Planning Commission
(Secretariat for the Committee on Infrastructure)

Concession for Nhava Sheva International Container Terminal

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This Case Study should not be reported as representing the views of the Planning Commission[#]**.**
The views expressed in this case study are those of the author and do not necessarily represent the views of the Planning Commission. This study is being published as part of a larger effort in the Planning Commission to identify areas for improvement in Public Private Partnership Projects.

The 30-year concession awarded to NSICT Ltd for a port terminal at JNPT has affected the public exchequer and user interests in several ways. The role played by TAMP, the independent statutory regulator responsible for fixing tariff, led to NSICT extracting inadmissible returns of Rs. 524 cr. during 2002-2005, which translated into annual returns of over 100% on its equity, as against the permissible 20%. TAMP also allowed the burden of royalty payments to be passed on to port users even though royalty was the basis on which NSICT was selected. As a result, port users paid over 80% more than what was due during this period. In addition, they may have also paid more as the capital costs and operating costs that formed the basis of tariff determination were not scrutinised, and offered opportunities for gold plating. The role of JNPT as grantor of the concession was equally suspect, as it took no steps to discharge its statutory duties under the law or the concession agreement, and allowed NSICT a free hand. The Department of Shipping (DoS) compounded matters by issuing directions which changed the tenor and structure of the entire deal. Against an estimated royalty of Rs. 8,390 cr. ($ 2.2 bn) to be paid by NSICT to JNPT over the concession period, its burden stands reduced to Rs. 2,560 crore ($640 million), resulting in an undue gain of Rs. 5,830 cr. ($ 1.46 bn) which would be borne by port users.

I. BACKGROUND

1. India has more than 5,000 kilometers of coastline with about 150 working ports including 12 major ports. The management and development of

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[#] The case has been written for academic purposes. It should not be construed as a comment or criticism on the functioning of any individual or authority or of a policy.

the major ports are controlled by the central government through the respective port trusts. Minor ports are controlled by the state governments. About 80 per cent of India's sea borne trade is conducted through the major ports, which are administered by the Board of Trustees constituted under the Major Port Trusts Act, 1963 (the "MPT Act").

2. In consonance with the policy of economic liberalisation, and in order to mobilise the resources required for creating additional capacity to handle the burgeoning traffic at Indian ports, the Government of India, in the Department of Shipping (the "DoS") issued Guidelines for Public Private Partnership[1] (PPP) in the Port Sector in 1996.

Guidelines for PPP in Major Ports

3. The objective of these guidelines was not only to attract private investment, but also to improve efficiency, productivity and quality of service as well as to bring in competitiveness in port services in India. The Guidelines listed the areas to be thrown open to private sector participation and outlined the procedure to be adopted for PPP initiatives. Salient aspects of the Guidelines were:

a) Open tenders to be invited for private participation on Build, Operate & Transfer (BOT) basis.

b) Period of license not to exceed 30 years.

c) At the end of concession period, all assets to revert back to the Port Trust, free of cost.

d) Two-Bid system (technical and financial bids) to be followed. Financial bids of only the technically qualified bidders to be opened.

e) Bidders to be asked to indicate in their financial bids (i) an upfront fee for the license; (ii) royalty per ton of cargo to be handled; and (iii) the minimum guaranteed cargo;

[1] "Guidelines to be followed by major port trusts for private sector participation in the major ports" issued by Ministry of Shipping in 1996.
See http://shipping.gov.in/writereaddata/linkimages/gideport2958264063.pdf

f) Comparative financial evaluation of offers to be based on the concept of maximum realisation to the Port on Net Present Value (NPV) basis calculated by using a discounting rate as periodically fixed by the Government. Royalty for the purpose of analysis would be based on the minimum traffic which the entrepreneur guarantees.

4. The PPP Guidelines recognised that the MPT Act provided[2] the legal framework under which Port Trusts could undertake PPP initiatives. While stating that Port Trusts would continue to maintain their regulatory role and "ensure that private investment does not result in the creation of private monopolies", the Guidelines underscored the need for an independent tariff regulatory authority for determination of port tariffs. The tariff so fixed would be a ceiling and both, the private entrepreneurs and the Port Trusts would be free to charge less than such notified tariff. Accordingly, the MPT Act was amended on 25th March 1997 for constituting the Tariff Authority for Major Ports (the "TAMP").

5. It was in this background that construction of Nhava Sheva International Container Terminal (the "NSICT") was started in 1997, following an Agreement signed between the Jawaharlal Nehru Port Trust (the "JNPT") and NSICT on July 3, 1997. The sequence of events that followed as well as the critical issues that have emerged so far are elucidated in this case study.

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[2] Section 42 of MPT Act 1963 42: Performance of services by Board or other person

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

49[C][(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.]

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount [49][specified by the Authority, by notification in the Official Gazette.]

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

II. OVERVIEW OF NHAVA SHEVA PPP PROJECT

6. Jawaharlal Nehru Port is located on the west coast of India. The NSICT terminal is part of JNPT and is located next to the container terminal of JNPT. A global notice was issued in December 1995 inviting bids from interested parties for construction, operation and maintenance of a new 600 m quay length container terminal for a period of 30 years on BOT basis. The project comprised construction of a two-berth terminal, reclamation of 20 hectares of area for container yards and installation of requisite container handling equipment along with other related facilities, with a projected capacity of 0.6 million Twenty Foot Equivalent Unit (TEU) containers per annum. The bid conditions did not specify the capital cost of the project.

7. After evaluating the financial bids of technically qualified bidders, using the criteria of highest NPV of royalty offered, JNPT awarded the contract to a consortium comprising of P&O Australia Ports, Konsortium Perkapalan Behrad and DBC Group of Companies. A License Agreement (henceforth referred to as the "Concession Agreement") was signed[3] on July 3, 1997 between this consortium and JNPT. The consortium was later incorporated as a separate company called the Nhava Sheva International Container Terminal Limited. NSICT thus became India's first PPP initiative in the port sector. Developed at a cost of about Rs. 733 crore[4] ($183.3 million)[5], in a comparatively short period of two years (1997 to 1999), the terminal was a welcome development for catering to the rising demand for container handling capacity.

8. One view of the partnership is that NSICT has been a runaway success - in recognition of its outstanding performance, the Confederation of Indian Industry bestowed the CII Award for Excellence in Infrastructure to NSICT in February 2003. NSICT has achieved operational results comparable with global

[3] It may be noted that at the time of signing of the License Agreement, TAMP had already been established. However, Guidelines for tariff fixation had not been issued till then though the PPP policy of 1996 had stated that TAMP will "fix a ceiling tariff and leave the private entrepreneur free to charge upto the ceiling at the rates to be notified by the entrepreneur"

[4] Project cost has been determined by using figures quoted in TAMP Order of 2000. The Order equates Rs. 396 crore ($99 million) to 54% of Project Cost (Para 2 viii)

[5] For purpose of exposition, Indian Rupee amount have been converted to US Dollars using an Exchange Rate of Rs. 40 /US $. Dollar values are rounded off to the nearest million. One crore is equivalent to 10 million

standards - recording Gross Ship Rates of over 100 moves per hour[6] and average vessel turnaround time of 0.75 days. In April 2005, NSICT handled traffic that exceeded twice the capacity estimated by JNPT at the time of bidding. The presence of a well managed terminal also created a competitive environment that spurred the modernization of the neighboring terminal owned by JNPT.

9. A contrary view is that NSICT made profits far in excess of the permitted returns and that a significant part of these profits could be attributed to monopoly rents arising out of a flawed regulation of tariffs in an environment of inadequate capacity creation compared to rising demand. The third terminal at JNPT was commissioned only in 2006. As a result, much of the volume and efficiency gains were not shared with the users. From its inception and upto March 2005, NSICT revenues aggregated over Rs. 1,624 crore ($ 406 million) out of which the royalty amount[7] payable to JNPT was Rs. 117 crore ($29 million) that constituted 7.2% of its total revenues. Between 2000 and 2005, it achieved an average return (post royalty) of nearly 80% per annum on its equity, which was four times the stipulated[8] return of 20%, making it one of the most profitable ports in the world albeit at the expense of captive users.

10. When viewed in the light of its extraordinary returns, notwithstanding the rate of return regulation, the project signals an unequal partnership between a private operator, fiercely driven by objective of maximizing returns, and an absentee landlord unable to enforce the basic terms of a badly structured Concession Agreement, coupled with a weak regulator who chose to be dependent on the "regulated" for determination of tariffs. This environment provided enough leverage for NSICT to manipulate the deal, ex post, to its own advantage and to the disadvantage of port users.

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[6] Source: NSICT monthly fliers during 2007 available at its Website: www.NSICT.co.in
[7] TAMP Order of 2005, Annexure 1. See TAMP website: http://www.tariffauthority.gov.in/. Annexure I of TAMP Orders of 2000, 2005, 2006 have been appended at end of Case Study
[8] The TAMP used a cost plus approach with an assured return on equity as the basis for tariff regulation as per the TAMP Guidelines of 1998

III. REGULATORY FRAMEWORK

11. The Tariff Authority for Major Ports (the "TAMP") was constituted in April 1997 as an independent statutory authority with powers to determine the tariff to be charged by Port Trusts as well as by private providers of port facilities. Notably, the functions and powers of TAMP were confined[9] to determination of tariff (including its revision). Unlike other statutory regulators such as in power and telecom sectors, it was not vested with any other powers of regulation including those related to setting and enforcing of performance standards or for other measures relating to protection of user interests. Even in this limited role of setting tariffs, Section 111[10] of MPT Act has made it obligatory for TAMP to follow the policy directions issued by the Central Government from time to time.

Overview of Tariff Guidelines of 1998

12. In February 1998, TAMP adopted a set of Guidelines for tariff regulation. Salient aspects of the Guidelines relevant to this case study are:

a) A cost plus approach[11] along with an assured rate of return would be adopted for tariff fixation.

b) Tariff proposals could be initiated[12] by any of the stakeholders – port trusts, port users, port operators and representative bodies of user-groups.

c) TAMP could exercise[13] suo motu jurisdiction in tariff fixation.

d) A participative approach[14] would be followed in the course of tariff reviews.

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[9] The PPP Guidelines for Ports Sector, which formed the basis for constitution of TAMP, restricted the role of TAMP to tariff determination & tariff revision. It stated that Port Trusts would continue to maintain their regulatory role in terms of ensuring that port facilities were available to users at competitive rates.

[10] **111. Power of Central Government to issue directions to Board**

(1) Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time:

Provided that the Authority or the Board, as the case may be, shall be given opportunity to express its views before any direction is given under this sub-section.]

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

[11] Para 18.1 of Guidelines

[12] Para 28.1 of Guidelines

[13] Para 28.2 of Guidelines

e) Tariff reviews would be undertaken with a two year validity[15] cycle; however, "for good reasons", private operators, or even port users could propose revisions ahead of schedule.

Overview of Revised Guidelines of TAMP

13. The Tariff Guidelines of 1998 were superseded by the "Guidelines for Regulation of Tariff at Major Ports, 2004" (the "Revised Guidelines") which were notified in the Gazette on March 31, 2005. Salient features of the Revised Guidelines relevant to this case study are:

a) Para 2.4.1: The 'cost plus' approach would continue to be followed with an assured 15% return on Capital employed[16] (the "ROCE").

b) Para 2.8.1: ''Royalty/Revenue share payable to the land lord port by a private operator will not be allowed as an admissible cost for tariff computation as decided by the Govt. in the Ministry of Shipping vide its Order No.PR-14019/6/2002-PG dt. 29th July 2003. In those BOT cases where the bidding process was finalised before 29 July 2003, the tariff computation will take into account royalty / revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty / revenue share not being taken into account, subject to maximum of the amount quoted by the next lowest bidder. This would, however, be allowed for the period upto which such likely loss will arise. This would not be applicable if there is provision in the concession agreement on treatment of 'Royalty/Revenue share" *(emphasis supplied)*.

c) Para 2.17.4: The final rate fixed by TAMP will ordinarily be effective only prospectively.

d) Para 3.3.2. TAMP may, *suo motu*, review its orders, for good and sufficient reasons. In such proceedings, the normal consultative process will be followed.

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[14] Para 5 of TAMP Guidelines

[15] Para 35 of Guidelines of 1998 state: "It is advisable to revise the tariff in two years to provide for stability to ports and to the trade."

[16] Para 2.9.2 of Revised TAMP Guidelines

e) Para 3.1.8. Tariff once fixed shall be in force for three years unless a different period is explicitly prescribed in any individual case by TAMP or in the concession agreement. For good and sufficient reasons, ports may propose revision ahead-of-schedule. After the specified validity period is over, the approval accorded will lapse automatically unless specifically extended by the TAMP.

Application of the cost-plus approach by TAMP

14. In the absence of any norms relating to capital and operating costs, TAMP had to rely on the information provided by the regulated, which was not always dependable or forthcoming[17]. Further, the Guidelines of 1998 provided for an assured return on equity, but did not specify a normative debt equity ratio. As a result, TAMP in its Order of May 10, 1998 accepted a Debt/Equity[18] ratio of 65:35, as stated by NSICT, but in subsequent tariff orders, it adopted[19] a debt equity ratio of 50:50 (typical debt equity ratios[20] for infrastructure projects range from 90:10 to 70:30). This increase in the proportion of equity implied a higher tariff that provided greater returns to NSICT at the expense of port users.

15. Though the Revised Guidelines of 2005 eliminated the distinction between debt and equity by providing a flat return of 15% on capital employed, no attempt was made to specify any norms relating to capital and operating

[17] TAMP Order of December 1998, Para 5(iv): "The NSICT has been extremely reluctant to part with information relating to cost-calculations… cash flow analysis etc. on the grounds of commercial confidentiality". TAMP Order of May 2000 Para 7 states: **"**While considering tariff proposal(s) of any Private Terminal Operator …. Regulatory Authority needs to be satisfied that…the estimates of costs are not abnormally on the higher side, and the tariffs proposed are not excessive giving an unreasonably high IRR. The NSICT was, therefore, required to furnish Financial Statements showing the IRR on the project cost as also on the equity capital on the basis of the tariff proposed.**"** Para 8 further states: During the scrutiny, the NSICT gave different figures on many items. When we referred to these discrepancies in detail and called for explanations, the NSICT's reply has been that the revised figures are based on experience gained subsequent to the original application.**"**

[18] Para 5(xviii) of TAMP Order of December 1998 states: "..The project cost had been estimated at Rs. 700 crore. The debt equity was stated to be 65:35" TAMP Order of 10th May 2000 **Para 3(xi) states: "**Incidentally, a scrutiny of some of the data available would highlight the dimensions involved. The project cost had been estimated at Rs.700 crore. The Debt-Equity ratio was stated to be 65:35**"**

[19] TAMP Order of 15th November 2000 stated "(xiv). As has been pointed out above, the NSICT has raised funds from different sources, costs of which are easily identifiable. That being so, it will be appropriate to allow the respective costs of capital in the overall return on investment. Even though we are fully aware of the pitfall in this approach due to non-observance of a prudential debt-equity norm, in the interim, we prefer adopt the approach of allowing the cost of respective sources of capital, accepting the 1:1 debt-equity ratio obtaining in this case. Significantly, the TRAI also recognizes 1:1 as a reasonable debt-equity ratio for the telecom sector."

[20] "Privatized Infrastructure: The role of Government" by Adrian. J. Smith published in 1999 by Thomas Telford Ltd.

costs that determine the bulk of port tariffs. The absence of any norms provides an inbuilt incentive to the concessionaire to overstate costs – be it capital or operating costs. Notably, while the need for evolving uniform standards and costing norms[21] has been recognised, effective steps in this direction are yet to be taken by TAMP.

IV. REVIEW OF TARIFFS AND RETURNS

16. A review of the events following the start of operations by NSICT reveals two aspects that merit a detailed analysis, viz. (a) tariff setting and return on equity/ capital employed; and (b) treatment of royalty in the computation of costs. While the tariff for NSICT reflects the combined effect of these two aspects, an effort has been made to segregate their impact in order to facilitate a better analysis. Issues relating to tariff-setting and returns are dealt with in this section.

Tariff setting & return on equity/capital employed

17. Clause 7.3.1 of the Concession Agreement entitles NSICT to recover charges from port users provided the rates do "not exceed the rates fixed by Licensor in respect of similar services and duly notified by GOI in official gazette or to be fixed by TAMP…as applicable, from time to time".[22]

18. At the time of commencement of operations, NSICT proposed to TAMP that it would adopt the then existing tariffs[23] of the JNPT terminal, and this was approved by TAMP vide order of December 5, 1998. Since TAMP had adopted a cost plus approach[24] in its Guidelines of 1998, this order was an ad hoc concession to NSICT, till such time as it was able to furnish the requisite cost data. To an extent, this ad hoc arrangement was consistent with the aforesaid

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[21] "Report of the National Working Group on Normative Cost based Tariff for Container related Charges" downloaded from TAMP Website. TAMP Guidelines Para 1,24,36.2. The Report was inconclusive in terms of establishing normative costs.

[22] Clause 7.3.1 of the License Agreement reads as follows: "The Licensee shall be entitled to recover from the owners…..charges….provided however that the rates and/or charges to be collected by the Licensee shall not exceed the rates fixed by Licensor in respect of similar services and duly notified by the GoI in official gazette or to be fixed by the Tariff Authority for Major Ports, constituted under Article 47A of the Major Port Trust Act 1963, as applicable, from time to time"

[23] Indian National Ship owners Association, in the course of TAMP joint hearings (Para 6) of TAMP November 2000 Order, stated "At the bid time**,** the JNPT rate was taken as the basis for the NSICT**.** Just before the bid**,** the JNPT increases their tariffs by 33**%.** So it is a bonanza for the NSICT**."**

[24] See Para 18.1 of TAMP Guidelines

clause 7.3.1 that allowed NSICT to charge the rates applicable for similar services provided at the JNPT until tariffs were determined by TAMP.

19. After 18 months of operation, NSICT applied for an increase of 30%[25] in its tariff. Vide its order of November 2000, TAMP permitted a 16% increase over the existing[26] rates. This increase in tariff[27] which was based on traffic and cost projections provided by NSICT[28] for the years 2000-01 and 2001-02 was allowed by TAMP[29] to bridge the likely deficit for these years (See Annex-I). Since projections for two years were used in line with the extant guidelines[30] of TAMP, the tariff was evidently valid for two years. The Tariff Order of November 2000 (Para 9(v)) had stated:

"The traffic and income projections furnished by the NSICT have been relied upon for this analysis without any modification…. If this approach seems to have given undue advantage to the terminal operator, at the time of review during the next revision of tariffs, any undue benefit accrued to the Terminal Operator may be set off against the future revision in tariffs" (emphasis supplied)

Table 1: **Gap between projected[31] and actual traffic**

(Traffic in TEUs)

Item	2000-01	2001-02	2002-03
Traffic projection furnished by the NSICT for tariff revision in Nov. 2000	4,93,450	5,79,803	6,50,000
Actual containers handled by NSICT (as obtained from the JNPT)	6,94,899	9,43,928	12,01,119

[25] See Para 1 of TAMP Order of November 2000.
[26] Between the time of the bid in 1997 and end 2000, the tariff rates would have registered an increase of over 54% (33% at time of bids and 16% increase after TAMP November 2000 Order)
[27] As per the prevalent tariff regulation guidelines, (Clause 18.1 of the tariff guidelines of May 1998), as well as the practice followed by TAMP a cost plus approach coupled with an assured 20% rate of return on equity was being followed by TAMP.
[28] Para ii) of the TAMP Order of 2005 states: This Authority while allowing the existing tariff at the NSICT in November 2000 relied upon the traffic and income projections furnished by the NSICT without any modification, owing to the limited period of the NSICT operation and non-availability of data from any other reliable source to validate the projections presented before this Authority for its consideration.
[29] TAMP Order of 2000, Para 9 (xx): Thus, the average deficit which is to be allowed to be bridged through tariff increase to assure the return on investment works out to 15.6%
[30] Para 35 of TAMP Guidelines of 1998: "It is advisable to revise the tariff in two years to provide for stability to ports and to the trade."
[31] Table has been reproduced from TAMP Order of August 2005

Variation (in %)	41%	63%	85%

20. The wide gap between projected and actual traffic, as shown in Table 1, should have signaled to TAMP the need[32] for a tariff review in 2002, in order to adjust the "undue benefit" enjoyed by NSICT due to increase in traffic volume. However, the next tariff review took place only in 2005. As brought out later by TAMP in its Order of 2005, there exists an inverse relationship between traffic volume and tariff. Relevant extracts (Para 10.1 of TAMP Order of 2005) explain the reasons:

> *Traffic forecast in tariff setting is significant since estimated revenue against which cost and return are set off is based on the volume of traffic. For same level of investment, the unit cost of handling varies with different levels of traffic, mainly because of distribution of fixed cost and return over the traffic base. If traffic increases, unit cost and hence unit tariff is generally expected to go down, if no significant change in the investment level takes place. In an increasing traffic scenario at a port, if tariff is not periodically adjusted, the service provider ultimately earns more return on his investment than the pre-determined level, at the expense of the users who in such case, pay more than the regulated level of tariff otherwise required".(emphasis supplied)*

Role of TAMP and JNPT between 2000 and 2005

21. There is a preponderance of evidence to suggest that TAMP engaged in protracted correspondence with NSICT that led to a delay of over three years in revision of tariff. Right until 2005, TAMP kept on dithering[33] and engaging in

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[32] TAMP Order of November 2005 Para 2.8 states: "The then existing rates were fixed considering a traffic volume of around 5.79 lakh TEU. The actual traffic achieved by NSICT in 2002-03 is around 12 lakh TEU. Even if no further traffic growth is presumed, there is no valid reason to believe that the present traffic level will drastically come down in future. There was, therefore, a strong case for reviewing the existing tariff and the consequential issues. It is noteworthy that in the existing tariff, the fixed cost and return are spread over only on a volume of about 5.79 lakh TEU whereas they should have been allocated over the traffic based on 12 Lakh TEU which was the level of performance since 2002-03."

[33] Reproduced from TAMP Order of 2005, (Para 2.3): "A communication was, therefore, sent to the NSICT on 3 October 2002, and again on 10 December 2002, with a request to expedite submission of its proposal for a review to this Authority. NSICT did not respond to either of the letters."

half-hearted efforts[34] to solicit cooperation from NSICT, whose interest was best served by avoiding a tariff review[35].

22. The sharp increase in the volume of traffic was known[36] to JNPT, yet there is no evidence to suggest that in its capacity as a licensor and in discharge of its responsibility under Section[37] 42 of the Major Port Trust Act, JNPT sought the intervention of TAMP for a tariff review or compelled NSICT to subject itself to a review of tariffs as per law, especially to prevent it from recovering monopoly rents[38].

Tariff order of 2005

23. The TAMP Order of 2005 recognised that NSICT had accumulated (post royalty) an excess surplus of Rs. 473.42 crore ($118 million) during 2000-2005,[39] over and above the admissible 20% return on equity. In addition, despite admitting that a reduction of 30%[40] in tariff was indeed warranted, TAMP reduced the revenue[41] by only 12.8% to bring it back to JNPT level.

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[34] TAMP Order of 2005, (Para 2.9): "Authority decided in September 2003 to advise the NSICT to file its proposal for review of the existing Scale of Rates within 60 days. If no proposal was submitted within the stipulated time limit, it was decided to declare the approval given to existing tariff as withdrawn after giving a further notice of 45 days."
TAMP Order of 2005, (Para 2.10): "The decisions of this Authority mentioned above were conveyed to the NSICT by Authority's letter dated 3 June 2004 and the NSICT was allowed time up to 1 August 2004 to file its proposal for review of the existing tariff. NSICT responded to this Authority's letter dated 3 June 2004 vide its letters dated 30 August 2004 and 1 October 2004."

[35] Para 4.3 of TAMP Order 2005: "The NSICT did not provide any information required for tariff review in its written submission. When the representatives of NSICT were told that the case would be closed for orders for want of information, the NSICT agreed to forward their audited annual accounts for the years 2000-01 onwards, as filed with Statutory Authorities…."

[36] Clause 7.3.5.2 of License Agreement states: "At the end of three months total royalty… calculated on the basis of actual TEU transferred across the apron…shall be paid by Licensee…"

[37] See footnote 2.

[38] Quote from PPP Guidelines for Port Sector "REGULATORY FRAMEWORK: The Port will continue to maintain its regulatory role under Major Port Trusts Act, 1963…… The Port should ensure that private investment does not result in the creation of private monopolies,"

[39] As per Para 10.(xii) of TAMP Order of August 2005: "During the last revision, the cost statement for the NSICT, showed average deficit of 15.61% for the years 200-2001 and 2001-2002. Based on this deficit position, this Authority accorded a 16% increase…cost statements prepared.. indicate an average additional surplus of 29% for the years 2000-2001 to 2004-2005 after allowing maximum permissible return on its investment and admissible costs. This amounts to Rs. 473.42 crore for the period 2000-2001 to 2004-2005. The accrual of additional surplus is on account of estimation error and the NSICT's failure to come with its proposal for review of tariff on expiry of the tariff validity period."

[40] Para 10.(xv) of TAMP Order of 2005. "Strict application of cost plus principles followed for regulating port tariff will warrant a reduction to the extent of approximately 30% in the existing tariff of NSICT."

[41] Para 10(xvi) of TAMP Order 2005: "As mentioned earlier, the revision effected in November 2000 is limited to amending (i.e.) allowing 16% increase in the rates prescribed in Sections 1 to 4 of the Scale of Rates of NSICT and introduction of Section 9 for allowing rebates. That being so, only these

Table 2: **Return on equity between 2000 and 2005**

Item	Return on Equity[42] (2000 to 2005)				
	2000-01	2001-02	2002-03	2003-04	2004-05
ROE permitted by TAMP (with Debt/Equity of 50:50)	18.8%	46.3%	74.9%	74.2%	76.3%
Actual ROE earned (with Debt/Equity of 65:35)	22.4%	61.6%	102.5%	101.6%	104.45%

Note: Surplus (Item III of Annexure 1 TAMP Order 2005) = Income – operating costs –100% royalty payments- See Annex-II.
Net Return= Surplus - Interest payments@10.5% - Dividend payment of Preference Shares@14%.
Return on Equity= Net Returns/ Equity

24. In the absence of any costing norms, TAMP not only accepted the costs as submitted by NSICT, it also "adjusted" the debt/equity ratio from the 65:35 (as stated[43] by NSICT and accepted in TAMP Order of 1998) to 50:50, post 2000. This "adjustment" resulted in the equity base[44] increasing from Rs. 213.17 crore ($53.3 million) to Rs. 304.53 crore ($76.13 million) for the years 2000-2001 and onwards. Table 2 depicts the ROE (post royalty) permitted by TAMP using a Debt Equity Ratio of 50:50 and the ROE that was due to NSICT if returns were paid on a Debt Equity Ratio of 65:35.

25. The TAMP Order of August 2005 provided for setting off Rs. 236.71 crore ($59.2 million) which was equal to 50% of the excess surplus[45] of Rs. 473.41 crore ($118.4 million) accumulated during 2000-2005. (See Annex-II). It notified a rate reduction of 12.8% in the tariff for the period[46] between

categories of tariff are considered for reduction for time being in order to bring the tariff level to that of JNPT. The effect of this reduction will only be around 12.8% of the revenue

[42] Figures related to Operating Costs , Income, Equity and Debt were extracted from Annexure 1 TAMP Order of August 2005

[43] See Footnote 18

[44] Total Debt +Equity shown in TAMP 2005 Order for 2000-2001 is Rs. 609.1 crore, Debt:Rs. 304.5 crore, Equity: 304.5 crore, Preference Shares Rs. 130 crore. If D/E ratio of 65:35 is adopted, Equity base reduces to 213.4 crore, Debt increases to Rs.396 crore. Interest rate on Debt was taken by TAMP @10.5%, Dividend on Preference Shares taken@ 14%

[45] See Footnote 39

[46] TAMP Order of August 2005. Para 10(xii) : "It is noteworthy that the additional surplus mentioned above does not take into consideration the benefit continued to accrue to the NSICT from April 2005

August 2005 to April 2008, the impact of which was estimated[47] at Rs. 112.58 crore ($28.1 million). However, even after this reduction, an unadjusted accrued[48] surplus of Rs. 231.43 crore ($57.9 million) – post 100% royalty payments- still remained as a result of permitting returns higher than the permissible 15% return on capital.

Tariff order of 2006

26. Following a representation from another terminal operator, DoS[49] asked TAMP to adhere to the Revised Guidelines, which had been notified[50] in March 2005, i.e. prior to the TAMP Order of August 2005. Accordingly, the TAMP Order of April 2006 permitted a pass through of royalty payments at a reduced level of 69.5% for the years[51] 2006-2008 as compared to 100% allowed earlier. Consequently, the total cost considered by TAMP for tariff fixation was reduced[52] by Rs. 72.53 crore ($18.1 million), which in turn led to a reduction in tariff by 12% for 2006-2008 (since 2005-06 had already come to a close) [53]. As a result, even though the Revised Guidelines were issued in March 2005, TAMP wrongly allowed NSICT to recover from users 100% of the royalty for the year 2005-2006.

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till implementation of the revised tariff." – This is relevant because it allowed NSICT to get the benefit of 16% higher tariff between April 2005 and August 2005 when the TAMP 2005 Order was notified

[47] Para 20 of TAMP Order of April 2006: "…The impact of tariff reduction ordered in July 2005 is estimated to be around Rs.11258 lakhs."

[48] Item no X of Annexure 1 of TAMP Order of August 2005 "Net surplus in addition to admissible (15%) Return, Payment of (100%) royalty as cost item and after adjustment of (50%) of past benefit/loss over the subsequent year (V+IX)" aggregated to Rs.344.02 crore ($86 million) for the years 2005 to 2008. Out of this, Rs. 112.58 crore ($28.1 million) was adjusted as a result of the 12.8% revenue reduction; therefore, the remaining Rs. 231.43 crore ($57.9 million) was left unadjusted.

[49] An extract from April 2006 TAMP Order: "The Ministry of Shipping, Road Transport & Highways (MSRTH), vide its letter No. PR-14019/38/2003-PG dated November 22, 2005, had sought clarification from this Authority on allowing full royalty as an item of cost in the case of NSICT. Subsequently, the Ministry pointed out that the decision of TAMP in NSICT case gave an impression of deviation from the revised tariff guidelines and was quoted as a precedent by another private terminal operator."

[50] The Revised Guidelines for Tariff Fixation were issued in March 2005. The Tariff Order of 2005 is dated 4th August 2005.

[51] It may be noted that although TAMP Order of April 2006 allowed 69.5% royalty as cost for the year 2005-2006 also, it had no meaning since 2005-2006 was already over. Since tariff fixation can have only prospective effect, it can be stated that TAMP allowed 100% royalty as cost for the year 2005-2006.

[52] The 100% Royalty for the years 2006-2008 aggregates to Rs. 237.80 crore ($59.5 million). Out of this, 69.5% i.e. 165.27 crore ($41.3 million) was allowed to be passed through as costs. The net reduction in operating costs, as a result of allowing 69.5% royalty as pass through was therefore Rs. 72.53 crore ($18.1 million)

[53] Para 20 of TAMP Order of 2006: " ….. This means, a net surplus of around Rs.7253 lakhs for the years 2006-07 to 2007-08 is available for adjustment. In order to adjust this net surplus, the tariff approved in July 2005 is required to be reduced prospectively by about 12%."

Overview of tariff movements

27. A summary of the tariff faced by port users of NSICT and JNPT terminals during the period 1996 to 2006 is depicted in Table 3. As can be seen, the tariff at JNPT terminal was Rs. 1950 ($48.8) in 1996 and this had been raised (see footnote 23) by 33% prior to commissioning of NSICT. It was this increased tariff that formed the basis of the adhoc tariff of Rs. 2,600 ($65) that was allowed for NSICT in December 1998. This ad hoc tariff of Rs. 2,600 ($65) was increased by 16% to Rs. 3,016 ($75.4) per container in November 2000.

Table 3: **Table of comparative[54] rates between 1997 and 2006**

(For Ship to Yard/Yard to Ship for a loaded 20ft foreign going container)*

(In Rs. per TEU)

Port Terminal	1996	1998	2000	2005	2006
JNPT	1,950 ($48.8)	2,600 ($65)	2,600 ($65)	2,600 ($65)	2,210 ($55.3)
NSICT	——	2,600 ($65)	3,016 ($75.4)	2,600 ($65)	2,288 ($57.2)

**The Scale of Rates (Annexure II of TAMP Orders) comprises of a number of items. Only the most significant item from Section 1 of Annexure II has been picked up, as an illustration.*

28. The increase in tariffs from Rs. 1,950 ($48.8) to Rs. 3,016 ($75.4) per container within a period of about three years, which also meant that the users of NSICT would pay 16% more as compared to the rates applicable to the JNPT terminal during 2000-2005, demonstrated the limitations of the 'cost plus' approach inasmuch as it required TAMP to raise the existing level of tariff significantly despite the avowed objective of improving efficiency and productivity through private sector participation.

Adjustment of past surplus

29. There are two issues related to adjustment of the past surplus. First is the quantum of excess surplus earned during the previous tariff cycle that should have been adjusted in the tariff cycle 2005-2008 and second is the period over

[54] Rates have been extracted from various TAMP Orders on NSICT and JNPT

which this adjustment should have been made. Both these are discussed in the following paragraphs.

30. It may be recalled[55] that the TAMP Order of 2005 had determined an excess surplus of Rs. 473.41 crore ($118.35 million) –during the period 2001 to 2005. It could be argued by NSICT that this extra surplus was on account of reduction in costs as a result of efficiency improvements. As per the Revised Guidelines, 50% of the savings on account of operational efficiency improvements leading to cost reduction[56] could be adjusted in the next tariff review while the remaining 50% could be appropriated by the concessionaire. However, no analysis appears to have been undertaken by TAMP to determine whether these gains had actually accrued on account of operational improvements. Yet, in its order of 2005, TAMP allowed 50% of the excess surplus to be appropriated by the Concessionaire while the remaining 50% was adjusted over the next five years, implying that the entire excess surplus was on account of cost reduction due to efficiency improvements.

31. Cost-Volume-Profit analysis[57] undertaken using costs for the year 2000-2001 as shown in Annexure 1 of TAMP 2000 and TAMP 2005 Orders (reproduced as Annex-I and Annex-II) seems to reveal that the large increase in the profits was evidently on account of a reduction in the unit fixed costs per TEU rather than any efficiency driven reduction in variable cost[58]. As such,

[55] See Footnote 39

[56] Para 2.4.1 of Revised Guidelines:

Illustration :

Let us assume expenditure on item 'A' is reduced from the earlier level of Rs 1000/- to Rs 900/- and it was established that this cost reduction was due to efficiency improvement. For estimation of expenditure under item 'A' for the next tariff cycle, the base will be considered as Rs 950/- [900+50% of (1000-900)] and not Rs 900/-.

[57] Cost elements shown in Annexure 1 of TAMP 2000 and 2005 order are nearly identical. Also both Orders indicate costs incurred for the year 2000-2001 although at different traffic levels. As part of the C-V-P Analysis, these cost components were segregated into fixed and variable components and then used to reconstruct the likely costs for the years 2001-2005, using the figures for traffic handled as given in Annexure 1 of 2005 Order. The reconstructed cost table was compared with the Annexure 1 of TAMP 2005 Order. The cost values were found to be comparable, (average difference across the period 2000-2005 between total costs shown in TAMP 2005 Order and those worked out was about 5%) thereby validating the hypothesis that the cost reduction per TEU was on account of distribution of fixed costs over a wider base. As an illustration, the fixed cost component of one of the heads of expenditure viz. the Equipment Running Cost was calculated as Rs. 258 lakhs while the variable cost component works out to Rs. 220 per TEU. As Traffic increases, the unit fixed costs reduced from Rs. 52.26 per TEU (@493450 TEU shown in TAMP 2000 Order for 2000-2001) to Rs. 37.1 per TEU (@694899 TEU traffic shown in TAMP 2005 Order for 2000-2001)

[58] Para 2.4.1 of Revised Guidelines "TAMP will continue with the existing portwise Cost Plus return on capital employed approach. Attempts will be made to evolve normative cost of each component of port operations. In order to encourage cost reduction due to improvement in efficiency / productivity of

NSICT did not qualify for the retention of 50% of the extra surplus and therefore, almost the entire extra surplus earned during 2001 to 2005 should have been set off in the tariff revision for the period 2005-2008[59], as was stated in TAMP 2000 Order, (see Para 19).

32. At any rate, Para 2.4.1 of the Revised Guidelines (issued in March 2005) that enabled appropriation of 50% of "cost reduction" by the Concessionaire should have been applied prospectively. The Guidelines of 1998 did not contain any such provision and as such, TAMP had no authority to allow the Concessionaire to retain any of the excess surplus accumulated prior to the Revised Guidelines. This led to an undue windfall gain of Rs. 236.7 crore ($59.1 million) for NSICT at the expense of the port users.

Adjustment of excess surplus over extended period

33. Notwithstanding the analysis presented in Para 31 above, it is seen that the TAMP Order of 2005 adjusted 50% of the accumulated excess surplus over the next five[60] years (See Annex-II). Given that the Revised Guidelines had fixed the tariff cycle of three years, the excess surplus should have been adjusted over three years, co-terminus with the tariff cycle, rather than over five years (2005 to 2010)[61]. As a result, against the due adjustment of Rs. 236.7 crore ($59.2 million), only Rs. 142 crore ($35.5 million) was adjusted, leaving a balance of Rs. 94.7 crore ($23.7 million) as an interest-free resource with the Concessionaire for at least three years. At the very least, this amount should

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the same operator, at the time of every periodic review of tariff, the actual cost reduction achieved due to efficiency improvement in the previous cycle will be considered. The benchmark for efficiency will be the average of the past performance of the same operator at the same terminal achieved in the immediately preceding tariff validity cycle. This would, therefore, naturally exclude any comparison of an operator at a terminal with that of the same or different operators at other terminals whether or not in the same port. Only 50% of such cost reduction will be considered in the relevant estimates of expenditure to be relied upon for fixing tariff for the succeeding tariff validity period. It is noted that this approach may result in the quantum of ROCE exceeding the maximum permissible limit set in these guidelines elsewhere and no moderation thereof will be effected."

[59] Tamp Order of 2000 (Para 9(v))

[60] TAMP Order of August 2005 Para10 (xii) states: "Even this adjustment is ordinarily to be made within the tariff validity cycle of three years. However, in order to smoothen the impact of this adjustment, this Authority has taken a liberal view and spread it over next five years…."

[61] *Para 10(xvi) of the TAMP Order dated 22nd July 2005 is reproduced below:*

"It is noteworthy that reduction in tariff is not effected to the level warranted by the cost / revenue surplus position because the cost statements have been framed with assumptions and approximation. The additional surplus (i.e. over and above the admissible cost and return) will be assessed at the end of the tariff validity period and will be set off in the tariff to be fixed for the next cycle (i.e. commencing from the year 2008)"

have been locked by way of an interest-bearing regulatory asset to be used for future tariff reductions.

V. TREATMENT OF ROYALTY

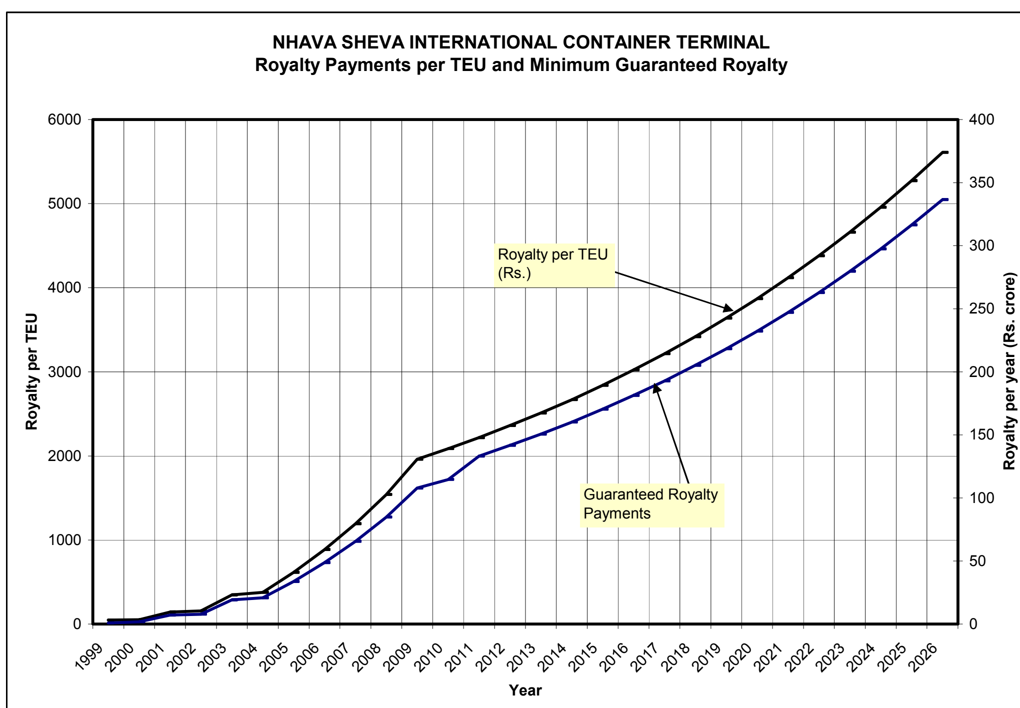
34. In addition to a three year delay in revising tariff to set off the "undue benefit" that NSICT got on account of volume leverage, the TAMP Order of 2005 permitted the royalty payments to be passed on to port users. In order to appreciate the implications of treating royalty as a cost, it is essential to provide an overview of the financial offer of NSICT and the basis on which the concession was granted to NSICT.

Bidding process and NSICT offer

35. It may be recalled that as per the Guidelines for PPP in Port Sector, referred to in paragraph 3 above, the bidding process treated royalty payments as the bid parameter for selection of the preferred bidder. Royalty payments were, therefore, central to the bid evaluation process. The financial offer[62] of NSICT, evaluated as the highest among competing offers, included the royalty payable per TEU and the minimum guaranteed royalty payments over the 30 year concession period. Graph 1 depicts the financial offer of NSICT. Starting with a base of Rs. 47 ($1.18) per TEU in the first year of operation (1999), royalty payments increase to Rs. 5,610 ($ 140.25) per TEU in the last year of operation (2027). The Graph also illustrates the minimum guaranteed amount payable by NSICT to JNPT each year, starting with the first year of operation of the terminal to the last.

[62] See Table at Appendix 12 page 142 of Agreement. This table is the Bidder's Final Financial Offer after Negotiations and shows the traffic projections, the Royalty per TEU and the minimum amount that NSICT is obliged to pay to JNPT

Graph 1: **Royalty per TEU & Minimum Guaranteed Payments**



36. Table 4 depicts the distribution of royalty payments over the life of the Agreement. For ease of analysis, the period of operation has been divided into four bands of seven years each. As can be seen, the royalty payments are strongly skewed towards the latter period of the concession.

Table 4: **Distribution[63] of guaranteed royalty payments**

(As % of minimum guaranteed royalty payment)

Years from start of operation	Royalty payments (%)
7 years	2.26%
14 years	17.24%
21 years	31.66%
28 years	49%

Concession Agreement and Treatment of royalty

37. From the perspective of the various competing bidders, royalty would evidently have had to be paid out of the operating profits of the Licensee as

[63] The royalty payments were aggregated without any discounting factor. The Table is based on minimum guaranteed traffic as stated in the NSICT Bid Offer (See Appendix 12 of Concession Agreement)

represented by the difference between the revenues earned and the operating costs incurred in the course of providing port services. While this was implied in the bidding framework as well as in the Agreement, it was not explicitly stated how royalty payments would be treated for purposes of tariff fixation[64]. However, Clause 7.3.1[65] reflects a clear intention to cap the tariff at the level notified by the Central Government for similar services or as may be fixed by TAMP from time to time. This does not in any manner suggest an intention to allow royalty payments to be computed as costs and passed on entirely to port users, as the determination of tariff is to be based on the cost of similar services and not on the different levels of royalty payments that the respective Concessionaires would bid for different port terminals.

TAMP approach to treatment of royalty prior to 2003

38. While fixing tariff for Chennai Container Terminal Limited (CCTL), a private operator[66] at the Chennai Port Trust, the TAMP, in its order dated March 6, 2002, had not allowed[67] 37.128% of revenue share payable by CCTL to the Chennai Port Trust as an element of cost to be included in the tariff and charged to port users.

Intervention by DoS in 2003

39. The Department of Shipping, invoking its powers under Section 111 of the MPT Act, issued[68] directions on the treatment of royalty in respect of bids

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[64] Clause 7.3.1 of the Agreement mandated NSICT to abide by the tariff set by TAMP.

[65] See Footnote 22

[66] Even though CCTL and NSICT are two different entities, they are both substantially owned and controlled by the P&O Ports. P&O Ports purchased Mundra International Container Terminal from Adani Group in 2003. P&O Ports were acquired by Dubai Ports World (DPW), a state owned company in the UAE in 2006. According to one estimate, nearly 60% of all Container Traffic at Indian ports is handled by DPW

[67] Para 17 (iv) (e) of TAMP Order on CCTL dated March 2002 "If automatic admission of any and every cost item is made, then, theoretically speaking, in cases like the one in reference, a licensee can conveniently offer a revenue sharing of the order of 99.9% and so formulate his tariff proposal as to cover all his other costs and margins in the balance 0.1% to be retained by him**….** **Para (f) of same order** "This Authority, therefore, finds it unreasonable to allow the 37.1% revenue share as a cost element for computation of tariffs at the CCTL."

[68] Quoted from TAMP Order of November 2003 on CCTL "Ministry of Shipping vide its letter No. PR- 14019/6/2002- PG(1) dated 7 November 2003 issued a policy direction to TAMP under Section 111 of the MPT Act for reviewing and revising tariff in the case of CCTL. Salient points contained in this policy direction were:

(i). The views of TAMP have been duly considered.

(ii). It has been considered that the policy about royalty payment being not taken as cost of CCTL for tariff fixation was not cleared till 29 July 2003, operators taking a stand that royalty payment was to be allowed a pass through and the fact that not permitting royalty payment as an element of cost has resulted in losses to CCTL which situation is likely to have adverse impact on policy of Government for private participation at ports.

invited prior to July 29, 2003 and these were later incorporated in the Revised Guidelines notified by TAMP in 2005. In the case of CCTL, DoS issued a specific direction to TAMP in November 2003 allowing a maximum of 27% of royalty/ revenue share to be treated as a cost payable by users, stating that if this was not permitted, CCTL would incur losses. As a result, while revising the tariff in 2003, TAMP permitted the aforesaid revenue share of 27% as a cost to be recovered from port users.

Royalty and Revised Guidelines of TAMP

40. The Revised Guidelines of 2005 recognized the principle that royalty should be paid out of the operating surplus of the Concessionaire (see Para 13 b above). However, for bids received prior to July 29, 2003, an ex post concession was granted by allowing royalty/ revenue share to be admitted in tariff computation subject to a maximum of the next highest bid. However, this concession was permissible only to the extent it was necessary to avoid a likely loss to the operator. If strictly implemented, these Guidelines implied that royalties would first be paid out of the concessionaire's profits, and if the profits were exhausted, the remaining royalties could be treated as a cost and included in tariff computation, subject to a maximum amount equal to the bid of the next highest bidder.

41. Though lacking somewhat in clarity, the Revised Guidelines of 2005 seemed to imply that (a) users could be burdened only after all the profits of the operator had been appropriated for payment of royalty; and (b) in no case would the tariff accommodate royalty payments in excess of the next highest bid. As a consequence, if an operator made losses even after the aforesaid adjustments, there was to be no further relief. This dispensation evidently amounted to a major concession that would relieve the respective concessionaires of potential liabilities running into several hundred crores of rupees in each case as would be seen subsequently in this Paper. The wisdom of granting such post bid concessions is open to scrutiny.

(iii). It has, therefore, been decided as a question of policy to direct TAMP.
(iv) TAMP may review and revise tariff in the case of CCTL so as to take into account royalty/revenue share as cost for tariff fixation in such a manner as to avoid likely loss to CCTL on account of the royalty/revenue share not being taken into account for tariff fixation, subject to a maximum of 27% (out of total 37.138%) royalty/revenue sharing being paid by them to the Port."

42. The above proposition relating to treatment of royalty can be illustrated by the following examples:

> Assume that the NPV of the royalty offered by the Concessionaire was Rs. 100 crore while that of the next highest bidder was Rs. 75 crore. In this case, the maximum royalty that can be permitted as cost to be passed through into tariffs, as per DoS Guidelines would be 75% in order to protect the concessionaire from making losses.
>
> To further clarify, three scenarios have been presented below:
>
> **Scenario A -** (where royalty is less than the profit)
> Profit of Concessionaire after operating costs = Rs. 110 crore
> Royalty due = Rs. 100 crore
> Royalty would be paid out of profit, with no additional burden on the users.
>
> **Scenario B**: (where royalty payable is marginally higher than profit)
> Profit of Concessionaire after operating costs = Rs. 90 crore
> Royalty due = Rs. 100 crore ($3 m)
> Royalty to the extent of Rs. 90 crore would be appropriated out of profits and balance Rs. 10 crore would be treated as cost to be paid by users through tariff.
>
> **Scenario C**: (where royalty payable is substantially higher than profit)
> Profit of Concessionaire after operating costs = Rs. 10 crore
> Royalty due = Rs. 100 crore
> First, royalty to the extent of Rs. 10 crore would be appropriated out of profits. Next royalty not exceeding 75% of the total royalty payable i.e. Rs.75 crore would be treated as cost to be paid by users through tariff. The balance Rs. 15 crore would be borne by the operator as its net loss.

In a situation involving rapidly increasing[69] royalty payments and a shrinking capital base (as result of depreciation), the project would veer from Scenario A

[69] See paragraph 35 of the Case Study. In the extant case, the CAGR of royalty payments is over 19%. The Net Capital Base that qualifies for the 15% return is gradually shrinking due to depreciation. See

to Scenario C over time. While the Concessionaire may survive under Scenario B, its entry into Scenario C would make the operations unsustainable.

Treatment of royalty in TAMP Order of 2005

43. Although the Revised Guidelines[70] had already been notified by TAMP, its Order of August 2005 did not give[71] effect to these Guidelines in the matter of royalty payments. Contrary to the Guidelines, it treated the entire royalty payment as a cost to be recovered from port users not only prospectively (2006 to 2008), but also retrospectively (2000 to 2005). Thus, the royalty amount aggregating Rs. 116.70 crore ($29.18 million) for the period 2000-2005 (see Annex-II for annual royalty amount treated as cost by TAMP) was added to the tariff and paid by port users whereas this should have been met from the returns of NSICT. Given that guidelines[72] permitted only prospective implementation and also given that all laws, rules and orders can only have prospective effect unless otherwise specified, the application of 2005 Guidelines to previous years was clearly beyond the jurisdiction of TAMP and led to an undue gain of Rs. 116.70 crore ($29.18 million) for NSICT and a corresponding undue burden on port users.

44. The above implied that for every TEU handled at NSICT during 2000-05, port users had to pay an average "tax" of Rs. 220 ($5.5). For the period 2006 to 2008, this amount would have increased to Rs. 828 ($20.7) per TEU, as per TAMP 2005 Order. The logic of such action by a statutory regulator whose primary function was protection of users is not evident.

Treatment of royalty as a cost

45. It is evident that treatment of royalty as a cost amounted to modification of selection criteria and tender conditions, ex post, to the advantage of NSICT. If royalty is permitted to be recovered from port users in this manner, then by implication, NSICT got the award because it offered to charge the highest tariff from port users-- a preposterous stance, bordering on absurdity. Further, if the bidders had known that royalty could be collected from port users, then no

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Annexure I of TAMP Order of 2005, 2006. The quantum of surplus would, therefore, keep reducing year after year, while royalty payable would keep increasing.

[70] Revised Guidelines were notified in March 2005. TAMP Order of 2005 was issued in July 2005

[71] Paragraph 10 (ix) c of the subject Order stated: "In the instant case, since it is suo motu review of tariff, the entire royalty amount payable by the private operator to the JNPT is allowed as cost for tariff review exercise giving the benefit to the NSICT."

[72] Para 34 of Original TAMP Guidelines and Para 2.17.4 of Revised Guidelines

bidder would have had a personal stake in offering any amount as royalty. In such a situation, the only limitation on the bidder would be the tariffs charged by competing terminals. However, in a situation of scarce capacity, this would act as an open invitation to extract high monopoly rents. Evidently, maximizing royalty collections by imposing an equivalent "tax" on port users could not have been the intent of DoS in an environment where an independent, regulatory institution was established to protect port users' interests. Such a redefinition of royalty signals a serious breach of law and contract in that the original selection criterion was changed ex post, to the benefit of the licensee, after awarding the tender.

Misinterpretation of Revised Guidelines by TAMP Order of 2006

46. In response to DoS letter[73] of 22 November 2005, the TAMP partially reviewed the Order of 2005. In its review, TAMP determined the royalty stream quoted by the second highest bidder[74] (Rs. 163.616 crore - $ 40.90 million) to be 69.50% of the NSICT bid and allowed the same as a cost for computation of tariff[75], compared with the 100% royalty that was allowed by it as a cost in the Order of 2005 (See Annex-III). However, since the Order of April 2006 was applied with prospective effect, it meant that 100% royalty was permitted as a cost to be passed through to port users for the period 2000 to 2006 and 69.5% royalty was allowed to be passed through for the period 2006-2008.

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[73] Quoted from TAMP Order of April 2006: "3. The Ministry of Shipping, Road Transport & Highways (MSRTH), vide its letter No.PR-14019/38/2003-PG dated 22nd November 2005, had sought clarification from this Authority on allowing full royalty as an item of cost in the case of NSICT. Subsequently, the Ministry pointed out that the decision of TAMP in NSICT case gave an impression of deviation from the revised tariff guidelines and was quoted as a precedent by another private terminal operator."

[74] Para 16 of TAMP Order 2006 : "In the royalty model, the bid values relate to initial payment and royalty payment. Since the bid values are more than one and the successful bidder was selected based on the NPV assessment, a similar analysis is to be followed to decide the royalty to be considered in computation to the extent quoted by the second highest bidder. The NPV of the revenue stream quoted by the second highest bidder in this case is reported to be at Rs.163.616 crore, which is found to be 69.50% of the NPV of the bid of NSICT. This means, a maximum 69.50% of the royalty quoted by NSICT can be admitted for tariff computation purpose, as per the revised tariff guidelines, provided NSICT would incur loss if it is not allowed to this extent."

[75] Relevant Extracts for the TAMP Order of 2006 are reproduced below: Para 13. On the above basis, this Authority has decided to allow in its calculations only royalty equivalent to the second highest bidder, as per information received from JNPT vide its letter no. PPD/CM/TAMP/2005/1352 dated 20 December 2005

Financial impact of the Revised Guidelines

47. Implementation of the Revised Guidelines has serious implications. As per the Financial Offer of NSICT (Appendix 12 of Agreement), the minimum amount of royalty payable by NSICT to JNPT over the entire life of the Agreement aggregates[76], using minimum guaranteed traffic figures, to Rs. 4,039 crore ($ 1010 million). This liability, subsequent to TAMP 2006 Order, would stand reduced to about Rs. 1,204 crore ($301 million) (i.e. 30.5% of original liability for the period 2006 to end of the life of Agreement)). The difference i.e. Rs. 2,835 crore ($709 million) would have to be passed through as cost to be paid by port users, since the financial offer of the next higher bidder was 69.5% of the NSICT offer. In effect, NSICT would pay a minimum guaranteed royalty of only Rs. 1,204 crore ($301 million), while the next[77] highest bidder had committed to pay a minimum guaranteed royalty of Rs.2,807 crore ($702 million).

48. As noted above, NSICT is currently handling over twice the minimum guaranteed traffic, which forms part of the bid and the Concession Agreement. Assuming that the traffic handled by NSICT stabilizes[78] at the 2006 level for the rest of the Agreement period, the total amount of royalty payable by NSICT would be in the vicinity of Rs. 8,390 crore ($2,097 million). By permitting 100% royalty between 2000-2005 and 69.5% royalty beyond 2005 to be treated as cost to be borne by port users, the liability of NSICT would stand reduced to Rs. 2,497 crore ($624 million) only. Port users would have to pay the remaining Rs. 5,892 crore ($1,473 million) on account of the post bid modification allowed by DoS. Thus, the DoS directive can be said to confer an undue gain of Rs. 5,892 crore ($1473 million) on NSICT and a corresponding loss to port users over the concession period of 30 years.

49. For justifying its actions, TAMP could take cover under the DoS directions issued in 2003 that mandated the post bid concession relating to treatment of royalty. However, TAMP exceeded these directions in three ways viz. (a) the benefit of these directions was given with retrospective effect; (b)

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[76] The royalty payments were aggregated without any discounting factor

[77] Please see Footnote 76

[78] This appears to be a conservative assumption, since the traffic levels assumed by TAMP in its order of 2006 have already been exceeded- In 2005 NSICT handled 1311193 TEU, in 2006 it handled 1344574 TEU., 10% higher than those assumed by TAMP See NSICT Flier available at NSICT Website

for the period upto 2006, 100% royalty was allowed as a pass through as compared to the limit of the second highest bid, and (c) NSICT was allowed to retain its profits instead of using them for payment of royalties. It cannot be the case that the operator would continue to make its profits while the entire royalty burden albeit to the extent of second highest bidder would be borne by the port users. Thus, the TAMP orders of 2005 and 2006, which have allowed NSICT to retain its profits while shifting the burden of royalties entirely on the users are beyond its jurisdiction.

50. A final implication of TAMP 2006 Order is that the tariff for NSICT would undergo a rapid increase, as the royalty rate payable per TEU increases[79] steeply over time. Such a scenario would not be tenable and the entire regulatory framework could face legitimate criticism. For example, when the royalty payable exceeds Rs. 2,000 ($50) per TEU after 2009, the entire operation of NSICT could become unsustainable, since NSICT would start to face Scenario C presented in Para 42 above.

VI. ROLE OF JNPT

51. The PPP Guidelines of 1996 had stated that the Port Trusts would continue to play a regulatory role and ensure that private participation does not lead to creation of monopolies. There is no evidence to suggest that JNPT acted in a manner that protected user interests or prevented NSICT from extracting monopoly rents, nor did JNPT seek any legal remedy to ensure that tariffs were set in accordance with the law. Even at the time of acceptance of the NSICT bid, no effort was made by JNPT to assess how NSICT proposed to pay royalty that would grow from Rs. 47 ($1.2) per TEU to Rs. 5,610 ($140) per TEU in the terminal year, at a cumulative annual growth rate of over 19%. As such, JNPT does not seem to have discharged the duties assigned to it under Section 42 of MPT Act, inasmuch as it made no attempt to ensure that user interests were protected in a manner compatible with the bidding process and the Concession Agreement, and that tariff was reviewed and reduced in accordance with law, as and when due.

[79] See Graph 1 of the Case Study

VII. SUMMARY OF INADMISSIBLE RETURNS

52. At this point, it is pertinent to assess and summarise the total quantum of inadmissible benefits provided to NSICT by: (a) permitting higher than allowable returns; (b) allowing retention of excess surplus; and (c) recovering royalty from port users.

53. To begin with, the statement of costs in Annexure 1 of TAMP Order 2005 (see Annex-II) was recast to remove royalty payments for the period 2000 to 2005. The return or equity was restricted to 20%, such equity being 35% of the total project costs, as determined in the Tariff Order of 2000, The Table below presents the outcome. It shows the operating costs (excluding royalty) used by TAMP to determine NSICT tariff. It also shows the surplus required for servicing the capital viz. (a) 14% dividend on Preference Shares, (b) 10.5% Interest on Debt, and (c) 20% return on equity, assuring a debt equity ratio of 65:35.

54. As can be seen from Table 5, the excess revenue provided by TAMP to NSICT on account of (a) increase in traffic volumes[80], (b) royalty payments, (c) excess surplus beyond the permissible 20% return on equity, and (d) overstatement of equity led to an additional revenue of Rs. 627.7 crore ($157 million) for the period 2000 to 2005. By implication, revenue charged from port users was 71.94% higher than that permissible.

55. The TAMP Order of August 2005 affected a 12.8% reduction in revenues. The order permitted (a) 100% royalty for 2005-2006, and (b) surplus in excess of the permitted 15% return on capital employed (ROCE). The total amount of inadmissible benefits[81] for 2005-2006 aggregated Rs. 145.66 crore ($36 million), as can be seen from the Annex-II.

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[80] Para 10 (xii) of the TAMP Order of 2005 states: "…It is clear from the discussion above, the substantial change in traffic has resulted in increase in their income from the level considered while fixing the tariff in November 2000. It is an undue advantage because the resultant accumulation is over and above the permissible level of return."

[81] Rs. 145.66 crore ($36.4 million) have been arrived at as follows: Revenue from Container handling (shown as Rs. 351.83 crore ($88 million) in TAMP Order 2005) was reduced by half of 12.8% to Rs. 329.31 cr. ($82.3 million), since 6 months of 2005-2006 had already elapsed by the time TAMP Order 2005 was notified. Revised Total income for 2005-2006 works out to Rs.356.99 crore ($89.3 million) after including Other Income aggregating to Rs. 27.68 crore ($6.9 million) . Operating costs for 2005-2006, excluding royalty, aggregate to Rs.130.10 crore($32.5 million). ROCE @15% is shown as Rs. 81.23 crore ($20.3 million) The remainder i.e Rs. [356.99 – 130.10-81.23] crore =Rs. 145.66 crore. $[89.3-32.5-20.3] million=$ 36.4 million

Table 5: **Excess Revenue permitted between 2000 and 2005**

(In Rs. crore)

Item	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	TOTAL
A. Operating cost* (excluding royalty)	90.30	100.85	110.82	117.22	121.60	540.79
B. Surplus required #	102.40	96.97	90.80	85.62	80.11	455.90
C. Total revenue required (A+B)	192.70	197.82	201.62	202.84	201.71	996.69
D. Revenue from storage* etc.	16.96	23.00	28.87	27.63	27.68	124.14
E. Revenue required from container handling (C-D)	175.74	174.82	172.75	175.21	174.03	872.54
F. Revenue from container handling allowed by TAMP ##	184.86	269.46	342.88	351.22	351.83	1500.25
G. Excess revenue permitted (F-E)	9.12 ($2.3m)	94.64 ($23.7)	170.13 ($42.5)	176.01 ($44 m)	177.80 ($44.5)	627.71 ($157m)
H. Excess revenue (%) (G/E)	5.2%	54.1%	98.5%	100.5%	102.2 %	71.9%

NOTES:

** Extracted from Annexure 1 TAMP Order 2005 after excluding Royalty*

#: Includes 14% Dividend on Preference Shares, 10.5% Interest payments on Debt and 20% Return on Equity assuring a debt equity ratio of 65:35

##: Extracted from Annexure 1 of TAMP Order 2005

56. The TAMP Order of April 2006 operated prospectively for the period 2006-2008. By this order, revenue from container handling was further reduced by 12% over and above the 12.8% reduction affected by TAMP Order 2005. Using Annexure 1 of TAMP Order 2005 as the base, the combined[82] revenue from container handling for the period 2006-2008 is calculated at Rs. 539.96

[82] For the year 2006-2007, and 2007-2008, the revenue from container handling works out to Rs. 269.98 crore($67.5 million) each, after affecting the 12.8% reduction ordered by TAMP 2005 Order and 12% reduction ordered by TAMP Order 2006. This works out to Rs. 539.96 crore ($135 million).

crore ($135 mill.). The Total Operating Income after adding Income from Storage and Others and Other Income aggregates to Rs. 595.32 crore ($148.83 mill.). The combined[83] operating costs aggregate to Rs. 273.69 crore ($68.4 million) while permissible[84] returns add up to Rs. 145.6 crore ($36.4 mill.). That leaves inadmissible benefits of Rs. 176.2 crore ($44 mill.) comprising of 69.5% of royalty pass through i.e. Rs. 165.3 crore ($41 mill.) and Rs. 10.9 crore ($3 mill.) of excess surplus.

57. Table 6 encapsulates the total quantum of inadmissible benefits that have been permitted by TAMP for NSICT during the period 2000-2008. As can be seen, the total unrequited receipts earned by NSICT, for which port users received no quid pro quo, aggregates to Rs. 949.54 crore ($237 million), all of which have arisen on account of TAMP Orders of 2005 and 2006. Nearly

Table 6: **Unrequited benefits received by NSICT**

(In Rs. crore)

Item	2000-2005	2005-2006	2006-2008	Total
Royalty pass through	116.69	68.25	165.27	350.21
Additional receipts on account of adjustment of D/E from 65:35 to 50:50	37.61	0	0	37.61
Excess surplus beyond 20% ROE (2000-2005) & 15% ROCE (2005-2008)	473.41	77.41	10.9	561.72
Total unrequited receipts of NSICT	627.71 ($157m)	145.66 ($36m)	176.17 ($44m)	949.54 ($237m)

sixty percent of the inadmissible returns were on account of TAMP not following its own guidelines on assured rate of return. While a substantial part (Rs. 473.41 crore: $118 million) could be attributed to a three year delay in tariff reduction resulting in accumulated excess surplus, an additional surplus of Rs.88 crore ($22 million) was permitted even for 2005-2008, which defies

[83] For year 2006-2008, the operating costs excluding royalty as shown in Annexure 1 of TAMP 2006 Order were Rs. 134.50 crore ($33.6 million) and Rs. 139.19 crore ($34.8 million) respectively. This aggregates to 273.69 crore ($68.4 million).

[84] Permissible returns of 15% on Capital Employed for the years 2006-2007 and 2007-2008 are given in Annexure 1 TAMP Order of 2006.

any explanation. Permitting royalty as a pass through for tariff determination accounted for over a third of the unrequited receipts; however, the quantum of benefits earned by NSICT on this account, would increase rapidly as royalty payments increase rapidly over time (see Graph 1).

58. Table 7 summarizes the business transacted by NSICT between 2000 and 2008. It lists the total income earned as well as the components of this income for the period 2000-2008. The total income[85] during the period aggregates to Rs. 2576.69 crore ($644 million). The total operating costs[86]

Table 7: **Summary of Business of NSICT (2000-2008)**

(In Rs. crore)

Item	Amount	
Income		
A. Income from Container Handling	2369.52	
B. Income from Storage & others, and Other Income	207.17	
C. Total Income (A1+A2)		2576.69 ($644 m)
Components of Income		
D. Operating Costs	944.58	
E. Admissible Returns (D/E Ratio of 65:35)	682.58	
F. Inadmissible Returns	949.54	
G. Total (Operating Costs +Returns) (D+E+F)		2576.69 ($644 m)

[85] The Revenue from Container Income is arrived at by adding a) Income from Container Handling for 2000-2005, b) income from container handling for 2005-2006 after reducing it by 6.4%, and c) adding Income from Container Handling for 2006-2008 after reducing by 12.8% and, further by 12%. This aggregates to Rs. 2396.52 crore. When Income from other sources is added (Rs.207.18 crore), the total revenue from Operations for the period 2000-2008 aggregates to Rs.2576.70 crore.

[86] These costs are simply the total of operating costs shown in TAMP Order of 2006.

(excluding royalty) incurred during this period were Rs. 944.58 crore and the permissible debt service and returns[87] aggregated to Rs.677.42 crore. On a percentage basis, the eligible costs (37% of revenues) and returns on capital (26% of revenues) account for 63% of the total NSICT income. The remainder 37% comprises of unrequited benefits received by NSICT and aggregates to Rs. 949.54 crore. Thus, the markup in tariff as a result of the unrequited payments would be in the vicinity of 60%. In other words, for every TEU handled, port users paid a rate that was nearly 60% higher than that permissible.

59. One of the primary responsibilities[88] of TAMP was to protect user interests. At the same time, JNPT was duty bound to ensure[89] that private port operators did not extract monopoly rents. Had TAMP discharged its role in an equitable manner and had JNPT not abdicated its responsibilities, these inadmissible returns would not have been recovered from port users.

VIII. OTHER ISSUES

60. There are several other issues that merit consideration. However, these are beyond the scope of this study. Some of the important issues that deserve careful attention are briefly stated below.

61. The Agreement did not specify any performance norms or delivery standards to protect user interests. The only delivery related norm that finds a mention in the Agreement[90] is crane moves per hour[91], which has a limited bearing on user interests. Moreover, no penalties have been specified for shortfalls in performance.

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[87] For the period 2000-2005, these include 20% Return (on 35% Equity, (Rs. 184.75 cr), interest@10.2% (Rs. 174.98cr.) on Debt and 14% dividend (Rs. 91 cr) on preference shares. For 2005-2008, these include returns of 15% (Rs.226.69 cr.) on capital employed

[88] TAMP Revised Guidelines Para 2.2

[89] PPP Guidelines (See Section 1.1 of Case Study)

[90] Clause 7.3.4 Productivity states: The Licensee agrees and undertakes that Gross Annual Average Productivity of quay cranes agreed to be provided by it shall not be less than 20 moves per hour per crane, unless failure is attributed to factors outside the Licensee's control a specifically set out in Article 12.1

[91] See TAMP Website: As per TAMP Assessment of Productivity Norms for Major Ports, Global standards are in the range of 30 to 35 moves per crane per hour, as against India average of 17.6 moves per crane per hour

62. The Termination Clause[92] provides a relatively low barrier for exit by NSICT – a likely scenario if the provisions of the Agreement are enforced. In the event of termination, a penalty[93] (Clause 13.7) equivalent to royalty payment in the preceding year (Clause 7.3.5.2) would be payable by NSICT. In return, JNPT would pay compensation to include, inter alia, the depreciated value of the assets. Having extracted excessive returns in the initial years, NSICT would be relatively free to walk out without much damage to its balance sheet.

63. Given the regulatory[94] role entrusted to JNPT by the MPT Act and the PPP Guidelines, clearly defined and enforceable reporting requirements should have formed part of the Concession Agreement. However, these were ill-defined[95] and open-ended. As a result, there was no institutionalized framework for obtaining audited costing and performance related information from NSICT at regular intervals. Consequentially, neither JNPT nor TAMP had timely access to validated information for enforcing compliance of the obligations of NSICT.

64. Clause 6.1.6 of the Agreement made it obligatory[96] upon NSICT to operate the terminal on common user basis. Yet JNPT did not initiate any action against NSICT for violation of this provision. JNPT only represented before TAMP[97], but even TAMP does not seem to have taken any cognizance.

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[92] Termination by Licensee is governed by Article 13 of Agreement. Consequences of a Termination Order as well as Rights and Obligations of the Parties, thereof are covered under Clauses 13.4.9.4 and 13.4.9.5 of Agreement.

[93] The Licensee shall pay a penalty to the Licensor, if the Termination order is issued by the Licensor, under provisions of Article 13.5.1 and 13.5.3. The amount of penalty will be one year's total charges as per Article 7.3.5.2 as actually paid in the immediate preceding year.

[94] See Footnote 1 and Footnote 2 and Para 4

[95] Clause 6.7 of the Agreement stipulated that the Licensee shall *from time to time submit to the Licensor such statistical reports and information on container and cargo traffic ... and any other information which the Licensor may require for monitoring performance and Licensee's obligation*".

[96] Clause 6.1.6 says: "Subject to the provisions of Article 6.1.7, the Licensee shall manage and operate the Container Terminal on a common user basis, open to any and all shipping lines… and refrain from indulging in any unfair or discretionary practice against any user."

[97] As quoted in Para 6 of the TAMP order No 4 of April 2001: A representation by JNPT: "According to the Concession Agreement, the licensee shall manage and operate the container terminal on a common user basis. Under clause 6.1.7 of the Agreement, the NSICT is supposed to reserve 33% of berth days for common user facilities and berths must be made available on "First-Come-First-Served Basis". The NSICT is neither following servicing the vessels on "First-Come-First-Served Basis" nor made available 1/3 berth days in a month for non-window vessels. It is obvious that the NSICT is giving preference only to bigger parcel size vessels preferring certain shipping lines to get better productivity and the small vessels though they come earlier than the bigger size vessels are kept waiting which is a gross violation of Concession Agreement."

65. The agreement stated that JNPT would widen[98] the access channels starting from 15th year onwards. The channel was actually widened to 350 meters from the first day of NSICT operations and was further widened[99] to 400 meters immediately after. Yet, there is no evidence to suggest that JNPT made any efforts to seek any sharing of costs or returns even though NSICT was the principal beneficiary of this investment.

IX. CONCLUSION

66. As highlighted in the Guidelines for PPP in Port Sector, the objective of private sector participation was to mobilize the resources required for additional capacity to handle burgeoning traffic at ports and to improve efficiency, productivity and quality of service as well as to bring about competitiveness in port services. The outcome, however, was quite different; the private partner leveraged its experience, its technology and expertise to provide high quality services to port users, but at the same time, extracted windfall and unlawful surpluses from users confronted with a monopolistic situation.

67. DoS and JNPT apparently erred in structuring the project which involved a tariff model that was incompatible with the bidding model. DoS attempted to address this incompatibility through an ill-conceived policy directive on treatment of royalty; however, in the process, it violated the bidding criteria, ex post. It cannot be denied that the financial offer of NSICT was made to JNPT with full knowledge of the regulatory framework and the tariff structure. If that is accepted, then the huge post bid concessions given by DoS would not stand to reason.

68. As the licensor/landlord port, acting under the provisions of Section 42 of the MPT Act, JNPT had assigned some of its functions to NSICT. The responsibility for ensuring that these functions were discharged by NSICT in accordance with law was that of JNPT. Further, since tariff is central to the

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[98] (Clause 6.4) states "*The Licensor agrees to consider widening of the navigation channel at entry point with reference to the existing width of 250m ... for the increased traffic of 600,000 TEU from 15th 12 Month period onwards.*"

[99] As represented by JNPT in Para 6 of TAMP Order of April 2001: "The channel has already been widened to 350mt. from the first day of the first year of the NSICT operations and has since been widened to 400mt… JNPT has fulfilled all obligations as agreed in the Agreement, which benefit NSICT in berthing of bigger LOA vessel and 3rd and 4th generation vessels on regular basis"

provision of services, the primary responsibility of ensuring that port users were not fleeced was that of JNPT. A careful scrutiny of the NSICT offer, at the bid acceptance stage, would have highlighted the unworkability of such a high royalty vis-à-vis the regulated tariff based on rate of return. Further, there is no evidence to suggest that JNPT approached either TAMP or DoS to seek intervention for a tariff review even though it was well aware of the benefits of traffic volumes being enjoyed by NSICT. Nor did JNPT exercise its powers under the Concession Agreement to any effect. Evidently, the sole beneficiary of JNPT acts of omission and commission was NSICT.

69. TAMP seems to have failed in evolving costing norms and performance benchmarks for private port operators with a view to achieving the stated[100] objective of improved quality of services to port users. In the case of NSICT, after fixing tariff in 2000, it seemed to have receded into a hibernation mode. It delayed tariff fixation for over three years. It failed to implement the Revised Guidelines and when it did, it gave a novel interpretation of these guidelines – an interpretation that would mean vitiation of the contract to the disadvantage of port users. In sum, the actions of TAMP during the past five years led to excessive and unlawful gains for NSICT at the expense of port users.

[100] Preamble of Guidelines for PPP in Major Ports

Annex-I

TAMP Order of 2000 (Annexure-I)

Revised Cost Statement				
S. No	**Items**	**Actual**	**Estimate**	
		1999-2000	**2000-2001**	**2001-2002**
	Traffic (TEUs)	343187	493450	579803
	Amount in Rs. Lakh			
1	**Operating Income**	9089.7	13,069.50	15,356.70
	Cont. income subject ot revision	1,196.60	1,271.80	1,507.90
	Cont. income not subject to revision	10,286.30	14,341.30	16,864.60
	Sub-Total	729.1	1,016.40	1,195.30
	Trade Discount	9,557.20	13,324.90	15,669.30
	Total container income	53.26	17.4	19.3
	Total Operating Income	9,610.46	13,342.30	15,688.60
2	**Operating Costs**			
	Equipment Running Costs	701.56	1,343.00	1,740.60
	Operating & Directro Labour	325.8	732.4	800.1
	Maintenance Labour	165.2	235.9	258.3
	Staff Welfare	54	88.41	94.61
	General Operation	508.2	643.6	1,136.40
	Property Costs	253.7	198	198
	IT/Communication	173.1	174.4	184.3
	Operations Equip. Depr.	1,845.50	3,139.69	3,888.81
	Equiment Hire	227	205.5	219.9
	Technical Services	337.15	343.6	374.8
	Sub Total	4,591.21	7,104.50	8,895.82
	Non Operating Depreciation	211	236.48	237.48
	Misc. Expenditure	308.8	310.2	310.2
	Total II	5,111.01	7,651.18	9,443.50
3	**Surplus (I-II)**	4,499.45	5,691.12	6,245.10
4	**Management and Genral Overhead**	556.6	559.6	589.9
5	**Net Surplus (III-IV)**	3,942.85	5,131.52	5,855.20
	Additional Income			
6	**Interest on Loans**	3,409.40	3,435.10	3,896.70
	Interest Income	0	0	0
	Forex Losses on repayment	279.2	18.84	95.74
7	**Net Surplus after Interest**	254.25	1,677.58	1,662.76
8	**Capital Employed**			
9	**Sharesholders Funds**			
	a. Equity Share Capital	23,238.20	23,238.20	23,238.20
	b. Preference Share Capital	0	13,000.00	13,000.00
	Amt. Not Utilised in Buisnes		4,365.84	3,944.96
	Total Shareholders Funds	23,238.20	31,872.36	32,293.24
10	**Borrowed Funds**	31,915.10	36,061.00	36.506.90
	Total Capital Employed	55,153.30	67,933.36	68,800.14
11	**Net Surplus after Interest**	254.24	1,677.58	1,662.76
	Add. Technical Services Fee	337.15	343.6	374.8
	Total	**591.4**	**2,021.18**	**2,037.56**
	Less-Div on Pref. Shares @ 14% *80%	0	639.98	1,296.94
	Less-Div on Equity Shares @ 20% *80%	0	3,271.05	3,314.15
	Surplus/Deficit (after Dividend & technical ser	591.4	-1,889.86	-2,573.53
	Surplus/Deficit Percentage of income subject to revision	6.51	-14.46	-16.76
	Average Percentage - 2000-01 & 2001-02		-15.61	

Annex-II

TAMP Order of 2005 (Annexure-I)

S.No.	Particulars	Financial Years							
		2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
	Throughput in TEUs	**694899**	**943928**	**1201119**	**1230355**	**1232470**	**1232470**	**1232470**	**1232470**
I	OPERATING INCOME	Amount in Rs. Lakh							
	Income from Container Handlin	18486	26946	34288	35122	35183	35183	35183	35183
	Income from Storage and Others	1679	2281	2859	2735	2740	2740	2740	2740
	Other Income	17	19	28	28	28	28	28	28
	Total Operating Income	20182	29246	37175	37885	37951	37951	37951	37951
II	OPERATING COST								
	Equipment Running Costs	1786	2578	3358	3803	4115	4362	4623	4901
	Operating & Direct Labour	748	807	856	907	961	1019	1080	1145
	Maintenance Labour	253	271	287	304	323	342	363	384
	Staff Welfare	88	98	103	110	116	123	131	138
	General Operations	484	532	596	610	617	625	627	633
	Royalty	407	1171	1847	3682	4562	6826	10053	13727
	Property Costs	198	198	210	222	236	250	265	281
	IT/Communications	174	184	201	219	239	260	266	273
	Operations Equipment Depn.	3965	3966	3966	3986	3986	3986	3986	3986
	Equipment Hire	205	220	233	247	262	278	294	312
	Technical Service Fee	0	0	0	0	0	643	641	637
	Sub Total (a)	8309	10025	11657	14090	15416	18714	22330	26418
	Non-Operating Depreciation	259	327	328	328	328	328	328	328
	Misc Exp.	310	310	310	310	255	24	24	24
	Management & General Overhe	560	594	634	676	722	770	822	877
	Sub Total (b)	1129	1231	1272	1314	1304	1122	1174	1229
	Total (II) (a+b)	9438	11256	12928	15404	16720	19835	23504	27647
III	**SURPLUS (I-II)**	10744	17990	24246	22481	21230	18115	14447	10304
IV	**Computation of Return**								
	(I) For the period 2001-02 to 2004-05								
	Preference Share Capital (Found nil in its Annual Accounts)	13000	13000	13000	13000	13000	13000	13000	13000
	With D/E (1:1), Equity	30453	28487	26255	24382	22389			
	Debt	30453	28487	26255	24382	22389			
	14% dividend on pref. shares	1820	1820	1820	1820	1820			
	Debt@10.5%	3198	2991	2757	2560	2351			
	20% ROE	6091	5697	5251	4876	4478			
	Total Return for 2000-05	11108	10508	9828	9257	8649			
	(ii) 15% ROCE for the 2005-06 onwards as per the revised guidelines						8123	7522	7024
V	SURPLUS/DEFICIT (III-IV)	-364	7481	14418	13225	12581	9992	6925	3279
VI	Surplus/ Income %	-1.80%	25.58%	38.79%	34.91%	33.15%	26.33%	18.25%	8.64%
VII	Average excess surplus %			29.14%				17.74%	
VIII	50% of net suplus (V * 50%)	-182	3741	7209	6612	6291			
	Cumulative for 5 years			**23671**					
IX	Setting off 50% of benefit accrued between 2000-2005 over next five years						4734	4734	4734
X	Net surplus in addition to admissible Return, Payment of royalty as cost item and after adjustment of past benefit/loss over the subsequent year (V+IX)						14726	11659	8014
XI	Net surplus as % of total operating income for 2005-2008 in addition to return allowed and after setting off 50% of the benefits accrued in the past 5 years						38.80%	30.72%	21.12%
XII	Average net surplus as % of total operating income for 2005-2008 in addition to return allowed and after setting off 50% of the benefits/losses accrued in the past five years (X/I)							30.21%	

Annex-III

TAMP Order of 2006 (Annexure-I)

S.No.	Particulars	Financial Years							
		2000-01	**2001-02**	**2002-03**	**2003-04**	**2004-05**	**2005-06**	**2006-07**	**2007-08**
	Throughput in TEUs	**694899**	**943928**	**1201119**	**1230355**	**1232470**	**1232470**	**1232470**	**1232470**
I	**OPERATING INCOME**	Amount in Rs. Lakh							
	Income from Container Handlin	18486	26946	34288	35122	35183	35183	35183	35183
	Income from Storage and Others	1679	2281	2859	2735	2740	2740	2740	2740
	Other Income	17	19	28	28	28	28	28	28
	Total Operating Income	**20182**	**29246**	**37175**	**37885**	**37951**	**37951**	**37951**	**37951**
II	**OPERATING COST**								
	Equipment Running Costs	1786	2578	3358	3803	4115	4362	4623	4901
	Operating & Direct Labour	748	807	856	907	961	1019	1080	1145
	Maintenance Labour	253	271	287	304	323	342	363	384
	Staff Welfare	88	98	103	110	116	123	131	138
	General Operations	484	532	596	610	617	625	627	633
	Royalty	407	1171	1847	3682	4562	4744	6987	9540
	Property Costs	198	198	210	222	236	250	265	281
	IT/Communications	174	184	201	219	239	260	266	273
	Operations Equipment Depn.	3965	3966	3966	3986	3986	3986	3986	3986
	Equipment Hire	205	220	233	247	262	278	294	312
	Technical Service Fee	0	0	0	0	0	643	641	637
	Sub Total (a)	**8309**	**10025**	**11657**	**14090**	**15416**	**16632**	**19264**	**22231**
	Non-Operating Depreciation	259	327	328	328	328	328	328	328
	Misc Exp.	310	310	310	310	255	24	24	24
	Management & General Overhe	560	594	634	676	722	770	822	877
	Sub Total (b)	**1129**	**1231**	**1272**	**1314**	**1305**	**1122**	**1174**	**1229**
	Total (II) (a+b)	**9438**	**11256**	**12928**	**15404**	**16720**	**17754**	**20437**	**23460**
III	**SURPLUS (I-II)**	**10744**	**17990**	**24246**	**22481**	**21230**	**20197**	**17513**	**14491**
IV	**Computation of Return**								
	(I) For the period 2001-02 to 2004-05								
	Preference Shares	13000	13000	13000	13000	13000	13000	13000	13000
	Equity	30453	28487	26255	24382	22389			
	Debt	30453	28487	26255	24382	22389			
	14% dividend on pref. shares	1820	1820	1820	1820	1820			
	10.5% as the cost of the debt	3198	2991	2757	2560	2351			
	20% ROE	6091	5697	5251	4876	4478			
	Total Annual Returns	**11108**	**10508**	**9828**	**9257**	**8649**			
	(ii) 15% Return on capital employed for the period 2005-06 onwards as per the						8123	7522	7024
V	Net Surplus/Deficit (III-IV)	-364	7481	14418	13225	12581	12074	9991	7467
VI	Surplus/Income (%)-(V/I)	-1.80%	25.58%	38.79%	34.90%	33.10%	31.81%	26.33%	19.68%
VII	Average net surplus %	29.14%					25.94%		
VIII	50% of net suplus (V * 50%)	-182	3741	7209	6612	6291			
	Cumulative for 5 years	**23671**							
IX	Setting off 50% of the benefit/loss accrused during the years 2000-01 to 2004-05 over the next five years						4734	4734	4734
X	Net surplus in addition to admissible Return, Payment of royalty as cost itme and after adjustment of past benefit/loss over the subsequent year (V+IX)						16808	14725	12201
XI	Net surplus as % of total operating income for 2005-2008 in addition to return allowed and after setting off 50% of the benefits accrued in the past 5 years						44.30%	38.80%	32.10%
XII	Average net surplus as a percentage of total operating income for the year 2005-06 to 2007-08 in addition to the return allowed and after setting off 50% of the benefits/losses accrued in the past five years (X/I)						38.40%		