



# Competition Issues in Regulated Industries: Case of Indian Transport Sector

The Energy and Resources Institute



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# Scope of Work

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- Analyze market dynamics
- Identify possible anti-competitive practices and barriers to entry
- Review international experience
- Suggest structural, legislative and regulatory changes to encourage competition
- Identify issues of advocacy for CCI

# Methodology

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- Literature review
  - Indian experience (Acts, policies, journals, articles)
  - International best practices (Case-studies)
- Questionnaire survey
  - Railways: Container (16), Procurement (50)
  - Ports (30)
- Interaction with stakeholders
  - Railways: Container operators, Vendors in procurement, Officials from Indian Railways
  - Ports: (13 stakeholders - Mumbai & Delhi)- regulator, MPT, terminal operators, liners, shippers

# Railway Sector in India

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- ❑ State owned monopoly
- ❑ No competition in movement of trains (Railway Act 1986)
- ❑ Vertically integrated; no separation of infrastructure and operations
- ❑ IR is divided into 17 zones, further divided into 67 operating divisions each under a Divisional Railway Manager.
- ❑ 6 production units (under the Railways Board), PSUs under the administrative control of the Ministry of Railways
- ❑ Number of areas being opened for private participation

# Focus Areas in Railways

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- 1. Private participation in Railways: Container cargo movements**
- 2. Wagon manufacturing (preference to PSUs)**
- 3. Anti Competitive practices in Railway procurement**
4. Private participation in Railways: Dedicated Freight Corridors
5. Inter-modal Competition
6. Reforms in Railways
  - International experiences



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# Private Participation in Railways

## Container Cargo Movement

# Case of Container Cargo Movements

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## □ Focus Areas

- Entry Barriers in the sector
- Issue of Level Playing Field
- Abuse of Dominance by the Incumbent

# Entry Barriers

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- ❑ Total number of players :15 (Licensees)
- ❑ Only 7 have started operations (including CONCOR)
- ❑ Market share
  - CONCOR 85%
  - Private players 15% (capacity limitation)
- ❑ Stakeholders Perspective
  - Satisfactory level of entry (in terms of No. of Licensees)
  - However, certain barriers are limiting the extent of operations
    - ❑ Land
    - ❑ Policy uncertainty: No formal guarantee of transit time



# Key Features (Container Segment)

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- Incumbent and IR: Overlap in professional interests
  - Railways owns 63% stake in CONCOR
  - Terminals on railway land
  - Key professionals from IR on deputation
- No independent regulator

***Issue of Level Playing Field***

# Level Playing Field (Issue 1)

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## □ **Payment mechanism**

- CONCOR (Flexible mechanism)
  - Pays haulage charges to IR in advance, on a fortnightly basis or payment credit of 15 days
- Private operators (payment on a per train basis)
  - Payment only by demand draft after container being weighed by IR goods clerk
- Private player's views:
  - CONCOR surpasses bureaucratic hassles faced by private operators
  - Present mechanism causes loss of valuable time and resources for the private players
- Railways' views:
  - Risk of default less with CONCOR
  - Discussion going on to improve the mechanism

# Level Playing Field (Issue 2)

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## □ **Allocation of Land for Terminal/ICDs**

- CONCOR's many terminals built on railway land
  - Made available at extremely attractive prices
  - Strategic/Prime locations
  - Necessary Rail facilities are available in the vicinity
- Private operator's Views:
  - Land should be allocated to private operators at the same cost
  - Access rights to the terminals at strategic location (where duplication is difficult)
- Railways' views
  - Old lease contracts (for CONCOR's owned) will be revised
  - In future, assistance to operators in land allotments

# Abuse of Dominance

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## □ CONCOR : Dominant Position

### ■ Private player's views:

- Pricing strategy by CONCOR (discounts to restrict entry)
- Penalizing customers for switching (no hard evidence)
- Very high access prices(prohibitive)set by CONCOR for its Terminals (which is on Railways land)

### ■ CONCOR's view:

- Competitive strategy necessary to protect its market share
- Allowing discounts but not 'predatory pricing'

# International Experience (Reforms in Railways)

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- Setting up of an independent regulator (Germany/Sweden/UK)
  - To Ensure Level playing Field
  - Transparency in devising haulage charges/access charges
  
- Separation of infrastructure & operations (Germany/Sweden/ UK)
  - Facilitates equal access rights to essential infrastructure
  - Ensuring level playing field
  - However, difficulties in implementation
  
- Promoting Inter-modal competition for greater efficiency (Sweden)



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# Preference to PSUs

## Wagon Manufacturing

# Preference/Protection to PSUs

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## □ Case of Wagon Procurement

- Centralized procurement
- 12 companies in wagon manufacturing
  - 6 PSUs
  - 6 Private Sector
  - 3 IR workshop also manufactures Wagons

## □ Open Tendering

- System of distribution
  - 45 % to PSU's
  - 30% to Private sector
  - 25% for Competitive Bidding, for all

# Preference/Protection to PSUs

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- Lack of competitive environment
  - Reservation of Orders
  - Political Interference
- Lack of level playing field
  - Special benefits to PSUs
    - Damages/Penalty waived off (PSUs)
    - Further orders allotted even after erratic supplies and arrears (Audit Reports)
- Adverse effect of reservation on:
  - Competitive outcome of the market
  - Incentive to be more efficient

*Should the practice of reservation be revisited??*







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# Competition Issues in Railway Procurement

# Railway Procurement

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## □ Focus areas

- Anti-competitive collusions (Bid rigging, cartels)
- Key characteristic (of public procurement) or practices which promote such anti-competitive practices
- Measures to promote greater competition
  - E-procurement

# Railway Procurement

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- ❑ Total procurement (2006/07): Rs. 18,651 crores.
- ❑ Reforms in the past to reduce Anti-competitive practices
  - Vendor Development Cells (1999)
    - ❑ Directives (Sep 1999) to establish VDC in all zonal railways/ RPU (Monitoring and ratings of the vendors)
  - Decentralizing Stores Procurement (2001)
    - ❑ Powers to GMs of zonal railways and RPU (45 stores item)
    - ❑ Aims to expedite the procurement process and to improve monitoring by bringing the procuring authority and end user closer
  - Instructions to include clause against cartel formation in all tender documents (2002)
  - E-procurement introduced (Northern Railways, 2005)

# Railway Procurements

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- Audit of Reports of the CAG of India, 2006
  - Comparative study of procurement & inventory management systems (2000-01 to 2004-05)
  - 19 items examined at Railway Board, Zonal Railways and RPU
- Highlights of the Audit report:
  - Cartel formation in 9 out of 31 tender cases examined for pre-decentralization period
  - Cartel formation in 47 tender cases issued by Zonal Railways/ RPU for the same items after decentralization
  - Cartels in Risk Purchases (27 cases examined)
    - In 5 cases, contracts placed on defaulting firms themselves
    - In 5 other cases, tenders did not materialize (due to lack of response or due to high price quotation)

# Railway Procurement (Case Study)

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- Procurement of High Speed Cast Steel Bogies (2006)
  - 9 firms participated in the tender
  - 7 firms quoted a uniform price of Rs.99, 638 per bogie for less than 50% of the total requirement
  - 1 firm quoted for the full amount but at a considerable high price (Rs 1,05,000)
  - 1 firm (part 2) quoted the minimum price (Rs. 87,000)
- Clause against cartel formation was not included
- IR forced to negotiate with the cartel members (*failed*)
  - 75% orders allocated to 3 firms in the cartel
  - Remaining orders to PSU (CLW) and Part 2 firm
  - Total loss estimated at 13.27 crore

Source: Railways Audit ([www.cag.nic.in](http://www.cag.nic.in))

# Railway Procurement

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- ❑ Cartels operating in Railways Procurement  
(*Conclusion from the case studies*)
  - Anti-competitive practices prevalent in railway procurement:
    - ❑ Illegally coordinating the bids amongst the cartel members (Bid Rigging)
    - ❑ Sharing market demand
    - ❑ Filing fabricated bid protests to deny an award to non-conspirators
    - ❑ Using their incumbent power or corruption to keep away any new entrants
      - Non Advertisement of tender forms (*vigilance report*)
      - Denying Tender form to entrants (*vigilance report*)

# Maximizing competition in Railway Procurement

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- ❑ Raising awareness amongst procurement officials
- ❑ Improved Designing Procurement Tenders
  - Reducing barriers to entry and increasing bidders' participation (role of RDSO)
  - Reducing flow of information to cartels
  - Reducing the frequency of procurement opportunities (centralized vs. decentralized)
- ❑ Enforcing strict competition law rules in public procurement (Competition Act and the role of CCI)
- ❑ Close monitoring of bidding markets
  - Devising Checklist for procurement officials (USA,Sweden)
- ❑ Modernizing Procurement: E-procurement

# Maximizing competition in Railway Procurement: e-Procurement

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- Benefits (case studies, International best practices)
  - Increase participation (reducing entry barriers)
    - Does away with geographical Constraints
    - Reducing bid preparation cost (small bidders)
  - Fall in the average prices
  - The data generated by the electronic tendering process can be used to screen for bid rigging
  - Reducing transparency to a safer level
  - Reduces the power of the cartels to manipulate procedures and documents



# Summing Up

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- Container Cargo Movements
  - Level of entry is satisfactory
  - There are certain apprehensions amongst private players w.r.t level playing field
  - No serious case of abuse of dominance (industry premature to assess)
- Wagon Manufacturing
  - The policy favors PSUs which may have adverse effect on competitive outcome
- Public procurement
  - Cartels still in operation despite of reforms undertaken

**Intervention Required**



# Ports Sector in India

## Major Ports

Acts: Major Port Trust Act ,1963  
Indian Ports Act,1908

Operator - Major Ports Trust

Market share –12 Major Ports  
(74% of maritime cargo)

Responsibility – Centre

Tariff – Tariff Authority for Major  
Ports (TAMP)

## Non Major Ports

Act – Indian Ports Act, 1908

Operator - State Maritime  
Boards/State Govt. department

Market share – 187 minor ports  
( 26% of maritime cargo-traffic,  
concentrated in a few ports)

Responsibility – State

Tariff – Ports/terminal operator

# Focus Areas in Ports

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- **Mergers and Acquisitions**
- **Shipping conferences**
- **Port Concession**
- **Competition regulation**
- Inter-port and intra-port competition
- Organizational issues
- Legal issues



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# Combinations: Mergers & Acquisition in the Maritime sector

# Combinations: Mergers & Acquisitions

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## **Research Issue**

- Have M&As in Indian ports led to emergence of dominant players who are abusing or can abuse their dominant position?

## **Competition issues in Vertical & horizontal Mergers (acquisition)**

- Market foreclosure
- Predatory pricing, arbitrary hike in prices
- Bundling of services

# Indian Experience

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Acquisition of assets of P&O Ports worldwide by DP World (2006)

## **Before the Acquisition**

P&O Ports in India: Container terminals at

1. NSICT (Nhava-Sheva International container terminal)
2. CCT (Chennai Terminal)
3. MICT (Mundra International Container Terminal)

DP World in India: Container terminals:

1. Vizag (Vishaka Container Terminal)
2. IGT, Cochin (Indian Gateway Terminal)

## **Post the Acquisition**

DP World (2006):

West Coast: NSICT, MICT, IGT, Vallarpadam (upcoming)

East Coast: CCT, Vizag, Kulpi (upcoming)

**Emerging as a dominant player in the Indian container market.**

**Stakeholders apprehensive that it may abuse its dominant position**



# Existing mechanism to regulate M&A in Indian Ports

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## **Competition Commission (once empowered)**

- ❑ Investigate M&A above a threshold level for appreciable adverse impact both within and outside India
- ❑ Investigate post merger in case of complaint of abuse of dominance

## **TAMP**

- ❑ No competition related powers for ex-ante regulation
- ❑ Post merger can regulate arbitrary hike in tariffs
- ❑ No intervention possible in case of predatory pricing

# Stakeholders Views

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Does the acquisition of P&O Ports assets by DP World amount to the emergence of private monopoly?

**Response:** Divided opinion

## **Stakeholders' Remarks**

- ❑ Private operator claims that as a global business it is not in their interest to behave like a monopoly.
- ❑ Yes, any M&A which allows more than 50% market share should not be allowed

DP World emerging as dominant but can they abuse their dominance?

- ❑ Competition from nearby ports (in both product & geographical markets)
- ❑ TAMP can regulate any arbitrary hike in tariffs post the M&A (Chennai ICT)
- ❑ **However, if it indulges in predatory pricing, TAMP cannot intervene**





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# Competition issues relating to Shipping Conferences

# Agreements in the Shipping Liner Industry

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## **Research issue : Anti-competitive behavior of a Conference**

Shipping Conferences can take steps to:

1. Control competition between member shipping companies (Price and output rules)
2. Prevent shippers from using non-member shipping companies (loyalty contracts)
3. Directly eliminate non-member shipping companies (predatory pricing behavior)

# International Experience: Conference & anti-trust laws

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Review of international experience shows that most nations (US, EU, Australia) have

1. Reviewed/Reviewing anti-trust exemption given to conferences
2. Most have repealed anti-trust exemption

Changing scenario worldwide:

1. Conferences (price fixing) are being replaced by more loose & non-binding consortia & alliances (vessel sharing, information sharing)
2. Direct negotiation between shipper and liner with confidentiality is being encouraged.

# Indian Experience: IPBCC

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## **IPBCC: Indo-European route**

### **Statutory stand on Conferences in India**

- ❑ Prior to Competition Act, no statute providing exemption
- ❑ Presumed to be exempted as India is signatory to the UN Code of Conduct for Liner Conferences

### **Stakeholder Issues with IPBCC**

- ❑ Conference prices act as benchmark
- ❑ But prices are fixed arbitrarily & are not necessarily competitive
- ❑ User has no negotiating power

# Indian Experience: IPBCC

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- IPBCC ceases operation by October 2008 following European Commission's ruling
  - Conference being replaced with Consortia & Alliances
  - No exemption under Competition Act, 2002 – any price negotiation will attract penalties as applicable on cartels
- CCI will need to monitor the new forms of agreement for
    - Any price fixing
    - Any restriction on members from directly negotiating with shippers



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# Concession Agreements in Ports

# Competition issues in grant of concessions

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## **Research issue**

Review of concession agreement to see whether-

- they may create entry/exit barriers;
- lead to dominant position of the concessionaire, which is prone to be abused;
- if there are any cases of collusive behaviour during concession granting process

# Concession granting process

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## **Competition Issues**

- ❑ Stakeholders' view – Restricting number of bidders for stage two may limit competition
- ❑ Restricting number of bidders for the second stage of bidding practiced in all large infrastructure projects – to ensure high quality of bid, international best practice suggests five bidders (MoF, 2007)
- ❑ Possibility of bid rigging - CCI is empowered to investigate



# Other conditions in Concessions

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## Entry

- Employment of existing personnel/ labour by private operator
- Stakeholders view on entry – shipping companies particularly concerned that their expertise is not being considered in bidding process

### **Port Concessions in Chile**

- Government provision for safety net and voluntary retirement for existing labour
- Private firms 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.



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# Competition Regulation in Ports

# Regulation of port competition

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- Identify competition related areas that require regulation – M&As, access issues, price, etc.
- Identify the existing regulatory mechanism and examine whether it addresses these issues
- Jurisdiction and power of tariff regulator
- Need for competition regulation

# Access Issues (Essential Facility Doctrine)

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- ❑ GTI denied gate access at JNPT
  - ❑ 20% electricity surcharge for electricity routed through JNPTs
  - ❑ Vested interest (vertical) at terminals may hinder access to essential infrastructure
- ❑ Experience of Peru: Regulator with competition powers can impose access regulation in case access to essential facility denied to competitors
  - ❑ In India, CCI can intervene under essential facilities doctrine.

# Regulation in Indian ports

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- Existing regulatory mechanism –
  - Port - Port trusts/authority
  - State - Maritime Boards, State Port Departments,
  - Centre - Ministry of Shipping
  - Tariff regulator for major ports - TAMP

# Regulation in Indian ports (contd.)

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## **Tariff regulation in Major Ports**

- Tariff Regulator (only for major ports) – TAMP
- As tariff authority:
  - It can check arbitrary hike in prices
  - It cannot intervene in case of predatory pricing
- Has no other regulatory functions and powers to enforce its decisions
- TAMP does not have competition related powers (as available in case of electricity sector)

# Summing up

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1. M&A: DP World emerging as dominant player & can abuse dominance by predatory pricing: TAMP cannot intervene
2. Consortia & alliances need to be monitored for cartel behaviour
3. Private players have raised issues regarding access to essential infrastructure: Essential Facility Doctrine
4. TAMP has no competition related powers

**Intervention Required**

# Points for Discussion (Railways & Ports)

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## □ Railways

- Need for a regulator in container cargo segment (who?)
- Preference to PSUs (Need for a protection policy)?
- Anti competitive practices in procurement: role of Railways (ex-ante) & CCI (ex-post)?

## □ Ports

- Essential Facility: Definition & enforcement
- Powers of TAMP





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Thank You