements facilitate the exchange of commercial information between carriers about freight rates, costs, capacity and conditions of service on a particular route. Unlike conferences, discussion agreements do not attempt to bind members to mutually agreed capacity levels or freight rates.

Laws in different countries determine the routes on which discussion agreements operate. Discussion agreements are allowed on United States, Canadian, Australian, Japanese, and New Zealand routes. In the European Union, discussion agreements do not benefit from the block exemption for anti-competitive behaviour. As a consequence, discussion agreements do not operate on European trade routes

3.8.1.3 Operational agreements

Operational agreements directly influence market activity. The primary purpose of these agreements is to achieve operational efficiencies or better target shipper requirements by sharing assets and/or coordinating service provision. Operational agreements vary according to the degree of cooperation between members. Agreements can take the form of route-specific agreements (consortia) or agreements covering several routes (alliances).

3.8.1.4 Consortia

Consortia are agreements to provide joint services through sharing of vessels, port installations or marketing organizations. They are means by which lines can provide services to shippers across a number of routes without investing in additional vessels or other assets. Consortia may allow vessels to be repositioned more easily in response to changes in demand than could occur if a single carrier were committed to servicing the route. Consortia can also minimise the costs associated with transporting empty containers. (Consortia discussed in detail in subsequent section).

3.8.1.5 Alliances

Alliances are agreements under which carriers attempt to achieve global coverage without committing large amounts of capital. These agreements typically cover at least two of the major east-west trade routes (Europe–Asia, Asia–United States, or United States–Europe) served either by combined services on each route or round-the-world services. Alliances tend to be formed between larger carriers and dominate some major routes.

3.8.2 International experience: conferences

3.8.2.1 United States (US)

In the early part of the 20th century, US granted the ocean shipping industry limited protection from antitrust regulations by allowing companies servicing the liner shipping markets in the US to form conferences and benefit from a system of price-fixing. This limited immunity to antitrust regulations was put forth in the Shipping Act of 1916. Following enactment of this Act, conferences began making extensive use of "dual rate" contracts to bind shippers to the conferences and prevent non-conference carrier competition. These dual-rate contracts, often referred to as "loyalty contracts," offered discounted rates to shippers who agreed to use only conference carriers.

The US Supreme Court ruled in 1958 that dual rate contracts violated the Act. In the wake of the decision, Congress amended the 1916 Act in 1961 to permit dual rate contracts, though limiting the permissible discount to 15 percent. At the same time, Congress also amended the Act to require the filing of tariffs, transferred the Federal Maritime Board's authority to an independent Federal Maritime Commission (FMC), and gave the FMC the power to disapprove agreements between and among carriers that were "contrary to the public interest.

The next phase of reforms affecting the liner industry came with the introduction of the Shipping Act of 1984. This Act broadened the antitrust exemption for carrier agreements and streamlined the regulatory process for those carrier agreements. The antitrust exemption was also expanded to cover inter-modal transportation through rates incorporating rail, truck, and ocean legs. The 1984 Act also abolished the FMC's public interest standard for reviewing carrier agreements. A carrier agreement would no longer require FMC approval, and took effect—and thereby became immunised from the antitrust laws—45 days after filing or submission of any additional information requested by the FMC. As a result of the 1984 Act, once an agreement has been filed, the only way it could be challenged as anticompetitive was if the FMC sought to have a court enjoin the activities of an agreement on grounds that it was "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."

The next major change in the liner industry came with the passing of the Ocean Shipping Reform Act of 1998 (OSRA). OSRA did not totally deregulate the liner industry servicing the US and it did not revoke the antitrust immunity for carrier agreements. However, it did make some market-oriented adjustments to the US Shipping Act of 1984. OSRA changed the dynamics of the liner industry from the dominance of liner shipping conferences that enjoyed overt price fixing to non-binding discussion agreements, global alliances and confidential contracting. OSRA came into effect on May 1, 1999.

The provision in the OSRA concerning service contracts is the most pro-competitive inclusion in the Act. The thrust of the pro-competition tenor of OSRA is evident in two aspects regarding service contracts:

1. Conferences and consortia can no longer restrict their members from negotiating contracts directly with shippers.
2. Although these contracts must still be filed with the FMC, they are filed confidentially. This allows the strategic details of the carriers' operations to remain proprietary, while still allowing the FMC to have access to the information it needs to assess implications for the industry.

The Act also addressed needs on the demand side of the market. Although shippers no longer have "me-too" rights to obtain similar rates and conditions of service as similarly located shippers, they are allowed to band together with other unrelated shippers in shippers associations to collectively enter into service contracts. This option helps strengthen shippers' bargaining power.

3.8.2.2 Australian experience

Traditionally Australia exempts liner-shippping services from antitrust regulation. Specifically, shipper lines are exempt from Part X of the Trade Practice Act, 1974 (TPA) which prevents anti-competitive behaviour in all of Australia's industries. The reasons for exempting the industry are the same as in other countries to ensure the stability of rates and supply.

However, with time it was perceived that service liners under various agreements were providing lower quality, reduced services and higher prices. It therefore became necessary to understand whether the collusive liner agreements provided benefits that would outweigh those detriments. In October 2003, the government body with oversight of the liner shipping industry, the Australian Competition and Consumer Commission (ACCC) commenced an investigation into the market conduct of the Asia-Australian Discussion Agreement (AADA). AADA is a registered agreement consisting of 16 lines that participate in the North East Asia – Australia southbound (import) trade. This investigation was in response to numerous complaints from freight forwarders and importers of unreasonable rate increases, both in magnitude and the speed of introduction.

The ACCC believed that the AADA used its antitrust exemption to lessen competition on the trade route and that the AADA might have been slower than competitors to invest in new capacity during a scarcity of cargo ships in order to further exploit the increasing demand for imports from China.

However, in this investigation, it was realised that it was difficult for ACCC to get information to prove anti-competitive practices. This was a reflection of a fundamental problem with the Part X. The onus is on the ACCC to prove anti-competitive detriment. Therefore in 2004 Australia undertook a review of Australian block exemption giving immunity to registered liner conferences from competition and anti-trust legislation (Part X of the Trade Practices Act of 1974). The review emphasized on the need for increased competition and concluded that the liner shipping industry does not warrant a blanket exemption from normal anti-trust and pro-competition legislation. It was found that "Agreements which fix prices and control the supply of shipping to a trade route pose the gravest anticompetitive risk."

This review recommended that the strongly preferred option is to repeal Part X. It was stated that in case the block exemption was to be retained, then the following options should be utilized:

1. Screen applications for exemptions rather than granting them automatically, i.e., there would be an application process with meaningful review.
2. Impose contract confidentiality

3.8.2.3 The European Union

In the European Union, there is no sectoral exemption of maritime transport from European Commission (EC) antitrust law. However, liner conference agreements, decisions and practices were given a block exemption under EC Council Regulation No. 4056/86. This Regulation stipulated certain conditions for the exemption of shipping conferences. For example, the conference agreement, decision or concerted practice should not cause harm to ports, transport users or carriers. Rates and conditions should not differ according to the country of origin or destination, or the port of loading or discharge, unless such rates or conditions can be economically justified.

In 2003, EC decided to review the Regulation 4056/86 in light of the cumulative conditions of Article 81(3) of the Treaty and to check whether the justification for price fixing and supply regulation by liner conferences in Regulation 4056/86 could be said to be valid in light of the present market circumstances.

The European Commission concluded that the conference system is not indispensable for the efficient working of the liner shipping. The Commission in September 2006 repealed Regulation 4056/86. Conferences have been asked to cease their practices of price fixing and supply regulation by October 2008. The Commission has issued draft Guidelines on the application of the competition rules to maritime transport before the end of the transitional period of two years.

Learning from international experience on conferences

International experience of the three jurisdictions, namely US, EU and Australia shows that most maritime nations are revisiting the exemption given to conferences from the anti-trust laws. In the case of EU, the block exemption has already been lifted and conferences on the EU route will cease to exist by October 2008. Further, in most countries, conferences are being replaced by consortia and alliances. Under these new forms of agreement, shipping liners can continue to pool together their resources and share information but they would refrain from any price-fixing. Most nations are also trying to encourage direct negotiation between shipping liner and the user. Contract confidentiality is also being enforced.

The following section discusses the working of consortia under competition law of various countries.

3.8.3 International experience: Consortia

Consortia are agreements to provide joint services through the sharing of vessels, port installations or marketing organizations. They are means by which liners can provide services to shippers across a number of routes without investing in additional vessels or other assets. Consortia may allow vessels to be repositioned more easily in response to changes in demand than could occur if

a single carrier was committed to servicing the route. Consortia can also minimize the costs associated with transporting empty containers.

Consortia agreements take a considerable variety of forms, given that the degree of co-operation and the extent of the common activity that they envisage are different, depending on the needs and the circumstances of the trades in question. For example, a consortium can be composed entirely of otherwise independent liner, or, they may be members of the same conference. In some instances conferences have members that participate in several consortia, and there are consortia composed of both conference and non-conference lines. The principal difference between consortia and conferences is that the former addresses rationalisation of container shipping service operations, whereas latter extends co-operation to uniform or common freight rates (OECD, 2001).

Typically, competition authorities have regarded consortia as more benign than agreements that attempt to set market rates or limit market capacity. It is generally agreed that the potential for operational agreements that do not include provisions for price fixing to reduce competition is less than those, which involve collusion over rates. The potential for an operational agreement to reduce competition increases with market share.

In Australia, Canada, Japan, New Zealand and the US, consortia benefit from general exemptions from collusion contained in competition law, whether or not the operators apply uniform freight rates. European system differs from countries like US and Australia as it provides a separate block exemption for consortia.

3.8.3.1 European Union: competition law and consortia

In the European Union, consortia are defined to be operational agreements without price fixing.

They have block exemption from European Competition law, subject to market share criteria. The block exemption was first adopted in 1995 by Regulation 870/95 for a period of five years but has been continued after periodic reviews. Currently the latest exemption is valid till 2010.

According to Article 1 of the European Commission Regulation 870/95 "Consortium means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to a particular trade and the object of which is to bring about cooperation in the joint operation of a maritime transport service, which improves the service which would be offered individually by each of its members in the absence of the consortium, in order to rationalize their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing."

Under the regulation, exemption applies automatically to consortia with market shares not exceeding 35 percent or if the consortium operates with a liner conference, 30 percent. For consortia with a market share above this, but below 50%, an opposition procedure is provided for in the Regulation. In such a case, the EC can disallow the agreement upto six months after notification. If the market share is greater than 50 percent, consortia need to seek an individual exemption.

In addition to the ban on price fixing, consortia must not seek to freeze capacity utilization. Members must also be allowed to offer individual service arrangements and be free to leave the agreement without penalty on reasonable notice. Further, the exemption is dependant on one or more of the following conditions being fulfilled: consortia operating within a conference are allowed to compete with other the other conference members on freight rates or services; or the consortium members are subject to effective competition from non-consortium lines.

The next review of the block exemption given to consortia is due in 2010 and shipping liners in the EU have appealed to the European Commission (European Liner Affairs Association ELAA) to grant more flexibility and to extend the exemption to cover more activities. The shipping liners have also proposed the removal of any reference to market share thresholds. The European Commission is expected to carry out consultations for reviewing this block exemption.

3.8.4 Users concerns on conferences:

3.8.4.1 Issue of surcharge

Generally cargo is carried under contracts, which specify a route-dependent ocean freight rate, plus a number of other charges to be levied at prevailing rates at the time the service are rendered. These 'other charges' include those that account for fuel price and exchange rate fluctuations, the fee charged for off-loading at various different ports, war risk if any, hazardous cargo if applicable, peak season charges if applicable, etc. These surcharges fluctuate, even if the ocean freight rate is fixed under a long-term contract, and shippers often bear the brunt of that fluctuation. Alternately, some shippers and carriers negotiate "all-in" rates including all surcharges, passing the fluctuations back to the carrier. Conferences can and do set most surcharges and non-conference carriers typically follow the conference surcharges. As these constitute a large percentage of the total shipping costs (20-30 percent), conferences thus directly set a significant portion of the price for ocean transport service.

The use of surcharges has been criticised by shippers because they can be imposed with very short notice periods and an apparent lack of transparency in relation to the real costs incurred by the carriers. It is generally viewed that surcharges are a means of indirectly increasing prices. Shippers believe surcharges render only the ocean freight component readily negotiable, leaving a significant proportion of freight costs non-negotiable when making shipping arrangements. The most common surcharges are the Bunker Adjustment Factor (BAF), the Currency Adjustment Factor (CAF) and the Terminal Handling Charge (THC). Of these, THC has come under criticism in a number of countries.

3.8.4.2 Terminal handling charges

THC consists of various cost elements for the activities performed for a container ex-vessel delivery till the container reaches the nominated site. It includes charges, part of which goes to the terminal operator and the remaining to the vessel owner. Carriers generally negotiate container-handling charges individually with terminal operators and in most markets gain discounts with volume, but these discounts are not public record and the shippers pay the uniform rate set by the Conference. This uniform rate takes into account the collective costs for its members and sets the aggregate rate. Many independent carriers charge the rate set by the Conference.

3.8.5 Indian experience

The India Pakistan Bangladesh Ceylon Conference (IPBCC) is a major Conference operating in the Indian subcontinent.

3.8.5.1 India Pakistan Bangladesh Ceylon Conference (IPBCC)

IPBCC is a consortium of shipping liners on the Europe India route. It is generally considered to be the oldest shipping Conference in the world. It was founded in 1875 initially as the Calcutta Steam Traffic Conference. There are currently 15 members of the IPBCC including Shipping Corporation of India. The IPBCC Conference accounts for 75 percent of the total cargo being moved on this sector.

In India, historically there has been no statute either specifically providing for anti-trust immunity to Conferences or requiring any preconditions for liner shipping to claim such exception. However, it was presumed that liner Conferences were exempt under law as India is signatory to the United Nations Code of Conduct for Liner Conferences (UN Code). The UN Code, enforced in April 1974, provided freedom to the Conference for rate-fixing and capacity adjustments.

The shipping liners, which are party to the IPBCC, announce Rate Restoration Initiatives (RRI) from time to time, which increases the transaction cost substantially, thereby reducing the competitive edge of the Indian product internationally. For instance, recently it was reported that the shipping rates to Europe increased by 180 percent in one-and-a-half years (till February 2008).

3.8.5.2 Shipper's concerns with Conferences

In the Indian industry, as in other countries, shippers are aggrieved with THCs paid to the Conference liners. These have become contentious because the Conference refuses to divulge details on the various components of the THC and how each component is calculated. Most of the THC charges are fixed by TAMP (since they relate to port). The liner adds a certain administrative cost (which is essentially its profit) to the THC. It however quotes a consolidated charge without giving a break up of charges which clearly shows the amount fixed by TAMP (which goes to the port authority) and the extra amount charged by the liner.

Another contentious charge for Indian shippers is the bunker adjustment charge (fuel adjustment). For any increase in oil prices, the bunker adjustment charge goes up. The exact amount of increase in price, which is passed to the consumer, is however not transparent. Maerks recently has come out with a formula for calculating the bunker adjustment charge for its liner. This has also been criticised by shippers.

3.8.5.3 Shipping liners perspective on Conferences

The Shipping Corporation of India (SCI), which is the only shipping liner in the container business in India that is party to the IBPCC, strongly argues for the need of such agreements in the liner industry. SCI opines that the liner industry is investment intensive and therefore shipping liners need to come together to provide services. Commenting on the rapid increases in oil prices of late, SCI stated that as a result of this price rise, liner business is essentially a loss making business and private players are not interested in entering this business.

In fact, SCI is of the view that such agreements are the only way to have more players and hence encourage competition in the liner segment. In the absence of such agreements, three to four major international players will dominate the container liner market.

3.8.6 Conclusion: Future of Conferences in India

The IPBCC is expected to cease its operations from October 2008 following repeal by the European Commission of the antitrust immunity given to Conferences from and into Europe. India's Competition law does not provide any exemption to Conferences and therefore they will qualify as cartels and the penalties applicable on cartels will apply on any price fixing agreement between shipping liners.

Shipping companies are now considering cooperating amongst themselves through alliances and consortia as is now being done in other countries. In the EC, 'consortia' and other agreements like vessel sharing agreements (VSAs) and voluntary discussions agreements (VDAs) have to be notified to the Commission and wait for the Commission's directions. Commission can exempt them from the provisions of the competition law under the exemptions specifically provided under law. The Commission will however monitor these consortia. Similar is the practice in the USA (Federal Maritime Commission), Korea, Japan, etc.

However unlike other countries, India's competition authority does not give any exemption to either Conferences or Consortia. Under the Competition Act, 2002 any agreement between shipping liners which covers activities identified under Section 3 (3) will be considered anti-competitive. These activities are

1. Determining price
2. Limiting or controlling production
3. Sharing of market
4. Bid rigging or collusive bidding

Members of consortia will have to approach competition authorities on a case-to-case basis for approval. A number of issues will have to be examined including whether the consortia entered into

a formal agreement, where the agreement was entered, etc. It could also be deliberated whether exemption could be granted by the central government under Section 54 of the Competition Act, 2002. Section 54 provides power to the central government to provide exemption to entities in public interest.

All these issues pertaining to interpretation of competition law need to be examined in a holistic manner by the Competition Authorities.

3.9 Port concessions

The government involves private sector in infrastructure development through agreements known as concession agreements. These concession agreements help government in granting rights to a private firm to operate an infrastructure service for which the government usually specifies the rules and regulations. In the ports sector, the 1996 privatization guidelines opened up private entry in terminal operation on a Build, Operate and Transfer (BOT) basis. A Model Concession Agreement (MCA) was formulated to spell out the policy and regulatory framework to be followed for building and operating port terminals on BOT basis. Port concession is the process by which the government transfers terminal operating rights to the private sector (Box 3.4). The concession structure provides a framework for the government to retain ownership of port land and responsibility for licensing the operators. Concession allows the private operators to invest their capital in the development of ports while the government funds are used in infrastructure development. Port concessions have worked in many countries e.g. at the Antwerp Port Authority, Ghana Port and at ports in Brazil and Chile.

Box 3.4 Port concessions

A port concession is a contract in which a government transfers operating rights to private enterprise, which then engages in an activity contingent on government approval and subject to the terms of contract. The contract may include the rehabilitation or construction of infrastructure by the concessionaire. These characteristics distinguish concessions from management contracts on one end of the reform spectrum and comprehensive port privatization on the other. Concessions, by permitting governments to retain ultimate ownership of the port land and responsibility for licensing port operations and construction activities, further permit governments to safeguard public interests. At the same time, they relieve governments of substantial operational risks and financial burdens.

There are two main forms of concession used in ports today: lease contracts, where an operator enters into a long-term lease on the port land and usually is responsible for superstructure and equipment, and concession contracts, where the operator covers investment costs and assumes all commercial risks. Such contracts are often combined with specific financing schemes such as BOTs.

The primary objective of concession agreements is to transfer investment costs from the government to the private sector. Concessionaires are obliged to construct and rehabilitate infrastructure and operate a facility or service for a fixed number of years. Concessions may be "positive," when a concessionaire pays the government for concession rights, or "negative," when the government pays a concessionaire for the services it provides under the agreement (Source- WB and PPIAF, 2003).

3.9.1 Competition issues in port concessions

Concessions become important from the perspective of promoting competition in the ports sector. If not carefully designed, they may create entry/exit barriers, private monopoly or lead to dominant position of the concessionaire, which is prone to be abused. Also if not kept away from collusive behaviour, concessions may affect the competitive environment. Therefore, there are at least two important aspects to be considered while designing and granting concessions. The first aspect is the concession granting process and the second is the implementation of concession, especially in relation to the anticipation of potential abuse of monopolistic position caused by such concession.

This section reviews the MCA in order to evaluate the following-

1. Whether the concession granting process is transparent, competitive and accountable? Is it kept away from collusive behaviour?
2. Are there any specific clauses/conditions in the concession agreement that may discourage easy entry and exit of private players or encourage anti-competitive practices?

3.9.1.1 Concession granting process: Competition issues

3.9.1.1.1 Restricting number of bidders for the Stage 2 of bidding

For privatization of berths and terminals, whether new or existing, open tenders are invited under the BOT model. A two-stage bidding procedure is followed. Stage one involves qualification based on experience and financial strength. Stage two requires qualified bidders to submit technical proposal and the price bid.

The Ministry of Finance's (MoF) Guidelines for pre-qualification of bidders for Public Private Partnership (PPP) projects, state that the number of bidders to be pre-qualified and short-listed for the second stage should be adequate for ensuring real competition in bidding. Also the number should not be so large that it could dampen participation by serious bidders, thus diluting competition, because credible investors are normally less inclined to spend the time and money necessary for making a competitive PPP bid, if the zone of consideration is unduly large (MoF, 2007).

The government policy on bidding criteria for cargo terminals at ports draws from the eligibility criteria drafted by the Planning Commission; it recommends that the number of bidders for large infrastructure projects be restricted to six. The stakeholders in the port sector are of the opinion that short-listing only five to six bidders based on their financial strength and past experience would limit competition in the sector. Players, who are small in comparison to some of the bigger international operators, may find it difficult to get short-listed for the second stage, which in turn may limit competition.

Box 3.5 Short listing criteria in bidding scrapped by NHA

The finance ministry recently announced that the prequalification stage (short listing) of firms bidding for highway stretches based on prior experience would be scrapped from 22 September 2008. Firms meeting the minimum threshold criteria will be evaluated for award of project. Prior to this, the companies bidding for the project were ranked on the basis of certain criteria and then five to six were short listed; only short listed bidders were allowed to submit a price bid. This practice gave more weightage to a few bigger companies that had developed similar projects in the past and thus limited competition.

Source Mint Article, 25 September 2008 www.livemint.com/2008/09/24220101/Shortlisting-criteria-in-biddi.html

3.9.1.1.2 Collusive behaviour of bidders

From the competition perspective, it becomes important to understand whether the concession granting process is transparent or not. Interactions with various stakeholders revealed that the concession process is quite simple and transparent. However a lot of time is taken in getting approvals at every stage from the government.

According to the stakeholders, there have not been any reported cases of collusion between players during the bidding process because colluding would go against the interest of the private players themselves. Stakeholders, however, raised concern that there is no established mechanism to ensure a check of collusive behaviour in future.

CCI, once empowered, would have the power to investigate any case of reported collusive behaviour by the bidders, which would include bid-rigging, cartelisation to fix prices, collusive tendering, etc.

3.9.1.2 Concession conditions: Competition issues

According to few stakeholders, the draft MCA guidelines issued by the government in 2008 protect the interests of the port trust and not the users. An examination of the MCA guidelines shows that a few clauses in the concession agreement can create entry barriers for the private players. The same are discussed below.

3.9.1.2.1 Employment of existing labour: Entry barrier

The present policy of taking over the port labour is a deterrent in attracting private investment in major ports. The concessionaire has to employ existing personnel/ labour as per the given conditions and compliance with all labour laws is the responsibility of the concessionaire alone. Concessionaire has to assume all labour liabilities, labour cannot be retrenched and compensation cannot be inferior to what they were already receiving (MoSRTM, 2008). Also, private investors at major ports cannot implement their own employment policies as the labour laws defined by the Ministry of Labour bind them. The clauses on labour conditions in the concession agreements, therefore, discourage entry of private players in terminal operation business.

International experience in design of port concessions in Chile shows that there have been initiatives by the government to reduce entry barriers related to labour issues by providing safety nets, voluntary retirement schemes, etc. (Box 2).

3.9.1.2.2 Expertise of shipping companies not considered during bidding: Entry barrier

Shipping companies have raised concern that their past experience in marine activities is not acknowledged and considered during the bidding procedure, while the expertise of real estate, construction companies, etc. is being considered. According to them, this poses an entry barrier for their admission into terminal operation business. They also complain that the concerns of shipping liners were not taken into account while framing the MCA guidelines.

However, it is observed that even prior to the new MCA guidelines, the experience of shipping companies was not considered. Bidders like Maersk, etc. qualified at JNP as port operators because of their experience in logistics and not for their experience as a shipping liner. This practice would ensure that all private players are at par while bidding and can win the bid based on their financial strength, technical proposal and efficiency in service delivery.

3.9.1.2.3 Other possible entry barriers:

- Minimum Guaranteed Cargo

The traffic risk is with the concessionaire. The concessionaire needs to unconditionally guarantee annual cargo handling of the levels set out in the concession agreement. Usually, big liners such as Maersk, DP World, etc. can guarantee the traffic levels, however other smaller and recent players may not be able to guarantee the traffic thus discouraging them from entering the market.

- Termination of concession agreement

At the end of the concession period, the terminal facility reverts to the port trust free of cost (including any capital expenditure/improvement made by the operator). This clause could deter few private players from entering. It may also deter the selected concessionaire from continuous upgrading and modernization of facilities and equipment through the lifetime of the concession.

In this context, the port concessions in Chile ensure that there are no entry barriers for bidders and disincentives on the part of concessionaire to invest near the end of the contract. After the

termination of concession period, the concessionaire is allowed to take away the mobile assets and part of the fixed assets that have not depreciated (Box 2).

- Government decisions

Few government decisions may also act as entry barriers. As an example, the government intervened during the bidding of JNP's third container terminal. P&O Ports was not allowed to bid for the third private terminal, the reason being that any player who has won the last bid in a port shall not bid for the next terminal so as to prevent occurrence of its monopoly in that port/region. Fundamentally this argument is pro-competition, however, the manner in which it was done limited competition during the bidding. This decision, which stems from the basic idea of avoiding monopoly at ports/regions should have been a policy decision built into the RFQ document that should have been followed in subsequent bidding of terminals.

It has been seen from international experience that in many countries (like in Chile), the concession agreements build in clauses to avoid occurrence of a monopoly situation rather than disallowing a particular firm to bid. In Chile, as per the concession clause, a private firm or its related companies are not allowed to hold more than 15% of a concessionaire if they already hold more than 15% in another terminal or private port in the same region, thereby, ensuring that the firm does not emerge as a monopoly once the concession is implemented (Box 3.6).

3.9.2 Conclusions

The above section raised a few issues related to the port concession granting process and provisions in concession agreements, which may create entry barriers for private players. There is a need to revisit these issues in the process of granting concessions and in the concession agreements in order to ensure that all players have an equal opportunity to enter port activities. CCI may like to take up these as advocacy issues with the concerned port trusts/ministry.

Box 3.6: Port concessions, Chile

In order to encourage investment in better port equipment and improve port efficiency, Chile had undertaken port reforms to attract private investment. The concessions were carefully designed to promote competition and investment. The contracts specifically spelt out some clauses to prevent concessionaire's abusing their monopoly powers.

Model

- State owned companies were formed; these companies owned the port infrastructure, ran maritime and land access and enforced concession contracts.
- The state owned companies in Chile were not allowed to handle cargo or berthing and had to share revenues with the concessionaire – a minimum annual rental and some revenue sharing on the upside.
- The government fixed annual rental payments in advance in order to prevent implicit subsidies to concessionaires, which might affect the competitive position of private ports.
- Unlike the Indian case, the concessioning authority or the state port company to some extent was a partner to the concessionaire as it shared a part of its commercial risk. The concession contracts established increasing rents to the state port company as the tonnage increased. Contracts ensured that the annual rents were proportional to the actual tons transferred in the previous year, with a floor in the downside and with revenue sharing by the authority in the upside.

Bidding mechanism

- Simultaneous bids for the main terminals were stipulated. Rather than using trial-and-error approach, there were similar bidding documents for all the concessions.
- Sealed bids were used in order to check collusive behaviour by bidders.

Competition related clauses/conditions

- The bidding process aimed at avoiding monopoly of a single concessionaire and encouraged competition.
- It led to a duopoly of two main concessionaires as the horizontal integration between concessionaires or between private port owners and concessionaires in the same region was controlled.
- A private firm or its related companies were not allowed to hold more than 15% of a concessionaire if they already held more than 15% in another terminal or private port in the same region.

- Vertical integration was also limited by allowing not more than 40% of a concessionaire to be owned by a “relevant” port player, defined as a shipping company, exporter, or importer operating more than 25% of transfers at the concessioned terminal or more than 15% of transfers at the ports in the region in the previous year.
- Vertical integration was also limited through other anti-discrimination rules, tariff ceilings and prescription of service quality standards.
- The port concessions ensured that there were no disincentives on the part of concessionaire to invest near the end of contract. It was allowed to take away the mobile assets after the termination of concession period and was also compensated for a part of the fixed assets that had not depreciated.

Labour issue

- The government agreed to provide a safety net to workers who were laid off due to concessions.
- Voluntary early retirement was provided to older workers.

Source: Foxley J and Mardones J.L, 2000

3.10 Port corporatization model

3.10.1 Port governance models

The port governance models have changed quite dramatically over the past two decades, much of it as a result of government devolution programs, which have led to port privatisation in many countries. The World Bank Port Reform Toolkit (WBPRTK) outlined four port administration models and assessed strengths and weaknesses of each model. These models differ based on whether the services are provided by public sector, private sector or mixed ownership providers, their orientation (local, regional or global), who owns the superstructure and capital equipment, and who provides dock labour and management. The four port governance models outlined in the WBPRTK are the service port, the tool port, the landlord port, and the private service port (Box 3.7). The choice of model adopted in each country is influenced by the way the ports sector is organized, structured and managed. These factors include the socio-economic structure of a country, the historical development of the port, the location of the port (urban area or isolated region), and the types of cargo that are typically handled (liquid or dry bulk, containers).

Box 3.7 Port governance models

Service ports have a predominantly public character. Under it, the port authority offers the complete range of services required for the functioning of the seaport system. The port owns, maintains, and operates every available asset (fixed and mobile), and cargo handling activities are executed by labor employed directly by the port authority. Service ports are usually controlled by (or even part of) the ministry of transport (or communications) and the chairman (or director general) is a civil servant appointed by, or directly reporting to, the minister concerned.

In the **Tool Port** model, the port authority owns, develops, and maintains the port infrastructure as well as the superstructure, including cargo handling equipment such as quay cranes and forklift trucks. Port authority staff usually operates all equipment owned by the port authority. Other cargo handling on board vessels as well as on the apron and on the quay is usually carried out by private cargo handling firms contracted by the shipping agents or other principals licensed by the port authority.

The **Landlord Port** is characterized by its mixed public-private orientation. Under this model, the port authority acts as regulatory body and as landlord, while port operations (especially cargo handling) are carried out by private companies. In the landlord port model, infrastructure is leased to private operating companies or to industries such as refineries, tank terminals, and chemical plants. The lease to be paid to the port authority is usually a fixed sum per square meter per year, typically indexed to some measure of inflation. The level of the lease amount is related to the initial preparation and construction costs (for example, land reclamation and quay wall construction). The private port operators provide and maintain their own superstructure including buildings (offices, sheds, warehouses, container freight stations, workshops). They also purchase and install their own equipment on the terminal grounds as required by their business. In landlord ports, dock labor is employed by private terminal operators, although in some ports part of the labor may be provided through a portwide labor pool system

In **Fully Privatized Ports**, port land is privately owned, unlike the situation in other port management models. This requires the transfer of ownership of such land from the public to the private sector. In addition, along with the sale of port land to private interests, some governments may simultaneously transfer the regulatory functions to private successor

(Source -WB & PPIAF, 2003)

3.10.2 Corpportization model

After the landlord port model, the next gradation on the path to full privatization is corpportization. It is not mere commercialization, but it involves transformation of the public port authority into a corporation. The port authority is converted into a corporation, which is legally and financially, an independent entity with its own board of directors. The transformation to a corporation is expected to give better performance levels to the port as this structure of governance is expected to function efficiently by applying market principles. The goal of corpportization is to constitute the corporatized firm as a single, self-contained entity.

The government or public port authority retains ownership in all shares of the venture and is transformed into a company. The main objective is to decrease direct government control over the company and to make it more responsive to market forces. Similar to privatization, corpportization can include financial restructuring and be a catalyst for the introduction of commercial principles. Corpportization is, in effect, privatization without divestment (WB & PPIAF, 2003).

According to WBPRT, corpportization usually has the following characteristics:

- A complete separation of the public management and regulatory functions from the commercial activities that are being corporatized;
- Clear and non-conflicting objectives for the new firm, set by the government;
- Greater management responsibility and autonomy for decisions on operations, investments, revenues and expenditures, and on commercial strategy;
- Where no market-based scrutiny is possible, performance measurement against a range of financial and non-financial criteria;
- Rewards and sanctions for managers based on performance; and
- Government ensures that the corporatized firm does not have any comparative advantages or disadvantages relative to private port firms operating under similar market risks and conditions (for example, with respect to tax and interest rates)

The advantages of having a corporatized structure include (WB and PPIAF, 2003):

- The management can be held accountable for its actions.
- The new corporation can be organized with clearer lines of communication and responsibility.
- Distinct targets can be set and adhered to.
- Stricter internal financial controls can be introduced and, where necessary, information and accounting systems established. This all seeks to make the business more aware of market and client requirements.
- One of the corporatized terminal's greatest strengths is its financial autonomy. This means that tariffs no longer require approval from the government or ministry (unless it is a monopoly environment and the government wishes to exercise strict control) and that the company should be allowed to establish its own procurement, contracting, and hiring and firing practices. In addition, such companies do not rely on government support for investments and have the authority to negotiate loans directly with commercial banks. The government, however, typically will continue to exert some measure of political control. Usually this is achieved through the appointment of board members.

Negative aspects of corporatization according to the WBPRT are:

- In a majority of cases, the new corporate entity still has a monopoly over the port land.
- Unless competition is created, the corporation may not be as efficient as anticipated.
- Governments are still able to politicize the corporatized firm by retaining the right to appoint board members and executive directors.
- There will often be a need to introduce a port sector regulator to create a level playing field among competing service providers.
- One of the most problematic issue affecting corporatized port authorities is the mix of public and private objectives. The rationale behind this type of reform is the expectation that corporatized ports operate as viable and effective businesses. However, while part of the ports' enabling legislation may state that they should pursue commercial objectives and operate as effective businesses, the public shareholders (ministers, commissioners, aldermen, or council members) have responsibilities other than strictly commercial ones, such as the delivery of public goods.

3.10.3 Port governance model in Indian ports: Moving towards corporatization of major ports

Most Indian ports currently operate under a service port model wherein all operations, services and facilities are provided by the port authority. After 1996, the government has gradually tried to transform port management from the service port model to the landlord model. The landlord model encouraged by the government envisages that the port authority will only be responsible for the regulatory functions and infrastructure while private enterprises will perform all operational and cargo-handling activities, generally operating under leases.

The Board of Trustees who are appointed by the Gol to administer the port represent government departments involved with port operations, labour and service providers such as stevedores, shipping agents etc. Their interest often lies more in protecting their turfs and not in promoting the commercial well being of the ports. The financial and other powers of the trustees are also limited. The different operations in the port are also not set up as separate profit centres. Revenue accounting rather than commercial accounting is practiced.

The inter-ministerial committee on corporatization of ports has estimated that investments of about Rs 50,000 crores would be required by year 2012 for up gradation and modernization of the 12 major ports in the country. Recognizing that port operations cannot be made efficient or cost effective unless ports are encouraged to operate on commercial lines, Gol as part of the 1996 policy guidelines, substantially increased financial and other powers of the port trusts. It also took a decision that all new ports will be set up as companies under the Indian Companies Act and the existing port trusts will also be gradually corporatized. This decision is based on the belief that corporatization will necessarily make ports operate on commercial principles and make it possible to evaluate their performance on the basis of their profitability. It will also expose the ports to the financial markets for meeting their working capital and project funding requirements and thereby subject them to market discipline.

Accordingly, the 12th Major Port at Ennore has been set up as a company under the Companies Act, with the conservancy functions being exercised by the Madras Port Trust. However, corporatization of existing port has not been undertaken so far. The Bill to convert the other 11 major ports into corporate entities has been stuck in Parliament for more than a decade as lawmakers are divided over the issue. Parliamentary Standing Committee is yet to give its recommendations on the proposed Bill. Corporatization would allow the ports to distance themselves from direct government control, access commercial funding for expansion, and revamp balance sheets in favour of commercial accounting. It would also allow prompt decision-making, improve efficiency, increase competition and make the ports accountable for their performance.⁷⁸

⁷⁸ <http://www.livemint.com/2008/06/11235813/Govt8217s-slow-pace-hinders.html>, last accessed on 3 June 2008

3.10.4 Conclusions

It is argued that the corporatization model for Indian ports holds a lot of potential in improving the overall performance of the sector. It should hence be pursued and adopted by the government. CCI may like to take it up as an advocacy issue and hold discussions with the Department of Shipping to promote corporatization model for Indian ports.

3.11 Labour issues and competition in ports sector

Port and port labour does not exist in isolation. Port labour plays a vital role in the success or failure of a port's performance. Port labour ranges from crane and equipment operators to stevedores to harbour pilots. Typical problems with respect to port labour include overstaffing, outdated and inefficient work rules, poor skills and training, inflated pay scales, and unreliability, which contribute to high costs and inefficient operations in many ports. Large investments were made in ports sector in 1990s; however, continued imposition of large work crews and rigid work rules in many ports, undermined the value of these investments and hence the commercial feasibility of ports and terminals both in developing and developed countries (WB & PPIAF, 2003).

The issue of port labour becomes relevant for competition in ports sector from two perspectives. First, to see if current labour laws and institutions create a barrier for private sector entry in terminal operation and oppose the privatisation/corporatization of terminal operations. Second, if the ports/terminals serving the same hinterland and already facing competition are affected by efficiency/inefficiency of labour in their ability to compete. Therefore, evaluation of the existing labour practices in ports sector from the perspective of competition focused on the following issues:

- Whether the current labour laws and institutions discourage easy entry of private players and oppose the privatization/ corporatization of terminal operation business?
- Whether labour inefficiencies affect inter-port and intra-port competition?

The next section discusses the current status of port labour in the Indian Ports Sector from the perspective of the above points.

3.11.1 Labour practices: Entry barriers for private players

Dock Workers (Regulation of Employment) Act 1948

Dock Workers (Regulation of Employment) Act 1948 was enacted to remove the anomalies in the working conditions faced by port workers under private stevedoring companies. This law sought to regularize the terms and conditions of employment of port labour, frame standard service rules and other welfare issues of interest to port and dockworkers.

Dock Labour Boards (DLBs)

The enactment of Dock Workers (Regulation of Employment) Act 1948 led to the eventual formation of DLBs, which became the exclusive suppliers of labour to the stevedoring companies or to the port authorities themselves. Seven major ports have had their respective DLBs, which were initially constituted in 1948 in accordance with the Dock Workers (Regulation of Employment) Act. DLBs are responsible for providing workers to perform on-board cargo handling operation, which was subsequently extended to stuffing/destuffing operation for containers on shore. The government has also sought to provide representation to labour in the constitution of board of port trustees under the Major Port Trust Act, 1963. Some of the DLBs such as in Mumbai and Chennai ports have been officially merged with the port trust making them one of the key stakeholders in port administration (I-maritime, 2003).

Entry barriers and opposition to privatisation/ corporatization

The provisions of the Dock Workers (Regulation of Employment) Act 1948 are highly protective of

rights of workers and are considered to be a roadblock from the standpoint of both corporatization and privatisation of ports, with its inevitable consequences for restructuring of port labour. Moreover, the protection provided to dockworkers has led to various malpractices such as speed money, over manning, low productivity, idle time, etc. The present policy does not provide for an exit policy for labour at the existing terminals and therefore, acts as a disincentive for private investment. Further, the unions at the ports are strong and attempts to privatise are opposed by them (Box 3.8) (I-maritime, 2003).

Box 3.8 Issue of labour unions

“The average ship turn around time in Indian ports was 7.8 days in 1996-97 (6.6 days in 1997-98 and 5.9 days in 1998-99) compared to a few hours in Singapore. In Indian ports, capacity and berth configuration have not changed to match the type and categories of cargo that need to be handled. Some ports (e.g. Calcutta) handle less cargo now than they handled years ago. Bureaucratic management and recalcitrant labour unions add to the inefficiencies, so such so most general cargo traffic in and out of India is trans-shipped at more efficient ports in neighbouring countries. The added costs to India's foreign trade are substantial. While private investors have been allowed to build and operate minor ports and a regulatory authority for ports also has been set up, the problems are too deep rooted to be resolved quickly. The issue of recalcitrant labour unions in ports is part of the broader issue of labour management in the public sector as well as in large-scale manufacturing. Without radical labour market reforms, progress involving this issue is bound to be slow, if not altogether impossible.”
(Source - Srinivasan T.N, 2002)

As discussed in the section on ‘port concessions’, the private operator’s liability to absorb existing labour is an entry barrier for private players (also established through stakeholder interactions). According to a few stakeholders, the requirement that privatized Indian port operations must function within the existing labour laws alone is a major detractor for prospective bidders. For private players, “the benefit of mechanised handling is offset by the impossibility of reduction in labour costs. Privatisation of existing facilities is unattractive given the current strength and inefficiency of labour. The strong industrial and political clout of the labour thwarts introduction of new labour practices,”⁷⁹ thus making the business unattractive to the private players.

The labour unions are against conversion of the present port model to corporate model, as they fear it would lead to a cut in the jobs. The corporatized ports will have the freedom to change the labour policies; or they may outsource the labour in order to improve profitability. Also, the corporatized ports may not have representation from labour unions, as is the current case with port trusts. The 11 major ports, which run as trusts, have two union representatives each on their boards. The labour unions are in favour of entrusting additional financial and operational autonomy to port trusts rather than converting them into a company.

3.11.2 Labour inefficiency: Impact on inter-port and intra-port competition

The main issue in Indian ports with respect to labour inefficiency relates to the difference in manning scales at different ports. The manning scales evolved three decades ago have not been changed, though modern cargo handling techniques have been introduced during this period. The ports continue to be afflicted by pockets of surplus labour. Current manning scales at ports also bear no relationship with need and work output thereby severely affecting port productivity.

“On an average, Indian ports handled around 1424 tonnes of cargo/ employee in 1998-99. In comparison ports in UK handled around 47,000 tonnes of cargo per employee in 1997-98. The port of Rotterdam handled around 50,500 tonnes of cargo / employee during 1998-99. Manning scales at different ports for specific activities such as container handling and stuffing vary widely. For example, for transfer of containers from ships to quay, Calcutta port employs a total of 32 persons as against 12 at Haldia, 15 at Mumbai, 21 at Chennai and 4 at JNPT. Again for container stuffing/ destuffing, Calcutta and Mumbai employs 28 persons, Chennai 7 and

⁷⁹ http://www.adb.org/Documents/CSPs/IND/2003/appendix3_private_sector_assessment.pdf, last accessed on 25 May, 2008

Haldia 2 for unitised and 7 for non unitised cargo. Such large manning scales result in excessive transaction and manning costs, making Indian ports highly uncompetitive” (Sundar S, 1998). The difference in manning scales between various ports/terminals affects the ability of the ports/ terminals to compete in their relevant geographical/ product market. This issue has also been discussed in the section on inter-port and intra-port competition.

3.11.3 Conclusions

The gap between the number of labour required (given modern cargo handling technology), and actual number of workers in the ports, is a major deterrent for private investment in port facilities. An appropriate voluntary retirement scheme needs to be designed to reduce excess staff. Proper training should be given to the port employees to improve their performance and productivity. The performance of port employees should be judged and linked to their productivity (Sundar S, 1998).

There is a need to revise the norms of output and the manning scales and to optimise this through extensive manpower training to enhance skills and managerial capabilities. Manning scales need to be reviewed and new techniques for cargo handling operations adopted. Once the above mentioned activities are undertaken, the sector will become attractive for private players and the ports/terminals would be better equipped to compete in their relevant geographical and product markets. CCI may like to organize discussions with the Ministry, port authorities, state port departments, private operators, labour unions, DLBs etc. and take this as an advocacy issue as it has significant bearing on competition in the ports sector.

3.12 Regulation in Indian ports:

Under this section, three different aspects of regulation in the ports sector are considered. These are:

1. Identifying regulatory barriers in the Port Acts and guidelines
2. Regulatory agencies in the sector: Competition related powers and functions
3. Tariff regulation: Competition issues in pricing

In India, the Major Ports are governed by the Major Ports Trust Act, 1963 and the Minor Ports by the Indian Ports Act, 1908.

3.12.1 The Indian Ports Act, 1908

The Indian Ports Act, which was enacted in 1908, was the first-ever comprehensive Indian port law that focused on the administration of all ports in the country. The Act included various aspects (ranging from procedural to operational aspects) involved in the governance of ports. It demarcated the central and state involvement in ports sector in the country. The Act of 1908 proposed for appointment of Conservator of Ports, who could give directions and impose penalties for enforcing rules prepared under the Act with respect to the vessels calling on Indian ports and management of port operations. The provisions of the Act focus on several issues related to shipping, safety and security of ships on Indian ports, introduction of compulsory pilotage services for vessels and financial powers of the Conservator to determine and collect various types of port dues from ships calling on Indian ports.

All Indian ports (major, minor and intermediate ports) till date derive their definition and status as a port initially under the provisions of the 1908 Act. Especially, the role and powers of the state governments in respect of minor and intermediate ports depends on the authority and powers defined under the 1908 Act. Even the Major Ports Act of 1963, derives its continuity and legal sanction from 1908 Act, which can therefore, be rightly considered as the source law for the Indian port sector.

3.12.2 The Major Ports Trust Act, 1963

In 1963, Gol enacted the Major Ports Trust Act (MPTA), 1963 that laid a regulatory and institutional

framework for administration of major ports in the country. The Act clearly defines the term “Major Ports”. At present there are twelve major ports in the country. Prior to the enactment of MPTA, Indian ports (major and minor) were governed either by the central or state government. A separate central ministry, Ministry of Surface Transport (MoST) or a state level port/maritime department used to manage the ports. Under the MPTA, a port trust organization is established at each of the country’s major ports. The central government appoints the board of trustees in each port. Major ports are not mere government agencies, but are legally independent entities functioning within a defined area. Ports are also entrusted with the performance of civic duties and functions, and have the power to raise funds for the furtherance of its activities by levying charges, fees, etc. (Sundar S, 1998).

3.12.3 1996 policy guidelines

Under the 1996 policy guidelines, GoI decided to adopt the concept of landlord ports and gradually secure private participation in the provision of port services. Accordingly in October 1996, policy guidelines were issued, which provided for private sector participation/investment in the following areas:

1. Leasing out existing assets of the port
2. Construction/creation of additional assets, such as:
 - construction and operation of container terminals.
 - construction and operation of bulk, break bulk, multipurpose and specialized cargo berths,
 - warehousing, container freight stations, storage facilities and tank farms,
 - craning/handling equipment,
 - setting up of captive power plants, and
 - dry-docking and ship repair facilities.
3. Leasing of equipment for port handling and leasing of floating crafts from the private sector.
4. Pilotage
5. Captive facilities for port based industries

As a further step towards securing private participation, policy guidelines were issued in 1997 to enable the major ports to set up joint ventures with foreign ports, minor ports or private companies. The MPTA was amended to give effect to the guidelines issued in 1996 and 1997 (Sundar S, 1998). The 1996 guidelines provided for the establishment of the Tariff Authority for Major Ports (TAMP) to fix and revise port tariffs. TAMP was set up in March 1997 through an amendment of the Major Ports Trust Act 1963. All powers for fixing tariffs in major ports lie with TAMP, but it has no jurisdiction over minor ports or private ports.

3.12.4 Competition issues

Although, the port trusts were expected to work on a landlord port model under the MPTA Act; the same has not been implemented completely. Many port trusts still operate one or more terminals at the ports and compete with private terminal operators.

3.12.5 Regulatory agencies in the sector: Competition related powers and functions

The existing regulatory mechanism in Indian ports comprises of the following agencies:

- Port trusts/authorities;
- State Maritime Boards/ State Port Departments;
- Department of Shipping, Ministry of Shipping, Road Transport and Highways; and
- TAMP

The major ports are placed under the Union list of the Indian Constitution, and are administered under the Indian Ports Act, 1908 and the Major Ports Trust Act, 1963 by GoI. The responsibility for development, management and regulation of major ports rests with respective port trusts under the

central government. The minor ports are placed in the Concurrent list of the Constitution and are administered under the Indian Ports Act, 1908. They fall under the purview of either central or state government, which also regulate matters pertaining to the administration of port dues, pilotage fees and other charges.

The Indian Ports Act (1908) lays down rules regarding safety of shipping and conservation of ports for the entire port sector and regulates matters pertaining to the administration of port duties, pilotage and other charges. The Major Port Trust Act (1963) lays down the institutional framework for the major ports in India. Accordingly, a Board of Trustees appointed by Gol governs each major port. The composition of these Boards reflects greater government representation compared to private interest groups. The trustee's exercise limited power and are bound by directions on policy matters and orders from Gol. The port trusts are expected to serve public interest rather than maximizing profits or revenues, while at the same time, ensuring optimum deployment of assets (Ray A.S, 2004).

None of these regulatory agencies have a specific mandate to promote competition in the ports sector though some of their decisions may have a bearing on competition indirectly. TAMP was set up as an independent tariff regulator after the decision to privatize port terminals was taken. The aim was to move towards competitive pricing and provide a level playing field to all the players at least on matters of pricing. However, TAMP has not proven to be effective in ensuring the same.

3.12.5 Establishment of independent tariff regulator after privatization

The private sector entry into the Major Ports, which was often in competition with the Port Trusts, created a need for establishment of an independent regulator to set port tariffs in order to ensure that there was no unfair competition between private sector players and the Port Trust. The 1996 guidelines therefore provided for the establishment of the Tariff Authority for Major Ports (TAMP) to fix and revise port tariffs. TAMP was set up in March 1997 through an amendment of the Major Port Trust Act 1963. TAMP guidelines, adopted in 1998, state that TAMP's overall objective shall be to move towards competitive pricing. TAMP is mandated to promote rationalization of the tariff system, applying uniform principles at ports to develop cost-based prices. All powers for fixing tariffs in major ports lie with TAMP; however it has no jurisdiction over minor ports or private ports.

As against the regulatory model for major ports in India, the Port of Singapore Authority, which was restructured in 1997, bifurcated the regulatory and commercial functions and vested the regulatory functions in a separate body i.e. Maritime and Port Authority (MPA). The MPA however, had no tariff setting functions (Box 3.9). "TAMP on the other hand is only a tariff setting authority and has no other regulatory functions. Ideally, there should be one regulator exercising all regulatory functions including tariff setting, if necessary in the port sector. TAMP has no role to play in opening up the port sector for private investment. TAMP has also not been specifically mandated to improve efficiencies or lay down quality of service standards in port operations. However, the Major Port Trust Act provides that while fixing tariffs the conditions under which the service to be rendered can be prescribed. Using this as a mechanism, TAMP is now seeking to relate tariff to efficiencies. But each port has its own tariff schedule and scales; the accounting procedures are also different. It would be necessary for TAMP in the first instance to establish some common accounting procedures amongst ports and move towards fixing uniform principles for fixation of tariffs; this would go a long way towards promoting inter-port competition" (Sundar S, 1998).

Box 3.9 Port regulation, Singapore

One of the most efficient ports in world and equipped with world-class infrastructure, the Singapore Port has achieved high performance levels after its privatization. With increasing inter-port competition, and promotion of private sector involvement in Singapore's infrastructure provision, the privatization decision for Singapore Port came in 1997. It was decided to corporatize the port so as to improve the efficiency and speed up the privatization process.

Before corporatization, the Ports of Singapore Authority (PSA) performed the role of regulator and terminal operator. However, after 1997 corporatization decision, the Maritime and Port authority of Singapore (MPA) became the regulatory body. MPA operates under the Maritime and Port Authority of Singapore Act, 1996. MPA was assigned the responsibility of overseeing the port and maritime affairs while PSA retained the service provision functions.

MPA performs the roles of port authority, regulator, planner, developer, national sea transport policy developer and government advisor on the matters related to sea transport. As a port regulator, it regulates the marine services (specifically pilotage and tugboat services) and port industry's economic behaviour. "MPA issues four types of public license: port services and facilities; pilotage services; towage services; and licenses for the sale of desalinated water. Public licenses require the licensee to provide efficient and reliable services and to comply with price control arrangements and service standards set by MPA. Licensees are prohibited from engaging in any conduct that would have the effect of preventing or distorting competition in the Singapore market for port services and facilities."

(Source - Tongzon J.L, 2006)

The TAMP fixes tariff ceilings for services rendered by major ports. The major ports are free to fix tariffs on various services at any level, which is less than the notified tariff ceilings prescribed by TAMP. It is mentionable in this context that TAMP's mandate is limited only to notification of the tariff bands and it has no other competition related powers in the sector. It is being argued by many port trusts that there is no need for TAMP; instead a tribunal could be set to hear complaints if any against port tariffs (Sundar S, 1998).

3.12.5.1 Role and functioning of TAMP: Issues relevant from the perspective of competition in the ports sector

TAMP's mandate is restricted to tariffs for port services at the major ports, but the government retains the right to invalidate TAMP's tariff rulings. Stakeholder discussions revealed that although there has been a debate about giving more powers to the tariff regulator, no changes have been made to the Act, since provision for formation of TAMP was made. There has been neither addition in powers of TAMP in the last 11 years nor any addition in TAMP's staff strength.

Government can give directives to TAMP on matter of policy. The tariff guidelines are also finalised by government (though in consultation with TAMP). In response to TERI's questionnaire survey, respondents also opined that TAMP was not created with the goal of promoting competition in the ports sector and TAMP's orders have not affected competition in the ports sector. However, the fact that tariffs are controlled makes the sector unattractive and adversely affects competition in the sector.

In terms of the role and functions of TAMP, following issues become important from the perspective of competition in the Indian ports sector:

Scope of TAMP

- TAMP can regulate only tariff issues. It has no other regulatory powers, which makes its role very restrictive.

Jurisdiction of TAMP

- This is major issue as TAMP's purview on tariff issues is limited to ports covered by the Major Port Trust Act. Ennore Port has been set up under the Companies Act and does not fall under the ambit of the Act and therefore of TAMP either. The regulator does not have a say in tariff determination at Ennore port or at terminal allocated to private investor at the Ennore port.
- Similarly TAMP has no jurisdiction over minor ports which come under the State Maritime Boards or State Port Departments. Terminal operators are free to fix the tariffs at the minor ports.
- Limited jurisdiction of TAMP raises issue of level playing field between major ports and minor ports, and between corporatized ports and port trusts.

TAMP's decisions: Issue of level playing field and rewarding efficiency

- NSICT case: It has been alleged that TAMP decisions led P&O extract inadmissible returns (over 100%) on its equity as against the permissible levels (20%). The decisions put P&O in an advantageous position where it could extract very high levels of returns, thus raising the issue of level playing field (Salhotra B, 2007).
- The three terminals at JNPT i.e. the terminal owned by the trust, Gateway Terminals India (GTI) and DP World, have different tariffs (Source- Stakeholder interactions).
- TAMP is also affecting the working of private terminals. For instance, the public terminal at JNPT is allowed a lower minimum number of days of storage while Nhava Sheva International Container Terminal (NSICT) has to accommodate goods for storage for a longer duration (Source -Stakeholder interactions).
- Tuticorin case: There is no incentive for the operator to increase the throughput. In the case of Tuticorin port, TAMP reduced the tariffs after the operator managed a higher traffic (Source- Stakeholder interactions).

Many stakeholders argue that there is a need to provide statutory power to TAMP so that it is able to enforce orders and call for data from port operators. Right now, TAMP cannot compel any party to share information. There have been instances where decisions of TAMP (which attempt to lower tariffs of terminals in major ports) have been challenged in courts by the port operators. In fact in a number of cases where TAMP had brought down tariffs, its ruling have been stayed by the High Court. Incidentally, about five years ago, the Shipping Ministry had tried converting TAMP into an appellate tribunal, while bringing the minor ports under TAMP's jurisdiction. But the proposal facing opposition from most of the States (that administer the minor ports) was never realised.

Stakeholders had differing views on the proposition of entrusting TAMP with competition related powers. Some opined that TAMP should have role in regulation of infrastructure (access regulation) and should be provided with competition related powers like Telecom Regulatory Authority of India (TRAI), etc.; others were of the view that TAMP does not require any special empowerment; CCI or an appellate tribunal (like in US–Federal Maritime Commission) can look into issues related to competition.

3.12.6 Gaps in the regulatory framework in Indian ports sector

It can be concluded from the above discussion that the regulatory framework in Indian ports sector lacks a single independent agency that:

- is responsible for regulating all relevant issues in the sector including competition issues;
- has a jurisdiction over all major and minor ports; and
- ensures a level playing field to all players in the sector.

The above stated conclusions lead to the next research query i.e. what should the regulatory framework in ports sector be comprised of and how it should address competition issues in the sector. This issue has been dealt in the next section, which discusses the regulatory framework in ports with relevant international experience.

3.12.7 Regulatory framework with a focus on promoting competition

The last two decades have witnessed many structural reforms in the infrastructure sectors of developing countries. These reforms have increased private sector penetration in the provision of services. Private sector participation and behaviour, however, needs to be regulated so as to prevent the occurrence of monopoly. Particularly for the transport sector, “the presence of natural monopolies is one of the failures that warrant economic regulation. If left unregulated, monopolists have incentives to maximize benefits by restricting the quantity of the services sold, causing negative consequences to the rest of society” (Defilippi E and Flor L, 2005). This holds true for the ports sector also and it is necessary to regulate the behaviour of private players so as to ensure competitive environment in the sector.

Ports are a hub for multiple activities with different economic characteristics, which require different regulatory treatment varying from technical, environmental, social, and safety regulations. For example, technical oversight is needed to ensure safe movement, avoid environmental pollution, and so on, and social oversight is needed to ensure fair treatment of workers and healthy working conditions. As a general practice these areas within the ports sector are either regulated by a government agency or a specialized, independent agency.

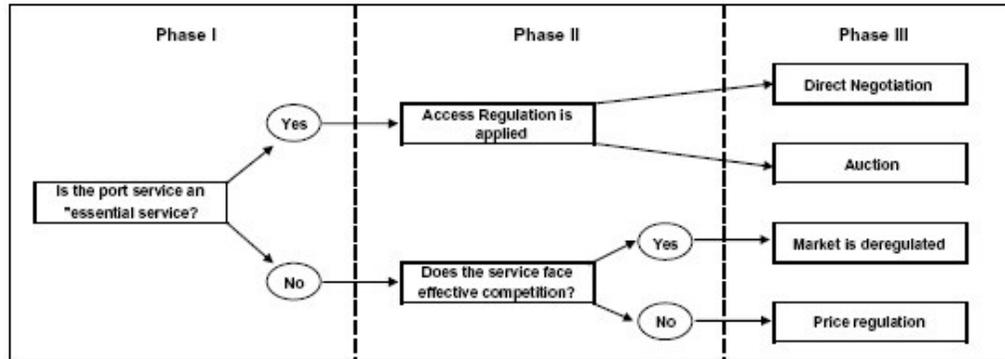
The regulatory framework of the ports sector should aim at eliminating barriers to competition and allow market forces to impact behaviour of the players. This can be achieved through two regulatory mechanisms, access regulation and price regulation. In the former, the access of firms to the facilities essential for competing in the market is regulated. In the price regulation mechanism, prices along with the quality of services are regulated so as to control the behaviour of private investors. Though both these mechanisms seek to internalise the negative externalities and maximize the sum of producer and consumer surpluses, price regulation is more costly. It requires unbiased decision-making processes and a lot of information, both of which are hard to collect. Particularly in developing countries, it may become more costly due to the weak institutional structures. Also price regulation is more prone to spawn market distortions than access regulation; a normative analysis suggests that regulators should implement disciplined processes aimed at promoting competition in as many markets as possible, enforcing price regulation only in the residual ones (Defilippi E and Flor L, 2005). An example of adoption of access and price regulation in the ports sector of Peru is given in Box 3.10.

Box 3.10 Regulatory structure in ports sector, Peru

The regulatory framework adopted in Peru aims to reduce regulatory risks by ensuring that the markets being regulated are only those where competition cannot be introduced. A sequential process is followed in order to determine which services will be regulated under which regulatory mechanism. The first decision involves determining whether a service is essential or not. If essential, then the regulatory option exercised is the access regulation. The following port activities in Peru are considered essential services:

- (a) Maritime transport of cargo and passengers;
- (b) Pilotage;
- (c) Towage;
- (d) Mooring;
- (e) Stevedoring;
- (f) Cargo transfer (within the port); and
- (g) Fuel supply;

If the service is not essential, the second regulatory option is exercised. Within the non-essential services some are not declared essential services because they are either competitive without the safeguards of the Access Regulation or are plainly monopolistic. The criterion to differentiate among them is the question: does the service face effective competition? If the answer is no, the service is regulated according to the principles and methodologies contained in the Methodological Guidelines given by government. If the answer is yes, the market is deregulated. The sequential process of adopting the regulatory framework in Peru is illustrated in the figure below.



(Source - Defilippi E and Flor L, 2005).

There have been different practices and approaches for port competition and regulation in different countries. For example, in Mexico, the Ports Law states that the Federal Competition Commission shall determine when to establish tariff regulation. If the Commission deems competition inadequate, it may stipulate rate of return regulation or price controls to prevent monopolistic exploitation. In such cases rates may be set based on benchmarks from comparable ports in more competitive situations or a synthesis of rates from cost data. Both methods are difficult, and the problem is that the regulated bodies are almost inevitably better informed than regulators. One way to do so, adopted in port regulations for Sri Lanka, is to involve the regulator only in cases of disputed rates. Adjudicating disputes between port operators or between port users and operators may be the most important function of a regulator in a liberalized port sector' (WB & PPIAF, 2003).

The WBPRT also discusses providing a regulatory framework in the ports sector that focuses on promoting competition and serves to:

- avoid legal challenges to the privatization program or transaction and identify any constraints in the law that would limit the ability to transfer services to private providers or the range of options that might be available for the privatization approach;
- define the regulatory role of the government in the reform and post reform effort and related institutional framework;
- anticipate the competitive environment (the extent of competition) of the port sector and the need for competition monitoring or economic regulation;
- consider the potential for restructuring the port sector to make it more conducive to regulation by competitive forces rather than government oversight;
- determine the range of strategies that might be available to the regulator to induce competition or discourage anticompetitive behaviour;
- identify the form of interventions that the regulator may use when anticompetitive behaviour occurs;
- determine what issues not specifically addressed in the existing or proposed law need to be addressed on a transaction specific basis (WB & PPIAF, 2003).

3.12.8 Regulatory options for Indian ports sector

The discussion in the above section leads to the conclusion that the port regulation should ideally

promote competitive environment. This is currently missing in Indian ports sector. There are different regulatory agencies with different jurisdictions and no specific mandate for competition regulation. Also there is TAMP, which has only tariff regulation of only major ports under its purview. It does not have any competition related powers. The gaps in the current regulatory set up in Indian ports sector raise the following two issues:

1. Should there be a newly formed independent sector regulator for the ports sector or TAMP's scope and jurisdiction should be increased to make it responsible for overall port regulation?
2. In either of the above cases, should this independent regulator be entrusted with competition related powers?

From the competition perspective, this study would discuss only on the second issue i.e. should the regulator in Indian ports sector (either TAMP with increased power or newly formed sector regulator) be entrusted with competition related powers. This issue has been debated for quite some time after an economy-wide institutional mechanism was established in the form of CCI. "The legalists argue that competition law covers the entire economy and that the competition issues should only be addressed by the authority set up for the purpose. It is further argued that the sector regulators have a narrow technical focus and their proximity to the industry being regulated makes them more vulnerable to capture" (Anant T.C.A and Sundar S 2005). "Pragmatists, on the other hand, argue that the sector regulators are best equipped to address competition issues in the regulated sectors as they have a better understanding of the sector. Sector regulators also tend to act on the principles of public interest rather than on the guidelines and rules that bind the competition authority and introduce an element of rigidity, say, M&A issues" (Malik S et.al, 2007).

Ideally, it should be left to the competition authorities to promote and maintain competition across the entire economy. However, in most jurisdictions including India, competition authority has only ex-post powers to enforce and maintain competition i.e. after there has been a violation of competition provisions. Also promotion of competition by the competition authority is restricted to only advocacy. In emerging economies like India where infrastructure services were traditionally provided by public utilities or government departments, it is necessary for a regulator to introduce competition and create a level playing field for new entrants; this needs to be done ex-ante. A sector regulator who has a better understanding of the sector issues is perhaps best equipped to introduce competition in this sector as in other infrastructure sectors. There could always be a 'sunset' clause that provides for the withdrawal of competition power from the sector regulator once competition is well established in that sector.

However, in adopting that approach every effort must be made to see that interface between the sector regulator and competition authority is clearly defined and the relevant laws provide for structured collaboration between the two.

3.12.9 Conclusions

The discussion clearly establishes that the existing port regulator only has tariff related powers and there is no other agency/regulator to look at other issues in the ports sector such as conservancy, competition, etc. While it could be argued that competition powers should be left to the competition authority, there is a case for vesting these powers in a sector regulator as in the case of electricity sector so that competition can be introduced, open access ensured and a level playing field created, ex-ante. The question whether there should be a port regulator or a transport regulator with powers to oversee competition issues across the transport sector needs to be discussed. It has also to be ensured that the relevant laws establishing such a regulator provide for constructive cooperation between the sector regulator and the competition authority.

3.12.9.1 Tariff Regulation: Competition issues in pricing

In a competitive market prices are determined by market forces. If a perfectly competitive market were to exist in the port sector, one would find demand and supply forces identifying the right price. If prices were high, the port would lose out on its consumers and demand for port services would reduce. Given that ports involve large sunk costs, there would be excess capacity and

infrastructure would be under-utilized. The port would be compelled to bring down its prices. On the other hand if prices were low, there would be increased demand of port services and the ports would increase their charges in order to increase profitability. Ports, however, are an infrastructure service, and have characteristics of a monopoly and therefore cannot be left to market forces. Port charges are generally determined by a port authority be it part of the government agency or an independent regulator.

To examine competition issues related to tariffs in the port sector, one needs to address questions such as:

1. Is there evidence that port charges and tariffs are related to the cost of provision of services or other factors?
2. Does the tariff determination process promote efficiency?
3. Are port tariffs and charges readily comparable between ports in the country (for promotion of inter-port and intra-port competition)?
4. Is there evidence of differential pricing/predatory pricing?

The first two questions pertain to the tariff determination process and are discussed in the subsequent Section I, Section II tries to address issue of tariff comparability (question 3) and Section III looks at the issue of predatory pricing (question 4).

3.12.9.1.1 Section I: Tariff determination process

Till 1997, the port charges and dues for various services used to be fixed under section 52 of the MPTA, 1963 by the port management with the approval of the central government. Port dues and pilotage fees are levied under the Indian Ports Act, 1908. The rates were prescribed in the 'scale of rates' published by the respective ports. The tariff structure of ports was varied and complicated. The scale of rates was ad hoc and, in many cases, not based on rational principles (Sundar. S, 1998).

TAMP, which was set up in 1997 tried to remove some of these anomalies by coming out with uniform principles of tariff fixation and modalities which would be followed at all the major ports. After detailed discussions and consultation with stakeholders it issued in 1998, the Guidelines on Tariff Fixation at the Major Ports. TAMP adopted a cost based model with pre-determined rate of maximum permissible return on investment (Box: 1). The tariffs so determined were to act as a ceiling. In practice, because of lack of excess capacity and lack of inter-port and intra-port competition, terminal operators have been able to charge tariffs at the ceiling level.

The question of whether port charges are related to the cost of services (question 1) can be answered in affirmative as tariffs are determined under the cost plus approach. However, the question on whether the tariff determination method promotes efficiency cannot be answered in affirmative. In fact, the main issue which private players have raised with this cost plus approach is that it did not reward efficiency. Under the cost plus approach, TAMP has the power to not allow those costs which were a result of port inefficiency. However, there were no prescribed standards of efficiency and performance standards related to various cost. These concerns were partly rectified after the issue of revised Tariff Guidelines of 2005. It was decided that cost reduction due to efficiency improved would be shared between users and operators (Box 3.11).

Box3.11: Summary of Tariff Guidelines

Tariff Guidelines, 1998

The cost plus model was followed with a maximum permissible return. For purpose of allowing return, TAMP recognized the capital employed as the base for port trusts and allowed a pre-tax return on equity of 20%. This return was allowed after accounting for the actual cost of debts as an admissible expense. A two-year tariff validity cycle was prescribed after which the tariffs would be reviewed. Rates fixed by TAMP were to act as a ceiling level and port were free to reduce or allow discounts depending on market condition.

Tariff Guidelines, 2005

The cost plus approach was continued but emphasis was to be given on efficiency. Cost reduction due to efficiency improvement was to be shared equally between users and the operators. Normative costs were to be evolved. It was also decided that revenue share/royalty paid to landlord port would not be recognized as cost⁷. An exercise was undertaken to determine normative tariffs for container related activities.

This **normative cost** to be applicable across ports could however not be determined because of the diversity of equipment infrastructure and dynamics in traffic profile at various ports. It was suggested that terminal approach alone would be possible. Under this approach, the efficiency for a particular terminal would be compared with its own performance in the previous year. Each of the major ports are now required to prepare normative project report specifying the desired key performance indicators for port services and the costs normally associated with such parameters.

Guidelines for Upfront tariff setting at Major Ports, 2008

Tariff for new projects at the major ports would be decided upfront based on normative costs. The tariff set would be a cap and once this cap is determined for a port, it would subsequently apply to all terminals that are bid out at this port. Tariffs would be reviewed every five years and the tariff cap would be indexed to inflation but only to the extent of 60% of the variation in WPI. After the tariff cap has been determined, bids would be invited on the basis of revenue share

Building in efficiency into the tariff set up has been a complicated issue and the regulator needs to carefully balance the interest of both the end consumer and the private player, such that tariffs are not too high and hurt trade but at the same time are attractive enough for private players to enter the sector. The regulator has been finding it difficult to balance these interests. Of late, port tariffs have been reduced in case of a number of terminals taking into consideration the efficiency improvement at the terminal. This has not gone down well with the terminal operators, many of whom, have appealed to the High Courts against TAMP's tariff order. Here, the case of Tuticorin, (discussed under the Section on inter-port and intra-port competition) is relevant. Its tariffs for the year FY 2007-08 were reduced by TAMP due to efficiency gains at the terminal. After this tariff reduction, the operator has decided to limit the traffic at the terminal as it argues that at the new tariff levels, the terminal would not even be able to cover its operational costs.

The second issue with the tariff determination methodology has been the issue of revenue share. It was decided by the Ministry of Shipping, that from 2003 onwards, revenue share (with the landlord port) would not be considered a pass through in tariffs. Maximum revenue share is the basis of selecting the winning bid amongst private players for developing a terminal/port. Players are competing aggressively on the revenue share to win projects and are trying to sustain this high level of revenue share by increasing costs (through unnecessary investment). This has implications on tariff and perhaps in order to address the anomaly the Ministry of Shipping has now come out with new bidding guidelines, under which tariffs would be set upfront before bidding. This tariff would be a cap, based on normative costs and bidders would then be invited on the basis of revenue share (Box 1).

3.12.9.1.2 Section II: Tariff structure and competition issues

Port tariffs in India are not comparable across ports, primarily because of the cost plus method

adopted for tariff. Since ports differ in terms of years of operation, type of facilities, traffic volumes etc. their costs differ significantly. Tariffs for handling containers at different ports range between Rs 971 and Rs 3540 per container. Even for different terminals at the same port (JNPT), the tariff for handling containers range between Rs 2550 and Rs 3540 (Normative tariff report, MoS). Tariffs have a direct co-relation with inter-port and intra-port competition. Since end users do not have much choice in switching terminals, they are bound to pay the price asked by the port operator. Consumer demand in a way is a “captured” and restricted at a port.

Besides large variation in tariffs, the tariff structure also varies from port to port. As highlighted earlier, there are a number of charges in the cost structuring. Port tariffs should be fair, simple and transparent based on broad banding and scientific clustering of cargo categories (Sundar S, 1998).

3.12.9.1.3 Section III: Predatory pricing

A major anti-competitive practice is predatory pricing, i.e. charging less than the cost in order to drive out competition. The possibility of predatory pricing is greater where a player has the option to cross-subsidise one business with another.

In India, the tariff regulator sets the tariff cap based on the cost plus method. The terminal operator is free to charge below this cap and the regulator does not intervene in such cases. This is a gap in the powers of the tariff regulator and in such a case only Competition Authority can intervene.

The landlord ports in India that provide access to basic infrastructure at a cost to all terminal operators is also a terminal operator competing with the private terminal operators (e.g. JNPT). It is in a position where it can hike up prices for basic infrastructure and use it to cross-subsidise lower tariffs for its terminal operation business.

In case of private terminal operators, predatory pricing would be possible for those players that have the option to cross-subsidise the terminal business with another related business in which it is well established. (Say a freight forwarder getting into terminal operations, a shipping company entering into terminal business).

In the existing scenario, where demand far exceeds capacity, players do not need to lower tariffs to attract customers. In fact, as seen in case of Tuticorin (discussed earlier), private players have opted for reducing their handling capacity when their tariffs were lower. However, in future, as capacity increase and there is greater competition amongst players, predatory pricing may become an issue.

Recommendation

In the long run, tariff trends would have to be analysed for possibility of predatory pricing. It could also be deliberated whether CCI should retain its authority to examine cases of predatory pricing, or should the tariff regulator be given powers to examine such issues.

3.13 Advocacy issues for CCI

Based on our analysis of the competition issues in the India port sector, following are some of the advocacy issues that can be pursued by the CCI for encouraging competition in this important sector.

3.13.1 Inter-port and intra-port competition

In order to encourage inter-port and intra-port competition it is necessary to keep in check any possible dominance by one player at a port or on a coastline. The government should be careful while awarding projects such that one player is not granted too many concessions at the same port or on the same coastline. CCI may take up this as an advocacy issue with the Ministry of Shipping.

CCI can advocate the need to promote intra-port competition. For this, CCI should commission a

study to analyse the impact of intra-port competition on service and efficiency levels at the three terminals at JNPT

Inter-port competition requires strengthening of rail and road connectivity as well as infrastructure availability at the competing ports, especially the minor ports. CCI can organize meetings with port authorities, rail and road developers, and policy makers in order to emphasise these needs.

Intra-port competition may be affected by the advantage that the landlord port has over infrastructure, which it may use to the benefit of its own terminal rather than that of the competing private player. It may be necessary to advocate that the landlord port moves away altogether from terminal operations business. Alternately CCI needs to explore the possibility of imposing 'Essential Facility Doctrine' in the future at ports in order to provide open or equal access to infrastructure facilities to all operators.

3.13.2 Port concessions

There are a few issues related to the port concession granting process and provisions in concession agreements, which may create entry barriers for private players. The condition of limiting the number of bidders in the second stage of the bidding process may prove to be an entry barrier for small players with the result that the large players get selected over and over again establishing their monopoly.

The concession agreement also sets a condition for absorbing the labour of an existing terminal and offering them wages not below the existing standards. This may deter investment in the sector. Further the clause on termination of concession agreement whereby at the end of concession period the terminal facility reverts to the port trust free of cost, may also deter investment.

There is a need to revisit these issues in the process of granting concessions and in the concession agreements in order to ensure that all players have an equal opportunity to enter into port activities. CCI may like to take up these as advocacy issues with the port trusts/ministry.

3.13.3 Corpportization model for ports

The corpportization model for Indian ports holds a lot of potential in improving the overall performance of the sector; the government should hence encourage it. CCI may like to take up it as an advocacy issue and hold discussions with the Department of Shipping, MoSRTTH to promote the corpportization model for Indian ports.

3.13.4 Labour issues

There are issues of uncompetitive manning scales at some of the ports as a result of which tariffs become uncompetitive. The existing labour policies are protectionist and exit of labour is not possible. These tend to make the sector unattractive for private players. CCI may like to organize discussions with the Ministry, port authorities, State port departments, private operators, labour unions, DLBs etc. and take up these issues.

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