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Effect of Legal Issues in Infrastructure Development:

The Case of Container Terminal Bids in

Jawaharlal Nehru Port Trust

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Abstract

The Jawaharlal Nehru Port Trust (JNPT) is the largest container port in India, handling about 40% of India's container traffic in 2014-15. JNPT has five container terminals (CT) out of which three have already been operationalised, a standalone CT of 330 metres (m) is partially operationalised and a fourth CT is under construction. While the first CT, Jawaharlal Nehru Port Container Terminal, is operated by JNPT, the second and third CTs are being operated by DP World and an APM Terminals-CONCOR consortium respectively. The standalone CT too is operated by DP World while the fourth CT was awarded to PSA International and is under construction. The development of the CTs is a case study to understand how various conflicts have been addressed or accentuated by policy makers, legal and regulatory authorities, and the mechanisms used to resolve them. Following a case-based analytical approach, case studies, court judgements, published and unpublished papers, media reports, primary data from discussions, and secondary data have been examined to construct a chronological story of the bids for the five CTs during the twenty five years since the commissioning of the port in 1989. The concessioning of each CT to a private stakeholder involved contentious issues which prompted the authorities to revise policy guidelines periodically to address them. Consequent and prolonged litigation resulted in time and cost overruns. Various issues, like policy formulation, contractual rights versus policy guidelines, strategic risks, monopoly prevention versus scale economies, market risks, effect of elections, leadership changes, security clearances, mutuality and clarity in documentation, that emerged during the bidding processes, have been crystallised as lessons learnt.

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1. Background

Given the significant relation between trade and GDP growth, ports need to ensure capacity expansion in keeping with cargo growth. Private management of ports is believed to improve port strategy and operational efficiency, and to better deal with restrictive labour practices (Kessides 2004). Delays due to litigation in port privatisation have high opportunity and overrun costs – to the port trust, to the private parties and to the economy as a whole. In this context, apart from frameworks based on morphology and operational efficiency of ports, Robinson (2002) discussed on port frameworks that are based on port governance and policy, and economics. Robinson called for a more precise understanding of competition law and classical economic theory to deal with the “possible and ready resort to litigation.”

Patel and Bhattacharya (2010) acknowledge the importance of recognising and systemically implementing the principles of appropriate market structures, competition and measured regulatory oversight. According to Zhang (2005), the top five critical success factors for PPPs are appropriate risk allocation and sharing, strong private consortium, political support, community/public support and transparent procurement. Theys et al. (2010) present an overview of the decisions surrounding bidding out port terminals through the different phases of the bidding process. For the pre-qualification phase, they discuss inter-alia: (i) excluding incumbent terminal operators, and (ii) measuring experience and financial strength. For the selection phase, they discuss inter-alia: (i) direct appointments versus competitive bidding, (ii) maximising revenues versus minimising tariffs, (iii) auctions versus negotiations, (iv) overbidding, and (v) entry barriers to potential bidders.

Capacity growth at Indian ports has not kept at pace with cargo growth. Litigation has impeded bidding out new port terminals to increase capacity. After close to 20 years of privatising ports and port terminals in India, the ports sector still lags behind the international benchmarks of port efficiency. Noting that port traffic is increasingly moving towards container and liquid bulk, this paper analyses the various legal issues that Jawaharlal Nehru Port has faced over the twenty five years since its commissioning in the context of its container terminals (CTs). The paper discusses in detail many of the concerns and concepts highlighted by Kessides (2002), Robinson (2004), Zhang (2005) and Theys et al. (2010) in the context of a case study of India’s largest container port and one of India’s first ports to privatise their CTs. Using a case-based approach, we have examined case studies, court judgements, published and unpublished papers, media reports, primary data from discussions, and secondary data.

2. Introduction

The Jawaharlal Nehru Port is the largest container port in India. Having reached its peak market share of 58% in container traffic in 2003-04, it handled 4.47 million (m) twenty foot equivalent units (TEU) of container traffic in 2014-15, with a market share of under 40%. It was ranked 30 among the world’s container ports in 2014. It is located in a total area of 2987 hectares (ha) in the south of Maharashtra on the Arabian Sea, on the mainland just across Mumbai. The port is run by the Jawaharlal Nehru Port Trust (JNPT), an autonomous body constituted under the Major Port Trusts Act (MPTA), 1963 (Salhotra, 2007). Containers constituted 89.24% of the total cargo handled by JNPT in tonnage during 2014-15.

JNPT has five CTs out of which three have already been operationalised, one is partially operationalised and one is under construction. The first CT called Jawaharlal Nehru Port Container Terminal (JNPCT) was commissioned on May 26, 1989 and run by JNPT. JNPT, apart from its self-operated JNPCT, developed and commissioned its Shallow Draught Berth (SDB) in September 2002. The SDB handles feeder container vessels, dry bulk cargo vessels and other

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