

Report of the
Inter-Ministerial Task Force
on
Draft Port Regulatory Authority
Bill

Planning Commission
(Secretariat for PPP & Infrastructure)

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(Secretariat for PPP & Infrastructure)

**REPORT OF THE INTER-MINISTERIAL TASK FORCE ON DRAFT
PORT REGULATORY AUTHORITY BILL**

1. Introduction

1.1 The majority of India's foreign trade passes through Indian ports, with the maritime sector handling approximately 95% of trade by volume and 70% of trade by value. In 2011-12, Indian ports handled 915 million tons of cargo - an increase of 3.4% over the previous year.

1.2 The traffic at non-major ports has grown faster than the traffic at major ports. Over the last 5 years, the traffic at major ports has grown by a CAGR of 4% while the traffic at non-major ports has grown at a CAGR of 14.6%. The low growth at major ports continued in 2011-12 and traffic has decreased by 1.7% over the previous year. This trend has resulted in the proportion of traffic at major ports falling from 90% in 1995 to 61% in 2012. Conversely, non-major ports have increased their proportion of traffic from 10% to 39% during the same period.

1.3 Ministry of Shipping has proposed a draft port regulatory authority Bill which seeks to create a national regulatory authority (called the Major Ports Regulatory Authority) at the centre, and state level regulatory authorities in the maritime states (called State Ports Regulatory Authorities) in order to regulate the rates for the facilities and services provided at the Ports and to monitor the performance standards of ports facilities and services. This Bill has attracted criticism from maritime states and other stakeholders.

1.4 Planning Commission had requested Ministry of Shipping to reexamine its proposal. In view of the above, an Inter-Ministerial Task Force was constituted by the Ministry of Shipping to examine the draft Port Regulatory Authority Bill and to make

appropriate recommendations regarding regulation/deregulation of Port Tariffs. The constitution of the Task Force is as follows:

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| (i) | Member (Transport), Planning Commission | Chairman |
| (ii) | Secretary, Ministry of Shipping | Vice-Chairman |
| (iii) | Joint Secretary (Ports), Ministry of Shipping | Member-Secretary |
| (iv) | Representative of M/o Law, D/o Legal Affairs | Member |
| (v) | Representative of D/o Economic Affairs | Member |
| (vi) | Secretary, TAMP | Member |
| (vii) | Managing Director, Indian Ports Association | Member |
| (viii) | Representative of Govt. of Gujarat/Gujarat Maritime Board | Member |
| (ix) | Representative of Govt. of Andhra Pradesh | Member |

2. Provisions of the Draft Bill

2.1 The draft Port Regulatory Authority Bill seeks to regulate tariff rates at all major and non-major ports and to monitor performance standards of facilities and services offered at all ports in India. As per the draft Bill, a Major Ports Regulatory Authority (MPRA) would subsume and replace the Tariff Authority for Major Ports (TAMP) while State Port Regulatory Authorities (SPRAs) would be created to regulate tariffs in non-major ports.

Functions of the Regulatory Authorities

2.2 The Major Ports Regulatory Authority shall have jurisdiction over all the major ports and a State Port Regulatory Authority shall have jurisdiction over all the ports, other than major ports, located within the concerned State.

2.3 The regulatory authority shall formulate and notify tariff guidelines, from time to time, prescribing the methodology, approach and other conditions governing setting of rates for different facilities and services by the Port Authorities and Private Operators functioning therein; lay down the performance norms and standards of quality, continuity and reliability of services to be provided by the Port Authorities and Private Operators and monitor actual performance and services provided with a view to secure compliance of the prescribed norms and standards by the Port Authorities and Private Operators having designed cargo handling capacity of more than 5 million tonnes per annum.

2.4 The regulatory authority at the national and state level shall have an advisory role for advising the central and the state governments on issues related to promotion of efficiency and competition in the Port Sector, promotion of investment in the Port Sector, and any other matter referred by the concerned government.

2.5 The MPRA shall specify the common principles, approach and methodology to be adopted by the SPRAs in their tariff guidelines and performance standards. The MPRA

shall furnish necessary clarifications on the implementation of the tariff guidelines and the enforcement of performance standards based on a reference made to it by a SPRA.

Tariff guidelines

2.6 The MPRA and all SPRAs shall notify, from time to time, a set of tariff guidelines which are to be applied by the concerned Port Authorities and Private Operators for determining their rates for various services provided by them and / or use of different facilities or properties in their occupation or belonging to them.

2.7 The tariff guidelines will contain broad norms for different components of operations and expenditure to be considered in the determining of rates. The tariff guidelines will also contain the methodology to determine rates, the periodicity of rates revision, and other conditions governing provision of services and/or use of different facilities or properties of the port authorities and private operators for the appropriate port.

Performance regulation

2.8 The Appropriate Regulatory Authority shall, from time to time, lay down the performance norms and standards of quality, continuity and reliability of services to be adhered by Port Authorities and Private Operators.

2.9 Every port authority and private operator would be required to furnish information, as prescribed to the relevant regulator. In the event of a discrepancy between the operation of a port and the applicable regulatory standards, the regulator may direct the errant party to comply with the draft standards within the time-limit to be specified and may choose to impose a penalty, whether one time or recurring. In the event of the direction not being complied within the specified time limit, the regulator may recommend to the relevant port authority, the termination of the concession agreement of

the concerned private operator; or may recommend to the relevant government to take suitable action against the port authority.

Appellate authority

2.10 The draft Bill also makes provisions for establishment of an Appellate Tribunal to be known as Port Regulatory Authority Appellate Tribunal to hear appeal against any direction or decision made by Port Regulatory Authority. Appeal against any order of the Appellate Tribunal lies with the Supreme Court.

3. Deliberations of the Task Force

3.1 The first meeting of the Inter-Ministerial Task Force was held on April 4, 2012 in which the representative of Ministry of Shipping stated in detail the purpose in proposing the draft Port Regulatory Bill.

3.2 In the second meeting of the Task Force held on May 17, 2012 the representatives of Indian Port Association, JNPT, Ennore Port, Government of Gujarat and Department of Economic affairs have made their presentations on the subject.

3.3 In the third meeting of the Task Force held on July 19, 2012 the report was finalised.

4. Views of the stakeholders

4.1 Ministry of Shipping

4.1.1 Tariffs in Major Ports are fixed by the Tariff Authority for Major Ports (TAMP). However, there is no policy regarding tariff in the state sector and tariff is fixed by the states in accordance with their own policies. Thus there is a wide variance in tariffs of Central and State Governments. In order to create a level playing field, Ministry of Shipping has proposed a draft Port Regulatory Bill that seeks to create a two tier system for tariff fixation in the Centre and States.

4.1.2 Since the remit of TAMP applies only to major ports, the non-major ports are free to decide their rates thereby undercutting the major ports and diverting traffic from them. Thus there is no level playing field amongst various ports and the major ports suffer a distinct disadvantage in their operations. Bringing all the ports, major and non-major, under a common regulatory system would eliminate this drawback.

4.2 Government of Andhra Pradesh

4.2.1 The Government of Andhra Pradesh does not support the enactment of the draft Bill. It has entered into concession agreements for development of Ports in the State with private companies. These agreements provide that the Concessionaire shall have the right to levy, collect and retain charges for port services and shall also have full freedom in fixing and revising tariff for various port services based on market conditions. The Concessionaire is required to be fair to all users in allocation of port facilities, operation of facilities and levying of tariffs.

4.2.2 In Andhra Pradesh, a much larger area than the water front is given to the concessionaire. The bidding parameter is revenue share to be paid by the Concessionaire. The State government is of the view that enactment of draft Bill would result in the existing concessions becoming *non est*. The welfare of consumers and optimum operational standards could be achieved through consumer courts by issuing a

notification under the existing Act. Hence, the State Government is of the view that the proposal of draft Bill may be withdrawn.

4.3 Government of Gujarat/ Gujarat Maritime Board (GMB)

4.3.1 The Gujarat Maritime Board has made great progress in the last few years. Traffic at GMB ports has grown by a CAGR of 13.3% over the last decade, double the rate of the major ports, which grew at a CAGR of 6.7%. Traffic in GMB ports grew by 12% over the last year, which translates to the GMB now handling 28% of national traffic compared to 3% in 1982. In comparison, traffic at major ports only grew 4% in the last five years, and over the last year, traffic at major ports decreased by 1.7%.

4.3.2 The success of the Gujarat model could largely be attributed to operational freedom given to the operator. The GMB offers complete freedom to private operators to set tariffs and run operations in its PPP model. For private ports, the only charge levied on the operators is a single waterfront royalty charge per ton of cargo handled.

4.3.3 The proposed draft Bill contains clauses that mandate the regulation of tariffs in non-major ports, which threatens the success and legal framework of the operation of ports in Gujarat. As per the draft Bill, all port authorities including private operators will have to abide by and apply the tariff guidelines notified by the MPRA and relevant SPRA. Moreover, the additional increased regulation will challenge the existing policy framework put in place by the GMB and undermine concession agreements with private developers under which payments to the GMB were based on the developers' freedom to determine the tariffs.

4.3.4 Even though the private developers in Gujarat operate ports with complete operational and tariff freedom, the GMB continues to prescribe, monitor and when necessary, enforce, performance norms and standards as mandated by the Indian Ports Act, 1908. The GMB ensures that concerns of predatory pricing, monopolistic markets and safety are appropriately regulated. The Concession Agreements of the projects

provide for performance norms that are regulated by the GMB. The procedure for dealing with defaulters is also laid down in these concession agreements. Thus, the existing institutional framework already addresses the issues pertaining to performance standards and operation norms that will be covered under the watch of the MPRA and SPRAs established in the proposed Bill.

4.3.5 The Government of Gujarat is of the view that the proposed Bill infringes upon the autonomy and freedom of State Governments. Several clauses in the draft Bill that mandate the MPRA to specify common principles, approach and methodology that will govern the tariff guidelines of SPRAs, and exercise authority over non-major ports until such time that a separate SPRAs are constituted are contrary to federal structure. The provision that the chairperson of the MPRA will be in the selection committee for the selection of the chairperson and members that constitute a SPRA further highlights the extensive influence of the centre in the running of state ports.

4.3.6 The Government of Gujarat is of the view that the existing institutional framework is sufficient to address the issues expected to be covered through the Bill. Indeed, it believes that market forces should be allowed to determine tariffs based on demand and supply conditions. Enactment of such regulatory structure would be a step-backwards for the Indian port sector, and hinder the growth of the non-major ports which have performed so well over the last few years. The establishment of the institutional structure proposed in the draft Bill would severely hamper the growth of non-major ports, which have indeed outperformed major ports in recent years. Thus in the State Government's view, the proposed Bill should be withdrawn.

4.4 *Indian Ports Association (IPA)*

4.4.1 The Indian Ports sector does not have a single independent agency having jurisdiction over all major and non-major ports. The gaps in the current regulatory system needs to be addressed either through a single independent sector regulator or by increasing TAMP's scope and jurisdiction to make it responsible for overall port

regulations. IPA is of the view that a common regulatory framework should be brought in place to ensure competitive environment and to prevent occurrence of monopoly among the sector. Moreover, the private sector generally ignores certain social aspects like environmental aspects, safety etc. which needs to be regulated by a Government agency or a specialised, independent agency.

4.5 *Jawaharlal Nehru Port Trust (JNPT)*

4.5.1. JNPT supports a comprehensive independent regulatory system that has under its purview both the major and non-major ports in the country. However, the JNPT is of the view that the regulatory authority's role should be limited to standard setting and not tariff setting, which must be left to the market, subject to non-restrictive practices. This is necessary as private operators are shifting business to non-major ports from major ports as their tariff is unregulated.

4.5.2 In other countries regulatory authorities are established only to avoid exploitation of customers by monopolistic forces and not usually for business to business transactions like those encountered in ports. Globally, tariff fixation is determined by the respective Port Authorities based on market forces and there is healthy competition in the sector. Moreover, port tariffs constitute only around 3 to 4% of the logistics expenditure while the balance 96 – 97% expenditure involving other charges is completely unregulated.

4.6 *Ennore Port*

4.6.1 The Port is a corporatised port which sets its own tariff. The principle adopted for upfront tariff fixation for PPP projects by the port is identical to guidelines and norms set out by TAMP.

4.7 *Department of Economic Affairs*

4.7.1 The current objective of the Bill is not in sync with the reality of the ports sector. An alternative bill need to be proposed where freedom would be given to the state governments to formulate policy with respect to Non Major Ports. It was observed that a

regulator is required for encouraging competition and unleashing the market forces. However, the regulator should not fix tariff. Landlord port model, corporatisation were stated to be the internationally functional models.

5. Deliberations of the Task Force

5.1 The Task Force observed that most of the maritime states have objected to the draft port regulatory authority Bill. The Major Ports are under Union List 27 and the other ports under Concurrent List 31. Under the concurrent list, states of Gujarat (GMB Act 1981), Tamil Nadu (TNMB Act 1995), and Maharashtra (MMB Act 1996) have created state maritime boards to administer, control and manage the non-major ports of their respective states with the assent of the President. There is need to examine whether the Central Government has the powers to set up regulators for state sector ports.

5.2 The current scenario in India is such that the growth and capacity addition of non-major ports, which are not regulated, have been better than that of major ports, which are regulated under TAMP. The provisions of the draft Bill that seek to bring non-major ports under the purview of SPRAs would seem to be an unnecessary obstacle to operations that are already running successfully. Indeed, rather than extend the major ports model to non-major ports, the possibility of replicating the successful non-major ports operations for the major ports sector should be examined. It was noted that private operators are shifting business to non-major ports from major ports as their tariff is unregulated.

5.3 It was observed that Port tariffs constitute only 3-4% of the logistic expenditure and the balance 96-97% of the costs are unregulated. Internationally tariff fixation is done by respective Port Authorities based on market forces, volume of business, etc. Further, it was noted that regulation of tariff is not necessary and if a regulator is felt essential it may look into issues related to competition, unfair trade practices, non-adherence to service standards, low quality of service, etc.

5.4 It was noted that the current objective of the Bill was not coincident with the reality of the ports sector. Due to multiplicity of models being followed by the maritime states, a single regulatory model may not be feasible for all the ports. Any change in

terms of existing Agreements due to the proposed Bill will also lead to expensive and time consuming litigations from private developers.

5.5 Given the international movement towards privatisation and the establishment of independent authorities managing ports professionally, the proposed draft Bill seeks to establish excessive regulation. Indeed, if the Ministry of Shipping wants to establish a regulatory structure, it should do away with the fixation of tariffs and intervene only in the case of predatory pricing by major ports. Also, the Ministry of Shipping should examine the possibility of converting the Major Port Trusts into independent authorities, maybe even transforming them into companies at an appropriate time in the future.

5.6 Rather than subsume TAMP under the MPRA and thus adding another layer of regulation at the state level in the form of SPRAs, the role of TAMP itself should be revised to no longer include the fixation of tariffs but to focus on the regulation of performance standards and quality of service at major ports. The tariff fixation mechanism based on Return on Capital Employed (ROCE) has proved to be inefficient compared to the determination of tariff rates by market forces in the non-major ports sector. Moreover, the current tariff regime under TAMP has even led to excessive tariff differentiation between berths in the same port. Hence, tariff regulation by TAMP needs to be discontinued.

Conclusion

5.7 The Task Force concluded that since the state governments do not regulate port tariffs, the draft Bill appears to be an unnecessary intervention on their operations that are otherwise working smoothly. However, the State Governments may be advised to ensure that the port operators publish their tariffs. It was felt that with sufficient competition in the sector, tariffs need not be regulated. The existing tariff fixation mechanism under the TAMP itself needs to be simplified in the first instance. It was suggested that the Ministry of Shipping should notify broad guidelines and rules in line with the international best practices. In the medium term, the Ministry of Shipping may take steps for amending the

Major Port Trust Act 1963 so that tariffs at major ports are determined by competitive market forces. While amending the Act, TAMP may be empowered to regulate performance standards and quality of service at major ports, including prevention of predatory pricing.

