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ABOUT THE BOOK

The infrastructure sector, in India, is understood as a dynamic and ever-evolving area within the legal and the economic perspective. Economic as such that it defines and redefines the structure of investments as made and raised which become drivers of the growth of this nation, and legal as all these business ventures are framed around specific and targeted laws and regulations which are framed well enough to protect the interests of those involved. This mechanism, however must work harmoniously for the infrastructure sector to progress in the upward direction as when it does not, iti gives rise to certain legal implications and complications. In this book, the predominant idea is to put forth the growth story of India's infrastucture sector which has evolved from being privately owned and leased to government, as during colonial times, being totally government controlled, as pre-liberalisation time before 1991 and post that time when foreign investments started pouring in the country. Various crucial sectors such as the Highways, Airports, Ports and Power were the ones which vitally shaped the law around the concept of Public Private Partnerships in India. These sectors, have been covered in individual chapters, illuminate the intricacies of the various forms of models which have helped the concept of PPP to be applicable in numerous models, depending on the need of the hour and the promoting of end-user benefits. For a very long time, the Build-Operate-Transfer Model was applied in various sectors, until it was discovered due to rising number of unfinished projects running into losses and litigation, that this model can no longer be universally applicable. This lead to the formation of the Build-Operate-Own-Transfer model, and so on.

This book aims to establish the understanding of the various finer points which arise within the concept of PPP, such as the dispute resolution in such models which may be averted by introducing the abstraction of Renegotiation of Contractual Terms within the PPP structure. Further, there has been a comprehension of obsolete and redundant clauses in the Model PPP Clauses which are adapted into various sectors and it forms the main content of the Concessionaire Agreement. Certain clauses which are ill-drafted have been de-discussed and laid out for deliberation that whether or not they may be substituted for the current clauses. To conclude, this book presents an amalgamation of information as well as leaves space for the readers to analyse the information and deliberate on the very obvious gaps and challenges in the infrastructure sector which are set as undertones by the author by means of presenting a comparison in between the ideal countries known for their PPP enforcements and comparing the sector there to India. Thus, a broad and a comprehensive understanding is put forth by the medium of this book to understand the individual sectors, their adaptation to the concept of PPP, their pit-falls and successes while also analysing the effect of this concept on the market and realm of fair competition.

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NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
BENGALURU

SAIRAM BHAT

Public Private Partnership In India
A Sectoral Analysis

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Foreword

by

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When Professor Sairam Bhat approached me to write a foreword for his new publication in the NLSIU Book Series, I was reluctant because of the subject matter being new and unfamiliar to me. At the same time, I was keen to encourage this enterprising young professor who holds out great promise to legal education and research in the country. He further persuaded me to undertake the task by sending the hardcopy of the entire manuscript supported by the abstracts of several essays included in the volume. I took some time to study and reflect on the work done by him and the co-authors and was greatly impressed by the quality of research involved and its contemporary relevance in India's development journey. I am sure readers of this volume, whether they are experts on the subject or not, will find the essays informative and useful to understand the dynamics of what is happening to the economy and how under the PPP regime.

Business Environment in Transition:

With economic liberalisation and globalisation, business organisation and methods have undergone structural and processual changes not anticipated by the legal system in place. The urge for competitive development and the demand for a globalising market have led to experimentation with different models of doing business, some borrowed from other jurisdictions and some innovated locally. Polity and politics also played the role in designing the new structures and processes. India, which initially developed its legal architecture based on the principle of the public sector in commanding heights of the economy, slowly moved into a mixed model and ultimately migrated to the market-oriented system prevailing in most parts of the developed world. In the process, the economy got opened up for private investments and participation. It naturally resulted in generating multiplicity of contracts occupying commercial activity across the board. In this transformation, Public-Private Partnership (PPP) became a mainstream arrangement for developmental activities generally and infrastructure in particular. These included sectors which in the past were exclusively managed by the public sector like land acquisition, railways, roads and highways, ports, smart-cities, healthcare and even defence production. The story of this transformation and its implications to the legal regime on economic governance is the subject matter of the volume in hand.

What is PPP and its importance at the present stage of development?

The Department of Economic Affairs of the Ministry of Finance of the Government of India has defined PPP in the following terms:

"PPP is an arrangement between a government/statutory entity/government-owned entity on one side and a private sector entity on the other, for the provision of public assets and/ or public services, through investments being made and/ or management being undertaken by the private sector entity, for a specified period of time, where there is well-defined allocation of risk between the private sector and the public entity and the private entity receives performance-linked payments that conform to specified and pre-determined performance standards, measurable by the public entity or its representative".

From the above definition it follows that PPP is a device or a vehicle to mobilise investment from the private sector for development purposes and is mutually profitable to both the parties. It is a hugely popular investment employed by developing and developed countries though the legal arrangement may vary from country to country and in different sectors within the same country. No wonder, at the present stage of massive infrastructure development undertaken in India, PPP is an inevitable tool for efficient and cost effective implementation of projects across all sectors of the economy.

PPP Models and their Management: Indian experience:

In an interesting comparative analysis of PPP as practiced in India, Japan and Australia, Ms. Bhuvanya Vijay investigates the structure evolved for PPP contracts in terms of clauses dealing with payments, state guarantees and distribution of risk, ownership patterns and termination of agreements. She draws some best practices that promote the stakeholder interests and facilitate cost-effective development processes. According to her, several PPP projects across developing and developed countries have failed due to mismanagement of risk and lack of a structured response to unplanned situations. In order to face such situations, the idea of renegotiation of contracts emerged, though it turned out to be a part solution only because nobody could write a contract that would last the next 20 or 30 years, due to varying nature of risk involved. This led to unending litigation which delayed completion of projects in time. The author thinks that a standardised law on PPP with freedom for Ministries of the Government to adopt more area-specific guidelines will do some good in this regard. An effective dispute resolution mechanism is indispensable to take the PPP movement forward.

According to Ms. Raagya Zadu, PPP experience in the high way sector has been a success story in India and there are many things to be learnt from that experience. According to Archita Narayanan, the health sector provides immense potential for PPP to thrive both in generating revenue as well as employment. Arguing for PPP to be adopted in a big way for expansion of Indian Railways, Pavithra R examines different models of PPP arrangements including the BOOT model of revenue sharing, annuity model for fixed fee recovering and the Line model for revenue sharing. The latest in the series is the Smart Cities Mission which include water, electricity, sanitation, urban mobility and transportation, housing, digitalisation, E-governance etc. all of which are expected to be created through Public-Private Partnership. Sharma and Prasad in their paper analyse the issues involved and practices being adopted in Smart City projects to achieve sustainable as well as inclusive development. Shraddha Gome looks at dispute resolution clauses in PPP contracts and finds that the common mode adopted is arbitration or expert adjudication. The author reports that judicial interference in PPP contracts is minimal. Unless there is arbitrariness or illegality apparent on the face of the record, the Court does not interfere at the bidding and award stages. At the contract management stage, disputes if any, go to Civil Courts or for mediation with a non-binding expert appraisal.

Professor Sairam Bhat in his article makes several interesting points on the constitutionality of PPP. There is no bar, constitutionally speaking, for the government entering into contracts with private parties for discharging its constitutional functions. It is a matter of policy in economic governance in which the judiciary will also not interfere unless there is arbitrariness or discrimination in decision-making. Competitive bidding is the standard procedure when private players are invited to invest and manage public utility services. It involved public auction and tender process to ensure fairness in the selection of the private players. Thus, disinvestment in the Bharat Aluminium Company (BAL Co) matter was declared by the Supreme Court as a policy issue involving several economic factors not to be interfered with by Courts under judicial review. The Court's view was that economic expediencies lack adjudicative disposition unless it is beyond the power and so abhorrent to reason. Otherwise the proper forum to test policy is the parliament. The author finds the BALCO judgement (AIR 2002 S.C. 1950) germane to the idea of PPP in the country.

Bhat asks the question whether a PPP contract is a statutory one or a mere Government Contract? If it is a statutory one, the writ jurisdiction will be applicable whereas in non-statutory contracts writ will be only be applicable if Article 14 is violated. Most PPP contracts are non-statutory in nature. However, in view of the provisions of Article 299 and 300 relating to "Contracts and Suits", judicial review of Government Contracts is determined in terms of legality (scope of decision making power), rationality (Wednesbury principle of reasonableness) and procedural propriety (abuse of power).

In this regard, one may add that certain provisions of the Directive Principles of State Policy are also relevant to resolve questions on constitutionality of governmental action, even if it is a policy matter. Thus, Articles 38 and 39 lay the foundation of economic governance that the State is bound to follow. Article 42, 43, 43 A, 48 and 48A are other provisions which the government is well advised to follow, if and when it enters into contracts with private players. Though the Directive Principles are addressed to the State to follow while making laws, they are declared fundamental in the governance of the country (Article 37) and, as such, acts as constraints in contract arrangements whether they are statutory or not.

An excellent discussion of the legal framework that State Governments have evolved (Andhra Pradesh Infrastructure Development Enabling Act, 2001, the Gujarat Infrastructure Development Act, 1999) in organising PPP contracts is provided in professor Bhat's introductory article on Sectoral Analysis. In these laws, private participation is envisaged in public works relating to design, construction, operation, maintenance and renovation. He points out the emergence of "Socialistic Regulatory Authorities" for governing PPPs which balances the interests of both consumers and the services providers. Citing the examples of the Telecom Regulatory Authority, the author says that it acts as a facilitator in clearing PPP, an administrator for tariff determination and policy continuity and an adjudicator to redress the grievances of consumers as well as between the Government agencies and the private operator.

Concluding Remarks:

A reading of the essays in the volume gives one insights into the emerging challenges to the PPP model of infrastructure development which is becoming very popular with State and Central Governments in India. As the editor says "PPP is the future and is here to stay and will contribute to legal system development as well". Therefore they deserve greater attention of everyone concerned. Fundamentals of public policy would inevitably apply to them, as the core outcome is service to the general public and the tax payer money is utilised for the project. Hence the importance of the study.

The Book Series of NLSIU has received much acclaim from the legal community as they are based on inter-disciplinary research on themes in which legal literature is rare. Moderately priced and beautifully produced, they serve a felt need for legal information support to teaching and developmental efforts. The editors of the volume deserve appreciation for the efforts they have put in to co-ordinate the work by multiple authors and to present the material with a glossary and list of cases. Few more teachers and researchers like Sairam Bhat can change the legal education scenario in the country which is otherwise stagnating for want of innovation and experimentation.

I recommend the book to the legal and business communities who may like to contribute to the development of jurisprudence and best practices in this emerging area of business laws.

Message from Vice-Chancellor

by
Prof. (Dr.) R. Venkata Rao
Vice-Chancellor
National Law School of India University, Bengaluru

We live in times of the Fourth Industrial Revolution- a revolution which is systems based and not product based. Hackneyed and anachronistic approaches will make us fossilized.

In keeping with its avowed policy of providing "Intellectually stimulating and socially relevant" inputs into legal education, National Law School of India University under its Book Series Project has made an earnest effort in the present book to focus on the diverse and varied contours of Public Private Partnership in India- a topic which may be admired by many and reviled by an equal number but which can be ignored by none.

Market economy has certainly the ability to distinguish between the efficient and inefficient but can it determine what is good and just for the society? What should be the role of the State? Maximal, Minimal or Optimal? Where do you place sectors like Education and Health?

PPP- does it mean profits for the private and losses for the public as debunked by some?

Is public really a part of the Public policy?

Are we not living in times when legal risk management focuses on avoidance of disputes rather than resolving disputes?

These are the issues that keep agitating the minds of the right thinking persons.

Normally legal education has in its curriculum a place for the 'past' and for the 'present' and rarely for 'future'.

This book is a sincere effort to emphatically state that there is 'future' in legal education imparted in National Law School of India University, Bangalore.

In these days of clamour for 'Make in India', this book is "Made for India".

The Editor Dr. Sairam Bhat and his team deserve to be congratulated for the stellar effort. The young student contributors with their amazing versatility have enriched and embellished the book.

I am confident that the book will meet the demanding expectations of all the stakeholders.

Preface

The rise in the number of infrastructure projects in the country in the past two decades has been phenomenal, leading to a subsequent rise in the cost of developing them. The past decade has been an epoch of mega infrastructure projects with a scaling rise in investment from the private players in various public sectors such as Roads and Highways, Ports, Airports, Power and recently in Defence and Railways. As an increasing number of private players are now entering the domain of development and investment in public utility projects and services, there has been a considerable amount of change in the processing of this participation or as we call it now, the 'Ease of Doing Business'. The Report of the Committee on Revisiting and Revitalising Public Private Partnership Model of Infrastructure, popularly referred to as the Kelkar Committee Report, which was published by the Ministry of Economic Affairs in 2015, was set to bring about policy changes in the Public Private Partnership model and also introduce a number of vital modifications in the allocation of risk within this particular framework. The need for a sectoral analysis of public private partnerships arises as these projects have major impact on the public utilities, public finance and most importantly, they affect the community directly. The unfortunate experience with such ventures has been the ever escalating costs in the project, disproportionate risk allocation and eventually, rampant political and bureaucratic malpractices.

Every government of the State as well as the Centre in its tenure has accepted the fact that in order to quench the deficit of developmental infrastructure in the country, the concept of public private partnerships is instrumental. Two key reasons being, the private players have the technology and the managerial expertise and the business model as adopted by the private players is always the one being aiming for profits. Hence, making the venture a profitable one. Similarly for the public sector, the benefits that are available for the private players are that the government provides the land as required for the construction of the infrastructure and the requisite clearances, also, balances the risk factor in the project, the chief risk being of the change in government, which is now actively included under the *Force Majeure* clause as 'Political Risks'. The post-privatisation period in India was the time when the maximum number of international players and private players entered the infrastructure realm and laid the foundation of the modern public private partnership model. This model developed out of the flaws and the many infamous PPP debacles which took place, the Nandi Infrastructure case in Karnataka and the Enron-Dabhol Case in Maharashtra being the most unscrupulous examples. Information available as on February 28th, 2018 (See, Dept. of Economic Affairs, Govt. of India) there are one thousand five hundred and thirty four awarded PPP projects worth 1, 349, 125.67 crores.

Public private partnerships are best understood from the model by which they are applied. Various models being the traditional Build-Operate-Transfer and the Build-Own-Operate-Transfer, there are various other models which involve different aspects of PPPs. The most recent PPP model is the DBFOT or the Design-Build-Finance-Operate-Transfer model wherein the private player not only builds the infrastructure but also designs it. Each sector has a best suited PPP model and the same is intended to be discussed in this book. Sectors such as Airports, Highways, Ports require a long gestation period and therefore the sought after model is the Build-Own-Operate-Transfer (BOOT) model whereas the Electricity, Health and Service sector which have a relatively low gestation period, but involve considerable amount of technical assistance and expertise, follow another distinctive model called the DBFOT or the Operation and Management (O&M) model. An intelligible illustration of DBFOT model would be the sixteen new National Highway construction contracts which have been given out in Karnataka via tendering process. Here, the concessionaire shall be responsible for designing the layout of these highways, raise the finance for the project, build and operate it to retrieve his costs and after the expiry of the concession period, transfer this highway to the public authority, which here would be the NHAI.

Interestingly, the O&M model is one which is concerned only with the operation and management, as etymology suggests. The simplest areas where such performance based or operations based private investment is rolled in, are the areas mostly under the local or municipal government. For example, sanitation, solid waste management, road maintenance, water supply etc. In a traditional PPP model, the biggest hurdle as witnessed by the private player is the obtaining of clearance and required permissions. With the new Land Rehabilitation Act in place, the cost of land acquisition has become four times the market value, thus adding on to the woes. The escalating costs has forced many of the private players now wanting to exit the model. In a need and initiative to encounter this problem the Government of India has shown keen interest in adapting to the Engineering Procurement and Construction (EPC) model. In this model, the entire project is funded by the government. It entails the concessionaire to design, engineer and construct the project by either employing his labour or by means of sub-contracting. The concessionaire however is legally liable to finish the project within the stipulated period of time without any undue delays. With all the clearances, land acquisitions and required permissions taken by the public authority, it is aimed at reducing the cost of the project as well as saving the gestation period from unprecedented delays. Whether or not the EPC model has been able to gather the trust of the private players is a matter of serious deliberation.

Within all these PPP models, the crucial factor becomes the underlying contract which governs all the terms and conditions of the public and private players and considering the issues which arise sooner or later into the contracts are mostly due to the faulty or ambiguous drafting of these clauses. A sense of understanding of these clauses is a precursor to a perfectly successful PPP project and therefore, mandatory than within the Model Concession Agreement, certain identified crucial clauses are deconstructed and understood from the very start. Clauses such as Refinancing, Force Majeure, Breach and Renegotiation are few clauses which require expertise in their precise drafting and incorporation in the contract. The Kelkar Committee Report on the Revitalising of the PPP Structure in India, has reiterated the urgent need of having a dedicated institutional framework for the same. It shall be entrusted with culling out of core research, policy-making and capacity-building responsibilities. With the initial proposition of a corpus fund of INR Five Hundred Crore in the financial year of 2014-15, the Government of India made its stance clear of being interested in expanding the scope of PPP in the country, and urged the panellists on the Kelkar Committee to bring together a proposition of a comprehensive PPP structure which would collectively be associated with management of risk, sector-specific model concession agreements which would also include Renegotiation within itself. The importance of renegotiation in this committee report has been suggestive of various reforms which would aid in a strengthened institutional framework. The report in a rather fascinating manner, refers to include renegotiation in an *ex-ante* provision, or, there must be some prediction to provide for such a clause. The nature of PPP being rigid, is bound to cause certain inconveniences to the parties owing to escalating costs, political risks, a change of law, or just, cost and time overruns, to facilitate the ease of doing business, the renegotiation clause within the Model Concession Agreement becomes relevant. A guidance note has been issued by the Department of Economic Affairs, providing for a renegotiation framework in the Highways and the Port concessions. Few of the preconditions which are mentioned therein are project distress likely to end in default; distress not caused due to private player and shall be detrimental to the government; likely to have social benefits and not materially different in terms of risk allocation to the Government of India etc.

With the advent of the concept of SMART cities in India, we have witnessed an increase in the private players wanting to finance and/or provide their technological expertise in realising the ambition of the government. The Smart City Mission Statement and Guidelines of 2015 have laid out the sectors where private partnership and investment is sought. In town planning areas such as sanitation, waste to energy plants, public transport, digitalization for e-governance etc. are areas where the private players are highly sought after for their technological superiority. Also, the government usually works out these contracts at the Urban Local Body level; therefore, the finance becomes a crucial factor. The peculiar nature of these contracts is that the gestation period is relatively shorter than traditional PPP contracts and the terms and conditions in these contracts stipulate the unique requirements of PPPs in SMART cities, from the traditional PPP contracts. As concerns the major sector of Ports and Highways, the PPP model has been more of a boon. The otherwise slow paced growth of these sectors has much to credit the private investment and the PPP mechanism for its growth in the past decade and a half. Within the port sector itself, there is still a requirement of bringing uniformity in the contracts and bring together the advantages of the private and public sector, rather than just privatization. Similarly, the highway sector as well, has a long period of gestation and the private player finds it, mostly in all cases, very difficult to sustain itself economically and profitably. Therefore the concept of Viability Gap Funding becomes seminal in these sectors. Discussing at length about this aspect is another idea behind this book. The Power Sector since the debacle of Enron, has been listed as a sought after sector for private investment. The Adani run Mundra thermal power plant in Kutch serves as the best example of a successful power plant by the private sector. However, to keep the competition healthy in this sector and this sector being largely price-driven, keeping the competition healthy is very important. The concept of PPP thus is well suited as the bidding and the possibility of new players coming in frequently keeps monopolisation of power at bay.

One sector which has recently opened up for private investment and is now functioning successfully in PPP mode is the Defence Sector. With the government now rolling in considerable amount of Foreign Investment in this sector, the distinctive factor is that the regulations mandate the formation of an Indian Joint Venture/ Special Purpose Vehicle which becomes the private player and contracts with the Government of India. This model is greatly made popular by the 'Make in India' scheme of the Central Government which aims at bringing in foreign investment, without compromising on the domestic players and competition. This sector has been largely popular with the private players as it involves technological competence which is entrusted with the private player and the finance which is the domain of the Government, and thus keeping in tune with providing for the Indian military, the private sector is able to provide state of the art ammunition and gears to the government. So far, the most successful PPP models have been in the ammunition for the Armoured Corps, latest technical gear for the infantry and the recently awarded project to Reliance for the manufacture of Infantry Combat Vehicles. The government in these projects generally mandates the technology transfer and is strict with compliance of the terms and conditions relating to the gestation period of private players delivering on time. These PPPs are characterised by being DBFO model provide benefits of accelerated delivery, improved performance, reduced costs, pooling of resources, advantage of economies of scale and a sustainable defence industry. However, the main issues with PPP in the defence sector are the overbearing interference of the bureaucracy, distrust of the government towards the private players and the transfer of intellectual property. Most of these concerns are shrouded under the excuse of national security and thus, even in case of malpractice by the government officials, it is very difficult to prove otherwise.

To analyse correctly, a focal point that remains is the aspect of risk management and dispute resolution which is fundamental for any contract, not only PPP in specific. However, the same is preferred to be governed by set of clauses which determine the liability of both parties, one of them being the Public authority; in order to immune themselves from the burden of uncalled for risk. Risk, if managed adequately, results in lesser time being wasted in dispute resolution and leaves no vacant area for assumptions and ambiguity. Countries such as Europe, Singapore, United States are ones having much greater experience in PPP models than India and thus it is also important to scrutinise the contracts in those countries to determine a valid and well balanced critique for the Indian framework. The contractual liabilities as affixed in those contracts for their infrastructure development and the clauses which define effective risk distribution and financial segregation in terms of liability, are matters of much relevance. Australia, for example, has many a success stories of their PPP models working harmoniously in the infrastructure as a whole.

This book, in its forthcoming chapters, shall be looking at all major sectors and their unique requirements, issues and strengths with the introduction of the concept of Public Private Partnership and makes an analysis for the better functioning of the same. Governance of all such developmental models is key and therefore bringing in the fundamental question of whether the Right to Information should be applicable to all PPPs or not is one, which aims to stir a healthy debate and deliberations on the same are sought by the authors. Defining of the 'Public Authority' within section 2(h) of the Right to Information Act is a relatively popular deliberation and the idea of bringing all PPPs into the realm of RTI is an idea which is mooted across forums. Public Private Partnerships, as popular as they might be for business purposes, deserve more attention than any other models as they involve much more than business concerns. Such projects gain public importance and fundamentals of Public Policy become applicable to them as the core outcome is service to the general public and the taxpayer money which is utilised for the grant and entire duration of this project. Therefore to conclude, before the beginning of this rather interesting concept, it is suggested that the idea of a PPP is promoted with the growth of India's infrastructure space, with efficient planning, superior execution, professional management necessart and proper accountability and delivery of service to citizens. PPP is the future and is here to stay and will contribute to a development of law and legal system in India

Dr. Sairam Bhat

Raagya P. Zadu

Contents

Part III

Analysing Nature of PPP

List of Abbreviations

AAI	Airports Authority of India
AAR	Authority of Advance Rulings
AERA	Airports Economic Regulatory Authority Assessment Council
AT&C	Aggregate Technical & Commercial Authority
BALCO	Bharat Aluminium Company Ltd
BIAL	Bangalore International Airport Limited
BMIC	Bangalore Metropolitan Infrastrcture
BOLT	Build Operate Lease And Transfer
BOO	Build Own Operate
BOOT	Build Own Operate Transfer
BOT	Build Operate Transfer
BSCDCL	Bhopal Smart Cities Development Corporation
BSNL	Bharat Sanchar Nigam Limited
BWSSB	Bangalore Water Supply and Sewerage Board
CAG	Comptroller and Auditor General of India
CAGR	Compound Annual Growth Rate
CCI	Competition Commission of India
CERC	Central Electricity Regulatory Commission
CIC	Central Information Commissioner
COD	Commercial Operations Date
CRF	Central Road Fund
DBFO	Design Build Finance Operate

DCM	Design Construct Maintain
DCMO	Design Construct Maintain and Operate Delhi Development Corporation
DGCA	Directorate General of Civil Aviation
DIAL	Delhi International Airport Limited
DPC	Dabhol Power Corporation
DVB	Delhi Vidyut Board
EOI	Expression of Interest
EPC	Engineering Procurement Construction
EU	European Union
FDI	Foreign Direct Investment for the North-East
GDP	Gross Domestic Product
GIDA	Gujarat Infrastructure Development Act
GIS	Geographic Information System
GNCTD	Government of National Capital Territory of
GST	Goods and Services Tax
HAM	Hybrid Annuity Model
HC	High Court
IIFCL	India Infrastructure Finance Company Limited
IIPDF	India Infrastructure Project Development Fund Improvement Project
INR	Indian Rupee
IPAT	Infrastructure PPP Adjudication Tribunal
IPR	Intellectual Property Rights
IPTC	Independent Private Transmission Company
JNPT	Jawaharlal Nehru Port Trust
JV	Joint Venture
KSIIDC	Karnataka State Industrial and Infrastructure
kWh	Kilo Watt Hour

LDOT	Lease Design Operate and Transfer
LED	Light Emitting Diode Limited
LLP	Limited Liability Partnership
LMA	Linking Melbourne Authority
MAE	Material Adverse Effect
MAGA	Material Adverse Government Action
MCA	Model Concession Agreement
MGC	Minimum Guaranteed Cargo
MIAL	Mumbai International Airport Limited
MMOPL	Mumbai Metro One Pvt Ltd
MMRDA	Mumbai Metropolitan Region Development
MoRTH	Ministry of Roads Transports and Highways
MOU	Memorandum of Understanding
MRTPA	Monopolies and Restrictive Trade Practices Act
MTPA	Million Tonnes Per Annum
MW	Mega Watt
NGO	Non-Governmental Organisation
NHAI	National Highways Authority of India
NHDP	National Highways Development Programme
NHIIP	National Highways Interconnectivity
NICE	Nandi Infrastructure Corridor Enterprise
NITI	National Institution for Transforming India
NPA	Non-Performing Assets
NSDC	National Skill Development Council
NSS	National Sample Survey
NSW	New South Wales
ODA	Official Development Assistance
OMT	Operate Maintain and Transfer

Ors.	Others
PFIA	Private Finance Initiatives Act
PHC	Primary Healthcare Centre
PIL	Interest Litigation
PNGRB	Petroleum and Natural Gas Regulatory Board
PPA	Power Purchase Agreement
PPP	Public Private Partnership
Pvt.	Private
R&D	Research and Development
RfP	Request for Proposal
RFQ	Request for Qualification
RMRS	Rajasthan Medicare Relief Societies
ROT	Rehabilitate Operate Transfer
RoW	Right of Way
RTI	Right To Information
SARDP-NE	Special Accelerated Road Development Program
SC	Supreme Court
SCADA	Supervisory Control and Data Acquisition
SDG	Sustainable Development Goals
SERC	State Electricity Regulatory Commission
SPV	Special Purpose Vehicle
T&D	Transmission and Distribution
TAMP	Tariff Authority for Major Ports
TIFAC	Technology Information, Forecasting and
TOT	Transfer of Toll
TPDDL	Tata Power Delhi Distribution Limited
TRAI	Telecom Regulatory Authority of India
UK	United Kingdom

UN	United Nations
USA	United States of America
USD	United States Dollar
VAT	Value Added Tax
VFM	Value For Money
VGF	Viability Gap Funding
WP	Writ Petition
WPI	Wholesale Price Index

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19. *Sachindanand v State of WB AIR 1987*

20. *Shailesh Gandhi v. Mumbai Metro One Private Limited (MMOPL) C.No. 2636/02*

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27. *UPSEB v. Banaras Electric Light & Power Co. Ltd, 2001, 7 SCC 637*

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Part I

An Introduction to Public Private Partnership

Chapter 1

A Sectoral Analysis of Public Private Partnership

Dr. Sairam Bhat

Introduction

Lack of cash has led virtually every state in the nation to explore innovative finance techniques that allow important improvement in infrastructure projects, in Public Private Partnership model to move forward while keeping taxes and fees low.[1] Private sector involvement in infrastructure has required regulatory reform, implying not only a new set of rules but an in-depth review of the way governments traditionally think about regulation.[2]

Infrastructure facilities include any form of facility, whether in the nature of a physical structure or a resource, commodity or a service, that is provided with an objective to be used by a society or a section of society.[3]

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1 Jeffrey N. Buxbaum and Iris N. Ortiz; *"Protecting the Public Interest: The Role of Long-Term Concession Agreements for Providing Transportation Infrastructure*"; Cambridge Systematics, Inc. 1 Research Paper 07-02 – June 2007; The Keston Institute for Public Finance and Infrastructure Policy Research Paper Series Index:<http://www.usc.edu/schools/sppd/keston/research/index.html.> (visited on February 2, 2018).

2 Evamaria Uribe; *Building Regulatory Institutions in Latin America: From Penalties to Incentives*; Inter-American Development Bank; <http://www.iadb.org/sds/IFM/publication/gen_154_666_e.html.>.

3 Piyush Joshi, *Law relating to Infrastructure Projects,* Butterworths, New Delhi 2003, p. 2.

Infrastructure is the most critical item for any development and even more so for industries. Despite heavy expenditure on it, in the last so many years, infrastructure was still inadequate for the needs of the country. In fact, one of the motivations behind giving so much prominence to the public sector in the initial years was the necessity of bridging the gap in the infrastructure-the heavy requirement of funds for which, it was thought, could only be provided by the Government.[4] Unfortunately, over the years, the public sector started becoming active in areas other than infrastructure. This left a huge gap between demand and supply, which was impossible for the government alone to make good. Ideas of involving the private sector more actively began to be mooted in the late 1980s, but not with much force, and nothing worthwhile was achieved in this regard. It is in this context that the Government in 1991, emphasized the creation of infrastructure, both by stepping up investment by the Government itself and by providing fiscal incentive to the privates sector.[5] Two main reasons provided for last of infrastructure development in the country have been identified as inadequate user charges and regulatory uncertainty.[6] States are increasingly turning to toll finance and PPPs to begin to fill the funding gap, instead of State financing infrastructure projects. Long-term concession agreements with equity participation by the private sector are one form of what are generically called "public-private partnerships" – also known as PPPs or P3. Over the last year or so, PPP has typically referred to these concessions, but PPP refers to any contractual agreements between the public sector and a private entity that allows for private sector participation in the delivery of infrastructure projects. PPPs range from the simplest form, design-build, to more complex transactions, including design-build-finance- operate (DBFO) or long-term leases/concession agreements which are based on build-own-operate and transfer [BOOT]. PPPs are now being developed on greenfield projects,[7] which are start-up infrastructure projects.

4 P S Palande, *Coping with liberalization: The Industry's response to new competition*, Response Books, New Delhi, 2000, p. 37.

5 *Ibid.*

6 Anupama Rastogi; *Infrastructure Sector in the Report of the PM's Economic Advisory Council*.<http://www.iimahd.ernet.in/~morris/iir02/chap%203(1).pdf>.

7 A 'green field' project is one where the Government does not have an infrastructure facility in place. It is building of a project right from scratch.

Constitutionality of PPP: Historical Origin

The economic crisis faced by India in 1990–91 provided an opportunity for unshackling the economy by de-licensing a number of sectors. This led to the opening up of the infrastructure sectors including power and telecommunication to enhanced private participation. Sectoral policies as well as those governing foreign investment were liberalised. Sector-specific developments were aimed at improving the policy climate for private investment. The power sector has witnessed various phases of policy developments. The earliest phase, which began in the early 1990s, was aimed to improve the policy climate for private investment. In 1991, the government of India amended the Electricity Supply (Act) 1948 to allow the entry of private investors in power generation and distribution.[8]

Similarly, there is no need to describe the importance of airports in the national economy. However, considering the public utility nature of the air transport industry the government has also sought to retain a direct stake in the sector. As such the public private partnership model which exists in India seeks to combine the strengths of both these sectors. The Constitution of India refers to civil aviation as a subject on the Central list, and the subject falls within the legislative competence of the Parliament. The Aircraft Rules, 1937, have been amended to allow airports to be owned by citizens of India or companies or corporations registered and having their principal place of business in India. While the public sector faces budgetary constraints and lacks required expertise, the private sector faces problems in acquiring land, obtaining environment and forest permits and other such clearances, securing

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A Greenfield project involve land acquisition, design, building, maintenance, operation and finally transfer to the Government after the period of concession is complete. In a green field project, the parties may even have a clause in the concession agreement for an extension of the period of concession. For example the Hyderabad and Bangalore International Airports are Greenfield projects as in both these two cities the Government was operating airports on Military airbase runways. These airports are being built by private consortiums for a concessional period of 30 years with an possible extension for a further 30 years.

8 Anoop Singh, *Policy Environment and Regulatory Reforms for Private and Foreign Investment in Developing Countries: A Case of the Indian Power Sector*; <http://www.adbi.org/discussion-paper/2007/04/26/2236.policy.environment.power.sector/policy.developments.for.private.investment.in.the.indian.power.sector/.>.

approvals from local authorities and overcoming inordinate delays caused by the Central, State and local governmental authorities. As Government contracts have strict procedural requirements, the initiation of PPP started at a very cautious note. Enron and BMIC provide important lessons for PPP in the country. At Enron, the controversial Power Purchase contract for extremely expensive electricity was suspended by the Maharashtra Power Board, which nearly went bankrupt as a result of high power prices. As reported earlier, the deal was reached through shadowy, secret negotiations, and in violation of the Electricity Supply Act. Begun in 1992, the Dabhol power plant near India's financial capital of Bombay in Maharashtra state was to have gone online by 1997. It was supposed to supply energy-hungry India with more than 2,000 megawatts of electricity. But endless disputes over prices and terms of the deal turned the venture into a symbol of what can go wrong in large-scale development projects when cultures collide. The first power project sponsored by the Enron Corporation at Dabhol in the State of Maharashtra ran into a series of hurdles, including renegotiation of the initial agreement, because of a change in the State Government. It also faced several legal challenges in public interest litigation, including challenges of the validity of environmental clearances. Fortunately, these obstacles, including twenty-five court cases, have been overcome.[9]

In the first phases of PPP, the Government took to the competitive bidding route. Wherein the Government invited interested private players to invest and manage public utility services. Competitive bidding route was ideally suited for Government Contracts.[10] It involved 'Public auction and tender process' to ensure fairness in selection of the private player. After such decision was taken on selection, the policy of selection could hardly be challenged in the courts as was held in the BALCO case[11] by the Supreme Court. Government would then have the freedom of contract, with the rule of reasonableness and non-arbitrariness in its action and conduct.[12]

9 Montek S. Ahluwalia; *Financing Private Infrastructure: Lessons from India*; <http://planningcommission.nic.in/aboutus/speech/spemsa/msa009.doc.>.

10 Sachindanand v State of W.B. AIR 1987.

11 AIR 2002 SC 1950.

12 A Government contract is judicial challengeable if one may prove, violation of Art 14, bad faith or procedure not followed as per Art 299.

The primary issue involved in the BALCO case was regarding, the validity of the decision of the Government of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Ltd. The question that arose for consideration in that case was, whether such a decision to disinvest is amenable to judicial review?

The petition was dismissed and the Supreme Court held that, "the process of disinvestment is a policy decision involving complex economic factors. The courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and, unless the economic decision, based on economic expediencies is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere".[13] The Supreme Court held that in such a case the appropriate forum for testing policy is parliament and not the court. This judgment of the Supreme Court gave impetus to the PPP idea in the country. PPP is based on economic factors, wherein the realization that the Government did not have adequate funds to own, control and manage all PPPs in the country, it had to look into inviting private players who would build and maintain public utility services on behalf of the Government. PPP envisages 'Governmental developmental project' to be built, operated, maintained by private investors and after realization of a reasonable return, later transferred the project to the Government. Thus one may notice that the nature of contract in a PPP is not a license for a private player. As a license would not have any sense of ownership [though in a PPP it is a limited type of ownership], the contract tend to create a usufructuary right in the framework of a 'Grant'. The Contract under a PPP grants a right of a public utility service for a limited time to a private player who then transfers it after the expiration of the said time period.

The challenge then is to find out the nature of contractual relationship between the Government and PPP. Whether such PPP contracts are statutory contract or mere Government Contracts? Whether a writ will lie even in the matter of non-statutory

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13 It is important to note here that Balco was not created by any Act of parliament. Would the decision of the Supreme Court been different if Balco was created by an Act of the Parliament ?

contracts? In the case of a non-statutory contract a writ will lie if there is violation of Article 14 or some other provision of the Constitution. However, in the case of a statutory contract, a writ will lie not only on the above mentioned (constitutional) ground but will also lie on the ground that there is violation of the statutory provisions relating to that contract. In other words, in the case of a non-statutory contract, a writ will only lie on constitutional grounds, but in the case of a statutory contract, a writ will lie on both grounds viz. constitutional as well as statutory grounds. This is really the essential distinction between the cases of a statutory and non-statutory contract.[14] Most of the PPPs are based on statutory contracts, but the growth story of PPP is so strong that in Mysore, a market place has been handed over to a private player under a concessional agreement.

Secondly what constitutes a PPP? In Enron and BMIO, the Government sought to privatize public utility such as power generation and building road network. The lesson drawn shows that in telecom, the Government has given license only to private companies to give services in certain spectrums. The license is for operation and service of telecom and other related activities. Whereas in the sector of Airports, the Airport Authority of India and the State Government are active stakeholders The stake holding of the AAI and that of the State Governments in the PPP of building airports is in the range of 16 to 18% each.

Judicial quest in administrative matters in PPP has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus, they are not essentially justiciable as to remedy any unfairness. Such an unfairness is set right by judicial review. But the courts are quick to point out that there must be judicial restraint in administrative action so as to ensure transparency, accountability and procedural fairness.[15]

14 Ram Dhyan Singh v. State of U.P Special Appeal No. 323 of 2004.

15 Tata Cellular vs. Union of India and others AIR 1996 S.C. 11(vide paras 85 and 86) it has been observed : “It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the

The first impression one gets about PPP is that this is very much a Government contract and hence the stipulations under Article 299 of the Constitution are mandatory.

As a contract between the Government and the Licensee[16] [Concessionaire], it would be covered by the provisions of Art. 299 and 300 of the Constitution. Thus judicial review of Government contracts is determined by duty of courts in confiding itself to check the legality of:

- Whether a decision-making authority exceeds its powers?
- Whether the contract committed an error of law?
- Whether the Contract committed a breach of rules of natural justice?
- Whether the Government reached a decision which no reasonable Tribunal would have reached? or
- Whether there is abuse of powers?

Further, the courts have a held that the grounds upon which an administrative action in Government contract is subject to control by judicial review are as follows:

1. Illegality: this means the decision-maker must understand correctly the law that regulates decision-making power and must give effect to it.
2. Irrationality, namely, Wednesbury unreasonableness or
3. Procedural impropriety[17]

The Legal Framework for Establishing a Project Vehicle for Infrastructure Projects

In India, the practice is to establish a Private Limited Company which may be formed from a joint Venture agreement between

lowest or any other tender is always available to the Government. But, the principles laid down in Article 12 of the Constitution have to be kept in view while accepted or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

16 Telecom Infrastructure was the first to be brought under PPP model, hence the contract between the Government and the Private player came to be know as a license agreement and the private player a licensee. ;

17 Supra note 15.

the partners. Project vehicle for investment in infrastructure projects is usually through a joint venture agreement between stakeholders. The joint venture agreement is entered by companies and corporations to facilitate the process, speedy incorporation and commencement of business. The Joint venture agreement is usually a follow of a Memorandum of understanding among the partners. A Joint Venture [the new consortium] is floated as a Private Limited Company, registered under the Companies Act. To sort the management part of the joint venture, the partners also enter into a Shareholder Agreement,[18] in which the concerns of management and decision making are clearly laid down to avoid confrontation and litigation. In India, as a project development vehicle, the private limited company model is preferred over the partnership model for the following reasons: 1. According to the Partnership Act 1932, the liability in a partnership is unlimited; 2. tax holidays under the Income Tax Act are not available to partnerships; 3. there are a limited sources for financing of the project in a partnership; 4. it is very difficult to get new partners and enable exit of old partners.

Thus, compared to Private Limited Company, the most suitable model in these cases would have been the Limited Liability Partnership [LLP] which in a sense will change the perception of the 'jointly and severally liability' principle in partnership. Countries like UK and USA have amended their partnership laws to suit joint ventures in infrastructure projects, but in India for apparent reason, the Government has not been able to introduce the LLP Bill in the parliament. LLP simplifies registration process and does away with complicated documentation. The Consortium can commence business with limited legal formalities and intervention.[19]

18 This Shareholders Agreement is for use by two existing companies that wish to form a limited company together in order to pursue a commercial venture. The agreement sets out the scope of day to day management by the appointed directors and also clearly states the limits of their powers - in order to protect the respective interests of the shareholder companies. This agreement is ideal for companies that wish to maintain as much control as possible over the new company structure and important shareholder decisions.

19 We have seen the lack of expertise of Indian Companies in the Airport sector, which forces them to ally with companies who have already built airports in other counties or Companies which have expertise in airport infrastructure.

State Legal Framework for PPP

The State Governments did not have a concept of passing legislations or policies especially to facilitate the participation of private players in the development of infrastructure. The attempt which began to introduce private players into infrastructure development was marred with a lot of alleged favoritism and arbitrariness. Except for Andhra Pradesh and Gujarat, none of the States in India had passed enabling legislations to make policies and guidelines for PPP. The Government of Andhra Pradesh enacted the Andhra Pradesh Infrastructure Development Enabling Act, 2001. This was done in order to provide for the rapid development of physical and social infrastructure in the state, attract private sector participation in infrastructure building, to present bankable projects to the private sector and to improve the level of Infrastructure in the state. Andhra Pradesh also has created Infrastructure Corporation of Andhra Pradesh[20] as a part of the Department of Infrastructure and Investment.[21]

The A. P Act attempts to anticipate every contingency relating to infrastructure projects and their bidding process. It lays down precise rules for a variety of development models and concession agreements - the permissions that would be required, operating conditions and controls, payment modalities, penalties for lapses and abuse of development rights or pollution of the environment by developers. The statute specifies how sole bids would be treated or how a limited response would be dealt with or consortium bids would be evaluated. The allocation of generic risks and their disclosure are laid down along with the facilities provided by government.[22] A conciliation board with precise proceedings for arbitration, settlement and judicial proceedings are spelt out. For the first time, the penalties specified under the Act for omissions

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20 Infrastructure Corporation of A.P Ltd. The Corporation was created on 31st May 2005. For more see <http://www.incap.co.in/html/about-incap.html>.

21 The following projects are notified as Infrastructure projects under the purview of Infrastructure and Investment Department: Knowledge Corridor; All Inland Water Transport Projects; Development of old Gandhi Hospital Premises Project; Infrastructure for all Natural Gas Projects; All New Airport Projects; Satellite Town Ships Projects. All PPP in Greenfield airport sector are based on Private Ltd Company model.

22 Enabling infrastructure development, Andhra Pradesh style.<http://www.rediff.com/money/2002/mar/28dalal.html>.

and contraventions by developers are as high as Rs 10 million (Rs 1 crore).[23] An Infrastructure Authority has been created which will administer an Infrastructure Projects Fund established by the government. All rules, clearances and permissions to be sought or complied with have to be disclosed upfront by the government, so that no transgression can be imputed later or occur because nobody knew about the requirements in the first place. Also, by making it an overriding statute, a serious attempt has been made to provide a genuine single window for all project clearances.

State of Gujarat was second to follow and it passed the Gujarat Infrastructure Development Act [GIDA] in 1999 and amended it in 2006 as the first law of its kind in India. The Infrastructure Act focuses on facilitating infrastructure development through private participation within its territory. The Act establishes the Gujarat Infrastructure Development Board (GIDB), comprising of members appointed by the state government, and provides for the basic framework along with which the GIDB would function and facilitate private participation in infrastructure projects. Several options for such participation are envisaged in a schedule to the law (build, operate, transfer (BOT); build, operate, lease, and transfer (BOLT); renovate, operate, and transfer (ROT)). The scheme for the concession agreement is to be separately prescribed. The nature of projects listed as falling within the jurisdiction of the Act are specified in Schedule 1 to the Act consistent with state subjects under the Constitution. Schedule 1 also mentions 'Power Generation, Transmission and Distribution Systems', which is in the Concurrent List. While facilitating projects on this subject, due compliance would have to be made with the Union laws prevalent in this sector. The Act provides for selection of the project proponent through the process of competitive bidding. Direct negotiations are also envisaged in the event that proposals are submitted not as response to any specific bidding process, but as the initiative of the concerned entity(ies). The law prescribes selection of bidders in an open bidding process based on three successive sets of criteria: pre-qualification; technical; and financial. Of these, the Act lays down the criteria for financial evaluation.[24]

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23 Although it is not clear why a finite limit on penalty has been prescribed instead of linking it to the size of the project and the nature of the offence.

24 For more see www.ibef.org.

The Gujarat Act allows the project developer to charge fees as specified in the concession agreement. Such fees can also be revised, based on criteria specified in the agreement. The Act recognizes that rate of inflation and variation in rate of foreign exchange are factors which may be taken into account for revision of fees. As financial security, the project developer is required to open an escrow account or execute a performance bond.

The Act identifies several ways in which the state government or its agency can provide assistance for the project, such as through participation in the equity of the project company; extending of subsidies; senior or subordinate loans; executing government guarantees; operation of escrow account; conferment of development rights in respect of any land; and incentives in the form of exemption or deferral of taxes.

The Act also considers the possible scenarios which may emerge from termination of the concession agreement with a project promoter, and provides for:

- payment of compensation to the developer in accordance with the concession agreement;
- take over of the project without repaying the investments made by the developer upon termination for default of the developer, but at the same time assuming liabilities of the developer for repayment of loans taken in lieu of the project;
- new concession agreement with a person recommended by the lenders, on the same terms as specified in the earlier concession agreement. The GIDA is in the nature of an overarching framework. Almost all of its specific provisions would require greater implementation and single window clearance mechanism from the State.

Following pursuit of these two States, Bihar government was next to introduce The Bihar Infrastructure Development Enabling Act, 2006 for the rapid Development of Physical and Social infrastructure in the State and to attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State and provide a comprehensive legislation for reducing administrative and procedural delays, identifying generic project risks.[25] Next to

25 <https://www.pppinindia.gov.in/pdf/state_ppp_initiatieves_compendium.pdf>

introduce an Act was the State of Punjab, by introducing the Punjab Infrastructure Development and Regulation Act, 2002 which provides for the partnership of private sector and public sector, in the development, operation and maintenance of infrastructure facilities and development and maintenance of infrastructure facilities through financial sources other than those provided by the State budget.

States like Karnataka, Assam, Rajasthan, Odisha, West Bengal etc. are ones which have specific policies towards Public Private Partnerships. Rajasthan, for that matter has developed a special 'fund' with a corpus of approximately 500,000 USD which are contributions from various financial authorities of the State. This fund is to be utilized for the purpose of factoring private involvement in infrastructure development along with the government.

A Study of PPP in Infrastructure Sector:

An Infrastructure contracts deals with public works. Some of these public works may be divided according to the area and sector of operation: They are:

- Physical infrastructure [bridges, roads, highways, ports, airports]
- System infrastructure [electricity, pipeline]
- Maintenance infrastructure [railway, Mass transport system. Waste management]
- Commodities [natural gas, petroleum, water supply]

Private participation in public works relate to design, construction, operation, maintenance, renovation or up gradation.

The importance of PPP in infrastructure project need not be over emphasized, considering that India is targeting a growth rate of nearly 10% per annum. Further, with practical difficulties in the country there is a considering acceptance that a welfaristic State with socialistic concerns can move competitively by balancing both the ideals of welfarism and socialism in building key infrastructure projects.

Telecom Sector

The only sector that seems to be attracting private capital is telecommunications, where large projects are being implemented.[26]

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26 Supra note 6.

If we trace PPP to the recent history, post 1991 liberalization policy of the Government of India, probably the first private participation in infrastructure happened in the telecommunication sector. The Telegraphy Act was amended and Sec. 4 allows the Central Government to grant a license on such condition and in consideration of such payment as it thinks fit to a 'service provider'.[27] Sec. 2(1)(e) of the TRAI Act defines a 'licensee' to mean any person licensed under sub section (1) of Section 4 of Indian Telegraphy Act, 1885 for providing specified public telecommunication services and licensor to mean the Central Government. Thus for the first time the Government eliminated the 'permit' system to grant a 'license' to private companies to providing public utility services. The license system of change is significant as the State is bound under the Constitution to keep providing these essential public utility services. Thus from a monopoly in telecommunication, the State moved on towards a contractual regime of licensing to involve and attract private participation in such essential services. Validating this move, the Supreme Court in *Tata Cellular v Union of India*[28] held that a telegraphy license is essentially a contract between the licensor and the licensee with the lawful object of providing communication services. To regulate the private players the Telecom Regulatory Authority of India Act 1997 was passed. Sec.11 (2) of Telegraphy Act authorizes TRAI to fix tariff for telecommunication services. The licensee is bound by any subsequent changes in the tariff order as per terms of license agreement itself. Sec. 10 state that 'no service provider shall, in any manner, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary'.[29]

The Cellular Mobile Service Agreement between the Department of Telecommunication and private investor has a license period of 20 years and is renewable for 10 years at a time upon a request made by the licensee.[30] The decision of the licensor in this regard

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27 Vikram Raghavan, *Communication Law in India*, New Delhi, Butterworths, Lexis Nexis, 2006, p. 267.

28 AIR 1996 SC 11.

29 India Infrastructure Report 2001: *Issues in Regulation and Market Structure*, Oxford University Press, New Delhi.

30 Cl. 3 of General Conditions of the Telecom License Agreement.

is final. The license is revocable before the period of 20 years for reasons specified in the agreement.[31]

While governmental control over the telecom sector remained, the establishment of a regulatory authority provided a level playing field between the government owned BSNL and other private players in providing telecommunication services in the country.

Airports[32]

'Due to the unavailability of public funds', the Airport Infrastructure Policy, 1997, as well as the 2003 amendment to the AAI Act, both recognizes the importance of private participation in the Airport Infrastructure sector.[33] The policy suggested modernization and up gradation of airports in accordance with International Civil Aviation Organization standards.[34] The Policy specifies that green field airports[35] may be permitted where an existing airport is unable to meet the projected requirements of traffic.[36]

There is no certain policy of the exact manner in which the project should proceed after the private developer has been selected and it has been seen that in India two major models have been followed; one regarding the upgradation and modernization of existing airports and the other regarding the construction of new airports.[37] Regarding the ownership of the airport, the Policy seeks to keep all options open stating that airports may be owned by the

31 See Cl. 10 and 11 of the Telecom License Agreement.

32 Seventh Schedule, List I, Entry 29 read with Sec. 246 of the Constitution of India vests the Union Parliament with the exclusive jurisdiction in relation to 'airports; aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes'.

33 Sec. 14 of the Policy of 1997.

34 Sec. 7 of the Policy on Airport Infrastructure 1997.

35 At present, Bangalore and Hyderabad have Greenfield airports. Cochin International Airport Limited in Kerala has been a pioneer in airport privatization. Funded by NRI travelers from Gulf and from exclusive rights to private companies in making business at the airport. CIAL is built on a BOO basis.

36 The Policy states that no Greenfield airport will normally be allowed within an aerial distance of 150 Km of an existing airport. More see Sec. 8(3) of the 1997 Policy.

37 In the case of Bangalore and Hyderabad we see construction of Greenfield airports [New airports built under PPP] and in case of Mumbai and Delhi we see modernization of existing airports and thereafter operation and maintenance handed over to under PPP.

Central Government, State Government, urban local bodies, private companies and individuals and also by joint ventures involving one or more of the above.[38]

The Airports Authority of India Act 1994 [AAI] as amended in 2003 provides for the concept of 'private airports'. Any airport owned by any person or agency other than AAI or any State Government, or in case of joint venture with the AAI or the State Government, being owned by such a person or private agency to an extent of over 50% in considered as private airport.[39] The AAI shall be competent to enter into or perform any contract necessary for discharge of its functions provided that no contract exceeding such value or amount as the Central Government may, from time to time, by order fix, provided further that no contract for acquisition or sale of immovable property or for lease of any such property for a term exceeding 30 years.[40] Currently the modernization, operation and maintenance of the Delhi and Mumbai airports was done in 2006 through the JV route with 74% participation by private key party and 26% by AAI.[41]

Recently, bringing a change in the way of land use in the airports sector, the Centre approached the apex court against the order of the High Court, terming the new Civil Aviation policy as unconstitutional under Article 14 of the Constitution. The Clause 12(d) of this new Policy provided for liberalizing end-use restrictions for existing (excluding PPP) and future greenfield and brownfield airports of AAI and future greenfield and brownfield airport projects under PPP.[42] This meant that all existing Airport Authority of India projects and the existing and future PPP airports shall be able to utilize their land for commercial and non-aeronautic use while the existing Delhi International Airport Limited (DIAL) and Mumbai International Airport Limited (MIAL) would not be able to. The management, operation and development agreement

38 Sec. 15 of the Policy.

39 Sec. 2(nn) of the AAI Act.

40 Sec. 20 read with sec. 21 of the AAI Act. Thus airport concession agreement can be for a maximum of 30 years and not more.

41 Delhi airport was won by a consortium comprising of GMR Group and Fraport AG. Mumbai was won by a consortium of GVK and Airport Company of South Africa.

42 National Civil Aviation Policy, 2016 Ministry of Civil Aviation, Government of India.

signed in between AAI, GMR and GVK allows the developer to use only 5% of the land for commercial purposes and activities which are mentioned in Schedule 6 of that agreement, which are limited. The Delhi High Court ruled in favor of the policy being unconstitutional and the same was challenged in the Supreme Court. Justice Chelameshwar, presiding over the bench, upheld the decision of the Delhi High Court and stated that the benefits of a liberalized land development policy must be given to existing developers and the policy cannot differentiate between past and present developmental infrastructure projects. In accordance with this judgment, this means that the DIAL and the MIAL along with the other existing airports can now look at commercializing their land for non-aeronautic purposes and be able to earn profits from commercial activities, which would eventually be for the benefit of the public as airports offer public utility services.

Power Sector

Power is a concurrent subject falling under Entry 38, List III of the Seventh Schedule read with Art. 246(2) of the Constitution of India. The legal framework in the Power sector can be traced to three main legislation and rules made there under:

1. The Indian Electricity Act 1910
2. The Electricity [Supply] Act 1948[43]
3. The Electricity Regulatory Commissions Act 1998.

The first of these governed the transmission, supply and the use of electricity. The second, on the other hand, provided for the formation of three statutory bodies at the central, regional and State levels to govern the generation, transmission and distribution of electricity but mainly regulates the generation of electricity. The last Act, provides for the setting up of Regulatory Commissions at the Central and State levels and for the rationalization of electricity tariffs, transparent policies regarding subsidies and promotion of efficient and environmentally friendly policies.

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43 Private participation was present in the power sector even during British times. Indian Electricity Act 1910, contained a framework for PPP through grant of licenses. However the 1948 Act created a virtual State monopoly with only a few exceptions.

In 2003 the Government of India enacted the Electricity Act which seeks to create a liberal framework for the development of the power sector. At present, power projects by the private developers can relate to, generation, transmission or distribution and supply. A license has to be for a period of 25 years unless revoked earlier.[44] The Electricity Commission can grant two or more persons license to distribute electricity in the same area. Further, no license is required to distribute electricity in rural areas. Further, the licensee can franchise the distribution in a specified area within his licensed area and the franchisee does not require a separate license. Further a license can be amended in public interest and the licensee has a right to raise objection. The Appropriate Commission can suspend a distribution license if it is necessary either in case of public interest, or where the standards regarding quality of electricity has failed, or there is persistent default in complying with the directions of the Commission or where the licensee has broken the terms and conditions of the license.[45] All suspensions shall be reasoned orders and the suspension shall be for a maximum period of one year, during which the distribution shall be managed by an Administrator appointed by the Commission.

Commission may also terminate the license in public interest or in case of willful and prolonged default. Licensee can sell his utility to any person found eligible by the Commission. The primary criterion for selection of purchaser has to be the 'highest and best price offered for the utility'.[46]

The Act entrusts the State Commission to determine tariff for supply and wheeling of electricity, however, if open access is permitted for a category of customers under sec. 42(2), it can determine only wheeling charges.[47]

The State of Delhi passed the Delhi Electricity Reform Act 2000 which in Part VI deal with licensing of transmission and supply. Sec. 20(4) lays the general parameters for license to be

44 Sec. 15(8) Electricity Act 2003.

45 *Ibid.* Sec. 24.

46 *Ibid.* Sec. 20.

47 Generally See Blueprint for Power Sector Development: Vision 2012-Power for All, Ministry of Power, Government of India, August 2001, Reports on India's Power Sector, New Delhi, Academic Foundation, 2003. <http://www.powermin.nic.in.>.

entered into agreement for purchase of power [under a transparent power purchase agreement], supply in bulk electricity to other licensee or to customers, may be entrusted with appropriate powers to take actions fro revenue realization, prosecution of theft, meter tampering, diversion of electricity or similar matters. The license holder has the duty to develop and maintain an efficient, coordinated and economical system of electricity supply and for the operation and maintenance of power system. Licensees also have to submit statement of accounts to the Commission and such statements shall be published with the Rules.[48] The Commission may inquire into the conduct or functioning of any licensee and may revoke a license in public interest.[49]

For the first time, under sec. 20 of the Delhi Reform Act 2000, a license was granted to a PPP in 2004.[50] North Delhi Power Ltd was founded in July 2002 through PPP framework, JV[51] between TATA Power and Government of Delhi. The term of the license is 25 years and the annual license fee is 0.05% of the amount billed during the previous financial year.

Highways[52]

There are a number of reasons for the inadequacies of our road networks. Primarily it has been the lack of resources provided to the sector which had decreased from the 9th to the10th five year plan. The National Highways Act, 1956 was amended in 1995 to specifically vest the central government with the discretion to 'enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a national highway'.[53] Thus, private participation in the development and maintenance of national highways has now become possible through a contractual arrangement between the central government and the private

48 Sec. 27 of the Delhi Act 2000.

49 Sec. 23, for revocation a 3 month notice has to be given to licensee and principles of natural justice have to be followed.

50 License is granted by the Delhi Electricity Regulatory Commission.

51 JV ratio is 51:49 % shareholding between TATA and Government of Delhi. NDPL serves a population of 4.5 million and spread across 510 sq kms. It has a registered consumer base of about 1 million.

52 Piyush Joshi and R.V. Anuradha; The Legal Framework for Private participation; India Infrastructure Report 2002.

53 Sec. 8(A) National Highways Act.

entity(ies). Certain basic elements for private participation are still missing in the legal framework. The National Highways Act specifies that national highways shall vest in the Union of India.[54] This provision inherently limits the scope and nature of rights that can be vested in a private developer as the relevant provisions only state that the government can enter into an agreement with the private participant in relation to the '*development and maintenance'* of a national highway. This limits the scope of private participation to 'development' and 'maintenance'; and not to activities such as 'operation' and 'management' of the national highway, development of land appurtenant to national highways, etc.[55]

Another concern for any private entity is the scope and powers of the National Highways Authority of India (NHAI) constituted under the NHAI Act, 1988. The jurisdiction of the NHAI spans over a national highway or part of a national highway which has been 'vested' in it or 'entrusted' to it by the central government. Both terms have significantly different legal consequences: through 'vesting', there can be an absolute transfer of interest in the property, depending on the nature of the vesting; whereas 'entrustment' would mean transfer in trust for a specific purpose only. This is significant in view of the fact that it is the NHAI, and not the central government itself, that has been constituted as the authority who would be signing the Concession Agreements for private participation in the national highway sector. Unless there is clarity as to the scope of powers and jurisdiction of the NHAI itself, the very basis of the Concession Agreement through which rights are sought to be granted to private developers, would be in question.[56]

Unlike most of the other infrastructure projects, the main asset of the project company in case of highways is not worth anything without the right to collect, manage, appropriate the toll revenue. Thus the lenders are exposed to the traffic risk as well as the risk of termination. Though the risk of termination can be managed with adequate legal and contractual framework being put into

54 Sec. 4 National Highways Act.

55 State Highway between Coimbator and Palgaht has been constructed by Larsen and Tourbo.

56 For a greater discussion on the scope and limits of private participation under the NH Act, the NHAI Act, and the Model Concession Agreement. Supra 52.

place, the lenders do face a direct risk.[57] Further management of the project [as opposed to construction, operation and maintenance] is very complex and expertise in the areas which include adjusting toll rates, planning maintenance for long term benefits, managing financial obligations are required. Lower usage of roads would put an immediate pressure on the object to increase the toll; in such cases, the reduction of toll in order to attract users would not be a viable option as purpose of financial projections, and it would be an uncertain assumption that a person not using a toll road would start using it just because the toll rate is lowered. Further unlike other infrastructure project, roadways hardly can advertise and sell their project increase revenues. Road networks are also poorly coordinated and further the government may have politically compulsion to extend the roads near popular vote banks areas. The Bangalore-Mysore corridor [BMIC] has been a bad example for private infrastructure projects in the country. It is thus imperative to have a Regulatory in place of such projects. As noticeable in the Highway sector, the prevalence of PPP is in various modes or models. At one time in the late 1980s, the system of PPP in the highway sector was the most resorted to, but was known in a different etymology. Owing to the factor of risk involved in the same and the rather slow attitude of the government to complete its tedious amounts of documentation, the private sector started to opt out from this sector and now the situation is such that there are not many private sector companies who bid for Highway projects. In order to revive the spirit of competition in this sector and to lure the private players back, the government now has proposed a 'Hybrid Annuity Model' which shall be enforced in order to limit the risk to the government sector and not let the private players be plagued by the associated cost risks. No such project has yet been given on this model, but the NHAI is strongly sending out the intention to put this in practice. The 'Swiss Challenge' method as well, has seen a significant growth in terms of prospective projects being done this manner.

Even the Indian Railways has allocated 1,00,000 crores for PPP for development of containers and inland depots on railway land. Delhi, Mumbai, Patna and Secunderbad railways stations have been offered for PPP development into world class terminals.

57 *Supra*, n. 25.

Private investment is also been invited in locomotive and coach manufacturing. Already cleaning and maintenance of super fast trains has been outsourced.[58]

Socialistic Regulatory Framework for Governing PPPs:

After a contract to operate, manage and build a public utility service has been entered into granting private players right to manage the PPP, the role of a Regulator in such a private public partnership should never be ruled out. The Regulatory Authority is not only a facilitator and a provider but also is an important agency to regulate conflict of interest between the State and private parties and amongst private parties themselves. The main stakeholder in any infrastructure development facility is the Government, as it is the Government which appoints the concessionaire for building of the infrastructure facility for public good.

The traditional analysis of the regulation problem as a natural monopoly has tended to concentrate on price or quantity instruments, with little concern about the institutions within which such instruments are operationalized. An alternative perspective can be gleaned from the so-called *new institutional economics* literature on regulation. This literature exhorts us to be sensitive to the fact that public utility provision is characterized by long-term contracts, and therefore the regulator can itself be viewed as an agency that balances the interests of both the consumers and the providers of a service over a long period of time. If perceived in this manner, the regulation problem becomes tractable as an exercise in institutional analysis. Given the fiat to regulate, a regulator has to choose an appropriate instrument to achieve a regulatory end.[59] An independent regulatory framework for ensuring economic regulation in the each infrastructure sector is a core essential as there may be many operators. A Regulatory must be facilitator in terms of single window clearance for PPP, an administrator for tariff determination and policy certainty and an adjudicatory to redress the grievances of the consumers as well between the Government agencies and the Private operator.[60]

58 V Jayanth, *Efficient use of rolling stock earns more profits for Railways*, The Hindu, March 3, 2008.

59 T.C.A. Anant and Jaivir Singh; *The Constitutional and Legal Framework for Governance*; <http://www.iimahd.ernet.in/~morris/iir02/chap%204.pdf.>.

60 The Telecom Regulatory Authority can be cited as a example.

Thus in the power sector the National Electricity Policy (NEP) stresses the need for regulatory certainty through independent regulation (GOI, 2005a): "….the need for regulatory certainty based on independence of the regulatory commissions and transparency in their functioning to generate investor's confidence." Such policy statements need to be translated into a political resolve to distance the government from the selection process of regulators and to provide financial independence to the regulatory institutions.[61]

Similarly the centre is also considering the appointment of an independent economic regulator for airports to fix airport tariff and safeguard public interest. An autonomous statutory Airports Economic Regulatory Authority (AERA) has been proposed as a long-term measure for the limited economic regulation of airports in view of the inherent monopoly characteristics of airport services. The regulator will be delinked from government control.

Independence of Regulators*:* Currently TRAI[62] has budgets allocated from the Consolidated Funds of India. This requires them to follow the employment, promotion and other rules and regulations as applicable to government departments, reducing their autonomy and restricting choices for appointments. TRAI has been perceived as following the government's perspective rather than having an independent view. This has led to weakening of the regulatory process. Further, the employees of the Commission and the Appellate Tribunal are to be appointed, as well as their salaries and other conditions of service are to be determined, by the central government. In addition, the Secretary General, who will play a very important role in the functioning of the Commission, will be only on deputation from the central government. These points seem to compromise the independence and autonomy of these two bodies.[63]

61 Supra note 9.

62 Telecom Regulatory Authority of India is the most prominent Regulatory in Infrastructure projects in the Country.

63 Australia followed PPP only after independent regulatory authorities were established in each area. Major airports in Australia are now privately managed, but publicly regulated.

Thus, in addition to resolving issues of contract formation and adjudication, the provision of public utility services is involved with issues of distribution, equity, and fairness. Therefore, specialized structures of governance are required to mitigate the problems associated with public utilities. The problem is exacerbated by the traditional bureaucratic and legalistic approach of the public administrations in the country. When the regulator becomes a co-administrator of the contract, it risks the creation of inefficiencies and perverse incentives.[64] It has been suggested that regulation can provide such a structure, where the regulator is seen as an agent who devises, allocates, and administers a collective contract for the provision of some natural monopoly output. This effectively means, to use phrases coined by Goldberg, that the regulator has to achieve a balance by protecting the producer's 'right to serve' against protecting the consumer's 'right to be served'.[65] Conceptualizing regulation in this manner places an emphasis on mechanisms for maintaining, adjusting, and terminating long term relationships and also raises questions about the appropriate instruments one can use for effective regulation. The discussion on instruments has often been couched in terms of trade-offs between prices and quantities (tariffs vs. quotas), command and control vs. market based instruments as in the discussion of environmental issues, and property rules or liability rules in the discussions of law and economics.[66]

The Role of Incentive Regulation

As said before, one of the great difficulties of this type of contract is that the regulator (or the public authority) is not only in charge of the standard regulatory duties but needs to guarantee to the public authority that every clause of the contract is fulfilled. It is, therefore, very important to develop a modem approach to this duty. Incentive regulation is an important way of prompting the private party to comply with the contract. Some examples can illustrate the point. First, contract design is critical to guarantee

64 Fred Aarons; *Bankable Concession Agreements: A Reality Check*, Inter-American Development Bank; <http://grupobid.org/sds/IFM/publication/gen_154_224_e.html>.

65 Goldberg, V. (1976), *Regulation and Administered Contracts*, Bell Journal of Economics and Management Science, Vol. 7. (autumn), 426–52.

66 Supra note 52.

efficient performance. Rather than design a very detailed contract, it is preferably to introduce in it mechanisms that prompt efficient performance and avoid excessive regulatory supervision. If this is the case, the contract and the bidding process should encourage the private contractor to design, for example, an efficient tariff system. The formulas for tariff regulation become critical in providing the right incentives to metering, to induce efficient consumption, optimize long-term investment requirements and, therefore, reduce the cost of service. Second, longer periods to review the contracted tariff regime will be preferable if profit-sharing mechanisms have been foreseen in the negotiation of the concession agreement and they allow the customer to share some of the efficiency gains without introducing uncertainty about the final outcome of the tariff review. Third, built-in investment incentives or mechanisms are necessary to overcome the disincentive the concessionaire faces in the later years of the concession agreements. Fourth, regulatory authorities have to rely more on ex-post evaluations of results, rather than ex-ante evaluations of inputs and means. A better alternative, and a more efficient instrument to guarantee compliance, is reliance on incentives for desired behavior rather than penalties for undesired behavior.[67]

The government must levy fees to meet administration and regulatory costs, along with universal service obligation charges, through revenue sharing, and not as an avenue to raise resources for the government. Increasing competition within the sector will ensure benefits of reduction in license fees is passed on to consumers. In relation to telecom the only area where government should collect rent is in the allocation of spectrum, which is a scarce resource.[68]

Thus a Regulatory in each independent infrastructure project is necessary:

– Private enterprises must not make undue profits from public works executed by a private company. Consumer interest is to be protected.

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67 Eva Maria Uribe; *Building Regulatory Institutions in Latin America*: *From Penalties to Incentives*; Inter-American Development Bank; <http://www.iadb.org/sds/IFM/publication/gen_154_666_e.html>.

68 Supra note 6.

- To have Government regulation in key infrastructure projects. Government control over infrastructure is the key for development in any country. There cannot be completely privatization of infrastructure projects. Also regulation of PPP should not end up in control but must rather balance competition interest between the Government, the Private investor and the citizen.
- Grievance redressal mechanism: A Regulatory has a important role in this matter
- Fixing tariffs
- Courts usually uphold the judgments of such Authorities as they are expert bodies with statutory role and function. Thus avoids a lot of litigation
- Greater credibility for long term investment
- Reduces direct Government interference by political decision

The Possible Approaches in Contract for Infrastructure projects in India: Concession Agreement[69]

Contractually, the move of creating PPP in India should be traced to the Enron power project and the Bangalore-Mysore Express Corridor. In Enron, the Government, entered into a Power Purchase agreement while providing free access to Enron to purchase land and establish its power generation unit at Dhabol. The realities were exposed when the Government felt that in the effect of inviting foreign investment, its consumers would be exploited for higher tariffs. The Power Purchase agreement did not provide of licenses or grant of rights to generate power nor did it in turn give socialistic control of the project to the Government. The Government was left with no alternative but to litigate the high tariff in the Courts and thereby delaying foreign investment into this country for nearly 5 years. Private players pressed for the application of the principle of promissory estoppel against the Government from going back on its promise in MOU [contract]. Supreme Court has held that there is limited application of the rule of promissory estoppel in contract

69 Concession agreements involve the temporary transfer of service assets to the private partner who makes the investments necessary to maintain the service provision in good condition during the term of the contract. The assets are transferred back to the public authority at the end of the concession period.

against the Government and hence the argument in this case against the Government failed.[70]

Today having learnt from Enron and BMIC, the Government enters into a contract with the PPP. This contract is titled as a Concessional agreement.

Concession is a right granted by a government to a corporation. The concession means a ***long-term leasing agreement*** with a difference made between and by the State and a concessionaire for the purpose of making foreign investments, exploitation of natural resources and doing business related thereto. Special conditions of concession shall be provided in concessional agreements; comparatively a lease would create some type of interest or a right of the leasee over the leased property. In a concessional agreement, the Government 'grants' a right to the private consortium to own the assets for a limited period of time. Further this ownership is neither absolute or qualified. It is ownership only for management purposes according to the nature and requirements of the concession agreement. The agreement is also a 'grant' for a limited time, ranging from 10-30 years, depending upon the infrastructure project. The time is important so as to give reasonable opportunity for the Concessionaries to recover the cost of investment in the project and also to make atleast 20-25% returns over and above the incurred cost of building, maintenance and operation.

Fundamental principles of concession are as follows:

a) Longevity of concessional rights to use land and natural resources and to conduct specific business activities;

b) Competitive approach to the selection of concessionaires, based on the assessment of tenders, specific regulations of which will be provided by the legislation on the Infrastructure sector;

c) Compliance with Statutory legislation in relation to the specific infrastructure sector as well as the contractual provisions.

Thus a Concession agreement specifies rules under which the company can operate locally. Some concession agreements might include tax breaks for the corporation, in order to keep them from

70 For more on Promissory Estoppel see M P Sugar Mills v State of U.P. AIR 1979 SC 621.

moving to another jurisdiction. It is an understanding between a company and the host government that specifies the rules under which the company can operate locally.[71]

Since the early 1980s, developing countries have used the BOT structure to finance infrastructure projects in sectors ranging from roads, to power, to water supply and treatment systems, among others. The BOT structure is based on a concession agreement, such as a toll road concession or contract for a power plant. The concession codifies the credit/financial structure in the legal documents to create what should be a watertight set of provisions acceptable to all parties to the transaction.

The operation period must be for a fixed term that is sufficient to pay back the project debt and provide a return to equity. For this reason, the agreement should contain provisions for the extension of the operation period. When a project's financial return has been jeopardized by a Government's default on its contractual obligations, then the period of the concession should be extended. Of course, adequate termination provisions must be included along with proper compensation (e.g. by establishing liquidated damages) to those affected.

Owing to the risk of default from either the Government or private investor, safeguards are necessary to provide adequate security to the project's lenders. Standard techniques to avoid default also include offshore escrow accounts and/or the assignment of the benefits of various contracts to the lenders, and the lender's right to "step in" and take over the rights of the project company. In the case of the assignment of rights under a concession agreement, lenders seek the prior consent of the government to ensure project continuity and loan repayment. Governments, however, are reluctant to assign concession rights. If they do, their preference is for assigning these rights just before the actual transfer is required. A sound assignment provision is necessary to provide comfort to the lenders that their loans will be repaid and to permit the Government to verify that the recipient of the concession ("assignee") is capable of satisfying the terms of the contract.[72]

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71 <http://financial-dictionary.thefreedictionary.com/Concession+Agreement>.

72 Supra note 47.

There are regulatory issues of particular importance that must be addressed in all concession agreements. These include (i) whether the public is willing to pay for services that were previously subsidized; (ii) whether regulations will restrict the freedom of the operator to set and review appropriate fare/toll levels; (iii) whether and when the concession will revert back to the Government; (iv) what will be the policy on competing infrastructure providers; and (v) whether the legal framework for awarding concessions, permits and land acquisition, if necessary, is well defined.

Operational risks arise from an operator's technical inability to fulfil its obligations, the failure of equipment to meet specifications during commissioning, or a host of other factors. A concession agreement must address these factors, while providing comfort to each party without encouraging the abandonment of the project at some stage. To mitigate some operational risks and ensure that the service is provided to the population, the contract can require the implementation of an operation and maintenance manual and/or the use of performance bonds/Bank Guarantee as mechanisms to monitor and control proper project operation.

Normally, the law of the country in which the project is developed applies to concession agreements. Yet, Governments are not always forthcoming in accepting alternative dispute resolution mechanisms (such as mediation and arbitration) to resolve controversies arising from a concession. These mechanisms are internationally recognized and provide a viable means to resolve problems expeditiously and transparently. Their inclusion in the concession will provide comfort and reliability to the parties involved in the agreement and, therefore, should always be considered. Further ADR clauses are not adverse to in Government contracts. As apart from arbitration, judicial review is still a possible approach for resolution of disputes.

Some of the earlier PPP projects included non-compete clauses that precluded the public sector from making any improvements that would increase capacity that competes with the privatized toll facility. Such clauses were intended to give the private sector comfort that the public sector could not unilaterally decide to undercut the revenue stream of the investors. There are enough examples of this occurring that this seemed like a reasonable provision that would be necessary to attract bidders. The Government of Karnataka also decided to compete with BMIC by going ahead and building its own express way from Bangalore to Mysore which may act as an alternative to the BMIC. Though this does not seem to have been challenged by BMIC in any of the Court arguments, this is something the Government must desist from discouraging PPP in any Infrastructure project.

It should be remembered that a concession agreement represents a partnership between public and private sectors.[73] Borrowed from Latin America, where it is popular, Concession may be fully privatized with Government holding a stake in the project or the public utility serviced.[74] Selection of concessionaire strictly by bidding. The ground which quotes the highest concession fee payable to the Government. Concession fee is that which is collect by toll [such toll can be collected as soon as the concession agreement is entered into]. A Concession agreement can be amended at a later stage also. For Example in 2006, in Bangalore International Airport Limited PPP, the Central Government approved the change in the contract in design [redesigning the terminal building] so as to increase the capacity of handling passengers at BIAL. Grant of Concession is usually for Airport between 20 to 30 years, for Highways not more than 10 years in State Highways, not more than 20 years in case of national highways.[75]

The lack of basic infrastructure services in poor urban and rural areas, the impact of infrastructure on overall economic performance, and its economic and social implications, are powerful incentives for governments to take an active role in the provision of infrastructure services. From a political perspective, state ownership of infrastructure assets and the provision of services are assumed to guarantee that social obligations will be met. It is also believed that ownership will allow the government to intervene whenever it perceives that the service provider is not fulfilling its obligations to provide adequate service.

73 Supra note 47.

74 Ellis J Juan; *Privatizing Airports-Options and Case Studies; Public Policy for Private Sector*, The World Bank, June 1996.

75 For more see <www.nhai.org>.

Another impetus for the concession approach is the belief that the private sector can deliver services at less cost than the public sector. They can do this because they have a stake in the long-term cost structure of the project and have an incentive to control costs and maximize their return on investment at every step. Most importantly, the private sector has agreed to operate and maintain the facility at a particular price: if it cannot contain costs and be efficient, it will lose money.[76]

Development of the Indian Defence Sector as the New PPP Venture

Introduction of the 'Make in India' initiative in the country by the recent government, has seen the development of a new trend in inviting private and foreign investment in various infrastructure sectors. The most recent one to accept this initiative rather handsomely was the defence sector. Surpassing the earlier existing impediments of having a closed environment citing national security, national interests etc. the Government of India now invites 100 percent Foreign Direct Investment in this sector. Increased private investment in various areas of the defence sector, such as direct and indirect defence components being developed by the Defence Public Sector Utilities (HAL, BEL etc.), has led to an increased focus on to the establishment of a strengthened institutional framework to ensure smooth functioning. Right from the manufacturing of defence components such as engines for Helicopters and indigenous aircrafts, batteries for submarines deployed in the naval services, critical components of the Infantry Combat Vehicles and Main Battle Tanks, to the proposals to fence the borders and contracting to develop the cantonment areas with small infrastructural facilities, the avenues are galore for private investment. Another area of interest has been the public private partnership model to be functional for maintenance, repair and overhaul (MRO). For this purpose, the illustrative example shall be the case study of the PPP in the MRO space in the United States of America. Similarly, private investment in a partnership manner is sought by the Border Roads Organisation (an extension of the

76 Jeffrey N. Buxbaum and Iris N. Ortiz; *Protecting the Public Interest: The Role of Long-Term Concession Agreements for Providing Transportation Infrastructure* Cambridge Systematics, Inc. Research Paper 07-02 – June 2007; The Keston Institute for Public Finance and Infrastructure Policy Research Paper Series Index: <http://www.usc.edu/schools/sppd/keston/research/index.html>.

National Highways Authority of India), the building of air strips for the exquisite usage for defence purposes and the development and/or refurbishment of the ports for defence purposes.

As much as it seems an exciting and forward-looking venture, it has its own challenges, the foremost being the feasibility of introducing privatisation without any strict regulator to oversee the work being done. The defence establishments being very sensitive and withholding national security, which sectors must be opened up for the private investors and to what extent, is something which must be established beyond reasonable doubt in a policy document. The current policy, providing an overview into the process of defence procurement and production, The Defence Procurement Policy of 2016, has introduced certain recommendations and suggestions wherein the concept of PPP can be ingrained into the defence sector, more specifically, with the Arms Manufacturing Units, so that this sector is strengthened in terms of finance, technology and quality. The private investors and companies such as L&T, Reliance Defence, Kalyani Defence Ltd., Mahindra and Mahindra etc are some very influential private investors who have shown keen interest and qualification to be introduced in the defence sector as partners to the Government of India. To overcome the issues of time and cost overruns, obsolete technology and mismanagement, the option which is being mooted very strongly is that of introducing PPP as a model. This model is preferred over privatisation as in a PPP model, the government of India as the chief partner, can efficiently exercise control over the outflow of information and safeguard against any kind of espionage which is greatly feared. Another contention is that PPP be introduced by method of making a 'Consortium' along with the Government. Like for example, if the existing Arms Manufacturing Units (AMU) of the Indian Defence Sector are converted into PPP models, with each AMU in partnership with a private concessionaire either individually or through a Special Purpose Vehicle being represented by a consortium of more than one Private Indian Company/foreign company, the output from that AMU shall be better in technology, time, efficiency and cost. The venture shall be profitable, thus ensuring that the defence sector is not pushed into a debt situation, nor compromising on the quality of the arms thus produced.

The Defence Procurement Policy of 2016, suggests some radical changes which are aimed at balancing the fear of privatisation and the need for introducing some efficiency within the defence sector. Strategic Partnership, as introduced by the DPP, 2016 is suggestive of some kind of contractual relationship between the Public and the Private (Domestic/Foreign) Investor with whom the trade relations shall be established and continued for a specified period of time. To make it easier for the vendors, there shall be enhanced parameters which would cater to the special requirements as according to the Request for Proposals and Request for Qualifications as would be floated. The policy has also aimed at making it easier for the quality assurance to be given, by creating levels of importance of projects, which shall not be stuck in endless paperwork but shall be sent for field-trials and quality checks to the Directorate General Quality Assurance in Kolkata, thus reducing the time for delivery of the equipment. It has been witnessed in the past, where HAL, the Defence Public Sector Undertaking has been in continuous legal complications with its private and MSME vendors due to delay in the delivery of the products so tendered for, that the amount of liquidated damages as imposed on the MSME has only been increasing while the financial debt on the DPSU has been increasing per year.

It would not be entirely incorrect to comment that the defence sector has gradually become the most important infrastructure investment destination. The PPP model can play a major part as it is a utilitarian model to combine the strength of public as well as the private sector and administer worthy results in a reasonable time period and resources. Merits of a PPP model in the defence sector is commitment to efficiency, state of art technology, timely outputs, positive competitiveness and greater transparency. This shall not only introduce healthy competition within the private sector, but shall also become assets for the country as the shared resources and risks would make them profit-making and nation-building ventures and not merely business ventures.

The only major concern which needs to be voiced here is that before the PPP is introduced in the core areas, such as arms and ammunition manufacturing and building of aircrafts and submarines, it is strongly suggested that there is a regulator in this regard, which shall be responsible for the administration, management and oversight of the PPP unit, so that the Government sector is not completely taken over by the wave of privatisation and for the long term realization of the Make in India initiative, there is a healthy and balanced mix of the private as well as public investment. Once assured of this, the PPP model is undoubtedly the best way forward for the defence industry which is currently plagued by time and cost mismanagement which is slowly becoming evident with its DPSUs now slowly losing their grip over efficiency and efficacy.

Conclusion

The legal regime surrounding airport privatization continues to evolve and there are many questions that are yet to be answered or are only just being considered. For example, the law relating to tender auctions that has stood since *R D Shetty v. Airports Authority of India*[77] has only recently been considered and restated in *Reliance Airport Developers Ltd. v. Airports Authority of India.*[78] The Supreme Court re-examined the law governing public auctions in the context of privatization, and upheld the government's right to exercise its discretion and good judgment while re-emphasizing the importance of natural justice in the granting of such concession. The Court held 'with all rights comes responsibilities'. Thus MIAL [the company developing Mumbai's Chhatrapati Shivaji International Airport] was held to be a 'State' for the purpose of the Constitution in *Flemingo Duty free v. Union of India.*[79]

With a pinch of salt, with a look at some of the concession agreement between Government and the private party, many of these agreements show lack of deep understanding of the future positions which are highly volatile and unpredictable. Take for instance, clauses in which the concession period is granted has often left aside the procedure for transferring the infrastructure facility after the period of concession is over. Further, vague and very general remarks of renewing the concession agreement have also been found. The agreement [s] fails to lay any guidelines as to the nature of the extension or the ground for denial of the period of

77 1979 Indlaw Sc 16.

78 2006 Indlaw Sc 913.

79 2008 Indlaw Mum. 228.

concession. Thus just a few years from the emerging concept, these agreement are bound to create legal problems after 20 or 30 years from which many of them may come up for review.

The use of eminent domain for public projects is a sensitive issue which transcends long term concessions. The public perception is that the power to use eminent domain is transferred to the private sector under a long-term lease agreement when in fact this has not been the case for any private concession agreement in any part of the world, especially in latin America[80] where concessional agreement first arose for public attention.

Further the constitutional framework in India does not permit for a single law governing grant of rights for development of projects in all the infrastructure sectors. While infrastructure remains an exclusive public sector monopoly, the rationalization of user charges in infrastructure is absolutely vital. A regulatory regime that is seen to be fair to consumers and also sensitive to the legitimate needs of investors, is absolutely essential.

In this context, regulation can fall into grey areas where the public-private partnership results in the co-administration of the contract and the operation. Inspection and control of the contract are sometimes conceived as the only required regulatory duty, but entails the danger of becoming a permanent auditing and co-administration of the contract. Intrusive regulation thus substitutes for a modem economic regulation (that should conceive its role as an ex-post verification of performance and regulatory compliance), increasing the risks associated with regulatory uncertainty. To avoid the above pitfalls, the design of the concession contract is critical to ensure proper and efficient regulation. Furthermore, the fact that the ownership of the assets remains in the hands of the public sector may not provide the appropriate incentives to the parties involved and will be a factor that increases the regulatory risk.[81]

The concession model has grown from the reality that our Infrastructure system needs far more money than is available from traditional sources. For example in Mysore, the building of

80 In Peru the Lima airport was first example of a concession agreement.

81 Supra note 47.

a shopping complex has been granted in a PPP model through a Concessional agreement.[82] This only goes to show the importance of PPP which may range from building highways and airports to building important public utility systems for greater and improved developmental activity within the country.

There are no silver bullets in public finance and there are no easy answers to this fundamental dilemma. Parts of the system are more than half a century old and need to be rebuilt. Some areas of our country are growing so fast that substantial and costly investments are needed simply to keep pace. The concession approach to project financing has many advantages over traditional methods and has met many concerns with these non-traditional techniques.

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82 Development of Commercial Complex at Makkaji Chowk, Mysore. Copy of this draft Concessional Agreement is with the Author.

Chapter 2

A Contractual Analysis of Various Models of Public Private Partnerships

Adwiteeya Sharma

Introduction

The growth and development of every nation is highly dependent on the infrastructure development of that country. The government specific models have a lot of bottlenecks in terms of finance, efficiency, etc. The privatization of the same allows for more investment from the private sphere and also a more efficient system. As the Indian infrastructure sector was highly deficient, the government adopted the Public-Private Partnership (PPP) model. The question which arises is what "public-private partnership" model is and how it is different from other form of construction contracts or privatization.

Public private partnership can be referred to as to "long-term, contractual partnerships between the public and private sector agencies, specifically targeted towards financing, designing, implementing, and operating infrastructure facilities and services that were traditionally provided by the public sector". In Indian context, "Public Private Partnership (PPP) Project means a project based on a contract or concession agreement, between a government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges". The basic difference between the traditional construction contract and PPP is that under the former, the private sector is responsible just for design and construction risk while under PPP, the private sector is supposed to bear more risk in terms of financing, demand, etc which is dependent on the contract entered into between the public and private entity.

PPP model can be of different types depending on what the government expects out of the private partner. It can be investment based PPP or mere operation and maintenance based, where the government merely wants to utilize the efficiency of the private sector. The basic premise here is to analyze the process of formation of a PPP and different modes which are to be followed by following a descriptive and analytical method. The first part of the chapter deals with the process of formation of a PPP, the requirement of identification of project, the mode identification, bidding, formation of a special purpose vehicle (hereinafter to be referred as "SPV"), etc. The second part shall look into the various modes of PPP like operation and maintenance, lease or affermage, concession in terms of Build-Operate and Transfer (hereinafter to be referred as "BOT") and then different forms of BOT. The third part is the study of two main sectors where PPP model has been significantly adopted.

Formation of Public-Private Partnership

The very first step is identification of the project by the government. For example, if a new airport has to be constructed. The second step after it is the stakeholder analysis or impact assessment. The government identifies the different stakeholders which will be involved, surveys them and considers the pros and cons of establishing the project. The third and very crucial step is the project structuring, along with risk analysis involved in the project at its core. The government once when it is sure that it wants to go ahead with the project, fulfils the pre-procurement functions like land acquisition for the project, etc. After this, the notice for tender is passed and the announcement for bidding is made.[1]

The government, depending on the project generally follows two different types of bidding procedure, i.e., one stage bidding and two stage bidding. In the case of one single stage bidding only request for proposal is to be filed. In the case of two stage bidding, firstly, request for qualification is filed by the parties. It is like an objective threshold check regarding the financial, technical, etc. qualifications of the private party. Once this stage is passed, the

1 PPP Cell, Ministry of Finance, Government of India, *PPP Guide for Practitioners*, <https://www.pppinindia.gov.in/documents/20181/33749/PPP+Guide+for+Practitioners/e3853cb9-ac07-4092-b8ac-60a8c4d4ed35> (visited on October 3, 2017).

shortlisted parties are notified and then they are required to file "request for proposal". A model draft agreement is always kept ready so that the private parties know all the risks and obligations attached. Finally, on the basis of evaluation of the "request of proposal" by a set panel, the project is granted. As these projects require high financial investment, different parties like a designer firm, construction contractors, etc, majority of times four-five parties together, form a consortium and then bid for the project.[2]

To give an example, the NHAI entered into a concession agreement with M/s GMR Pochanpalli Expressways Private Limited for design, operation, construction, development, finance and maintenance of Adloor Yellareddy and Gundla Pochampally on NH-7 in Andhra Pradesh. The government had directed NHAI to widen the 2-lane portion of National Highway No. 7 from 367kms to 447 kms. NHAI invited proposals via a single staged process to develop and maintain this specific stretch, and had mentioned the terms for selection in its notice which it had sent to the firms initially, as an invitation for proposals. It asked the potential bidders to divide their entire proposal in three parts and send it across in the same envelop. These parts were the firm's credentials, the technical proposal and the financial proposal. The firm with the highest combined score of the technical and the financial proposal would be selected finally.[3]

To illustrate the difference between the two kinds of bidding processes, another example is when the government was working on the Zoji La pass on National Highway 1 between Srinagar and Leh. It had initially invited bids, but had not received any. A meeting was held by The National Security Council on "Border Infrastructure" and it was decided that the development of this tunnel was a strategically important issue and must be taken up again. It called for bids for the second time through a double stage bidding process. Herein, the technical proposal is submitted first. The firms were allowed to recommend the government on the technicalities of the project. Only the firms that were selected

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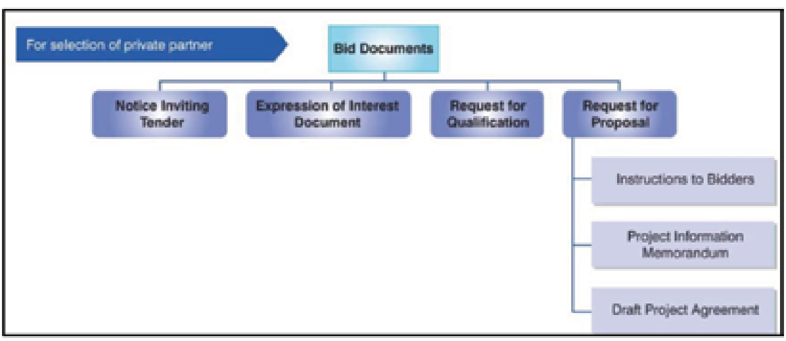
2 *Ibid.*

3 National Highway Authority of India, *Concession Agreement between National Highways Authority of India and M/s GMR Pochanpalli Expressways Pvt Ltd*, PPP INDIA <https://www.pppinindia.gov.in>.

in this stage are allowed to submit their financial proposals to the government. In this scenario, many firms had submitted their technical proposals, but, out of the ones which were selected, only one had sent its financial proposal. As a result, the government decided to shift the bidding process from a double staged process to a single staged one. The change was made so that the firms could submit their technical and financial proposals at the same time, in different envelops. Nevertheless the bid was cancelled in lieu of violating Central Vigilance Commission (CVC) guidelines. Finally the government gave the project to National highways and Infrastructure Dev. Corp. (NHIDCL) with full funding for its design, construction and operation[4].

At another instance, NHAI adopted a two-stage bidding process for developing, maintaining and operating the Jaipur Kishengarh section of NH-8. The process was divided into the qualification stage and the bid stage. In the qualification stage the firms were required to submit documents with regards to RFQ. Post that the NHAI announced a list of 6 candidates who could put forward their financial proposals in the bid stage.[5]

The government also has a model "request for qualification", "request for proposal", and various model concession agreements for different sectors. These model agreements were made in 2007 and have been continuously updated and are flexible to change as per the requirement of individual projects.



4 <https://economictimes.indiatimes.com/news/politics-and-nation/cabinet-approves-zojila-tunnel-project-in-jammu-and-kashmir/articleshow/62351425.cms>, <http://www.dailyexcelsior.com/a-tunnel-strategically-important/>.

5 *Ibid.*

Fig 1. Process Followed for Selection of Private Partner

Once the project is granted to the consortium or to a single private party, it is their obligation to form a special purpose vehicle in which they will be stakeholders. This special purpose vehicle enters into the agreement with the government for the purpose of fulfilling the obligations of the project undertaken[6]. The consortium can either form a special purpose vehicle (in the form of a company incorporate under Companies Act, 2013) or can also enter into unincorporated joint venture. Both of them have been discussed in detailed.

Special Purpose Vehicle

In PPPs, once the process of choosing the successful bidder is completed, the successful bidder is required to form a company specifically for the purpose of fulfilling the obligations of the project undertaken. This company is generally called Special Purpose Vehicle. It is generally formed when the project agreement is to be signed. It is the SPV which signs the contract with the government.[7] Therefore, all the rights, liabilities, assets and obligations will be assumed by the SPV. Subsequently, the cash which is required for the purpose of the project is piped through this SPV, and it is this SPV's balance sheet where all the assets and liabilities in relation to the project are recorded. As per the model "Request for Proposal" of the government, the winning bidding entity has to form a SPV in the form a company incorporated under Companies Act, 1956 (now 2013).

Consortium of Private Entities

When two or more than two private parties are involved, they form a consortium and the members of this consortium are the ones who will be shareholders in the SPV, in addition to other shareholders (like investors, lender banks, etc). As these consortium members will be playing different parts in the project, like construction

6 Government of Haryana, *PPP Policy in Haryana*, <http://www.haryana.gov.in/portalapp/ citizens/policies/PPP-Policy-Haryana.pdf> (visited on October 3, 2017).

7 Ernst & Young LLP and FICCI, *Public Private Partnership: The next continuum*, (2013), <http://www.ey.com/publication/vwluassets/ey-public-private-partnership-the-next-continuum/$file/ey-public-private-partnership-the-next-continuum.pdf> (visited on October 3, 2017).

contractor, etc, all the members may not want to be shareholders of the SPV created. In the case of the construction contractor, it might just want to be a nominee contractor in the proposal. The main reason behind not wanting to be a shareholder in the SPV is the obligations and the risks which arise out of it. A shareholder is generally responsible for all the aspects involved in the PPP project.[8] But if as a construction contractor you don't want to be overburdened with extra responsibilities and just want to focus on the construction activities, it is a beneficial idea to stay out of the SPV. The shareholders will get an equity stake in the SPV and their equity share will be as provided in the shareholders' agreement which they would have already negotiated and agreed to amongst themselves. Depending on the work and funding, the equity holding of different members vary. Generally, it is the primary sponsors who collectively (as PPPs are generally for high budget infrastructure projects) hold the majority share of equity in the SPV.

This structure has its benefits in terms of just having one point of responsibility and liability of the SPV, towards the government as well as its lenders. Therefore, there is no requirement of joint and several liabilities of different consortium members.

Government: Merely a Contracting Party or an Equity Holder in the Spv[9]

In a lot of PPP projects, it is the private entities which are responsible for sourcing the funds and they are only the part of the consortium which forms the SPV. There are certain projects in which the government entities also provide with some part of the funding. In such projects, the government entity is also provided with equity in the SPV proportionate to the finances or other capital provided by the government. In India, government entities are also part of the SPV. Ex: Delhi International Airport Ltd.

8 Isabel Marques De SA, *How do you build Effective Public Private Partnership*,Yale Insights (May 16, 2017), <http://insights.som.yale.edu/insights/how-do-you-build-effective-public-private-partnerships> (visited on October 3, 2017).

9 UNESCAP, *A Primer to PPP in Infrstrusture,* <http://www.unescap.org/ttdw/ppp/ppp_primer /2253_b_buildoperatetransfer_bot.html> (visited on October 3, 2017).

Unincorporated Joint Venture

The other form of structure which is followed by the consortium members is the "unincorporated joint venture". This structure is more like a cooperation agreement where the parties agree to be part of it as individual contractors instead of being shareholders of a company or partners of a registered partnership. The basic premise is that the joint venture establishes business relationship between the parties for the furtherance of a common purpose. This structure is adopted in the cases where the parties do not want to be burdened by the formalities associated with an incorporated company or any other corporate vehicle. The advantage of this structure is that the parties mutually decide and agree upon their rights and obligations and also the duration of their relationship[10]. In such a JV the rights, duties and obligations of the parties as between themselves and third parties and the duration of their legal relationship will be mutually agreed by the parties under the contract. But, this advantage has converted into disadvantages into those cases, where the governing authorities made it obligatory for all the parties to the joint venture to have joint and several liability.

In the case of *Alstom Transport SA* v. *DIT*,[11] four parties formed a consortium and bid for the tender. On being successfully chosen as the private partner, the private members were to dutifully perform the obligations arising out of the concession agreement. It was held that the members of the consortium were jointly and severally liable to fulfil the conditions of the tender and were also jointly and severally obligated towards the concessioning authority for the purpose of performance of the obligations arising out of the agreement. In one of the cases, the Authority of Advance Rulings (AAR) held that as the private members entered into the agreement with a common commercial purpose, and they are jointly and severally liable for the purpose of fulfilment of obligations arising out of the concession agreement, the consortium should be treated as "Association of Persons", disregarding the division of rights and liabilities mutually agreed upon by the parties. This leads to issues

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10 The National Council for Public-Private Partnerships, *Types of Partnerships*, (2012), <http://www.ncppp.org/ppp-basics/types-of-partnerships/> (visited on October 3, 2017).

11 Alstom Transport SA v. DIT, TS 387 AAR (2012) (Authority for Advance Rulings).

regarding the handling of income tax filing by different parties.[12] Therefore, this structure has not proved to be an appropriate model in India.

Modes of Public Private Partnership

There are different modes of public private partnership depending on the agenda with which the project was started. In certain cases, where the asset is already in existence and mere maintenance is required, just maintenance contract will be entered into. In other cases, where a new asset has to be built, but the ownership always needs to vest in the government, BOT framework will be adopted but in cases where ownership passes on to the private party the "Build, Own, Operate and Transfer" framework(hereinafter referred as BOOT) needs to be followed. Therefore, dependent on the requirement of the project, different modes are followed. This section discusses three major modes.

I. Management/Service Contracts

This mode is generally chosen when the asset is already in existence and for its efficient functioning, management and maintenance by a private entity is required. This mode functions on the contractual arrangement between a private partner and the government entity for the partial and full management of a public asset. This mode allows the government to utilize the skills of the private sector for "service design and delivery*, operational control, labour management and equipment procurement"*.[13] This mode is more focused on input rather than output. In terms of ownership, the asset is always with the public entity. The ownership of the asset is not transferred to the private partner.

The remuneration of the private entity is either based on its performance or as per the amount fixed in the agreement with the public entity. Unlike other frameworks, it is not dependent on collection of tolls, etc. The quantum of risk sharing for the asset condition, with the public entity is either very low or negligible. In

12 As this paper is not dealing with tax related aspects, this issue has not been discussed in detail here.

13 SAS Institute & OECD, *Different Forms of Public-Private Partnership*, (2009), <https://www.oecd.org/cfe/leed/42171363.pdf> (visited on October 3, 2017).

this mode, generally, the duration of the contract is short ranging between two to five years. But in case of large operation assets like airport, it can be longer and can extend upto twenty to thirty years. There are various different kinds of management contracts like supply-service, operational management, etc[14]. The operation and maintenance contracts are generally more sophisticated and complex in nature. They are way more focused on efficiency by incentivizing the private entities to be more efficient by linking the remuneration to defined performance targets.

II. Lease/ Affermage

In this mode of PPP, the private partner is generally not responsible for financing the investment but when it is applied with other modes like build-operate or rehabilitate and transfer, etc, the private partner is also required to make certain financial investment. The commercial risk involved here is much higher than the one involved in a management contract. The duration of the contract is also longer than the one in management contracts. The basic difference between lease and affermage is that under a lease, the private partner is allowed to retain the revenue which he must have collected from the customers who must have used the facility and he just has to make a payment of specified lease fees to the public entity. Whereas, in case of an affermage the public and the private partner share the revenue collected amongst them[15]. NHAI adopted a two- stage bidding process for developing, maintaining and operating the Jaipur-Kishengarh section of NH-8. The process was divided into the qualification stage and the bid stage. In the qualification stage the firms were required to submit documents with regards to RFQ. After this NHAI announced a list of 6 candidates who could put forward their financial proposals in the bid stage[16]. As far as its structuring is concern, both leases contract

14 NIGP Business Council, *A Guide to Public-Private Partnerships1 (PPPs): What Public Procurement Specialists Need to Know*, (2015), <https://www.nigp.org/docs/default-source/New-Site/research-reports/guidetopublic-privatepartnerships(ppps)>.

15 World Bank, *PPP Arrangements / Types of Public-Private Partnership Agreements*, (2016), <https://ppp.worldbank.org/public-private-partnership/agreements> (visited on October 3, 2015).

16 Public-Private-Partnership Legal Resource Center, *Leases and affirmative contract*, World Bank Group (July 26, 2018, 2:05 PM), <https://ppp.worldbank.org/public-private-partnership/agreements/leases-and-affermage-contracts>.

and affermage contract are very much similar but difference lies in the way the distribution of profit is done. In the former one, some receipts go to the awarding authority i.e. government as a token of fee for being financial investor and owner of asset which you can say "lease fee" and the remainder being retained by the operator and as far as affermage is concern, both government and private, share the profit. For example, if some road project is done through PPP of leases and affermage model then the revenue which is collected in the form of toll tax would be distributed among the parties.

Examples of leasing in the transport sector include Rajiv Gandhi Container Terminal, India, Laem Chabang Port Terminals B2, B3 and B4 in Thailand, and Guangzhou Baiyan Airport in China.

- Potential advantage – it is concern with improving operating practices without giving private sector control of asset. Moreover, cost recovery option is also very much available to the government.
- Potential disadvantage- There is very less space for improving the efficiency[17].

Two sectors in which lease and affermage contract are prevalent are water and sanitation and energy sectors. There was a contract between the government and private party in the Middle East in 2004 introduced to improve water quality, efficiency and collection. Contract went out to tender but there were no bidders because of political instability and dangerous operating conditions, but also because the operator was asked to take on full risk of the asset condition and collection risk, without any transition period to test authority's data. The government sought to outsource water and sanitation operations over a relatively long period, it was willing to transfer control of day to day operations and to retain responsibility for financing investment[18]. Main features of this agreement were-

17 World Bank, *Public Private Partnership in Water- Contract* (visited on July 26, 2018), <https://www.ifc.org/wps/wcm/connect/feac99804b9ae6f8bca9ff1be6561834/T_2a_PPP_ContractsDelmon.pdf?MOD=AJPERES>.

18 Public-Private-Partnership Legal Resource Center, *Leases and affirmative contract*, World Bank Group (visited on July 26, 2018), <https://ppp.worldbank.org/public-private-partnership/sector/water-sanitation/lease-and-affermage-contracts>.

- Operator had to perform whole water and wastewater network and bill customers.
- Term was set for 12 years (this is quite a typical period for a lease).

III. BOT/BOOT (Concession Agreement)

In this particular framework, the private party is generally supposed to build and operate a public asset for a fixed period of time. The question of with whom the ownership lies depends on the project. In these types of PPPs the movement of the payment can be both ways, the government can pay certain amount as investment in the project (as per the agreement) or the private partner can pay the government for the concession rights. They are generally there for longer duration ranging somewhere from 5 to 50 year. This form of PPP does not focus much on inputs as the private party is generally left with the autonomy to decide the way it should approach the project in order to achieve the performance standard set by the government authority. But the autonomy is not extended to certain areas like "requirements regarding frequency of asset renewal and consultation with the awarding authority or regulator on such key features as maintenance and renewal of assets, increase in capacity and asset replacement towards the end of the concession term".[19] On the basis of different projects, different forms of BOT or BOOT modes are followed like DBOT, LDOT, DBFOT, etc. Annexure- A attached to this paper talks about these different modes.

The figure on the next page provides for the different modes of PPP applied in different projects in different sectors.

19 NZIF, *What are Public Private Partnerships*, (2009), <http://www.nzsif.co.nz/Social-Infrastructure/What-are-Public-Private-Partnerships/> (visited on October 3, 2017).

Fig. 2. Different Modes of PPP in different sectors in India

Sno	Sector	Project type	No of Projects	Amount Rs Cr	Total Amt Rs Cr
1	Airports	BOOT	2	4408	
		LDOT	2	14400	
		BOO	1	303	
		BOT	1	20	19131
2	Education	BOT	6	199	
		BOOT	5	745	
		DBFOT	1	600	
		Lease	1	40	
		Not Specified	4	209	1793
3	Power	BOO	9	36902	
		BOOT	33	13512	
		BOT	19	19050	
		DBFOT	1	382	
		Not Specified	7	15298	85144
4	Health Care	BOOT	1	275	
		BOT	4	92	
		DBFOT	2	217	
		Mgmt Contract	2	28	
		Not Specified	4	1274	1886
Sno	Sector	Project type	No of Projects	Amount Rs Cr	Total Amt Rs Cr
5	Roads	BOOT	2	443	
		BOT	92	42902	
		BOT-Annuity	63	27022	
		BOT-Toll	272	131606	
		DBFOT	13	2762	
		Not Specified	15	39561	244296
6	Railways	BOT	8	3318	
		DBFOT	1	594	3912
7	Ports	BOO	1	1500	
		BOOST	6	9594	
		BOOT	9	28886	
		BOT	13	14286	
		BOT-Annuity	3	5777	
		BOT-Toll	14	11493	
		DBFOT	2	538	
		Lease	3	1475	
		Mgmt Contract	1	150	
		Not Specified	10	18702	92401
8	Tourism	BOO	1	55	
		BOOT	4	537	
		BOT	13	891	
		BOT-Annuity	2	1067	
		DBFOT	11	1089	
		Lease	14	565	
		Mgmt Contract	2	92	
		Not Specified	7	334	4630

Domestic Practices: Sector Specific Studies

In this section of the paper, two different sectors and their policies have been discussed. The first sub-part deals with the "Airport" sector and the second part deals with the "Highway" sector.

I. Airport Sector

The airport sector in India has been and is dominated by the PPP sector. Almost all the airports in India are working under the PPP model (this has been discussed in detail in later part of this section). The National Aviation Policy, 2016 also talks about the PPP model being followed in the airport sector. The Strategic Plan (2010-15) also stated that "all non-operational Airport Authority of India or state government airports and all green-field airports can be developed through PPP model and BOOT scheme". [20]It also provides for government funding in order to bridge the funding gap.

India has a "Greenfield Airport Policy" which provides for the mechanism to be followed to establish a new airport. The policy states that "the AAI Act enables AAI to grant a concession to a private entity for financing, development, operation and maintenance of an airport being managed by AAI. As such, greenfield airports to be developed by the Central Government could adopt the concession route if private participation is envisaged". Therefore, the policy provides for PPP route for establishment of a new airport. This policy regards the PPP model to be the preferable model in case a Greenfield airport is set up by AAI. It states that in case of lack of funding, the capital grant under Viability Gap Funding Scheme can be provided.[21] It also states that the land for the airport will be provided by AAI and the project to be granted through competitive bidding.

As the airport sector falls under the Union list, a state government cannot enter into a concession agreement with a private party for the establishment of an airport as it would be unconstitutional but the state government can aid the establishment of the airport in its state by providing other aids. In the following sub-parts the researcher has looked into the PPP mode followed in different airports in India.

Delhi Airport

The condition of both the airports was quite dismal, therefore in September, 2003, the Union Cabinet decided upon restructuring of both Delhi and Mumbai airports. This restructuring was supposed to be done through establishment of joint ventures.

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20 Tojo Jose, *What are the different models for Public Private Partnership (PPP) in infrastructure?*<http://www.indianeconomy.net/splclassroom/271/what-are-the-different-models-for-public-private-partnership-ppp-in-infrastructure/> (visited on October 3, 2017).

21 Greenfield Airport Policy.

AAI incorporated "Delhi International Airport Private Limited" (hereinafter to be referred as "DIAL") as its subsidiary. The LDOT (Lease Develop Operate Transfer) scheme of PPP was to be followed.[22] The evaluation process as mentioned below was followed:

> "*Phase 1- bidders were qualified on the basis of mandatory requirements such as net-worth, participation of an Airport Operator in the consortium, etc.*
>
> *Phase 2 - assessment of certain mandatory financial parameters such as commitment for funding the debt and equity requirements.*
>
> *Phase 3- technical evaluation relating to development plans and track record.*
>
> *Phase 4 - preferred bidder was to be selected based on the highest share offered to the AAI as a proportion of the gross revenues from the airport. The evaluation was carried out by the Evaluation Committee (EC) consisting of the Financial Consultants (FC), the Legal Consultants (LC) and the Global Technical Advisors (GTA).*"

In 2006, after the completion of the bidding process, the AAI entered into an Operation Management Development Agreement (OMDA) with DIAL. Initially, DIAL was a joint venture between three major consortium members, GMR Group (64%), AAI (26%) and Fraport AG (10%). Later in time, the shareholding pattern of this joint venture has changed (not relevant for the purpose of this paper). The function of this JV was to "oversee the operation and construction of Delhi International Airport's terminal and runway buildings".[23] DIAL was provided with the exclusive right to "operate, maintain and develop" the Indira Gandhi International Airport for 30 years. The government of Delhi also entered into State Support Agreement (SSA) with DIAL to provide assistance. The Mumbai airport also followed the similar process.

22 LDOT Mode Lease Develop Operate Transfer (LDOT): "In this type of PPP arrangement, assets are leased out to the private sector under specific terms, to operate and maintain the asset for the term of the concession period, after which the assets are transferred to the authority".

23 Supra note 1.

Bangalore Airport

The process for establishment of Bangalore airport started way back in May, 1999 when a MOU was signed between KSIIDC and the Airport Authority of India. For the purpose of development of the airport, expression of interest was invited in June, 1999. After that, in November-2000, the private parties (bidders) were asked to submit a detailed report about how they would take up the project. On October 29, 2001 a consortium which was led by Seimen's won the bidding process. A joint venture called BIAL was formed. The duration of the concession period was 30 years, with eligibility for further extension of 30 years. This project followed DBOO scheme which is Design, Build, Own and Operate.[24] The BIAL was given the authority to perform any function which was related to PPP of aircraft, passengers, baggage and cargo, etc. It was also given the power to grant service providers to perform these activities.

A number of Greenfield airports are coming up in different parts of India and almost all of them will be developed through PPP model. Examples are Greenfield airports in Andhra Pradesh, Maharashtra and Uttar Pradesh (DBFOT scheme). As establishment of airports require high investment and more efficient administration and maintenance, the government has preferred PPP model.

II. Highway/ Road Sector

Highway sector in India is the one major sectors which is highly dominated by PPP model. National Highway Authority of India (hereinafter to be referred as "NHAI") is the government entity which governs this sector. In this sector, the involvement of a private party is under any one of the three modes which are BOT Annuity, BOT Toll and EPC (Engineering, Procurement and Construction). EPC is not considered to be a PPP model.[25]

- **The Build Operate and Transfer (BOT) Annuity Model**

  Under this model, the private party (developer) is assigned with the duty to build the highway which it operates for the duration as agreed upon and finally transfers it to the government. Once

24 Supra note 1.

25 *See also*, World Bank, *Toolkit for PPP in Roads and Highways: Main Types of PPP*, (2009), <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-13.pdf>. (visited on October 3, 2017).

the commercial operation of the project starts, the government starts making payment to the private partner. Generally, the payment is made on a six month basis.[26]

- **BOT Toll Model**

  Under this model, the developer is assigned with the duty to develop the road and then he recovers the investment made by him through toll collection. The duration for toll generally is for a period of 30 years. In this model, there is no payment made by the government to the developer for the purpose of him recovering his investment.

- **Engineering, Procurement and Construction (EPC) Model**

  This model is not a PPP model. Under this model, the finances related to the project are taken care of by the government. The private partner is generally involved for his/her engineering expertise. This model proves to be a financially burdening model for the government.

The BOT mode (Toll and Annuity) is the majorly chosen mode. Till 2012, around 20,000 kms of national highways were awarded under this mode. In 2009, the NHAI started following the "Operate Maintain and Transfer" model for the purpose of maintenance of the highways.

BOT (Toll) mode of PPP contracting	BOT (Annuity) mode of PPP contracting	OMT mode of PPP contracting
• Road alignment, location of structures, LA, environment clearance - authority • Structural design, finance, construction, O&M - concessionaire • Tolling - concessionaire on the basis of GoI toll policy • Concession period depending on road capacity, subject to maximum 30 years	• Road alignment, location of structures, LA, environment clearance - authority • Structural design, finance, construction, O&M - concessionaire • Tolling, if any, is done by the authority separately • Concessionaire is paid fixed semi-annual annuity • Concession period is generally 20/ 17 years	• Concessionaire is handed over developed road for O&M • No capacity augmentation • Tolling is done by the concessionaire as per GoI toll policy • Concessionaire pays annual concession fee to authority • Concession period is 4-9 years

Fig. 3 Different modes of PPP in Highway Sector

26 Asian Development Bank, *Different Models of PPP*, (2007), <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Cross-Border-Infrastructure-Toolkit/Cross-Border%20Compilation%20ver%2029%20Jan%2007/Session%204%20-%20Private%20Sector%20Participation/Private%20Sector_02%20Diferent%20Models%20of%20PPP%20-%2029%20Jan%2007.pdf> (visited on October 3, 2017).

- **Hybrid Annuity Model:**

The above models have led to a considerable number of issues subsequently leading to stalled projects and increasing the non-performing assets (NPAs) of the banks. In order to do away with the unwanted consequences involved with the existing models, the government has come up with the Hybrid Annuity Model (hereinafter to be referred as "HAM") in order to revive PPP in the road sector. In financial terms hybrid annuity means "that payment which is made in a fixed amount for a considerable period and then in a variable amount in the remaining period."[27]

In the Indian context, the new HAM is a combination of BOT Annuity and EPC models. As per the policy suggested,

> "*the government will contribute to 40% of the project cost in the first five years through annual payments (annuity). The remaining payment will be made on the basis of the assets created and the performance of the developer*."[28]

As the government will pay 40 percent of the amount during the construction stage itself, the developer will have enough liquidity but he will have to arrange remaining 60 percent through equity and loans. The developer will not have any right to collect toll, It is the NHAI which will be responsible for revenue collection. The advantage of the model is that there is sharing of financial risk between the private partner and the government. Though the developer will have to bear the risks related to construction and maintenance as is required under BOT (Toll), the financial risk are not to be completely borne by him.[29]

To Bridge The Funding Gap

The process of selection of the private party is similar to as has already been discussed in the first part of the paper. The major issue which arises is regarding funding of the projects which generally has to be arranged by the private partner which can be

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27 Asian Development Bank, *Public-Private Partnership Handbook*, (2008), <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (visited on October 3, 2017).

28 *Ibid.*

29 Supra note 1.

a disincentive for the private partner to bid. In order to incentivize foreign investors, the government has allowed "100 per cent foreign equity in construction and maintenance of roads, highways, tunnels etc". Viable Gap Funding scheme allows the government to give capital grant upto 40 percent of the project cost in the infrastructure sector (for projects upwards of INR 200 Crores). The government in order to further incentivize the private partners has provided "100% tax exemption in any 10 consecutive years within a period of 20 years after completion of the project".[30] The government has permitted "duty free import" of certain equipments which are required for the purpose of highway construction. Government's support in terms of land acquisition and other assistances also comes as an added factor which lowers down the transaction cost involved.

Concept of Negative Grant:

Grants are generally paid by the procurement authority (government) to the private entity. "Negative grant" as the name itself suggests is what is paid by the private party to the government. Negative grant is generally made in those cases where the private entity thinks it would be a profitable venture to do so. For example: D.S. Construction, for building the Delhi-Gurgaon expressway, paid a negative grant of Rs. 67 crores to the government. It did so because it expected to earn huge surplus as it estimated high traffic usage of the expressway.[31] Though the traffic usage of this expressway turned out to be really high, but as they did not factor in the economic growth, there is a lot of traffic congestion which takes place.

Conclusion

In this research paper, the researcher focused on the formation of a Public-Private Partnership, the process followed and the different modes of PPP which are involved. The first part of the paper briefly

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30 *See* J. F.M. Koppenjan, *The Formation of Public-Private Partnerships*, 83(1) Public Administration 135,138 (2005).

31 Another example, from media reports dated about a year ago, is of a joint venture (of Soma Enterprises, Nagarjuna Construction Company and Maytas, a Satyam Computers group company) that clinched the bid from among seven entities to develop the nine-km highway from Hosur Road leading to Electronics City. The estimatedcost of the project was Rs. 450 crore, on a BOT toll basis. And the joint venture offered to pay Rs. 16 crore as negative grant to the NHAI.

elaborated on the process of formation of a PPP, from the stage of identification of the project, the stakeholder analysis, different stages of bidding involved to the requirement of formation of special purpose vehicle once the project has been granted to a consortium. In this section, the researcher talked about two methods, one can be a company incorporated under the Companies Act, 2013 (As is required by the model "Request for Proposal") and other can be an unincorporated joint venture. As the liabilities in case of the latter are joint and several, and there are certain tax issues involved, it is researcher's recommendation that the SPV should be in form of an incorporated body in order to avoid unwanted uncertainties and consequences.

The second part of the paper describes the three main types of PPP model which are followed, the maintenance contracts, lease/ affermage and BOT/BOOT (concession contracts). These different types of modes are chosen on the basis of the requirement of the projects. For example, if just operation and management of an already existing asset is required, the financial investment required for the project, whether the investment of the private party will be recovered through fees paid by the customers for the usage of the facilities or on revenue sharing basis with the government, whether government intends to part with the ownership of the asset or not.

The third chapter is a case study of the two major PPP driven infrastructure sectors in India, i.e. Airport and Highways. The Airport sector has major policies and like all other sectors model concession agreements to govern the PPP model. In this section, the researcher further analyzed the process followed in Delhi Airport and Bangalore Airport and how on the basis of their requirements they followed LDOT and DBOO mode of PPP. The highway sector basically follows the BOT (Toll), BOT (Annuity) or EPC frame work and also Operation and maintenance model for certain highways. In order to deal with the issues arising because of these models, the NHAI has come up with Hybrid Annuity model which shows that different models are still evolving. Then in this section the researcher also focused on the funding provided by the government and the concept of negative grant. In the end, the researcher concludes that India follows different PPP schemes for different projects and the PPP model is evolving in India in order to meet the new requirements which are arising day by day.

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Chapter 3

Model Public Private Partnership Clauses

Jeydev C.S. & Sahil Raveen

Introduction

The complexity and sophistication of PPP transactions, and the fact that they are often heavily negotiated to reflect the characteristics of a given infrastructure project, frequently means that considerable time and expense is involved in preparing and finalising PPP contracts. This has led many commentators to ask if it is possible to reduce costs, and shorten the time involved in such processes, by standardising the provisions found in concession agreements or other PPP Contracts between the Contracting Authority and the Private Partner. To date, however, there is no universally accepted language for such agreements on an international basis.

It is true that PPP transactions are often of such scale and complexity that individually negotiated and constructed provisions are necessary. However, certain broad issues can be seen to be common among most transactions, such as *force majeure*, *dispute resolution* and so on. There have been some efforts by trade bodies, multilateral institutions, and legal advisors to suggest '*draft clauses*' for these issues at a global level; however, no meaningful scholar has attempted to bridge these industry norms and suggestions with the actual practice of PPP transactional drafting in India. The authors hope to review specific instances of contractual drafting as they have been seen in large PPP projects in India, and evaluate their appropriateness against normative global best practices.

Given the unique scope it evaluates five distinct types of clauses, namely *force majeure*, *material adverse government action*, *change in law*, *termination payments*, and *refinancing*. While these clauses are in no way exhaustive, the authors feel that they form some of the most crucial elements of controversy. Other clauses have by now been well established with respect to Indian practices. For instance, *dispute resolution clauses* are now fairly standardised in India, and Contracting Authorities have expressed clear disinterest in adapting them to international practices. As such, it would belabour the point to further extend literature in this regard. For this reason, the authors feel that the aforementioned five clauses merit urgent consideration. Where deemed to be appropriate, the authors have also recommended model clauses that may be adapted and adopted by Indian contracting parties – these are inspired substantially by international best practices; however, we have only advocated their use in cases where they would lend substance to the Indian experience and where Indian parties have not implicitly or explicitly shown dis-favour.

Clause 1: Force Majeure

Force Majeure as a concept developed in civil law but has been adopted widely in the common law countries including India due to the certainty it provides to the contract in case of occurrence of certain consequences that are beyond the control of the parties.[1] The researchers believe that well-defined force majeure clause can help the parties determine their liabilities in case an event beyond the control of the parties occurs and renders the performance of the contractual obligations impossible for the affected party. There are three relevant aspects that are to be looked into while drafting a force majeure clause and these are whether to have an indicative or an exhaustive definition, what are the consequences that will follow in case the force majeure event occurs and in what cases can the force majeure event lead to the termination of the PPP contract.

A comprehensive force majeure clause in a PPP contract should provide for a sound definition that will set the scope of the force majeure event, the relief that the clause will provide to the affected party including the kind of obligations to be undertaken by each party in case of occurrence of one of the force majeure event. Apart from this, the clause should provide for the duration of time

1 S. Litvinoff, *Force Majeure, Failure of Cause and Théorie de l'Imprevision: Louisiana Law and Beyond*, 46(1) Louisiana Law Review 1, 3 (September 1985).

after which the parties can terminate the contract and the costs allocation including the termination payment that will occur in such a circumstance.[2] There is no standard definition or agreement with regard to what constitutes force majeure and it is completely on the parties to mutually agree on the scope of the clause depending on the sector in which the PPP project is going to be carried out.

There are two main approaches that can be taken with regards to defining force majeure events. The first approach is to have an inclusive definition where all events beyond the reasonable control of the affected party, satisfying certain other criteria, be covered as force majeure events. This approach is beneficial in countries where the courts are unlikely to expand on the definition in the contract to provide relief to the affected party. However, a exhaustive list would be a better option where the parties can foresee the force majeure events that are likely to arise and want certainty with regards to termination in case of occurrence of the force majeure event.[3] A well-drafted force majeure clause can help in allocating the risk in such a manner that the burden does not rest with any one party as the event is not due to an act of any one party but due to an act, which is beyond the control of the parties.

The researchers are of the view that the drafters should take into account the sector specific requirements but at the same time look to provide certainty with regards to that sector by drafting a force majeure clause, which covers all the aspects, mentioned above. A force majeure clause should look to provide relief to the parties who are not able to meet their contractual obligation due to the force majeure event. Further, it should look to provide for the sharing of additional costs and the loss of revenue that takes place due to the occurrence of the force majeure event. The parties to the PPP contract should look to mutually agree, at the time of entering into the contract, with regards to the kind of reliefs that can be granted with regards to the contractual obligations of the parties. The parties can look to include liquidated damages, extension of time for performance of contractual duties, extension in the operating period and so on.[4]

2 World Bank, Guidance on PPP Contractual Provisions, 15 (2017).

3 *Ibid*, at 22.

4 Supra note 2, at 24.

In India,[5] the researchers have to come to see that the force majeure clause is very lengthy and detailed as it includes large number of components within it, including the material adverse government action events, which have been covered in the next section of this paper.[6] The model agreements in India issued by the government agencies do not enforce any standard clause with regards to the PPP contract and only issue guidelines with regards to having a force majeure contract but no form is given. In most cases, the force majeure clause in India includes MAGA events within it and divides them into mainly two types, indirect political events and direct political events. The researchers believe that there is a fundamental issue with including political events, direct and indirect under the force majeure clause as strictly speaking these form a part of material adverse action taken by the government. Therefore, it would be better to incorporate them in a separate clause as the risk allocation and cost bearing will be different if these events are to occur. As a legal system matures, it is important to have distinct provisions to prevent the Courts from reading the risk sharing of type of event into another. Further, the researchers believe that having an exhaustive list of force majeure events in the provision, as done in the case of *Delhi-Gurgaon Expressway 6/8 laning PPP*,[7] can help in reducing the disputes arising at a later point of stage about the sharing of costs and termination payments. Based on these considerations, we propose the adoption of the following draft model force majeure clause[8] that may be inserted in PPP contracts.

5 The authors have considered PPP agreements, actual and model agreements, in India in various sectors such as Airports, Ports, Highways, Oil and Gas, Power to understand the clauses in greater detail.

6 *See* Article 34 of Concession Agreement between National Highway Authority of India and Rohtak-Panipat Tollway Private Limited for Four Laning of Rohtak-Panipat Section of NH-71A on Design, Build, Finance, Operate and Transfer ("DBFOT) Basis; Also look at clause 16 of Operation, Management and Development Agreement between Airports Authority of India and Mumbai International Airport Private Limited for Mumbai Airport; Further look at Clause 12 of Model Concession Agreement of National Highway Authority of India for Annuity Based Projects.

7 *See* Clause XXIX of Concession Agreement for Conversion of Delhi-Gurgaon Section of NH-8 into an Access Controlled Eight/Six Lane Highway on Build, Operate and Transfer (BOT) basis between National Highways Authority of India and Jaypee DSC Ventures Limited.

8 *See* note 2, at 31.

Model Force Majeure Clause

Definition

"**Force Majeure Event**" means the occurrence after the date of the PPP Contract of:

a. war, civil-war, invasion, armed conflict, terrorism or sabotage; or

b. nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Private Partner or its sub-contractors; or

c. pressure waves caused by devices travelling at supersonic speeds, which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligations under this PPP Contract.

Consequences of Force Majeure

1. No Party shall be entitled to bring a claim for a breach of obligations under the PPP Contract by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt but without prejudice to Clauses 5 or 7 below, the Contracting Authority shall not be entitled to terminate this PPP Contract for a Private Partner Default if such Private Partner Default arises from a Force Majeure Event.

2. Nothing in Clause 1 above shall affect any entitlement to make deductions or any deductions made as a result of [*insert reference to clauses addressing pricing and payment mechanism*] in the period during which the Force Majeure Event is subsisting.

3. On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

4. As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the PPP Contract.

5. If no such terms are agreed on or before the date falling 120 (one hundred) days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this PPP Contract for a period of more than 180 (one hundred eighty) days, then, subject to Clause 6 below, either Party may terminate the PPP Contract by giving 30 (thirty) days' written notice to the other Party.

6. If the PPP Contract is terminated under Clause 5 above or Clause 7 below:

   a. compensation shall be payable by the Contracting Authority in accordance with [*insert reference to Compensation on Termination for Force Majeure clause*]; and

   b. the Contracting Authority may require the Private Partner to transfer its title, interest and rights in and to any [*insert defined term of relevant Project assets*] to the Contracting Authority.

7. If the Private Partner gives notice to the Contracting Authority under Clause 5 above that it wishes to terminate the PPP Contract, then the Contracting Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 (ten) days after the date of its receipt stating that it requires the PPP Contract to continue. If the Contracting Authority gives the Private Partner such notice, then:

   a. the Contracting Authority shall pay to the Private Partner the [*insert defined term for availability payment*] from the day after the date on which the PPP Contract would have terminated under Clause 5 above as if the [*insert defined term for the service*] was being fully provided; and

   b. the PPP Contract will not terminate until expiry of written notice of at least 30 (thirty) days from the Contracting

Authority to the Private Partner that it wishes the PPP Contract to terminate.

8. The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Affected Party shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimize the consequences of the Force Majeure Event.

9. The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with the applicable obligations under this PPP Contract. Following such notification, the PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

Clause 2: Material Adverse Government Action

Material Adverse Government Action (Hereinafter, "MAGA") clause is of great importance in PPP contracts where one of the parties is the government or a public sector entity, which is mostly the case in India. MAGA events are also known as political force majeure as it is government action, which results delaying or preventing the private party in performing contractual obligations. They also result in a material adverse financial impact on the private partner. The MAGA events are completely within the control of the Contracting authority, which is the government and therefore all the risk allocation is to be made to the Contracting authority.[9]

A MAGA risk is usually different from a force majeure risk as in case of MAGA, the Contracting party or one of its constituents is in control of the event. The occurrence of MAGA events adversely affects the private partner's interest in a PPP event and the ability to perform contractual obligations.[10] The researchers in line with the recommendation made by the World Bank states that there should be a separate MAGA clause in India as the risk allocation in the case of occurrence of such events should entirely be borne by the Contracting authority as it is in control of the event.

9 Supra note 1, at 35.

10 Supra note 1, at 36.

The sharing of the MAGA risks by the private partner results in increasing the premium that the private partners charge for the PPP project due to the likely loss that can arise due to the other party. In order to reduce this premium and thereby the costs of PPP, it is important that the Contracting authority bear the risk and provide adequate compensation rights to the private party in case of occurrence of a MAGA event. The researchers believe that it is especially important in emerging countries such as India to have a separate MAGA clause and complete risk bearing by the Contracting authority due to the high level of political interference in PPP projects along with cyclic political changes that take place. It can be said that having a MAGA clause with the Contracting authority bearing the risk is likely to increase the investor confidence and thereby reduce the financial premium they impose on it.

The drafters of the MAGA provision need to take into account the political risks associated with specific jurisdictions but at the same time they need to include key concepts such as the scope of Material Adverse Government Action, the consequences, the risks allocated and the circumstances in which termination can take place.[11] It is important to have mutually acceptable definition of MAGA events, as the Contracting party should be willing to accept the risk associated with MAGA clause. Unlike the force majeure clause, the researchers recommend that a MAGA clause in PPP contracts should have an exhaustive list of events that will be covered by it as the entire risk resulting from the MAGA event has to covered by the Contracting Authority. Apart from this, every MAGA clause should look to include a notice period where the private party can notify the public party involved in the PPP about the occurrence of material adverse government action and to ask it to remedy the same. The researchers believe that only if no change in circumstance takes place in the notice period, then the two parties should look towards termination.[12]

11 World Bank, Report on Recommended PPP Contractual Provisions (2015).

12 A.C. Agra, *Dissecting and understanding PPP contracts No. 4: MAGA- Material Adverse Government Action* (July 17, 2017) Agra <https://www.albertocagra.com/ppp/dissecting-and-understanding-ppp-contracts-no-4-maga-material-adverse-government-action/> (visited on September 20, 2017).

The MAGA clause should also look to provide instances where termination can be made in case of the MAGA event, the consequences for the same and the termination payments to be made by Contracting Authority to the private party. This will provide certainty to the private player and to the contract with regards to occurrence of these events. The termination aspect of the MAGA clause should look to restore the private player in the same position, as it would have been in case the MAGA event had not occurred. Apart from it, a reasonable compensation to the private player should also be included in the termination payments that are likely to be made once termination is made due to the prolonged MAGA event. The compensation to be made to the private player may be linked to the direct influence, the public player in the PPP contract, had on the occurrence of the MAGA event.[13]

The MAGA clause is an emerging trend in PPP contracts around the world,[14] as it is believed that separating risk sharing in case of force majeure from government action risk is necessary to effectively prevent disputes relating to termination payments and cost sharing from arising. However, in India we mostly see that the drafters of the PPP contract look to include it within the force majeure clause but the researchers believe that this is not the best practice for the reasons mentioned above.[15] The researchers believe that a separate MAGA clause in India will help in increasing the investor confidence, reducing the premium on financing and also stop the courts from reading risk sharing provisions of force majeure clause to determine the costs payable while determining the termination payments and other contractual reliefs in case of occurrence of a MAGA event. In this light, the researchers recommend the adoption of the following model MAGA clause[16] in PPP contracts in India.

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13 Supra note 1, at 39.

14 National Government Agency of Philippine, Draft Public-Private Partnership Manual, 36 (August 2014)

15 *See also* Clause 12 of Model Concession Agreement of National Highway Authority of India for Annuity Based Projects.

16 *See* note 2, at 40.

Model MAGA Clause

Definition

1. For the purposes of this PPP Contract, "Material Adverse Government Action" means any act or omission by the Contracting Authority or any relevant public authority [*define if necessary*] or event set out in Clause 2 below, which occurs during the term of this PPP Contract and which (i) directly causes the Private Partner to be unable to comply with all or some of its obligations under the PPP Contract and/or (ii) has a *[Material]* Adverse Effect] on its [costs or revenues] [*insert defined terms*].

2. For the purposes of Clause 1 above any actor omission shall mean and be limited to the following circumstances:
   a. Failure of any relevant public authority to grant to the Private Partner or renew any permit or approval that is required for the purposes of the Private Partner's proper performance of its obligations and/or enforcement of its rights under this PPP Contract, in each case within the required timeframe under [Applicable Law], except where such failure results from the Private Partner's non-compliance with [Applicable Law];

   b. any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, [occurring inside *[name of country/state]*];

   c. radioactive contamination or ionizing radiation, [originating from a source in *[name of country/state]*];

   d. any riot, insurrection, civil commotion, actor campaign of terrorism, [*occurring inside [name of country]*];

   e. any strike, work-to-rule, or go-slow which is not primarily motivated by a desire to influence the actions of the Affected Party so as to preserve or improve conditions of employment by the Affected Party, *[occurring inside [name of country/state]]*;

   f. expropriation, compulsory acquisition or nationalization by any relevant authority of any asset or right of the Private Partner, including any of the shares in the Private Partner;

g. any act or omission of any relevant authority adversely affecting the legality, validity, binding nature or enforceability of this PPP Contract; and

h. [*add any other events specifically appropriate to the PPP Project*].

Consequences of Material Adverse Government Action

3. If a Material Adverse Government Action occurs, the Private Partner (i) shall be excused from the performance of its obligations under the PPP Contract to the extent that it is prevented, hindered or delayed in such performance by reason of the Material Adverse Government Action and (ii) shall be entitled to compensation under this PPP Contract, in each case subject to and in accordance with the provisions of this Clause [*whole clause*].

4. To obtain relief pursuant to Clause 5 below, the Private Partner must:

   a. as soon as practicable [and in any event within [•] *business days*] after the Private Partner becomes aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under the PPP Contract, following which the Parties shall consider in good faith any option to mitigate the impact of the Material Adverse Government Action;

   b. within [•] *business days* of receipt by the Contracting Authority of the notice referred in Clause (4)(a) above, give full details of (i) the Material Adverse Government Action and (ii) any Estimated Change in Project Costs and/or loss of revenue claimed and/or delay and/or any breach of the Private Partner's obligations under this PPP Contract;

   c. demonstrate to the Contracting Authority that:

   i. the Private Partner could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring material costs;

ii. the Material Adverse Government Action was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or delay and/or breach of the Private Partner's obligations under this PPP Contract;

iii. time lost and/or relief from the obligations under the PPP Contract claimed, could not be mitigated or recovered by the Private Partner; and

iv. the Private Partner is using reasonable endeavors to perform its affected obligations under the PPP Contract.

5. If the Private Partner has complied with its obligations under Clause (4) above, then the Contracting Authority shall:

   a. compensate the Private Partner for the Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred [*and loss of revenue*];

   b. give the Private Partner such relief from its obligations under this PPP Contract as is reasonable for such Material Adverse Government Action; and

   c. if the Material Adverse Government Action occurs during the [insert defined term for Construction Period] and causes a delay in achieving the [insert defined term for scheduled services commencement date], such date shall be postponed by such time as is reasonable.

6. [In the event that information is provided after the dates referred to in Clause 4 above, then the Private Partner shall not be entitled to any extension of time, compensation or relief from its obligations under this PPP Contract in respect of the period for which the information is delayed].

7. If the Contracting Authority and the Private Partner cannot agree on the extent of any compensation, delay incurred, or relief from the Private Partner's obligations under this PPP Contract, as applicable, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with Clause *[insert reference to dispute resolution clause].*

Termination due to Prolonged Material Adverse Government Action

8. If a Material Adverse Government Action subsists for a continuous period of more than 180 (one hundred eighty calendar) days, a Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect thirty (30) calendar days after its receipt. If, at the end of this thirty (30) calendar-day period, the Material Adverse Government Action continues, the PPP Contract shall be terminated pursuant to Clause [*insert reference to clause governing termination*] and the Private Partner shall be entitled to the compensation set out under clause [*insert reference to Compensation on MAGA termination clause*].

Clause 3: Change in Law

In a PPP contract, a private partner has the obligation to comply with the law of the land where the subject matter of the contract is situated.[17] The private party computes the risk associated with the PPP project based on the applicable law at the time of entering into the contract and therefore it is important that it be protected in case the applicable law changes after it enters into the contract.[18] A change in law clause is beneficial for PPP contracts as it will help in reducing the risk associated with PPP contracts for the private party, thereby reducing the financial premium that they charge. Secondly, financing a PPP project in emerging markets becomes much easier if the lenders are assured that the project will be protected against uncertainties likely to arise from change in law.[19]

Any unexpected change in law can result in rendering the contractual obligations unviable or impossible for the private player, therefore a change in law clause is needed to provide the private party with relief from their obligation or to provide costs resulting from the damage caused due to change in law. The researchers are of the view that the change in law clause should look to provide relief to the private party for the resulting damages

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17 Supra note 1, at 45.

18 Phillip Kelly, *Preparing a Public-Private Partnership Law: Observations from the International Experience,* 28 (Working Paper No. 4, ADB East Asia, April 2016).

19 Supra note 1, at 47.

to the extent of the altered compliance regime, the relief should be addressed at treating the alteration in costs and obligations resulting from the change in the legal regime that has taken place.

The change in law clause should be sufficiently wide to allow the private party to claim relief in cases where any change in the applicable law takes place, including any modification in interpretation and application of the applicable law. The change in law clause itself cannot attempt to alter the applicable law or keep the private party or the PPP project out of the ambit of the changed laws as it would run into trouble for two reasons mainly- *firstly,* there will be legislative competence issues as the PPP contract itself is not a result of deliberations in the legislative body nor is it directly passed by it and *secondly,* there will also be issues with regards to making administrative commitments based on the commercial agreements that the public body is entering into.

The researchers believe that there are two broad approaches that can be used while incorporating a change in law clause. In the first approach, it can be made part of the MAGA clause as in less mature polities; the legislative action cannot be assessed separately from executive action for the purpose of risk allocation. In these cases having change in law provisions within the MAGA clause would be better for the purpose of risk allocation. The second approach relates to having a distinct change in law clause to deal with the risk allocation in case of change in applicable law. This is more suitable in polities where legislative action can be distinguished from executive action and where it is believed that there can be change in law circumstance without resulting in MAGA or force majeure.

A change in law clause should look to clearly define the applicable law to the PPP contract and address issues with regards to whether court decisions and international conventions constitute a part of applicable law. The researchers take is that judicial precedents should be included in the definition of applicable law as they form the part of the law of the land and are binding on other lower courts.[20] The most important component of a change in law clause is to outline the change itself, which will lead to transferring

20 *See* Art. 141, Constitution of India, 1950.

of the risk to the Contracting authority. The other important aspect of the change in law provision is the relief and the compensation to be given to the private party in case of change in applicable law including the termination payments that may need to be made in case the PPP project becomes unviable or impossible due to change in applicable law or the interpretation of the it.

In India, the researchers saw that in a large number of PPP contracts, the change in law clause is not drafted in a comprehensive manner.[21] In most cases there is no clear definition of law and what comprises it.[22] The researchers believe that there can be number of disputes arising due to this as the private party and the Contracting Authority are not on the same page with regards to the instances when this clause can be invoked. It is important that the applicable law to a PPP contract be clarified in the change in law clause including the question whether judgments given by Courts of Law will be covered by this clause. The researchers are of the opinion that a change in law clause should also look to contain the ways in which the Contracting Authority will make good the losses occurred to the private party and what is the extent to which the losses will be offset. The following model change in law clause[23] is recommended to be incorporated in PPP contracts in India.

Model Change in Law Clause

Definitions

1. "**Applicable Law**" means any decree, resolution, law, statute, act, decision, ordinance, rule, directive (to the extent having

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21 *See* Article 41 of Concession Agreement between National Highway Authority of India and Rohtak-Panipat Tollway Private Limited for Four Laning of Rohtak-Panipat Section of NH-71A on Design, Build, Finance, Operate and Transfer ("DBFOT) Basis (March 2010); Also, look at Article 13 of Concession Agreement between Cochin Port Trust and Indian Oil Corporation Limited for Construction, Operation and Maintenance of A Multi-User Liquid Terminal at Puthuvypeen SEZ at Cochin Port (April 2014).

22 Refer to Article XXXVI of Concession Agreement between National Highway Authority of India and Rohtak-Panipat Tollway Private Limited for Four Laning of Rohtak-Panipat Section of NH-71A on Design, Build, Finance, Operate and Transfer ("DBFOT) Basis; Also, refer to Clause 33 of Concession Agreement between Cuttack Municipal Corporation and Essel Bhubaneshwar MSW Limited for Development of a Regional Municipal Solid Waste Management Facility in the city of Cuttack (May 2014).

23 *See* note 2, at 57.

the force of law), order, treaty, code or regulation or any interpretation of the foregoing by a relevant authority having jurisdiction over the matter in question, as enacted, issued or promulgated by any relevant authority, in each case applicable in India.

2. "**Change in Law**" means, after the Setting Date, any of the following events:

   a. the enactment of any new Applicable Law;

   b. the repeal, modification or re-enactment of any existing Applicable Law; and/or

   c. a change in the interpretation or application of any Applicable Law, which

   i. adversely affects (i) the ability of a Party to comply with its obligations under the PPP Contract or (ii) [the Base Case Equity IRR]; and

   ii. was not in the [*insert applicable publication source for legislation*] or in effect at the Setting Date.

Consequences of a Change in Law

3. If the mutually agreed procedure has been followed by the Parties in the event of Change in Law, the affected Party shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Change in Law.

Clause 4: Termination Payments

Termination payments clause is one of the most important clauses in any PPP contract as it is very important for the purpose of risk allocation. Termination payments can be stated to be upfront commitments on compensation payable in case termination of the PPP contract takes place due to certain specified reasons, the reasons that the parties to the PPP contract agree to at the time of entering into the contract.[24] In case of termination, the innocent

24 Supra note 1, at 61.

party seeks damages from the party due to which the situation of termination arises; in this case it is better to have agreed to termination payments before hand than to wait for the matter to be resolved through dispute resolution mechanisms.

The objective behind having a comprehensive termination payment clause is ensure greater level of certainty in the PPP project by making sure that the innocent party will get its share of costs that it has put in the project along with the losses due to the termination without going through lengthy and uncertain legal proceedings to determine the amount of compensation due to it.[25] The termination payments clause also gives confidence to all the stakeholders including lenders and contractors as they have clarity on the consequences of termination of the PPP contract and the action that will follow if the Contracting Authority or the private partner refuses to fulfill one of their contractual obligations under the PPP contract. This certainty provided for in the PPP contract through termination payments clause in turn allows the lenders to assess their risk with regards to the PPP project and provide financing at a lower rate, therefore, reducing the cost of the whole PPP project.[26]

The termination payments clause is intrinsically linked with the termination clause therefore it is important to link the termination payments with the termination event and the manner in which it takes place. This will help in ascertaining the amount of relief to be provided by one party to the other in case of occurrence of that particular termination event. Mainly, there are four types of termination events that will lead to making of termination payments.[27]

The first one is when the termination is carried out by the Contracting Authority because of private party's fault in complying with the contractual obligations. In this case, the private party will have to provide termination payment to the Contracting Authority to the extent that it needs to fulfill the PPP project. The second termination event is where the Contracting Authority voluntarily

25 Allen & Overy, *Termination and Force Majeure Provisions in PPP Contracts: Review of current European practice and guidance,* 9(March 2012).

26 *Ibid.*

27 Supra note 1, at 62.

terminates the PPP contract for public policy reasons such as shift to other means of infrastructure as a matter of policy and so on. The third scenario is where the private party to the PPP contract terminates the contract, as the Contracting Authority does not fulfill its contractual obligations. In the previous two instances, the Contracting Authority will have to make good the potential losses to the private party along with the payment for the costs that the private party had incurred to fulfill its obligations. The final termination event relates to force majeure, MAGA or change in law where the parties themselves are not directly at fault. In such cases the termination payments need to be computed after assessing the involvement of the Contracting Authority in these events, in case the involvement is not direct, the two parties should look to share the costs incurred in order to ensure that no one party is disadvantaged due to the occurrence of the termination event.[28]

The researchers believe that a termination payment clause should aim to provide certainty to all stakeholders by providing objective methods of calculation in case of occurrence of any type of termination event. As mentioned earlier, this allows for easier financing of the project as lenders can be assured of payment in case there is some issue with the PPP project. While the researchers believe that termination payment clauses should provide certainty, they cannot comprise on the liability under applicable law and no attempts should be made to circumvent the liability as it may run foul of the courts at the time of enforcement. The other important aspect of every termination payments clause, according to the researchers, should be to provide for compulsory negotiation before going for other dispute resolution method. This will ensure that the parties attempt at negotiating a way out to continue the PPP project after keeping in mind the interests of all stakeholders. These negotiations can alternatively be used by the parties to determine the costs payable by one party to another in light of the termination event without needing to go to more formalized dispute resolution mechanisms for this purpose.

In India, the researchers examined that in PPP contracts, there is usually a termination payment clause present but the nature of

28 Supra note 1, at 63.

the same differs widely from one PPP contract to another.[29] Though, the researchers believe that some of the difference can be attributed to the diverse fields in which PPP contracts have been examined but there is still a need to have certain standardized provisions within the termination payment clause. It is important according to the researchers to have an objective method for determination of payments to be made at the time of termination along with a provision for method of sharing. Apart from this, the researchers are of the opinion that having a negotiation provision before termination payments clause is put into use. It is the view of the researchers that having negotiations between the two parties can lead to a solution where the PPP contract might be able to continue on altered terms acceptable to both parties, therefore doing away the need of termination payments in the first place. To reduce the time wastage in case the negotiations fail, the researchers also recommend that the negotiations can be time bound and can be completed before other dispute resolution mechanisms are put in place.

Given the inherently subject specific nature of the financing documentation, it would not be appropriate to set out a restrictive articulation of a generic clause to address termination payments. Rather, it is advisable to utilise the aforementioned guidelines while negotiating the exact contours of such a clause.

Clause 5: Refinancing

Pubic Private Partnership projects in the present day are characterized by heavy reliance on private capital.[30] In a PPP contract, the private party usually negotiates long-term financing agreement with external borrowers to fulfil the capital requirements of the PPP project.[31] Sometimes, during the life of the project, there is a need to restructure the financial obligations to external debtors. Refinancing is nothing but replacing the existing terms of debt

29 *See* Clause 13 of Concession Agreement for Development, Construction, Operation and Maintenance of the Hyderabad International Airport between Ministry of Civil Aviation, Government of India and Hyderabad International Airport Limited (December 2004). Also, look at Termination framework in Planning Commission, Government of India, Model Concession Agreement for State Ports.

30 J. Gehrt et.al.,*Refinancing in Public-Private Partnerships: Conceptual Issues and Empirical Results from the UK and Germany*, (Working Paper No. 2010-02, TU Berlin Workgroup for Infrastructure Policy, 2010).

31 *Ibid.*

obligation in a PPP project with newer terms. In light of the long life cycle of PPP projects, refinancing provisions are incorporated in PPP contracts to allow change in financial terms with change in the market conditions.[32]

Refinancing of debts is done in any project for a number of reasons including better financial terms because of the reduced risk associated with the project. It is known that refinancing of debts can lead to reduced debt payments and in turn greater revenue for the PPP project, this benefit is known as the "refinancing gain".[33] This refinancing gain is not the result of efforts of the private party alone but must be shared in a fair manner with the Contracting Authority. In order to ensure that both the private party and the Contracting Authority share this refinancing gain equitably, it is important to have refinancing provisions at the time of entering into the PPP contracts to safeguard this right of the parties in the PPP contract.

As it is seen that refinancing of debts can lead to effects on other provisions of the PPP contract such as the amount due at the time of termination, it is important to have clear provisions of refinancing to prevent disputes in a PPP contract. A refinancing provision can help in determining the amount of share the Contracting Authority and private player in the refinancing gain earned during the course of the PPP project.[34]

A refinancing clause in a PPP contract should have a clear definition as to what forms of refinancing can take place and it should capture all potential forms of refinancing to minimize the scenarios where one of the parties circumvents the refinancing provision to keep the refinancing gain for themselves. The most important aspect of every refinancing provision is to have lucid refinancing gain definition. It is important for both the parties to agree on a mutually acceptable definition of the same as it forms the crux of the refinancing provision. It has large financial considerations on PPP projects and therefore it is essential to define refinancing gains after careful considerations and keeping in mind the interests of all the stakeholders concerned. Apart from this,

32 Supra note 1, at 79.

33 Supra note 1, at 79.

34 Supra note 1, at 79.

in every refinancing provision, it is important to incorporate an objective method of calculating and sharing the refinancing gain; this is imperative to make sure that both the Contracting Authority and the private party are on the same page with regards to the amount of refinancing gain earned and way of sharing the same. Finally, the refinancing provision should also contain the manner of payment so as to avoid issues in this regard.[35]

Refinancing in PPP projects is still a considerably new phenomenon in India and for this reason most PPP contracts do not have refinancing provisions,[36] which can help in determining the change in position of the parties to the PPP contract. The sharing of benefits or the cost sharing arising from refinancing for a PPP project can be a matter of contention between the Contracting Authority and the private party at a later point of stage when and if it happens, therefore according to the researchers, it is best to incorporate a refinancing clause at the time of entering into the PPP contract. It should look to include the meaning of *refinancing*, depending on what is acceptable to the parties, and the objective way in which sharing of benefits or cost would take place between the parties to the contract. The researchers believe that having refinancing provisions as a standard clause in PPP contracts in India can be beneficial for all the stakeholders in a PPP contract. The following model of refinancing clause[37] is recommended to be incorporated in PPP contracts in India.

Model Refinancing Clause

Definition

1. "**Refinancing**" means:

a. any amendment, variation, novation, supplement or replacement of any Senior Finance Documents [*to be introduced as a defined term*];

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35 Supra note 1, at 83.

36 *See* Concession Agreement for Development, Construction, Operation and Maintenance of the Hyderabad International Airport between Ministry of Civil Aviation, Government of India and Hyderabad International Airport Limited (December 2004); Also, look at Concession Agreement between Cochin Port Trust and Indian Oil Corporation Limited for Construction, Operation and Maintenance of A Multi-User Liquid Terminal at Puthuvypeen SEZ at Cochin Port (April 2014).

37 *See* note 2, at 84.

b. the grant of any waiver or consent, or the exercise of any similar right under any Senior Finance Documents;

c. the creation of or granting of any form of benefit or interest in the Senior Finance Documents, or the creation or granting of any rights or interest in any contracts, revenues or assets of the Private Partner whether by way of security or otherwise; and

d. any other arrangement having been put in place by any person which has an effect similar to any of (a) to (c) above or which has the effect of limiting the Private Partner's ability to carry out any of (a) to (c) above.

Mechanism and Operation of Refinancing

2. The Private Partner shall promptly provide the Contracting Authority with full details in relation to any contemplated Refinancing, which shall include the proposed changes to the Financial Model, a justification of the assumptions on which it is based, the proposed contractual documentation and any other information that the Contracting Authority may reasonably request in relation to that Refinancing.

3. The Private Partner shall obtain the Contracting Authority's prior written consent in relation to any Qualifying Refinancing [*to be agreed between the parties beforehand*].

4. The Contracting Authority shall be entitled to receive a [•] share of any Refinancing Gain [*to be defined in accordance with parties' understanding*]in a Qualifying Refinancing [*adapt in accordance with agreed sharing mechanism*].

5. The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain in a Qualifying Refinancing as:

   a. a lump-sum payment which amount shall not exceed the relevant distribution made on or about the date of the Refinancing and shall be due on the date immediately after the date of the relevant Distribution;

   b. an increase of any fee payable by the Private Partner to the Contracting Authority over the remaining PPP Contract period / or a reduction of the availability payment to be paid by the Contracting Authority to the Private Partner over the remaining PPP Contract period; or

c. a combination of both.

6. The Parties shall act in good faith in relation to any Refinancing or proposed Refinancing (including the manner of calculation of the Refinancing Gain and of payment of the Contracting Authority's share of the Refinancing Gain in a Qualifying Refinancing).

Conclusion: Suggestions and Caveats

As with any paper of this nature, some cautionary thoughts must be emphasised. As indicated, PPP transactions are usually very complex, and extensive due diligence – with the assistance of qualified legal, financial, and technical specialists – needs to be undertaken by both Contracting Authorities and private parties before concluding a PPP Contract and related agreements. In this regard, the suggestions of this paper should simply be regarded as a recommended starting point and one of many inputs for the contracting parties to consider.

Further, many of the provisions set out in the preceding parts of this paper, will affect the allocation of risks in a PPP transaction – and the fairness of the overall risk allocation in a transaction can only be assessed by consideration of the entirety of the PPP Contract and related agreements. It should likewise be noted that this paper primarily focuses on PPP transactions on a project finance basis, as reflected by the attention given to the protection of lenders' rights and the sharing of the benefits of refinancing.

However, the overall import of the researchers' recommendations is this – while these suggestions may neither be comprehensive or a panacea, a scenario where these considerations are valued is more optimal than one where they are not. The five clauses considered here are in no way exclusive, but are some of the most contentious of those that are often seen in PPP contracts.

The real takeaway from this however remains the disconcerting degree to which Indian PPP contracts deviate substantially from international best practices. No PPP contract that was reviewed by the researchers would score favourable ratings when compared to the normative ideal form we used as our benchmark. It is therefore clear to the authors that Indian parties, both Contracting Authorities and private parties need to negotiate in a responsible and considerate manner when drafting clauses in these PPP transactions. The costs incurred through inconsiderate efforts in this regard are far more prohibitive than that incurred through the time and effort to be expended in ensuring a detailed and comprehensive drafting of particularly important clauses, without compromising on the freedom for manoeuvre that both parties expect.

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Chapter 4

Renegotiation in Public Private Partnership Contracts

Vayuna Gupta & Aditi Bansod

Introduction

Infrastructure development is one of the key factors that determine the economic growth of an economy. The productive capacity of an economy is often measured along with the existence and development of infrastructure facilities such as rail network, highways, power plants, etc. Innumerable studies conducted by both development bodies and government agencies indicate that there is a direct relationship between infrastructure development and the economic growth of the country.

By the year 2020, it is projected that India will become the fifth largest economy of the world with an economic growth of US$6 trillion. This cannot be achieved without a strong infrastructure sector development and for the same, India heavily relies on the Public Private Partnership model. A study conducted by the World Bank on PPP in infrastructure suggests that India has accounted around half of all the new Public Private Investment projects in developing nations in 2011. Along with that India has been the topmost recipient of Public Private Investment since 2006.[1] The report also indicates that India accounts for the single largest market for private participation in infrastructure in the year 2011. The present Five Year plan of India envisions an investment of around 56 crores in the infrastructure sector, which accounts for about 8.18 percent of the total GDP of India. The plans envisage that around 48 percent of this investment is to come from the private

1 J. Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right*, The World Bank, 2011, 43.

sector using the Public Private Partnership model or through direct investment.[2] As the scale of private sector investment is so huge, there is obviously a need to enable a regulatory model and suggest policy reforms. Given the critical importance of private investment to meet India's infrastructure needs, it is essential to put in place, appropriate remedial measures and ensure equitable justice to private players in case of genuine commercial in-viability of contracts. However, it also evident from the global experience of PPP renegotiation, that it can be used by both parties to make opportunistic gains from the contract. In the course of this paper the researchers shall try to trace the history of renegotiation of PPP contracts in India. They will also try to understand the reasons, process and consequences of such renegotiations on the basis of the data available via secondary sources. Lastly, the researchers have done a thorough analysis of the Dhabol Project so as to look into the practical aspect of this renegotiation.

One of the primary criticisms that the Public Private Partnership projects face is that there is no long term flexibility in these contracts and there is a need to amend or make a modification in the physical infrastructure or change the kind of service provided by the private player at a later point of time in future while the life cycle of the project is still operative. Such cases often result in substantial cost to the government. This is one of the primarily recognised risks in the Public Private Partnership project contracts.

"Several recent reports on PPP contracting highlight the need for enhanced contractual flexibility, in particular aimed at taking into account possible changes in user needs that – in the presence of rigid contracts – have sometimes triggered very costly contract renegotiation processes. Enhanced flexibility, in particular directed to accommodate changes in user needs, is important for the long-term projects typical of PPP, and may be achievable through well designed change-management contractual clauses necessary to limit potential abuses. However, enhanced flexibility will inevitably come at the cost of lower predictability and higher risk for the investing private-sector party, and of reduced effectiveness of the competitive selection process."[3]

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2 *Ibid.*

3 Iossa, Elisabetta, Giancarlo Spagnolo, and Mercedes Vellez. *Best Practices on Contract Design in Public-Private Partnerships*: Report prepared for the World Bank, 2007, 57.

A renegotiation of the Public Private Partnership project contract is changing or making amends in the original contractual terms and conditions as against an adjustment that takes under the mechanism already defined in the original contract in areas like the tariffs and payments.[4]

Renegotiation is when:	Examples
(i) a change in the risk matrix assignment and / or in the conditions of the contract, or	Reduce the level of services (airports, from IATA A to B).
	Defer or advance investments for several years.
	Extension of the contract term.
	Reduction guarantees (financial bonds)
	Increase the guarantee of the government (to pay lenders).
	Delays in the reduction of tariffs (tolls).
	Reduce the thresholds of the economic equilibrium of the contract, etc.
(ii) a change in project scope (if this was not regulated in the contract).	Government requests new investments.
	Reduction of fees for the government.
	Avoid bankruptcy of the operator.
	Changes on the contract scope, etc.
Renegotiation is not when:	Tariffs are adjusted with a formula set it in the contract or indexed by inflation or other index.

4 Richard Foster, *Comparative Study of Variation Clauses in Public Private Partnership Contracts*, Working Paper, 2013, 5.

	Triggers are activated and eventual investments become mandatory.
	Payments to operator if they are regulated in the contract, etc.
	Corrections of errors in the contract, which do not create obligations, commitments or contingencies (typos, contradictions that affect the implementation for the PPP contract, etc.).

One of the widespread phenomenon which operates in the Public Private Partnership contract is aggressive bids and renegotiation of contract at a later point of time is often linked to this phenomenon. The rationale behind aggressive bids is that they are often presented at the time of auction with the aim of winning the Public Private Partnership contract or award, and later on after getting the contract, the private players bilaterally renegotiate better terms with the government. In cases where the government receives only one valid bid in the process of auction and the institution is also weak, then the government's position to negotiate often becomes quite weak.[5] As a result, the government generally tries to negotiate the Public Private Partnership contract and accept parts or entire of the renegotiation conditions. Even if the case is such that the original contract is signed and they decide against the renegotiation of terms and conditions, the consequence for the government is not very favourable as contract has to be cancelled and the whole project has to undergo rebidding following a new procurement process. Added to that, on the political front, this situation affects the credibility of the government and even then there is no guarantee that the new procurement process will bring with it more competition. Thus, aggressive bids affect or delay the whole Public Private Partnership project in political terms. Thus, we can understand aggressive bids as a situation where at the time of bid, the existing value of revenue is not sufficient to make up for present value of costs, taxes and depreciation of the

5 Dean Israel, Renegotiating Contractual Terms under PPPs- Moral Hazard or Practical Solution?, CRISIL, 2013, 9.

Public Private Partnership project and thus it generates losses on return on capital and investment.[6]

Initiator of Renegotiation

The initiation for renegotiation of the Public Private Partnership contract can be made by:

a) The government;

b) The operator or concessioner;

c) Both or ambiguous.

When the renegotiation request is made by the government, it is often due to alteration in factors like, change of priorities, change of ruling party in government or situations when the government itself finds it impossible to fulfill its contractual obligations. In some cases, there exist some politically opportunistic reasons too like government wanting to expand investment or the government trying to delay the increase or decrease of tariff value so that it can gain popularity before the elections.[7]

Conversely, when the request for renegotiation is made by the private player in a Public Private Partnership model, the renegotiations are most often than not due to resourceful reasons with the intention of seeking the maximum net present value out of the Public Private Partnership contract. But there also exist cases when the renegotiations are initiated by the private players to cover up against both domestic and external shocks that significantly unbalance the whole planned financial equilibrium for them.[8]

Negative Implications of Renegotiation

There are numerous concerns that are posed by both private player and the government regarding renegotiations of Public Private Partnership project contracts. It can be argued that renegotiations

6 HRD Strategic Framework, *Public Private Partnerships – Change, Leadership and Management Approach*, Public Sector Trainers' Forum Conference, 2013, 62.

7 Department of Economic Affairs, *Developing a Framework for Renegotiation of PPP Contracts*,(2014), <https://www.pppinindia.gov.in/documents/20181/27456/developing+a+framework+for+ren egotiation+of+ppp+contracts.pdf/52ca99a2-8193-4748-90bb-a9ffeb09c45c>. (visited September 13, 2017).

8 *Ibid.*

essentially defeat the competitive effect of the action including transparency and thus makes the credibility of the entire project questionable. Added to that, the government suffers adversely in cases of renegotiations initiated by the private players because there exist information asymmetry and lack of negotiation skills with the government, coupled with lack of competitive pressure to renegotiate the contract.

Renegotiations often distort the public tender as the winner in most cases is one who is a better negotiator and not the better operator. Renegotiations also increase the liabilities of the government through their fiscal impact on the whole project and thus it often results in overall decrease in advantages of the PPP project to its ultimate users.[9]

Re-Negotiation Model Concession Agreements: Indian Perspective

Renegotiation in case of a PPP contract uses the criterion of whether the private sector continued to be active in a project or not, rather than a strict legal definition of exit from the project. Thus a project that has been abandoned by a private party and later revived by another is regarded as having been cancelled. But if the private party has sold its interest to another without a cessation of service or abandonment, it is not a cancellation.[10]

History

A blockage in the bidding process of some PPP programmes has developed with private sector developers and financiers stating that they will not participate in any project bidding. As far as the contractual elements of the PPPs is concerned, there is a general consensus that the model concession agreements (MCAs) are inflexible with no ability to change the terms of the concession. For the next generation of PPP contracts, experts have suggested, among other things, amending the model concession agreement to include provision for renegotiation.

9 Richard Foster, *Comparative Study of Variation Clauses in Public Private Partnership Contracts*, Working Paper, 2013, 5.

10 Sanjay et.al, *A review on Cancellation of PPP Projects in India*, 2(6), IJAIR, 202, 203, (2013).

The recent years have witnessed major slow down and severe stress in the infrastructure project due to a lot of factors. Currently as many as 220 infrastructure projects having an investment of above 7 lakh crores are either delayed or have become unfeasible to achieve owing to reasons like delay in governmental clearances, insufficient credit support, slowdown of economy or lack of adequate fuel and power, etc.[11] As a result, private players have suffered severe losses and faced massive financial stress. There are typically two kinds of problems that demand an amend in the contractual terms. These will be discussed in the following section.

Premium Payment in Highway Projects

There can be two forms of Public Private Partnership models that generally operate in highway sector. The first is Build-Operate-Transfer contract and the other is Engineering-Procurement-Construction contract. In the first kind of contracts, concession contracts are awarded to private parties by National Highway Authority of India (NHAI). Here, the private player is responsible for building, maintaining and operating the highway along with the right to collect fare or toll from the users of such highway till the concession period ends and the National Highway Authority of India receives annual payment from these private players in return which is known as the premium. On the other hand, the Engineering-Procurement-Construction contract indicates a model where the private player is responsible just for the development of the highway and the transfer of the same is made to the government as soon as the construction ends.[12]

In the year 2011-12 out of the 27 Public Private Partnerships operating on the BOT model in the highway sector, 24 projects showed major delay due to factors like delay in receiving environmental clearances and inability to procure finance. Major road developers such as GVK and GMR have found themselves unable to pay the premium to the government and thus have made a request to modify the terms of payment. Since a long time, the

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11 Department of Economic Affairs, *Developing a Framework for Renegotiation of PPP Contracts*,(2014), <https://www.pppinindia.gov.in/documents/20181/27456/developing+a+framework+for+renegotiation+of+ppp+contracts.pdf/52ca99a2-8193-4748-90bb-a9ffeb09c45c> (visited September 13, 2017).

12 Dean Israel, Renegotiating Contractual Terms under PPPs- Moral Hazard or Practical Solution?, CRISIL, 2013, 9.

NHAI and other governmental ministries have shown discomfort with the idea of renegotiation of terms of previously awarded contracts with the private parties and have eventually resulted in a crisis in the highway sector.

Fuel Supply Constraints

The Indian economy has seen various mega power generation projects in the past years by big business houses like Reliance Power, Tata Power and Adani, etc. Most of the power projects in India rely on Indonesia for their coal supply and thus when a sudden change was made in Indonesian regulations, the tax impact on coal that these business houses imported from Indonesia was huge. Added to that, the Coal Authority of India which hold the public sector monopoly for coal supply, has been inefficient in suppling and thus resulting in massive financial losses for these companies. These private players made an appeal to the Central Electricity Regulatory Commission (CERC) regarding revision in power tariffs. The power purchasing states opposed this appeal and eventually private players like Tata and Adani were given the relief of revision of tariff for the Mundra Ultra Mega Power Plant project set up in Gujarat in 2013.[13]

There are a number of appeals lying before the CERC where private players and power developers operating for power purchasing states like Andhra Pradesh, Maharashtra, Rajasthan and Punjab where they are citing reasons like unexpected price rise in coal and thus demanding a revision of their previous contracts.[14] Thus, the primary underlining issue remains the same; is it possible to renegotiate the terms of previously entered into contracts due to unanticipated circumstances?

The magnitude of losses suffered by the private players in the power sector along with the increasing number of Non-Performing Assets (NPA) for the Indian banks make it crucial that the issue of renegotiation of Public Private Partnership contracts is dealt

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13 Department of Economic Affairs, *Developing a Framework for Renegotiation of PPP Contracts*,(2014), <https://www.pppinindia.gov.in/documents/20181/27456/developing+a+framework+for+ren egotiation+of+ppp+contracts.pdf/52ca99a2-8193-4748-90bb-a9ffeb09c45c> (visited September 13, 2017).

14 *Ibid.*

with seriously. Thus, it becomes imperative that study must be made on the issue, whether it is permissible to renegotiate the terms of Public Private Partnership contracts and if yes, then for the protection of tax payers what kind of contract design and regulatory mechanism must be put in place.

For a long time, the NHAI and various finance ministries have been uncomfortable with the idea of renegotiating previously awarded contracts with private players, resulting in a crisis in the road sector. The data provided by the NHAI on the highway PPP programmes shows that a default on the concessions would mean that the government would need to pay two third of the cost of the highway and have toll revenues in perpetuity as well as own all the assets so created. But this may not be possible as most of the projects are at the pre- Commercial Operation Date (COD) stage and hence have not been completed.[15] Additionally, there are very few termination options available to the public authority. The termination is extremely punitive and might result in the government over-paying for the assets. There are several problems associated beginning from inadequate information on critical land, design or demand made available to bidders. The MCA has very limited forms of relief in the event of any case outside the scope of the concession agreement. Additionally, the MCA does not allow for any form of amendments to the Concession Agreements. This is because of the absence of any framework within which such amendments can be identified, negotiated and approved by empowered bodies on a rational basis.

Later, The Planning Commission laid down a proposal in 2013 to add a renegotiation clause in PPP contracts, including the drafts that had already been sent to the concerned ministries. Arun Jaitley announced new initiatives on building infrastructure through the so-called public-private partnership (PPP) mode in the national budget he presented to Parliament on 29 February, 2016.[16] For

15 Department of Economic Affairs, *Developing a Framework for Renegotiation of PPP Contracts*, (2014), <https://www.pppinindia.gov.in/documents/20181/27456/developing+a+framework+for+ren egotiation+of+ppp+contracts.pdf/52ca99a2-8193-4748-90bb-a9ffeb09c45c> (visited September 13, 2017).

16 P. Manoj, *Renegotiation of PPP Contracts becomes a Reality*, Live Mint, (March 9, 2016), <http://www.livemint.com/Opinion/1QbmdvoIZ9aCYaQEWv06jJ/Renegotiation-of-PPP-contracts-becomes-a-reality.html>. (visited September 13, 2017).

the resolution of disputes in infrastructure-related construction contracts, PPP and public utility contracts, a Public Utility (Resolution of Disputes) Bill was to be introduced in 2016-17. The guidelines were to be issued while, keeping in view the long-term nature of such contracts and potential uncertainties of the real economy, without compromising transparency for renegotiation of the PPP projects.

Force Majeure clauses were added in PPP Contracts in order to assist renegotiation of these contracts. The force majeure clause aims at protecting the interests in cases wherein the risks are beyond the control of the private players adversely affecting their business.[17] The private entities use this force majeure clause whenever unforeseen circumstances affect the viability of the PPP project in the hope that the adjudicating authority may renegotiate terms. For example, Tata and Adani cited change in coal expert norms by the Indonesian government to increase tariffs under power purchase agreements via 'force majeure' clauses.[18]

Reasons for Re-Negotiation

In India the PPP projects are associated with the following critical problems:

- Project design and validity are not well thought out because of the rush in concluding PPP contracts. This has resulted in most of these projects being cancelled or running into opposition.
- There is a complete lack of transparency because in quite a few cases though the contract has been concluded, terms of the agreement have been altered to suit the private investor without any prior review.

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17 C.R Sukumar, *PPP Companies in Telangana looking to Renegotiate projects Claiming unfavourable Business Climate*, Economic Times, (October 8, 2014), <http://economictimes.indiatimes.com/news/economy/infrastructure/ppp-companies-in-telangana-looking-to-renegotiate-projects-claiming-unfavourable-business-climate/articleshow/44660427.cms> (visited September 13, 2017).

18 C.R Sukumar, *PPP Companies in Telangana looking to Renegotiate projects Claiming unfavourable Business Climate*, Economic Times, (October 8, 2014), <http://economictimes.indiatimes.com/news/economy/infrastructure/ppp-companies-in-telangana-looking-to-renegotiate-projects-claiming-unfavourable-business-climate/articleshow/44660427.cms> (visited September 13, 2017).

- Shift from build-operate-transfer to design-build-finance-operate-transfer has led to contractors raising 100% project finance via debt. End-users foot the bill. To get the projects, contractors are known to offer unsustainable bids, affecting the viability of operations— making demand for tariff review inevitable.

- In case of social sector PPPs the services might not reach the poor and it is also pretty difficult to hold the private sector accountable.

- There is a lack of an independent regulator to evaluate, monitor and review projects, leading to transfer of public assets without proper evaluation.[19]

Trebilcock and Rosenstock classified the reasons for renegotiation into 4 categories: low-balling by private players in the competitive bidding stage, opportunism, lower than expected demand and unforeseen changes in project environment. Gaush highlights further reasons based on anecdotal evidence such as faulty contract designs, failure on the part of the government to honor contract clauses, defective regulation and its effects.[20]

There are three mechanisms for assigning/transferring risk to the contractual parties (i) entrenchment of right (ii) Material Adverse Effect (MAE) and (iii) renegotiation at the time of risk realization.[21] In renegotiation approach, the risk is renegotiated at later stage at the time of risk realization. Renegotiation is preferred by many private parties probably because of the facts that it involves bargaining between the sponsor and the government in a non-competitive environment. Since there are substantial differences in skills, capability, and information, the private party tends to gain considerably from renegotiation. On the flip side, it also encourages corruption and political influence.

19 Sanjay et. Al, *A review on Cancellation of PPP Projects in India*, 2(6), IJAIR, 202, 207, (2013).

20 M.P Raje, *Renegotiating Contractual Terms under PPPs- a moral Hazard of a Practical Solution?,* <https://www.crisil.com/Crisil/crisil-young-thought-leader/dissertations/Meenal%20Raje%20Winner%20.pdf>. (visited September 13, 2017).

21 M. Kakati and Pallav Bruah, *Optimal Risk Allocation in PPP Projects in India*, Wei International Academic Conference, 144, 150, (2016).

The case for a renegotiation can be made explicit and recorded so that the decisions made are rational and defensible. It should also include evidence that a renegotiated concession agreement is likely to have direct cost implications for the government that are less than the financial outcomes of doing nothing. There are certain conditions as stated by the finance ministry as well to ensure that no renegotiation is encouraged on concession agreements. These include:

1. Any foreseeable event of distress at the financial close.
2. Any event that would have impacted the private entity like any other company in the ordinary course of business (for example, a certain change in law)
3. Risks taken by the concessioner while preparing for the bid.
4. Any impact arising directly or indirectly from the performance, action or inaction of the private entity
5. Failure of an associated party to provide finance to the concessioner.[22]

Procedure for Re-Negotiation

There are varied cases and circumstances under which renegotiation may be encouraged. On the flip side there are circumstances also wherein encouraging renegotiation may not give the desired result. This has been discussed in detail in the table given below. A certain checklist has also been provided for to ensure that renegotiation is proceeded with in the most optimum conditions only.

Underlying Trigger	Indicators (Not a comprehensive list)	Renegotiation Permissible?
Aggressive and unrealistic bidding by concessionaire	• Losses incurred by the project in normal project environment and in absence of adverse external factors right from start of the contract	Should not be

22 P. Manoj, *Renegotiation of PPP Contracts becomes a Reality*, Live Mint, (March 9, 2016), <http://www.livemint.com/Opinion/1QbmdvoIZ9aCYaQEWv06jJ/Renegotiation-of-PPP-contracts-becomes-a-reality.html>. (visited September 13, 2017).

	• Renegotiation within a short period from award of concession or even before project commences	
	• Low balling of tariffs or high-balling transfer fees by the winning party; this can be identified by comparing the winning bid with average of the losing bids or historical bids	
Opportunistic behaviour by the concessioner or the government	• Renegotiation within a short period from award of concession or even before the project commences	Permissible when injured party demands just compensation for the loss caused by opportunistic behaviour
	• Renegotiations initiated close to elections or when the government is under fiscal stress	
	• Unfair or inconsistent application of amendment in regulations or terms to similar projects	
	• Disproportionate increase in returns to private players	
	• History of renegotiation by private players	
	• Renegotiation benefits demanded in excess of losses incurred due to adverse developments in project environment.	
Failure of the government to honour clauses	• Inefficiencies or corruption	Permissible if project is unviable or will cause loss of public welfare
	• Lack of fiscal capacity to honour contract clauses	
	• Lack of technical expertise and knowledge	

	• Inter-ministry co-ordination issues	
Macro-economic shocks, force majeure and other unforeseen factors	• Financial or credit crisis	Permissible if contract becomes impossible or commercially unviable
	• Currency and commodity price shocks	
	• Adverse regulatory changes in foreign countries affecting project performance	
Defective regulation	• Legal, institutional, administrative and enforcement related problems	Will require more intensive analysis and depend on situational peculiarities.
	• Lack of maturity in regulatory framework or governing laws	
Faulty contract design	• These would be much more difficult to identify and subject to peculiarities of each situation. However, anecdotal evidence suggests faulty contract designs or regulations lead to renegotiation within a short duration of contract award.	

Source: M.P Raje, *Renegotiating Contractual Terms under PPPs- a moral Hazard of a Practical Solution*

Renegotiation checklist

1. Change proposed is agreed to by both parties
2. Information provided to all stakeholders involved
3. costing for the renegotiation and understood by both parties
4. Contract Management Team considered employing a third party in the renegotiation process

5. Reviewed by consult of the Authority
6. Timelines and scope of project redefined
7. Increase/Decrease in funds justified
8. Is in compliance to Concession Agreement
9. Payment mechanism and scheduled restructured as per the renegotiated contract

The Kelkar Committee Report, 2015 on Revisiting and Revising the PPP Model mentioned re-negotiaton as a possible option in case of PPP contracts. It stated that the final decision on a renegotiated concession agreement must be based on:

1. Complete disclosure of the renegotiated estimated long-term costs, risks and potential benefits
2. Comparison with the existing financial position for government just prior to renegotiation.
3. Comparison with the financial position for government at the time of signing the concession agreement;

These caveats permit the authority regulating the PPP Model of Infrastructure concession to take a decision based on a complete comparison of the likely outcomes over the future of the concession.[23]

Results of Re- Negotiation

Renegotiations incidences were higher in contracts with price cap features, (42%) investment obligations by the private players (73%) and in contracts based on lowest tariff rather than highest transfer fee.[24] The outcomes of renegotiation were revision in tariffs, changes in annuities paid to the government, changes in investment quantum and schedules, changes in rate of return of the project and were mostly favorable to the concessionaire.

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23 *Report of the Committee on Revisiting and Revitalizing PPP Contracts,* <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133954> (visited September 13, 2017).

24 Department of Economic Affairs, *Developing a Framework for Renegotiation of PPP Contracts*, (2014), <https://www.pppinindia.gov.in/documents/20181/27456/developing+a+framework+for+ren egotiation+of+ppp+contracts.pdf/52ca99a2-8193-4748-90bb-a9ffeb09c45c> (visited September 13, 2017).

Several reports document the concerns with renegotiation. Opportunistic behavior by private players, increase in tariffs, especially on contracts which have initially been awarded to lowest tariff bidder based on competitive bidding, loss of sanctity of contracts, undermining of competitive bidding principles applied in the initial award of the contract due to the bilateral nature of renegotiation and reduction in general welfare of the people due to increase in costs of goods and services are some of the major concerns.[25] What has happened lately is that the renegotiation route to financial sustainability of PPP projects is closed. Corruption wary decision-makers are circumspect about giving relief through the renegotiation route, and, therefore, there is no option for the project sponsors that bid aggressively but to walk out of the projects to cut losses.

The following indicative list includes features/clauses that can be incorporated in contracts to reduce the need for renegotiations, streamline the process and discourage frivolous renegotiations:

- Financial criteria such as tariffs or premium payments for selection of bidder in a competitive process should be applied once initial selection has been made based on technical expertise, reputation and past experience.
- Parties who seek to win the contract and then renegotiate tariffs should establish minimum viable tariff structure and schedule to prevent extreme low bidding.

  Phased tariff revision scenarios and mechanism should be built into the contracts.
- Triggers for renegotiation should be laid down in the contract
- Provisions for competitive re-bidding along with/in lieu of renegotiations contracts should be built in to discourage parties from using renegotiations as a bilateral negotiations process for mutual benefits, within a short period of initial award of contract
- Imposition of heavy fines on frivolous or opportunistic renegotiation attempts.

25 Ministry of Finance, *Government of India (2015): Economic Survey 2014–15,* <http://indiabudget.nic.in/es2014-15/echapter-vol2.pdf>. (visited September 13, 2017).

- Specification of the regulatory mechanism to be used for the purpose of renegotiation.[26]

Gaush (2004) suggests that the renegotiation mechanisms should be embedded in law rather than the contract or decree, as law is more difficult.[27] The most effective way would be to set up/ identify an independent quasi-judicial regulator for every sector to examine renegotiations on a case to case and act as mediator and a judge. India already has adequate institutional framework for administrative and dispute resolution issues. Thus the renegotiations framework should have adequate power to recast contracts rather than being limited to an administrative or dispute resolution body. For a resolution of issues like Change of Scope or Renegotiations, an immediate escalation to the Authority at Decision Making Level needs to be done so that they can be resolved in a fast manner and addressed with priority. These issues need immediate resolution in any project and cannot be resolved without consultancy from the Authority. Hence, for such events immediate escalation is done to avoid/ minimize delays in project execution.[28]

Case Study - Dabhol Power Project

Project Overview:

Dabhol power plant is a massive combined-cycle power plant (largest Gas- fired power plant) of capacity 2184 megawatts spread over two phases on the western coast of Indian State of Maharashtra. The project took 9 years to commence operation after being initiated in 1992. The 20 years Power Purchase Agreement (PPA) in 1993 between DPC and the Maharashtra State Electricity Board (MSEB) guaranteed off-take through a take-or-pay contract.

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26 M.P Raje, *Renegotiating Contractual Terms under PPPs- a moral Hazard of a Practical Solution?* <https://www.crisil.com/Crisil/crisil-young-thought-leader/dissertations/Meenal%20Raje%20Winner%20.pdf> (visited September 13, 2017).

27 M.P Raje, *Renegotiating Contractual Terms under PPPs- a moral Hazard of a Practical Solution?* <https://www.crisil.com/Crisil/crisil-young-thought-leader/dissertations/Meenal%20Raje%20Winner%20.pdf> (visited September 13, 2017).

28 Ministry of Finance, *Guidelines for Post-Award Contract Management or PPP Concessions,* <https://www.pppinindia.gov.in/documents/20181/33749/Guidelines+on+Post+Award+Contract+Manage ment+of+PPP+Concessions/> (visited September 13, 2017).

The Phase-I was of capacity 740 megawatts and Phase-II of 1,444 megawatts. The total project cost was $2.9 billion. Enron owned 65%, Bechtel Enterprises owned 10%, General Electric owned 10%, and the Maharashtra State Electricity Board owned 15%. The project was cancelled in 2001 as MSEB stopped drawing the expensive power from the project.[29]

What went Wrong?

Bharatiya Janata Party (BJP), a rightwing party came to power in 1995. The new Government appointed a committee of state ministers (the Munde Committee) to review the Dabhol project. The Munde Committee had prepared and issued a sharply critical report that recommends cancelling the Dabhol project. The state government cancelled the project on this advice of the Munde Committee.[30] Enron had decided to go for arbitration against state Government and seeks $300 million as compensation. The state Government had filed suit to void the agreement. A meeting was held between Rebecca Mark, Chairman of Enron International and Bal Thakre, the top power in one of the ruling parties This meeting resulted in renegotiation between Enron and the state. A revised agreement was made between Enron and state Government, with increased stakes for MSEB[31] and Enron started the power generation of phase-I (740 megawatts) in 1999. The revised agreement aimed at restructuring of the project and tariff, capital costs, payment terms, environment and finding out if any Central power utilities or States would be willing to lift surplus power generated by DPC. Enron suspended it's arbitration proceedings in London. The terms of the renegotiation agreement were:

1. equity participation: MSEB shall be a 30% shareholder with a proportionate decrease in shareholding of DPC. The idea behind

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29 Sanjay et.al, *A review on Cancellation of PPP Projects in India*, 2(6), IJAIR, 209, 203, (2013).

30 Minority Staff Committee on Government Reform U.S. House of Representatives "fact Sheet-Background on Enron's Dabhol power project", (February 22, 2002), <http://finance-mba.com/Dabhol_fact_sheet.pdf> (visited September 13, 2017).

31 *Enron wants Renegotiation Meet Rescheduled*, The Hindu, (May 4, 2001), <http://www.thehindubusinessline.com/2001/05/04/stories/140456uy.html> (visited September 13, 2017).

adding an Indian shareholder was to deal with the suspicion on foreign investment.

2. Output Capacity: The output capacity of both Phase I and Phase II was increased.
3. Capital Costs: The regasification plant was removed from DPC, treating it as a separate project thereby reducing capital costs.
4. Power tariff: The political situation in Maharashtra asked for a reduction in power tariff paid by the MSEB.
5. Fuel: the original plan was to use distillate oil and liquefied natural gas as fuel. This was altered to naphtha in the renegotiated agreement.
6. Environment: The original plan had no obligation towards the environment, but the altered agreement mandated Enron and DPC to conduct air and water surveys and plant trees.
7. Enron and DPC also agreed to use local supplies and suppliers to whatever extent possible.[32]

The Maharashra government agreed to accept the panel's report. The power purchase agreement between DPC, the Maharshtra Government and MSEB was amended.[33] By 2001, the MSEB was unable to make payments to the DPC for the electricity it took under the power purchase agreement. In April 2001 the Enron began arbitration proceedings and in June 2001 the Dabhol Power Company (DPC) ceased operation of the Phase-I portion of the plant and halted construction on the 90% completed Phase- II portion (1,444 megawatts).[34]

Reasons of Cancellations

The main reasons of cancellation of project are as follows:

- The project had lost the support of newly formed State Government of Maharashtra.

32 J. W. Salacuse, The Three Laws of International Investment, 291, (2013).

33 *Ibid*.

34 Sanjay et.al, *A review on Cancellation of PPP Projects in India*, 2(6), IJAIR, 202, 208, (2013).

- There was a contract dispute between the Government and plant owners.
- The company was associated with allegations of fraud, misrepresentation, violation of human rights, malfeasance and corruption at highest level.
- Lack of transparency and competition in the bid process.
- The project was not financially viable according to World Bank because it denied to finance the project.
- Cost of the project was greater than comparable projects. Enron cost Rs 4.49 Cr per MW Comparable projects cost Rs. 3.6 Cr per MW[35]
- The power generated by plant was more expensive than that from domestic power purchaser therefore the MSEB stopped drawing the expensive power from the project.
- The MSEB was not paid an amount of Rs. 29.31 billion to company.
- Government criticized the process and content of original and revised agreement.[36]

After the Dabhol debacle and given the sorry financial state of the main power off-takers (the State Electricity Distribution companies), foreign investors viewed the political and commercial risks of investing in India to be excessive (though the sentiment seems to have improved lately). This partly explains the growing importance of domestic firms (like the National Thermal Power Corporation, Reliance Energy, and Tata Power) in the Indian power sector.[37]

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35 Minority Staff Committee on Government Reform U.S. House of Representatives *Fact Sheet-Background on Enron's Dabhol Power Project*, (February 22, 2002), <http://finance-mba.com/Dabhol_fact_sheet.pdf> (visited September 13, 2017).

36 Sanjay et.al, *A review on Cancellation of PPP Projects in India*, 2(6), IJAIR, 202, 206, (2013).

37 K. V. Pratap, *The increasing Incidence of PPP Project Cancellations in India*, 51(39), Economic and Political Weekly, 27, 28, (2016)

Global Experience of Renegotiation of PPP

Contracts

As the very nature of the Public Private Partnership contract suggests, it is entered into for rather longer periods of time, generally extending upto 20-30 years. Thus, it becomes necessary to revisit the terms of contracts due to incapability of making a prediction about changes in the project environment. In 2004, the World Bank conducted a study on more than 1000 Public Private Partnership projects operating in Latin America between 1985 and 2000.[38] This study suggests that more than 41 percent of these Public Private Partnership project contracts had to be renegotiated. Further, the study highlights that 85 percent of renegotiations had taken place within 4 years of the initial award of contract and most of the renegotiated contracts underwent negotiation within 2.2 years of their award.[39] This particular observation thus makes it clear that renegotiation happening in such short a period of contract award indicates the aggressive bidding by the private players, alternatively, it is suggestive of error in the contract design itself. Further, the study shows that the renegotiations were initiated by the private players in most of the contracts and also the fact that in contracts having terms like a price cap feature, investment obligations by the private players and award of contracts based on lowest tariff rather than highest transfer fee experienced more incidences of renegotiations.

The study of Public Private Partnership projects suggests a different experience in other parts of the world. In the United Kingdom 22 percent of the total Public Private Partnership projects witnessed renegotiation requests on the instance of the government. On the other hand, 6 of the 21 projects Public Private Partnership projects in the transportation sector had undergone renegotiation in the United States between 1991-2000 and the terms of renegotiations were mainly favorable to the concessionaire.[40]

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38 J. Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right*, The World Bank, 2004, 43.

39 *Ibid.*

40 Thorsten Beckers, Jirka Gehrt, Jan Peter Klatt, *Renegotiation Design for Long-Term Contracts: The Case of Public-Private Partnerships*, Workgroup for Infrastructure Policy, Berlin Institute of Technology, 2010, 16.

Country Comparison of Legislative Framework; Governing Renegotiation of PPP Contracts

Australia

Centralization of policy and advisory services were allowed in state-run projects by the formation of Infrastructure Australia (IA). It is a statutory body established under the Infrastructure Australia Act, 2008. All PPP Policies and guidelines are within the ambit of IA. These policies and guidelines apply to all agencies at a national level (subject to the Financial Management and Accountability Act 1997 (FMA Act)) unless it is advised otherwise by a specific government decision (in which case an exemption is required and documented for audit scrutiny).[41]

The Infrastructure Australia National PPP Guidelines clearly specify that the assumption in the contract is that of a study of feasibility and a business case that may demonstrate management synergies, efficient asset utilization, encourage innovation, optimal risk transfer and integrated whole-of-life asset management. A change to these needs to be proved based on an ex-ante approval. The sole glitch being that the term 'material' is devoid of an explanation in the National Guidelines.

Additional approvals apart from the usual ones prior to entering into a contract are required in certain situations. They include:[42]

- Cases wherein there has been a material change in the project such as amendment to key objectives, scope of services, conclusions and assumptions (including economic and financial appraisals) change significantly
- Changes in risk allocation from the previous government
- An amendment to the budget funding is required

41 Foster Infrastructure. *Comparative Study of Contractual Clauses to Provide for the Smooth Adjustment of Physical Infrastructure and Services through the Lifecycle of a Public-Private Partnership (PPP) Project.* Melbourne: The Australian APEC Study Centre, 2012.

42 Infrastructure Australia. National PPP Guidelines: Volume 2: Practitioners' Guide. March 2011. <http://www.infrastructureaushttp://www.infrastructureaustralia.gov.au/public_private/files/Vol_2_Practio ners_Guide_Mar_2011.pdf.> (visited on 17 September, 2017).

- Rise of issues relating to public interest

Renegotiation of the PPP contract can happen only once the agency obtains an approval before the commencement of renegotiations from the PPP authority. Once the government approves of the renegotiation, a cabinet approval is needed before commencing negotiations.

United Kingdom

UK has used PPP for public services under the name of Private Finance Initiative (PFI) since 1992. They emphasised on value for money while justifying this decision. PFI credits would help obtain massive series of investments into infrastructure ranging from hospitals and schools to municipal infrastructure and roads in the period 1992 to 2010.[43]

As per a typical PFI project, public sectors enter into long-term contractual arrangements with private sector companies that will design, build and operate the asset. UK has around 700 PFI contracts. Recently PF2, a new entity called Infrastructure UK (IUK) has been formed in the Treasury and the PPP programme.

IUK's core mandate is:[44]

- To provide greater clarity and coordination over the planning, prioritization and enabling of investment in UK infrastructure; and
- Greater value for money, while providing for UK Infrastructure.

IUK provides advice to the Commercial Secretary to the Treasury who leads on infrastructure issues and reports to the Chancellor of the Exchequer. Renegotiation or change mechanisms are provided for in Operational Taskforce Note 3: Variations Protocol for Operational Projects of 2008 and Standardization of PFI Contracts 4 (SOPC4) of 2007. The aim of these mechanisms is to ensure the following:

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43 National Audit Office. *Making changes in Operational PFI Projects*. London: The Stationery Office, 2008.

44 *Ibid.*

- Clear process, with clearly defined roles, responsibilities and timescales;
- Quick and efficient procedures (appropriate to the scale and complexity of the change required), with transaction time and cost kept to a minimum;
- Transparent pricing; and
- Value for money.

These changes are classified on the basis of the requesting party- authority or private party, stage of the PPP at which they are requested and the size. The difference lies merely in the process. Though, generally there is great flexibility to initiate change from either party at any time and to any value.

The authority has to approve of the changes, but most of them are subject to the ability to pay for them. Most of them seem to have been requested by the public authority only.

In addition to the change regime, there are also the Relief, Compensation, Change in Law and Force Majeure principles built into each PPP agreement. These provide for supervening occurrences outside the control of the private party with consequences set out in the contract.

Standardised Model Concession Agreements

PPPs involve huge investments that are recaptured only after a long time. This is the reason for which they are structures similarly around the world. The predominant form of financing is project or "limited recourse" finance. Because of similarity in financing approach a standardized approach has been adopted in developing concession agreements in different jurisdictions.[45] A major advantage of this being that it is simpler for an international consortium of developers, contractors and financiers to understand the rights and obligations under the agreement in different jurisdictions. There has also been a movement across different

45 Ministry of Finance, *Guidelines for Post-Award Contract Management or PPP Concessions,* <https://www.pppinindia.gov.in/documents/20181/33749/Guidelines+on+Post+Award+Contract+Management+of+PPP+Concessions/> (visited September 13, 2017).

jurisdictions towards a standardized allocation of risks between public and private parties to the agreements. The public sector prepares the projects and the agreements through a feasibility study and procurement process till when project agreements are signed implemented. A regulatory mechanism in this field would increase the number of PPP projects in number and spread it over diverse sectors.

Conclusion

It is impossible to predict the range of possible risks and to allocate these with precision over 20 to 25 years in a complex environment. As such, the key to any PPP does not lie in the ownership of financing method, but rather in how the balance of risk and rewards is set out so as to be able to survive significant changes over a long period of time. Further, investors in PPPs are not perfectly rational. They, like the stock markets on which they are often listed, go through periods of exuberance and paranoia-like caution. In the exuberance of the initial stages of a PPP program, risks might be seen as the unlikely “bad things” that happen to other investors. And in the wary period that follows the occurrence of that risk, risks are perceived as certain events that will bedevil the very project the investor is scrutinizing.

As a result of changing perception, the private party tends to opt for renegotiation when it perceives that project risk has been incorrectly underestimated[46] and greater public sector support is desired. Similarly, if the private party overestimates the risk or achieves better-than-expected returns, the public sector often seeks the right to renegotiate the contract so that returns and risks are more equitably shared.

This concept of equitable sharing in the so-called “upside” of PPP Agreements is important in the context of the PPP projects being a form of publicly-owned social or economic infrastructure. Considerable effort has gone into the prescribed sharing of returns

46 Athias, L., *Uncertainty, Renegotiation, and Incentives in Public Private Partnerships – An Economic Analysis of Worldwide Toll Road Concessions*, Doctorate Thesis, University of Paris, November 2007,22.

above a threshold limit[47] or even of refinancing to the benefit of the sponsors generating a refinancing gain share for the public sector. Particularly in developing countries, the interests of the poor and other civil society stakeholders should be considered in all phases of the strategy and negotiation process.[48]

Thus, the legislative framework in many countries describes the content of Concession Agreements and related documents and permits changes in terms and reallocations of risk. In addition, because amendments that amount to a material change in the terms of the Concession Agreement may offend public procurement principles of competition and transparency as well as diminish the value of such a contract to the public sector, regulatory frameworks in various jurisdictions also prescribe processes for such changes.

In India most of projects are cancelled due to loss of political support, high license fees, change in Government`s policy and increase in tariffs of charges related to electricity and water supply projects. The magnitude of losses suffered by power developers and the rising non-performing assets on the balance sheets of Indian banks have made the renegotiating of PPP contracts one of the most crucial issues for India today. Earlier, the government was unwilling to encourage re-negotiation of PPP. This would lead to either a complete failure of the project or lack of faith in the private players.

It was only after the planning commission laid down a proposal that this renegotiation clause was added in PPP contracts. Eventually the finance ministry laid down certain conditions to ensure a genuine requirement for renegotiation of concession agreements. One major theme running through them is financial loss suffered by the private players. The Kelkar Committee finally laid down the conditions to be adhered to in case renegotiation needs to be looked into. Renegotiations should not be ruled out in principle. It is not difficult to conclude through this paper that the main aim in case of PPP projects is to cater to the requirements and profits of private players. For an economy such as India's where

47 *Ibid.*

48 Bracey, N. and Moldovan, S., *Public-Private-Partnerships: Risks to the Public and Private Sector*, Paper submitted for the 6th Global Conference on Business and Economics, Boston, Massachusetts, 2013, 31.

infrastructure depends heavily on contribution by private players, it is quintessential to cater to their needs. With renegotiation, the aim is to protection of the project while ensuring voluntary participation from new players. But, this also means that it is simpler for the private players to shirk off responsibility and look for discarding the project in the smallest of exigencies. Thus, a case-by-case analysis is warranted given the unique nature of each PPP contract, and both parties should have the right to seek renegotiations, if the contract results in losses.

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Part II
A Sectoral Study

Chapter 1

Indian Highway Sector and Public Private Partnership: Evolving Models of PPP

Raagya P. Zadu

Introduction

Owing to its vast land area, India has the second largest road network in the world. Connecting all States and cities with a road network is a daunting task which the National Highways Authority of India has been attempting to do throughout the barriers of time. Highways play a seminal role in addressing and determining the economic prowess of a country as most of the transport is still done by road. Also, on the public index, well connected highway infrastructure is crucial for any nation, developed or developing as it implies the strength of infrastructure facilities as are provided to its citizens. Thousands of kilometres of road building incorporates more than just financial investments as it involves various other aspects such as land acquisition, meticulous planning, anticipating risks attached and the environmental and social impact which might be caused due to this activity. This therefore becomes very tough for the government to carry out alone. It is for this reason that the private players are looked at for support so that the strengths of both sectors can be combined and such mega projects can be carried out successfully. This partnership has to be tailored in a manner which involves the private and the public sector in such a way that it is advantageous not only for the project proponents but also to the public at large. Issues which loom low at mega-projects are those of risk allocation, cost overruns, procedural delays and lethargy and most importantly, the sharing of financial liabilities. These issues are mostly defined and specifically stated in the respective agreements in between the private and public authority, but still, in the various models which are followed and adopted, there are instances of contractual conflicts. Models which are mostly popular in the highway sector are Build-Operate-Transfer (BOT), Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Build-Operate-Lease-Transfer (BOLT), Lease-Develop-Operate (LDO), Rehabilitate-Operate-Transfer (ROT), Design-Build-Finance-Operate (DBFO) etc. All these models with their own little variants have been formulated and practiced since 2006. Many such cases have been brought into light when issues and litigations have plagued the development and completion of these highway projects, therefore giving ample opportunity for scrutinizing where the real challenge lies. In the upcoming chapter, the same shall be discussed in detail as to how these models evolved, what issues and challenges they created and how their contractual liabilities and implications have affected this Highway Sector, which now is considering the much debated and discussed Hybrid Annuity Model.

Another very important aspect to consider here is the fact that over the years, there has been a significant drop in the interest shown by the private sector in Highway Construction Projects. Upon glancing over in the past decade, the Tenders for building of Highways have not seen any new private player who has expressed his interest in these projects. The reasons have been speculated to be many, ranging from distrust in the Authority's working, lethargy in the working of the public sector and the multitude of paperwork and complicated administration, cases of corruption in the grant of tenders, major issues in the acquisition of land for these projects and shifting of risk allocation, giving rise to financial complications. The recently released Model Concession Agreement, a framework for PPP consisting of model regulatory framework and policy implementation of the project. It incorporates plethora of issues such as mitigating and segregation of risks, differentiated responsibilities of the parties, the absolute nature of costs involved, termination and penalties for untimely breach or damage caused. The underlying reason for bringing into force a Model Concession Agreement in the various sectors of PPP was to ensure some amount of transparency, uniformity in the contracts and to eliminate substandard work being done in the infrastructure development projects. Most models of PPP as mentioned above have their own versions of MCAs as available on the respective government portals like National Highways, State Highways, and Ports etc. The recent trend however has seen a falling number of private players in the National Highways construction projects. Owing to major bottlenecks which even the MCAs fail to prevent, in the long run the private players prefer to not get entangled in the NHAI web of complicated and at time, controversial projects. There are *Force Majuere* clauses which even provide for a political risk, in case of a change of government, the private proponent shall not be subject to incurring of financial losses, but that does not seem to be lucrative enough. The introduction of this very new concept of Hybrid Annuity Model (HAM) seems to be the Authority's new chance to involve more private players in this sector as they offer the private sector only the construction and free them of all other encumbrances therefore not involving them into any complications. Etymologically, the HAM is an amalgamation of the BOT Annuity and the Engineering Procurement and Construction (EPC) Model. In the former, the government invites bids for the engineering knowledge from the private sector whereas the production cost including the raw material procurement is met by the government. The role of the private sector is limited only to the knowledge and technical know-how. The HAM, therefore, is a combined effort to bring together the positives of the BOT annuity and the EPC in a way that the government provides approximately 40 per cent of the cost for the first five years by annual payments while the remaining payment shall be done through the creation of assets and performance of the developer. With the amount to be paid by the government gets fixed, the private sector player clearly has to raise the remaining sixty per cent by means of equity or loan. The developer also gets no Toll rights and that becomes the sole responsibility of the NHAI.

This chapter, with the help of various case studies on the types of PPP models in the Highway Sector as they developed over time, shall analyze the issues and challenges as posed and the prospect of various new models which are now being considered in order to maintain the harmonious interaction of the private with the public sector.

The Highway Sector in India: A Statistical Review

Coping up with the growing traffic, the government of India has been the sole regular financer of the road and highways sector. Over the years, the budgetary allocation for the highway sector has seen an upward increase. From a traditional 'Government Only' approach, the trend has gone to introduction of the private investors slowly and now, on an equity basis. Various models focussing on the amount of risk estimated and the finances required, have been developed and religiously followed. Of what started as Turnkey projects or 'Greenfield' projects, where the private investor developed or brought about the innovative plan for the development of infrastructure, now the model which is being sought after is the EPC, where the government agrees to completely finance the project. By the assessment of the changing and continuously evolving models of PPP in the Highways, one can understand and correlate with the relationship between the Private and the Public authorities. On one hand, there was a time when the private player was yearning to get into the development of public utilities and the arrangement of finances and design were developed in-house making those projects fall in the 'Greenfield' category, whereas now, only to keep the private player involved and to aid in the ease of doing business, the government authorities are now proposing to undertake all the financing and most of the risk management, making this fall into the category of an EPC model.

There was a time, when due to the incessant change in government policies and an increased instance of favouritism and nepotism, that the private players started exiting the highway sector. That was the time, during the UPA I-II government when there were only two or three private players who were involved in the Highway sector. Fearing a public uproar and the attention of the Competition Commission, the government, rather, the NHAI started looking at becoming more flexible in its risk allocation and financing models. The Planning Commission then rolled out certain Model Concession Agreements for the various sectors, a robust committee was setup under the chairmanship of Justice Kelkar, in order to revitalise the PPP sector, and this committee then suggested various recommendations which reformed crucial clauses in the Concession Agreements, thus gaining some trust and confidence of the private players. With a change in government, the planning commission was replaced by the NITI Ayog and the Ministry of Road, Transport and Highways (MoRTH) was given power to create such policies and roll out such flexible notifications which would interest the private players into investing into the country's highway. Rooting on the enormous size of the country, the ministry has stressed that this sector promises an enormous potential for return on investment as the government proposes to expand the roadways annually. For instance, the Highway Outlay for the year 2016-17 was set at USD 8.21 billion[1]. During the period of 2012-2017, the total budgetary support in this sector has been that of USD 22.1 billion.

The concept of Privatisation and the economy opening up to industry and development in a big way happened during the early 1990s. The highway sector and the road development sector did not remain untouched by it for a very long time. The government at that time had developed a National Highways Development Programme (NHDP) which was entrusted with the building of highways and roads. The first few phases of this project were incorporated into the famous Golden Quadrilateral Project of the NDA government in 2001, where mostly the projects were awarded in the Engineering Procurement and Construction mode and the aspect of PPP was experimented upon. The third phase of the NHDP saw the first wave of PPP coming into the Highways sector, with as high as 107 projects were awarded under PPP alone in the Phase 3[2]. It was only during the period of the Global Financial Meltdown during 2008 that the number of projects being awarded in PPP mode staggered down drastically, but by 2010 and onwards, till 2017, the number of projects which have been awarded have risen up gradually, that too in various modes of the public private partnership. The standard form of PPP has been the BOT, or the Build Operate and Transfer mode, of which maximum number of highways have been constructed. The newer models which evolved, were only advanced forms of this model where the Operations were added, then the Design and later the Financing has been incorporated. There have been multiple reasons, apart from the economic crisis because of

1 Make In India, Report on Roads and Highways for the year 2016-17. <http://www.makeinindia.com/sector/roads-and-highways> (visited on March 8, 2018).

2 The Road Ahead: Highways PPP in India, *ASSOCHAM*, PriceWaterCoopers, February 2012.

which the private players had started to opt out of the PPP mode from Highways. It was seen that there was unrequited interference from the political parties and that the political propagandas and will was a large factor in the awarding of tenders. There being no articulate body to resolve such disputes, the highway projects only ran into legal issues which were civil in nature, land acquisitions, environmental and forest clearances, public protests, and later into risk assurances. Causing huge losses to the private player, there remained only very few designated private players who got the tenders, thus leaving less space for other competitive firms to get into the highway sector. PPPs in the roads and highway sectors, being long term commitments, where the concession period itself ranges from a minimum of 20 years upto 40 years to recover the costs, it involves huge risks and financial requirements. An illustration here would be the example of the NICE Road in Bengaluru, which was the very first attempt at a Public Private Partnership in the country where the private players tried to introduce the mechanism of bringing his own design, technology and finance to build a stretch of road from Mysuru to Bengaluru. As no such model existed before, the government of Karnataka entered into a Memorandum of Understanding with the private consortium which had foreign investors as well and entirely escaped the requirement of floating a tender. What followed next, was the arbitrary and massive acquisition of land for the road and in order to raise the huge amount of finance, there were proposals for starting five townships along the road project. This litigation, was one of the most infamous ones in the history of PPP in the roads sector as it portrayed the weaknesses and the inabilities of the planning and execution of the government in the handling of private projects. With the concept of bidding for Highway projects started seeming lucrative, the private bidders started quoting unrealistically low prices in order to corner the projects while ignoring the fact that the projects which the NHAI is rolling out are expanding with their scope, finance and project costs. This was the chief reason when in 2007-2008 the global economy nose-dived, creating and sustaining finance became impossible and the projects ran into stagnancy due to towering debt crisis, which resulted in exorbitant user charges. Government of India introduced 100% FDI in Highways along with provisions of 40 per cent capital grants on the project cost to keep the private sector interested in the Highways, and its result was evident as the dropped private contribution rose from 5% during five year plan (2007-2012) and envisaged to increase to 34% in the 11th plan and 40% in the 12th plan (2012-17).[3] In 2012, the Government of India introduced a number of initiatives to boost private sector investment, which included, the right to collect and retain toll; allowed External Commercial Borrowing (ECB) upto maximum period of five years; Duty-free import of certain identified high-quality construction technology and machinery; implemented Viability Gap Funding (VGF) in form of capital grant subsidies upto 40 per cent of the project cost etc.[4]

All measures and initiatives of the NHAI and the Ministry of Roads Transports and Highway (MoRTH) did manage to generate the interest of the private sector, leading to an evolution in the Models of PPP implementation. The Design-Build-Finance-Operate and Transfer Model was the next step of introducing the addition of designing of the infrastructure project by the private sector. This enabled the government to have the state of art technology and the latest infrastructure techniques to be implemented and the private investor gained as it did not have to depend upon the public authority to provide anything but the requisite permissions of land and rehabilitation. Change in the government and governance both, led to a number of reforms in the Highways Sector and the concept of 'Ease of Doing Business' greatly benefitted the private as well as the public sector. According to a report submitted by the MoRTH and NHAI to the Press Information Bureau, during the year 2014-2017, there was an increase of 17 kms per year in the Highway construction alone. About 11,000kms worth of construction work has been given to the private sector under various modes of PPP. The Foreign Investment Promotion Board has been done away with to ease the procedures and the powers of the PPP Appraisal Committee shall also be reorganised, as it has been witnessed quite evidently, that the inter-ministerial approach is only ending in a log-jam scenario, causing delays in the working of the projects. Only mega-projects with a very high value shall be referred to the

3 Source: Planning Commission and PwC analysis

4 Public Private Partnership: The Next Continuum *Earnst &Young* FICCI 2013.

PPP Appraisal Committee. Also, with the Planning Commission being replaced with the NITI Ayog, the structure of planning for sectors and investments took a new turn. It introduced the much required sector specific focussed research into the financial and regulatory processes and came out with reports which clearly stated the reasons for ill-performance and those suggestions were actively incorporated as notifications and circulars by the MoRTH. The most avid illustration here is, immediately after the 2015 Union Budget, the Kelkar Committee was setup which gave recommendations for revitalising the PPP Sector in India. This report gave an exhaustive set of recommendations and guidelines for the sector and the reforms as required, that the new projects which are now being given out are considered to be under a strengthened mechanism. As much as the statistics on the report as published on the 'Make In India' website seems overly ambitious, the figures which it states are on the optimistic side. It depicts the progress and growth of the Highways sector by determining the 'Growth Drivers' which is basically the Government's initiative of laying down the National Highways Development Project; Special Accelerated Road Development Program for the North-East region (SARDP-NE); Development of roads in Left Wing extremism (LWE) affected areas National Highways lnterconnectivity Improvement Project (NHIIP). A total of 63,591 kilometre of National Highway is aimed to be built through the above mentioned initiatives.[5]A very interesting aspect of PPP which has been mooted now and the NHAI has now floated tenders, is the concept of 'Monetizing the Road Assets'. This is a Transfer of Toll (ToT) Model which aims at simply giving out the right to collect toll on select national highway stretches that have been built on public funding for a specified period of time. The bids in this model shall depend only on three factors, namely, traffic projections, Operations and maintenance costs and the financing plan. Involving due diligence for visioning operations and maintenance costs, the financial engineering part and cost of capital shall be the determinant of who wins the bid for these projects. The funds thus raised with the monetizing drive, shall be utilized to raise finance for the (yet

5 *<http://www.makeinindia.com/sector/roads-and-highways> (*visited on March 30, 2018)

to be introduced formally) '*Bharat Mala Project* andthe *Sagar Mala Ports* Project.[6]

Apart from introducing of new models and making the business process easier, the NHAI under the new government has taken strict cognizance of private sector companies which have resorted to unfair means of business. Larsen and Tubro for example was one of the many private players whose works contract has been cancelled due to faulty bidding in PPP/EPC projects. These companies which include infra-giants such as L&T, Hindustan Construction Company, Essel Infra Projects, JKM Infra, Madhucon Toll Highways etc. whose contracts have been terminated as they failed to maintain the required criteria for the proper bid. L&T lost the six-lane project in Maharashtra's Pimpalgaon-Nasik-Gobde section.[7] These companies shall also be unable to participate in bids for PPP/EPC projects till 2019. In a press release, the Chief Executive Officer and Managing Director of L&T Infrastructure, Shri S.N Subramanyan commented that L&T officials met with the NHAI officials who cancelled their work contracts, did not provide them with any official paperwork about the same and alleged that under the concession agreement, the Concessionaire could not complete the required criteria, which is why their contracts were terminated. Speaking about the issues, it was clearly stated that the inordinate delays were due to encumbrances on the land on which the construction was to take place as there was no Right of Way and clearances etc. which was the obligation of NHAI to provide. Therefore, the cancellation of their works contract was bad in law. Arbitration proceedings are underway and an amicable solution is expected shortly. By cancelling almost close to twenty contracts of various mega infrastructure companies like Hindustan Construction Company's four lane highway project in West Bengal, Gammon Infrastructure in Bihar, Transstroy (India) Ltd., JKM Infra and NKC Projects in the Northeast have all been cancelled and barred from taking part in the bidding for PPP/EPC projects till 2019-2020, on one hand is viewed as a strong step from the

6 <*https://www.livemint.com/Politics/obFGnkGpyp1efmNO8B 8rhP/NHAI-seeks-to-auction-1720km-of-highways.html*> (visited on March 30, 2018).

7 <http://www.business-standard.com/article/news-ians/nhai-cancels-work-of-major-infra-companies-due-to-faulty-bidding-117110301442_1.html> (visited on March 30, 2018).

NHAI from cracking down on faulty biddings and inability of private players to live up to their obligations under the concession agreement, it is also being criticized as a premature step by the private sector investors. Their combined defence is that there are encumbrances on the land and there are major issues with the land acquisition and clubbed with the new GST norms, the entire procedure of proceeding with the work has become a very difficult task. Most of the dispute resolution being in Arbitration proceedings, the intricate details of the issues are hard to get.

Contemporary Models of Public Private Partnership

By establishing the verity of continuing private investment in the public utility sector, the NHAI ("Authority") has incessantly evolved the models under which projects are given out. Depending on the scope of the proposed project, the Authority invites bids according to the regulations as setup. What started as an initial simple model of Build Operate and Transfer (BOT) where the private investor has the prime responsibility of the structural design, arranging the finance for the project, the operations and maintenance of the project while the Authority stays responsible for proper road alignment, land acquisition, getting the Environmental and/or Forest Clearances. The toll which is imposed on the users is fixed and collected as per the Government of India Policy on Tolling, which is collected by the private player for a maximum concession period of thirty years. While the discussion on PPP models has been done much in detail, one question remains unanswered, as to what exactly constitutes a "Concession Period" and why the projects under PPP are referred to as Concessions. The private player or the "Concessionaire" are referred to as such, as they are granted certain rights and privileges for a specified period of time, the Concession Period. For example, the land which the Authority acquires for the development of the project, is granted to the private investor at a certain rate, per acre, as a Concession, therefore the term. The first ever project to be granted under the BOT (Toll) Model was the Rau-Pitampura State Highway in Madhya Pradesh, in 1993. Soon after, a Model Concession Agreement was considered as important to bring about some uniformity in the contracts which are given out in PPP modes and the NHAI, which was a body created out of a central legislation was passed. Once the regulations and bye-laws for the determination of National and State Highway Tolls was completed, a large number of private investors showed keen interest in such participation. Evolving just a little here, the concept of BOT (Annuity) was introduced. In this model, the only difference is that instead of the concessionaire collecting toll according to the policy, the Authority grants a fixed amount of money to the concessionaire, on an annual basis. The success rate of these two models is such that till date, these two are the most common and sought after modes of PPP in the Highway Sector. The next modification to this basic model comes to be understood as the Build Own Operate (BOO) Model. Here, the concessionaire gets into a contractual agreement to build, design, finance, construct, even operate the project before transferring it back to the public authority. The concessionaire operates and utilizes the structure to get his return on the investment before transferring it to the Authority.

With the subsequent development of technology and state of art techniques, it slowly became difficult for the Authority and the government to keep pace with the trending new requirements and changing the government's policies is a task which takes a lot of time to process, it was thought better to give the private investor a way where the Design and Construction accordingly were to be introduced by the concessionaire itself. This model evolved as the DBFOT Model, or the Design Build Finance Operate Transfer Model. The terms of the DBFOT concession agreement is similar to the model concession agreement except for a few clauses which redefine the duties and obligations of each of the parties, especially the Risk Allocation. It provides for the formation of a Special Purpose Vehicle which is used to develop, construct, maintain and at times operate the project for the duration of the concession period. To illustrate this, an existing SPV in a Rs. 1,526 crore project in Rajasthan is K.G Tollway Private Ltd. which is a fully owned subsidiary of IRB Infrastructure Developers Ltd. This SPV has recently been approved by the NHAI for a six-lane project from Kishangarh to Gulabpura.[8] The GMR Group was awarded probably the biggest project in terms of capital cost, which it implemented through the DBFOT Model. This was the 555 km long Kishangarh

8 <www.infrastructureindia.gov.in> (visited on March 30, 2018).

– Udaipur – Ahmedabad highway, the first brownfield mega highway project of the country.[9] Srinivas Bommidala, Business Chairman – GMR Urban Infrastructure & Highways said "The strategy for the Highways Business of the Group has been to bid with detailed preparation. This successful bid is the culmination of a thorough study of the traffic and its growth potential. From a contractual purpose, negotiating the split in the provision of finances is the key clause as the Authority and the Concessionaire both contribute towards the project cost, which is determined during the bidding process. The Authority, in most cases, agrees to pay fifty per cent of the project cost during the construction phase, thus limiting its risk and avoiding getting into excessive future liabilities. This share of fifty per cent maybe lesser during the negotiation period, if the concessionaire shall be collecting a User-Charge or a toll and lesser, if the concessionaire during due diligence is afraid of not being able to raise enough finance. The concession period in this model is predetermined with applicable liquidated damages clauses to prevent delays and ensure timely completion of work. This Model however has its own drawbacks and has at times dwindled the interest of the private investor as the financial risk is more or less completely on the concessionaire and the Authority becomes all the more desolate from the project altogether. Due to the mismanagement of risk and increasing instances of the Authority imposing liquidated damages for delays in project handling, the private sector seems to have been losing interest in the business venture. Raising finance became a catalysing factor for the private investment going down, the NHAI mooted a new concept of granting projects, under the Hybrid Annuity Model (HAM). This found mention in the 19th Report of the NHAI (MoRTH) to the 16th Lok Sabha. As the etymology suggests, the HAM is a synthesis of the Engineering Procurement Construction (EPC) and the BOT mode. Just like under the EPC model, the Authority pays the private player an amount to lay the road. The private player has no ownership of the project as the same is owned completely by the Authority from the beginning. This aspect of EPC combined with the feature of the BOT where the private player raises finance either by collection of Toll or as in the Annuity model where the government pays amount of money to the

9 *Ibid.*

private player every year, insulating the private investor from the Toll risks. HAM now, combines EPC and BOT in roughly a 40-60 per cent combination, where 40 per cent of the project cost is released by the Authority in the construction period itself. The remaining 60 per cent of the financial cost is raised by the concessionaire. While the Operations and Maintenance remains with the concessionaire, the Authority collects the toll, hence insulating the concessionaire from the toll revenue collection risks. Retaining the interest of the private sector is possible as the annuity payments are assured at regular intervals, thus mitigating the additional risk of raising finance during the O&M phase as well. It is assumed that once the land acquisition and the capital raising risk is separated from the private investor, the project shall be able to progress on time without inordinate delays.

As explained by Mr. Vijay Kumar,[10] while earlier it seemed that such equity-lite HAM projects were unlikely to bring banks onboard, over one-and-a-half years (HAM projects began being awarded in 2016) some of the projects have achieved financial closure and many applications are pending with banks.In a HAM project, the developer gets 80 per cent land upfront while the concession period is linked to the commercial operations date (COD) and not to an appointed date, which means excluding the construction time from the annuity. Hence, the construction overrun and time overrun risks as well as land acquisition are mitigated. So far, the NHAI has awarded thirty projects through the HAM model and roughly translates into 1821.54 kilometers worth Rs. 28162.13 crores.[11] The new and revised Model Concession Agreement for the Highway Sector now has been remodelled into the Hybrid Annuity Model.

Issues and Challenges to the Highway Sector

Post-Liberalisation and Privatisation in the 1990s, the infrastructure sector opened up in a huge manner for private investment. The start to the same, was not a very smooth one as the initial few infrastructure projects were plagued by irregularities which were related to regulatory, legislative, financial and even procedural

10 Associate Director of India Ratings and Research, a renowned Credit Rating Company in India, Headquartered in Mumbai; Excerpt from an interview to the Business Standard, July 13th 2017.

11 Supra note <www.morth.nic.in> (visited on March 30, 2018).

in nature. The environment was rather conducive not just for irregularities to creep in, but also impacted the entire institutional framework which gave rise to strict regulations concerning method in which private investments were to be allowed. The National Highway Authority of India was one amongst the first sector specific body which was formed to administer and manage the development of the biggest infrastructure requirement of the country. This sector, has been largely governed by the political will and economic growth ideology of the governments which have risen to power and therefore, the graph depicting the interest of private investments has not been steady, but fluctuating. There have been various projects which were left abandoned and tax-payer money has been jeopardised along with the interests of the public in the same as there have been major management irregularities in this sector. The foremost example of one of the largest projects was the NICE Road debacle and the project which is still incomplete with billions of rupees gone waste in investment. The issues and challenges therefore which plague the development of the Highway sector in the country can be best explained through a classification of the identified issues and taking up the illustrations of cases which highlight the prevalent problems and the way in which they have been addressed. Three important issues which are in focus in this chapter are Regulatory, Financial and Dispute Redressal Issues. Each one of them, seminal to the cause of establishing and sustaining the PPP model in the Highway Sector.

Regulatory Issues

Beginning of the issues in the regulatory procedure is from the process of awarding the tender. Most highway projects have run into stagnancy due to litigation arising from faulty bidding procedure. Reiterating the recent instance where the work contracts of eminent infra-giants were cancelled by NHAI, it did send a strong message to the private investors that any kind of lapses on their part shall not be acceptable. In order to maintain a balanced stance on this issue, reflecting on the defence of the concessionaires, the one major challenge that has captured the debate is the urgent requirement of a sectoral regulator for Highways has surfaced. It is the collective opinion of the existing conglomerate of the private companies, that in order to facilitate the processes of granting tenders, managing projects and even handling dispute resolution, one such body which is separate from the NHAI must be created. It has been infact commented upon by the ex-Finance Minister during his 2013-14 budget speech that "the sector faces challenges not envisaged earlier, including financial stress, enhanced construction risk and contract management issues, which are best addressed by an independent authority."[12] With the Highway Projects under PPP mode are awarded under a bilateral agreement or a Model Concession Agreement, the requirement for an independent road regulator does not arise as the contract agreement itself provides for all managerial and redressal mechanisms and the NHAI is sufficient to supervise and monitor the same under the direction of the Competition Commission of India, but it is important to note that the NHAI itself is a managerial body and has been set up under a statute and therefore requires certain amount of accountability on counts of assessment of its own performance. Interestingly, the NHAI by itself has assumed the role of policy-maker, regulations maker by issuing bye-laws and also is party to the PPP model concession agreements. One body, with the role of judge, plaintiff and defendant at the same time, is not good in law. Currently, there are a number of cases which are pending in front of arbitral tribunals and committees, even in civil and high courts on languishing projects which have turned into loss-making ventures for the concessionaires.

Shifting focus on to regulatory issues, reference is best made to *GMR Infrastructure Ltd. and Anr. v. National Highways Authority of India and Ors*[13]. In this case, the highlight was that GMR and Madhucon, were two successful bidders for a NHAI project and both received letters after qualification from NHAI seeking clarifications, the reply of which was sent on time. Now, subsequently the NHAI sent a letter to GMR and quashed its eligibility, which was supported by their contention under a certain clause within the Request for Proposal (RfP) as was floated by NHAI. When the Ministry of Roads Transport and Highway was approached in this regard by the aggrieved concessionaire, a select committee was setup to look into the matter. Taking the matter up in a writ petition

12 Lok Sabha Archives, Budget Session, 2013-2014. <www.loksabha.nic.in>.

13 W.P.(C) NO. 6792/2008

to the Supreme Court, the concessionaire alleged that the exchange of letters in between the MoRTH and NHAI was an attempt to do something indirectly which cannot be done directly and hence is an absolute evidence of unfairness and opaqueness in the bidding process and subsequent grant of project. During this period of time while the MoRTH took cognizance of the regulatory mechanics within the NHAI, around five chairmen of related public authority had been changed. Identified as unrequired political pressure on public authority in exercising of duties, it was held that the public authority must be given freedom from political pressure to ensure proper functioning.

In another case of *Patel Engineering Ltd v. Union of India*[14] the concessionaire had successfully qualified in the bidding process and was asked to sign the Model Concession Agreement within the specified time period which the concessionaire did not sign as they wished to withdraw from the same due to incorrect tender rates quoted by them. After this withdrawal, the tender was given to another company with lower bidding quotations and the Earnest Money Deposit by Patel Engineering was forfeited by NHAI, also debarred the same company from participating in their tenders for the next one year. This debarring was challenged by Patel Engineering in this case on the grounds that debarring can happen only in the event of proved fraud, corrupt practices etc and a mere refusal to sign the concession agreement is insufficient cause to blacklist a company. This has caused them significant loss in their business goodwill. The apex court here upheld the matter in favour of NHAI as the action by Patel Engineering had caused heavy losses to the Public Authority and the debarring is to prove as a deterrence measure to avoid such activity in the future.

Financial Issues

One of the very significant requirements for a profit making venture in a PPP project is achieving 'Financial Closure' in record time. A financial close is when the main lender to the concessionaire, which can be one bank or a consortium of banks and credit agencies have signed all project financing and other financial agreements and all the conditions on those

14 Special Leave Petition (C) NO.23059 of 2011

agreements have been met and the concessionaire to the PPP can start accessing the money to start work on the project. The financial strategy is seminal for the concessionaire to be able to raise adequate finances as it directly affects the quantum of expenses and determines the viability of the project. This entire process of planning for a water-tight financial strategy is time and capital consuming. A Public Private Partnership differs from any other project which requires investment in a number of ways. Most importantly, in PPP, the government carries out different functions and is a major factor in determining the success or failure of the same. Some amount of financial contribution is provided by the public authority and also provide the institutional framework for the same, aid in implementation and the organising of the project along with sharing the allocated risks. Financial risks are understood and best bifurcated in two parts, namely, *pre-operative and operative phases*. In the former, the main risk is the lack of ability to raise enough debt and/or equity where the concessionaire is to arrange for adequate funds, and in the latter, an inappropriate of failed financial structure is the biggest risk. Addressal of this particular aspect is now, done by means of creating a Special Purpose Vehicle, especially for purpose of ensuring finance and/or through *Viability Gap Funding (*VGF). It is the government's initiative to make the PPP model lucrative for the private investors and thus offers this option of 'bridge-finance'. In VGF, the developers who quote low during bidding process to get the project, either due to lack of experience in construction or due to their need of cornering highway projects for their profit, end up with inadequate amount of finance and thus the project languishes in inordinate delays. Therefore, the public authority steps in and VGF can take various forms, including capital grants, subordinated loans or interest subsidies. The viability gap is determined by open competitive bidding to maximise efficiency and ensure that funding costs are kept at a minimum.[15] Despite being huge scale projects, Highway projects have ingrained issues as they have certain risks attached. Ecological and technical risks during the construction period, consequent delays in obtaining required clearances,

15 Hiren Maniar, Journal of Infrastructure Development, Vol. 5(1), 2013, Pp. 33-65

corrupt practices etc are the few major reasons due to which major financial institutions do not prefer financing such projects. Post construction period, highway projects demand extensive operations and maintenance and such costs are very difficult to pre-estimate. Usually, while costing for O&M, the requirement is of due diligence by Traffic Expectation studies etc. which determine the revenue by basis of collection of a user-fee or Toll, but such studies are not always very effective or reliable.

An interesting reference here can be made to the Delhi-Jaipur Expressway which was started on BOT(Toll) basis on the DBFO pattern, under the National Highways Development Programme of the NHAI (Phase VI). The concessionaire was M/s AECOM Asia Co. Ltd., Consulting Engineers Group Ltd. Engineer Advisory Services Private Ltd, in a consortium basis. The land prices, during the time of passing of this project to the actual construction time, jumped almost 30 to 40 percent leading to financial issues. The concessionaire incurred losses equivalent to almost seven lakh per day. The concessionaire applied to NHAI for an extension of their concession period by five years in order to be able to recover their investment and repay the mounting loan amount of rupees 1,600 crore. The issue arose due to loss incurred by faulty financial planning and cost overruns. Even in the Delhi Gurugram Expressway, constructed on a negative grant, the date on which the traffic study was conducted was ten years prior to actual commercial operation, which led to a huge delay and a deficit of close to six billion rupees. The concessionaire bore the entire risk and ended up making a huge loss and returning back with a bitter taste of the PPP mode of doing business.

Formulating a progressive financial support system, the Ministry of Finance now provides capital grants to financially dubious but economically viable projects under VGF procedure. The only few requirements to avail funding through VGF is as follows[16]:

1. The total fund must not exceed 20 percent of the total project cost;

16 *Ibid.*

2. VGF under the Scheme is normally in the form of a capital grant at the stage of project construction. Proposals for any other form of assistance can be considered by Empowered Committee along with the approval of the Finance Minister on a case-by-case basis;

3. VGF up to ₹100 crores for each project may be sanctioned by the Empowered Institution subject to the budgetary ceilings indicated by the Finance Ministry. Proposals up to ₹200 crores may be sanctioned by the Empowered Committee, and amounts exceeding ₹200 crores may be sanctioned by the Empowered Committee with the approval of the Finance Minister.

It might be appropriate to mention here that out of the twenty-six highway projects awarded under the HAM model, in the fiscal year 2017, five of them were scrapped due to inability of the developer to invest equity or bring in debt. The banks were reluctant to fund due to weak balance sheets and lack of construction expertise and experience. The various 'Ease of Doing Business' mechanisms introduced by the Government of India, brought in many smaller companies to participate in bids for NHAI, however due to lack of experience and adequate expertise in raising equity, they do not have enough credibility to make the banks give them financial closure.

Way Forward: Suggestions and Concluding Remarks

In a conscious bid to generate more private concession investment in the Highways Sector, the MoRTH and NHAI together have introduced various criterias individually. While some of them have worked, the others have not, depending on a case to case basis. A number of international private equity funds, including Morgan Stanley, Blackstone etc hav been set up only to invest in the infrastructure assets of the country. During the economic meltdown of 2007-2009, most of these assets suffered losses in their own way, but it showcased the effort undertaken by the existing government. The expectation of a reasonable concessionaire or investor in public asset is an annual return, enough to break margin to their investment and make a decent profit. Thus, for this purposes, a traffic study must be conducted in a careful manner and ensure completion of project on time. When during this time, the quest for

PPP mode of investment in public utilities declined sharply, the Ministry and the NHAI together with the Central Government, brought in a number of additions which were aimed at revamping the interest of the private investors.

National Highway Interconnectivity Improvement Project

With an estimated cost of 6, 461 crores, the Cabinet Committee on Economic Affairs, chaired by the Prime Minister, gave the approval to the development of 1120 kms of National Highway in 2016. This project, to be executed in Phases, is estimated at a cost of rupees 6,461 crore.[17] The project will ensure safe, fast and all weather movement of traffic on the proposed National Highways mostly located in backward regions thereby improving socio economic development. The NHIIP is being undertaken with the assistance of the World Bank. This project is aimed to have three integrants, namely road safety, road improvement and maintenance and institutional development.

Kelkar Committee on Revisiting and Revitalising Public Private Partnership Model of Infrastructure: Roads and Highways

It had recommended setting up an independent regulator for the roads sector. It had also noted that service delivery to citizens is the government's responsibility and PPPs should not be used to evade such responsibilities. The Kelkar Committee had noted that inefficient and inequitable allocation of risk can be a major factor leading to failure of PPPs. PPP contracts should ensure optimal risk allocation across all stakeholders. The basic principle for risk allocation should be to ensure that the entity that is best suited to manage a risk should be allocated that risk.[18] The Committee had also observed that since infrastructure projects span over 20-30 years, a private developer may lose bargaining power because of abrupt changes in the economic or policy environment. It recommended that the private sector must be protected against such loss of bargaining power. This could be ensured by amending the terms of the concession agreement to allow for renegotiations.[19]

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17 Press Information Bureau Government of India Cabinet Committee on Economic Affairs (CCEA), 24.08.2016.

18 Prachi Mishra, PRS Legislative Research Institute for Policy Research Studies, New Delhi.

19 *Ibid.*

Refinancing options too have been discussed and suggested via re-negotiations in the highway sector.

India Infrastructure Finance Company Limited

Created in 2006, this is one company which has been floated for the only objective of providing finance to infrastructure projects. Provision of long term debts by this non-banking company is an effort of the government to address fiscal restraints. A government owned non-banking financing system is in a way a very good idea to mobilize long term debt.Providing finance to commercially viable projects, priority is given to PPP projects, the concessionaire of which has been selected by a competitive bidding process. IIFCL in the financial year 2016-17 gross sanctions of rupees 13,860 crore during 2016-17 which took cumulative gross sanctions to ₹ 1,09,159 Crore under Direct Lending, Takeout Finance and Refinance Schemes. Disbursements during the year stood at 7,122 Crore taking cumulative disbursements to ₹ 55,966 Crore.[20] In a comment made by the Chairperson of IIFCL during the Annual General Meeting of 2016-17, Mr. Sanjeev Kaushik stated that in order to overcome the structural challenges faced by the sector and attract private investment, Government is consistently making efforts to improve the ease of doing business, fasten project clearances and adopt single-window clearance system. It has also taken several steps towards creating a conducive policy and regulatory environment for the sector. For instance, Government plans to introduce a Public Utility Bill for resolution of PPP contract disputes based on Kelkar committee recommendations in an effort to institutionalise the arbitration mechanism. Also, under revised arbitration norms, Government agencies are now required to pay 75% of the arbitral award amount to an escrow account against margin free bank guarantee, in cases where the award is challenged. This is expected to induce investor confidence in the construction industry and allow developers to speed up execution of existing projects. Government is also working on several other recommendations of the Kelkar Committee on Revisiting and Revitalizing the PPP model of Infrastructure Development.[21]

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20 IIFCL Annual Report, 2016-17; <*http://www.iifcl.org/WriteReadData/BalanceSheet/Documents/201710240537316540603IIFCLAnnualReport2016-2017.pdf*> (visited on April 2, 2018).

21 *Ibid.*

Special Purpose Vehicle through Project Grading

Since the SPVs are raised in a project specific manner, they do not have balance sheet strengths and consequently, they do not get proper credit ratings. This results in higher costs as the interest rate is imposed higher. To overcome this challenge, the Government of India has proposed a special rating for Special Purpose Vehicles, which shall be based on the detailed assessment of the project and the project proponent, along with the quality of the concession agreement signed. The commercial risks of such projects rests with the concessionaire and the regulatory and political risks rest with the public authority, it is expected that this project grading of SPVs shall be able to generate more confidence in the concessionaires to generate a quicker financial close.

To conclude, it must be reiterated that with a long term of private investment and interest required, to sustain the existing private participation, the government of India is introducing EPC (Engineering Procurement Construction) model in a big way. It is a huge step from the part of the government for assuming all risks and financial capacities on its own, the private companies shall have a very reduced portion of responsibility and it would be beneficial for the infrastructure development as the concessionaire shall only be concentrating on the engineering and construction part of the project without having to fret about other major risks. Another move of the Government to generate funds for the upcoming two major infrastructure initiatives, Sagarmala and Bharatmala projects, the NHAI is now monetizing its road assets by giving out tenders for Transfer of Toll on public funded highways. These tenders shall be awarded on only three criteria which would be based on preliminary due diligence studies estimating the traffic and the O&M costs. The private concessionaire shall be entrusted with the collection of the toll and the maintenance of those road assets for a specified period of time after which the asset shall be transferred back to the government. This is a forward looking and an optimistic step which is now giving much hopes of raising funds which shall be utilized in nation building activities, without causing much of a dent on the tax-payer's pocket.

India is the world's fastest developing economy with the largest road network, both a win-win situation for the private players to invest in the Highway infrastructure. With the Model Concession Agreements in the most suitable PPP models is now being preferred by the private companies, the MoRTH now must actively review the institutional framework of the roads and highway sector as this is the only biggest sector which does not have a designated regulator. The NHAI has assumed the role of an umbrella body, at times, being the reason of arbitrariness and lack of transparency. With the regulator of an independent nature in place, there shall be ease of resolving disputes and redressal which shall make this sector, a transparent and a fairly competitive profit making sector of the country.

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Chapter 2

PPP in Healthcare Sector in India

Architha Narayanan

Introduction

In a welfare driven economy, it is essential to look at areas such as education and health to make sure that adequate attention, both financial and policy is paid to the development of such social infrastructure. In India, the healthcare system is the largest sector in terms of revenue generation as well as employment.[1]

Despite India being one of the fastest growing economies in terms of GDP and healthcare being a crucial aspect of the social infrastructure that is required in a nation, what is shocking is that the total expenditure by the State on healthcare as a percentage of GDP is the lowest in the world. (1.4% of the total GDP)[2] The Public Health infrastructure in India comprises of district hospitals, secondary level district hospitals, community health centres, primary health centre, sub centres, medical colleges etc.[3]

The Healthcare Sector comprises of various other sub sectors such as medical equipment, hospitals, health insurance, medical tourism, etc. But the quality of various healthcare services along with coverage still remains a major challenge for the State, despite

1 Ayona Bhattacharjee & Deepanshu Mohan, India's Healthcare System Is Becoming More and More Unequal The Wire (2017), <https://thewire.in/health/india-healthcare-system-inequality> (visited on April 3, 2018).

2 Economic Survey says India's public spending on health well below global average - Times of India, The Times of India (2017),<https://timesofindia.indiatimes.com/business/economic-survey/economic-survey-says-indias-public-spending-on-health-well-below-global-average/articleshow/56897993.cms> (visited on April 3, 2018).

3 Shankar Prinja et.al., PLoS ONE (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4990301/> (visited on April 3, 2018).

the fact that the Country is one of the primary destination for medical tourism because of the low cost associated to medical services as compared to other Countries in West as well as Asia (cost of surgery in India is one tenth of that in Western Europe and the USA)[4]

Recently there has been a major shift with regard to the nature of healthcare in India and the sector has witnessed rapid privatisation with multiple households in both rural and urban areas now opting for private healthcare providers.[5] The sector itself has experienced substantial growth in recent years (compounded annual growth rate of 16.5% and is likely to be worth $280 billion by 2020) which is largely attributed to the rise in privatization of the industry.[6]

Status and Characteristics Regarding Access, Availability and Quality of Healthcare Provided in India

The shift in the trajectory of the healthcare delivery system has also thrown up multiple challenges in relation to accessibility, availability and quality of healthcare services in India. The Government, i.e. public healthcare system comprises of limited secondary and tertiary care institutions in key cities and focuses on providing basic healthcare facilities in the form of primary healthcare centres (PHCs) in rural areas. The private sector provides majority of secondary, tertiary and quaternary care institutions with a major concentration in metros, tier I and tier II cities.

According to the NSS (National Sample Survey) of 2014, 42% of the total cases of hospitalization in rural areas were in public hospitals and the remaining 58% in private hospitals. Whereas in urban areas, 68% were in private and 32% were in public hospitals. This data indicates the reduction in the number of public hospitals treating patients as compared to the private hospitals.[7]

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4 IBEF : India Brand Equity Foundation, <https://www.ibef.org/archives/detail/b3ZlcnZpZXcmMzc3MzQmOTU=> (visited April 3, 2018).

5 Khushbu B. Thadani, *Public Private Partnership in the Health Sector: Boon or Bane*, 157 Procedia - Social and Behavioral Sciences 307–316 (2014).

6 Supra note 1.

7 *Ibid.*

There are also concerns regarding high medical costs in private hospitals given the increase in the number of patients accessing these hospitals and one of the arguments for such a rise in prices is the information asymmetry that exists between patients and health care providers. Such an asymmetry can lead to power being concentrated with a few conglomerated providers that are private. And if left unregulated, such an arrangement could lead to distorted prices in diagnosis and treatment.

Despite the above concerns, one can note that the prevalence and rise of private healthcare providers has and is still steadily increasing. Certain reasons such as the quality and accessibility of public healthcare facilities both in urban and rural areas can be attributed to this shift to private players.

Emergence of Private Players in the Healthcare Sector

The contribution of private sector in healthcare expenditure in India is around 80 percent which is one of the highest in the world. Almost 94 percent of this amount (which covers both financing and provision aspects) comprises of out of-pocket expenditure on health. The remaining 6 percent is the expenditure on provision, which accounts for the private sector contribution to 60 percent of all in-patient care and 78 percent of total number of visits in outpatient care in India. In addition to this, the private sector today provides 58 percent of the hospitals and 81 percent of the doctors in India.[8]

The argument currently is that such a rise in the number of private players in this sector is positive in terms of better quality of health services and reasonable pricing due to increase in competition, and also reduced burden on public healthcare. But such a rise in the dependence on the private sector for the provision of an essential service is also considered problematic in terms of accessibility and affordability to patients residing in rural and semi urban areas.[9]

This aspect becomes even more crucial considering recent studies indicating the quality of health care and health care providers in rural areas. The study indicates that medical doctors

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8 Ibef.org. (2018). [online] <https://www.ibef.org/download/PolicyPaper.pdf> [visited on April 3, 2018].

9 Sanjay Basu et al., PLoS Medicine (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3378609/> (visited on April 3, 2018).

are untrained, with healthcare providers prescribing high rates of antibiotics warranting a need for independent quality control checks on medical licenses and treatment practices.[10]

The debates around provision of health care services and increase in coverage, access and quality, to a large extent still focus on the fact that it the primary responsibility of the state to provide such services and complete privatization of the sector is not exactly favoured by policy makers or experts either. Public intervention in healthcare delivery is necessary and can take various forms.

A critical point in the deliberation regarding the provision of health care services in light of universal healthcare has also been reached, both nationally and internationally. This has generated a renewed interest in the healthcare provisioning and financing. A balanced approach to healthcare service delivery is garnering more support compared to the options of complete marketization or government control. Such an approach is necessary to safeguard a robust, basic primary healthcare network and remains vital for transforming the socio-economic trajectory of India.[11]

Healthcare as a sector is experiencing new opportunities wherein providers of such services are tweaking the existing models present in the sector to increase accessibility. Trends such as the State's role shifting from that of a provider to a payer, attractiveness of the sector for Private equity investments due to demand- supply mismatch and the gradual acceptance of Private sector partnerships through health PPPs are some key changes that can be seen.[12]

The relevance of these new models increases in light of the new challenges such as increasing the service quality and equitable accessibility in light of the rise in population and demand for such services. Also, changes in the disease incidence profile necessitate a resolute effort from both private and public institutions through

10 Deepanshu Mohan, What Policymakers Can Do About Healthcare in Rural India The Wire (2017), <https://thewire.in/111658/healthcare-rural-india-policy/> (visited on April 3, 2018).

11 Zile Singh, *Universal Health Coverage for India by 2022: A Utopia or Reality?*, 38 Indian Journal of Community Medicine 70 (2013).

12 Healthcare, PwC, <https://www.pwc.in/industries/healthcare.html> (visited on April 3, 2018).

policy initiatives and incentivisation of financing for increasing the access of such services.[13]

PPP in Healthcare Sector in India

The Ministry of Health and Family welfare, Government of India has defined Public-Private Partnerships (PPP) as "*collaborative efforts, between private and public sectors, with clearly identified partnership structures, shared objectives, and specified performance indicators for delivery of a set of health services.*"

A health services public private partnership (PPP) can be described as a long-term contract between a public-sector authority and one or more private sector companies operating as a legal entity. The government provides the strength of its purchasing power, outlines goals for an optimal health system, and empowers private enterprise to innovate, build, maintain and/or manage delivery of agreed-upon services over the term of the contract. The private sector receives payment for its services and assumes substantial financial, technical and operational risk while benefitting from the upside potential of shared cost savings.[14]

The Public Private Partnership model in healthcare acts as a facilitator for the public sector by offering support and aiding in management and quality service delivery. PPP initiatives in the healthcare sector span areas such as adoption and management of primary health centres, pharmaceuticals, diagnostics, medical equipment and supplies, R&D investments, contracting out medical education and training, telemedicine and medical insurance etc.[15]

Management and operations, infrastructure development, IT infrastructure development, financing mechanism, capacity building and training and materials management are the key thrust areas where PPPs have opportunities in the healthcare sector.

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13 Nilaish Nilaish, *A Review of Indian Healthcare Sector*, SSRN Electronic Journal (2017).

14 Prasanna B Joshi et.al., International Journal of Research in Management, Economics and Commerce, ISSN 2250-057X, Impact Factor: 6.384, Volume 07 Issue 05, May 2017.

15 Medind.nic.in. (2018). [online] <http://medind.nic.in/haa/t08/i1/haat08i1p132.pdf> (visited on April 3, 2018).

The PPP models most prevalent in this area are Joint Ventures, BOO (build, own, operate) /BOOT (build, own, operate, transfer), concession, leasing and management contracts.[16] Some examples of the above models are:

Contracting

'Contracting' is considered to be the most prominent PPP model currently used in the health care sector. There are different modes of contracting such as contracting in, contracting out, service contract, operations and management contract and capital projects with operations and maintenance contract.[17]

Contracting out of Services

An example of contracting out of services is that of the Sawai Man Singh (SMS) Hospital in Jaipur. The hospital is a government run tertiary care hospital and provides free treatment to the poor. The hospital has contracted out services such as MRI and CT scan facilities, which though crucial for treatment are highly capital intensive. The MRI and CT scan facilities are provided by Soni Hospitals Pvt Ltd.

The SMS hospital as per its agreement provides space to the private provers for an amount of Rs 5000/- per month and Soni hospital charges rates from the patients for provision of services. Herein the private provider is obligated under the agreement to provide free services to 30% of all patients from very poor economic categories and their eligibility for free services is to be verified by the hospital's Medical Superintendent.[18]

This agreement, in this case, was for a period of seven months and a two stage bidding process took place with technical evaluation in the first stage and financial bids invited from those providers who qualified the technical evaluation as the second stage. The monitoring and review of the Project that was done by Rajasthan

16 Supra *note* 8.

17 Thadani, K. (2014). Public Private Partnership in the Health Sector: Boon or Bane. Procedia - Social and Behavioral Sciences, 157, pp.307-316.

18 Sawai Man Singh Hospital - Radiology services | The Center for Health Market Innovations. [online] <https://healthmarketinnovations.org/program/sawai-man-singh-hospital-radiology-services> (visited on April 4, 2018).

Medicare Relief Societies (RMRS) committee observed that patients were happy with the services provided.[19]

The crucial issue with regard to the above case is of whether the above model is really that of a PPP or actually of outsourcing a particular service. Hiring of security or particular services such as MRI could constitute as outsourcing. In PPP, the distinction lies in the fact that the private parties take substantial risk in financing project costs over a significant period of time.

Management Contract

A notable example of a management contract in the healthcare sector in India is that of the Primary Health Centres in Gumballi and Sugganahalli village in Karnataka. In this particular case, the management of the primary health care centres in these two villages was contracted out to Karuna Trust by the Government of Karnataka in the year 1996. The Karuna Trust is a public charitable trust that has been implementing health and development programs through public private partnership in India for over two decades and is currently manages 68 Primary Health Care Centres (PHCs) in six states of India. The intention in this case was to allow civil society to aid the Government in increasing the reach and access to comprehensive primary health care to the tribal community residing in the hilly areas of these villages.[20]

This model involved the Government covering 90% of the Project costs with the remaining being covered by the Trust. The responsibility of maintenance of the assets such as stocks and supply of essential drugs and the provision of all personnel at the public health centres and sub centres that were there within its jurisdiction was with the Trust. The salaries of the staff are shared between the Government and the Trust and the Government pays for the expenses of running the PHCs, including building maintenance. This particular PPP was considered to be highly successful and a model PPP in relation to management of PHCs. The PHCs in these villages are unique as they have moved on to offering services such as OPD, eye care, dental care, labour room,

19 *Ibid.*

20 Birmingham.ac.uk. (2018). [online] <https://www.birmingham.ac.uk/Documents/college-social-sciences/government-society/idd/research/non-state-providers/india-health-final.pdf> (visited on April 5, 2018).

eye operation theatre, pharmacy, and laboratory, which is beyond what PHCs typically offer.[21]

Joint Venture (JV)

Unlike the previous example, there have also been instances of certain unsuccessful PPPs in the Healthcare sector as well. The Rajiv Gandhi Super-speciality hospital in Raichur, Karnataka is one such example. The hospital is a JV of the Apollo hospitals group and the Government of Karnataka with financial support from the Organisation of Petroleum Exporting Companies (OPEC) of Rs 600 million given as a one-time grant. The aim of this venture was to provide super speciality health services to people below the poverty line at subsidized costs. The hospital, land, building, residential area for staff and other infrastructural facilities like water, power, roads etc. were provided by the Government of Karnataka and the competent medical facilities were provided by Apollo.

A one-off government grant by the Government covered building and civil works, medical equipment, furniture and fitting, non-medical equipment, computers and software, vehicles, pre-operative expenses and working capital. Moreover the government agreed to pay Rs. 95 million for re-equipping the hospital and Rs. 101 million for administrative expenditure and also agreed to reimburse the losses anticipated for the first three years of operating the hospital to Apollo. But an evaluation report by the Government of Karnataka found that only 154 of the total bed strength of 350 were operational and out of those only 40 beds were available for BPL patients. The report indicated the unsuccessful operations of this venture stating that *"this sub-optimal capacity utilisation has seriously affected the sustainability of the hospital, thereby leading to serious question on the commitment towards the PPP model of functioning*. It was also mentioned in the report that this particular model had poor accountability and maintenance, the records were not maintained appropriately and that the there was a failure to deliver on many fronts.[22]

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21 Dr. Ramakrishnan Ramachandran, Public Private Partnership (PPP) in Indian Health Care, SSRN Electronic Journal (2012).

22 Sylvia Karpagam, NITI Aayog Should Learn From Karnataka's Experience With Public-Private Healthcare The Wire (2017), <https://thewire.in/160920/niti-aayog-ppp-model-healthcare> (visited on April 4, 2018).

In 2012, the State Government of Karnataka terminated the contract with Apollo and the equipment of the hospital was seized by the Principal District and Sessions Court in 2016 because the group had defaulted on payments. Yet the Planning Commission in 2012 identified the Rajiv Gandhi Super-speciality hospital as one of the two models in Karnataka appropriate for upscaling and replication.[23] The state must look at the performance of such models objectively based on the output received and the intending aim of the Project before suggestions of replication and scaling up are made.

Another example of a JV is that of the Uttarakahnd Mobile Hospital and Research Center that started operating in the year 2002. This is a partnership between the Government of Uttarakhand, Birla Institute of Scientific Research and the Technology Information, Forecasting and Assessment Council (TIFAC). The aim of this partnership was to make healthcare accessible in remote hilly areas of the state, wherein the setting up of a mobile clinic becomes useful. Another pro of such mobile units would be the reduced expenditure by the Government on the maintenance and setting up of permanent healthcare establishments. This particular model of Mobile healthcare units is unique as it looks at the diagnostic and curative requirements of people from poorer socio-economic backgrounds that are living in remote regions and also serves as a tool for data collection on health profiles and spreading awareness. In this PPP the capital costs were borne by the Technology Information, Forecasting and Assessment Council and the operating costs were shared equally by TIFAC and the Government of Uttarakahnd.[24]

This Project is considered to be quite successful and has treated around 50,000 patients in the state. Based on the response that this initiative has received, a similar mobile unit has been introduced in another region, Garhwal.[25]

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23 *Ibid.*

24 Planningcommission.nic.in. (2018). [online] <http://www.planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_heasys.pdf> (visited on April 4, 2018).

25 *Ibid.*

PPP in Health Insurance

In 2002, the Government of Karnataka introduced a health care scheme called Yeshasvini Cooperative Farmers' Health Care Scheme. This micro insurance scheme was introduced with the motivation of increasing the access to affordable healthcare to cooperative farmers in which the cooperative institutions are themselves active players. The Government intended public private partnership to provide such subsidized healthcare.[26]

In this scheme, beneficiaries i.e. any member of a cooperative society, can access medical treatment and procedures for a nominal annual rate. The Government of Karnataka is responsible for partial subsidy benefit, the Karnataka State Cooperative Department for communication of the plan, cooperative societies for enrolling members, cooperative banks for assistance in premium collection, Family Health Plan Ltd for the administration of claims and a network of hospitals for delivery of benefits.[27]

A quarter of the monthly premium that is to be paid by the members of the cooperative society (Rs 2.50 of Rs 10 per month) is provided by the Government and the scheme covers a network of hospitals which includes private hospitals that provide high end facilities. This is one of the primary attractions of this scheme to its target audience which is the reason behind enhanced membership of the scheme. The scheme was initiated by the Department of Co-operatives of the Government of Karnataka and the Narayana Hrudayalaya Super Specialty Heart Hospital in Bangalore. The cooperative card holders under this scheme can access treatment that is free across 160 hospitals that are located in almost all the districts of Karnataka. This can be done for any procedure costing up to two lakhs.[28]

The Yeshasvini Farmers Health Care Trust, which comprises of members of the State government and the hospitals involved in the scheme has been formed to ensure the smooth functioning

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26 Aradhna Aggarwal, *Impact evaluation of Indias 'Yeshasvini' community-based health insurance programme*, 19 Health Economics 5–35 (2010).

27 *Ibid.*

28 Radermacher et al., Yeshasvini Trust, Karnataka India by Ralf Radermacher, Natasha Wig, Olga van Putten-Rademaker, Verena Müller, David M. Dror: SSRN (2007), <https://ssrn.com/abstract=1020989> (visited on April 5, 2018).

of the scheme and is the regulatory body for implementing the scheme. The premium that is received for the insurance scheme is deposited in the account of this trust and the trust is responsible for formulating policies, addressing complaints of the insured members or doctors, appoint the third party administrator and essentially control and monitor the whole scheme.[29]

The responsibility of the day to day management and administration of the scheme is with the Family Health Plan Limited, a Third Party Administrator in the field of Health Insurance duly licensed by Insurance Regulatory Development Authority of India. The network of hospitals under this scheme are recognized hospitals across the state of Karnataka which offer comprehensive healthcare services that are paid for by Yeshasvini.

Health insurance is an area where PPPs have been considerably successful in India. A health insurance scheme following the PPP model in the state of Andhra is the Arogya Raksha Scheme initiated by the Government of Andhra Pradesh. This scheme is fully funded by the Andhra Pradesh Government and is run in collaboration with the New India Assurance Company, a public sector general insurance company and multiple private clinics in the state.

The aim of the scheme was to provide accessible healthcare which is affordable and of good quality by providing a network of hospitals and healthcare providers to rural areas and by providing personal accident and hospitalization benefits to people below the poverty line.[30]

These benefits can be obtained by BPL persons after undergoing sterilization from government healthcare institutions. An Arogya Rakha certificate is provided to persons undergoing such sterilisations by the medical officer at the clinic. Under this scheme, a person and two of his or her children are covered under the above mentioned benefits and the Government pays an insurance premium of Rs 75 to the insurance company per family. Such persons can get treatment at a hospital identified under the scheme for Rs 2000 per hospitalization subject to a limit of Rs. 4000 for all treatments taken under one Arogya Raksha Certificate in any

29 *Ibid.*

30 Cppr.in. (2018). [online] <http://www.cppr.in/wp-content/uploads/2012/03/A-Study-of-PPP-Models-for-Social-Healthcare-Insurance-Akshay-V.pdf> (visited on April 5, 2018).

one year. The process is such that the persons with an Arogya Raksha Certificate and two of his/her children can get treatment for free at a hospital which in turn claims it form the New India Insurance Company.[31]

Conclusion

With the rise in population, the demand for essential services such as healthcare is increasing at a very fast pace. The Government and the public sector currently do not have the capacity to deal with the population burden and its healthcare needs and the requirement for private participation for not just meeting the demand but also improving accessibility and quality of services by bringing about technical expertise and resources has also been vastly acknowledged.

But there has also been a consensus about the impracticability of the public sector ceding its responsibility of providing social infrastructure and essential services. Government control and regulation in such areas is still thought of as crucial. Taking these factors into account, the State has recognized and has been taking steps to promote private participation and investment into healthcare. A National Policy on PPP and promotion of the formation of the Public Private Partnership Approval Committee have also been brought about to address the issues affecting private participation in healthcare and other sectors and for streamlining all such PPP projects.

But multiple implementation issues still exist with PPP projects in India, such as improper identification of beneficiaries, budgetary constraints, delay in payments from the Government and inaccurate measuring of performance of projects. And these unfortunately act as a hurdle in the optimum utilization of such an arrangement to serve the healthcare needs of the population.

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31 planningcommission.nic.in [Online] <http://www.planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_heasys.pdf> Draft Report on Recommendation of Taskforce on Public Private Partnership for the 11th Plan (visited on April 5, 2018).

Chapter 3

PPP in SMART Cities

Aashraya Sharma & Shriya Prasad

Introduction

The Smart Cities Mission was launched in India with an objective to provide "*infrastructure, a decent quality of life to citizens, a clean and sustainable environment and application of SMART solutions."*[1] The Smart City Mission Statement & Guidelines, 2015 laid down that the infrastructural elements of Smart Cities include water and electricity supply, sanitation, urban mobility and public transport, affordable housing, digitalisation, IT connectivity and good governance including e-governance and citizen participation.[2] The Guidelines acknowledge, "*Application of Smart Solutions will enable cities to use technology, information and data to improve infrastructure and services*."[3] These Smart solutions include water management, waste management, energy management, urban mobility, e-governance and citizen services (such as public information and grievance redressal, video monitoring, e-service delivery), etc.[4] Smart Cities seek to ensure safety and security of citizens, provide education, safeguard citizens' health, create employment, enhance incomes and they seek to achieve sustainable as well as inclusive development.[5]

The Ministry of Urban Development, Government of India advocated that the implementation of the Smart Cities project

1 Clause 2.3, Smart City Mission Statement& Guidelines, 2015.

2 Clause 2.4, Smart City Mission Statement & Guidelines, 2015.

3 Clause 2.6, Smart City Mission Statement & Guidelines, 2015.

4 Clause 2.5, Smart City Mission Statement & Guidelines, 2015.

5 Clauses 2.4 and 2.6, Smart City Mission Statement & Guidelines, 2015.

should be via public private partnerships (hereinafter, "PPP").[6] This paper is a study of PPPs in Smart Cities, focussing mainly on the contract entered into to develop a Smart City via a PPP. It examines the necessity of PPPs for the development of Smart Cities, the difference between a PPP that seeks to develop a Smart City from a traditional PPP in infrastructure/public service delivery and different models of PPP that have been used in the development of Smart Cities worldwide. Then, a case study is undertaken in the paper of the Concession Agreement of the development of the Smart City in Bhopal, in which important clauses of the Concession Agreement are analysed and suggestions are made regarding clauses in the Agreement. The researchers hope that this study will lend clarity as to how contracts in PPPs for the development of Smart Cities should be drafted, by enumerating important contractual clauses in this regard and by emphasising their importance.

Necessity of PPPs for the Development of Smart Cities[7]

Local city governments do not possess the technical capabilities and expertise that are required in the creation of Smart Cities and neither do they possess the financial capabilities to execute such large-scale projects. A PPP transfers risks to parties that are best able to handle and reduce them. Hence, by opting for a PPP to finance and manage a Smart City project, the private party brings in finance for the project without expanding the local government's indebtedness. The involvement of a private partner ensures that technical expertise, efficiency and output certainty are lent to the project. Innovation is fostered through competition in the tender process. PPPs bring about accelerated urbanisation & digitalization and also increase productivity in public services, all while ensuring that the city municipality maintains strategic control over the project. In the course of the contract, there is also skill transfer between the private party and the municipality. Lastly, PPPs also ensure the development of the local economy as the project often involves local actors, thereby resulting in creation

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6 Clause 10.1, Smart City Mission Statement & Guidelines, 2015.

7 *Public-Private Partnerships for SMART City Management,* Uraia (September, 2015) <https://issuu.com/uraiaplatform/docs/oct_2015_-_uraia_-_smart_ppp_-_eng_>.

of employment opportunities locally, employment of local banks, firms and other resources.

Difference between PPPs in SMART Cities and Traditional PPPs[8]

Smart City PPPs are different from traditional PPPs that are for the development infrastructure or which dispense public services, by virtue of Smart City PPPs including the added element of Smart technology. Hence, the most crucial element of Smart City PPPs is that they must be in consonance with the latest innovation in administrative procedures and management processes. This is relevant because technological innovation gives rise to rapidly changing contexts which necessitate flexible and responsive administrative and legal frameworks. These innovations give rise to healthy competition and transparency between the citizen and the municipality.

Models of PPPs Employed in SMART Cities

There is no single model of PPPs that is used to develop a Smart City. Instead the models of PPP that are used vary across cities depending on the preferences of that city's urban local body, especially with regard to the level of risk that the urban local body would prefer to be borne by the parties to the PPP. On this note, following are the models of PPPs that have been employed in SMART City projects across the world:

Model of PPP	Example(s)
Build - Operate - Transfer (BOT) Build - Own - Operate - Transfer (BOOT)	Barcelona Gix[9] Bhopal[10]
Build - Design - Finance - Operate - Transfer (BDFOT)	● Barcelona Tramway[11]

8 Supra note 7.

9 *PPP for Cities,*IESE Business School & PPP for Cities (November 17, 2016) <http://www.pppcities.org/wp-content/uploads/2016/11/7.-PPP-for-Cities.pdf>. *See Public Private Partnerships for sustainable and Smart Cities,* PPP for Cities (July 4, 2017) <http://www.gruppocap.it/FileFolder/c4337907-c08e-4155-b548-245d23322578/File/Attivita/Ricerca%20E%20Sviluppo/Servizio%20Idrico%20e%20Agricoltura/Convegno%20Acqua%20e%20resilienza/Presentazioni%20mattina/03%20Bufi.pdf>.

10 *Concession Agreement for Implementing Smart City Pan Projects in Bhopal under PPP on BOOT Model* (hereinafter "Concession Agreement"), Bhopal Smart City Development Co. Ltd *(2016)* <http://smartcities.gov.in/upload/tender/582d46309cbf5bhopalConcessionAgreement_Part2.pdf>.

11 *PPP for Cities,* IESE Business School & PPP for Cities (17 November 2016, Barcelona) <http://www.pppcities.org/wp-content/uploads/2016/11/7.-PPP-for-Cities.pdf>.

	• Cairo Wastewater treatment[12]
	• Metro Sevilla[13]
Operate & Manage (O&M)	Barcelona Telecare[14]
Design - Build – Operate (DBO)	• Yin Chung[15]
	• Hefei[16]
People first model to achieve Sustainable Development Goals (SDGs)	Donsheng Group[17]

'People First' Model to Achieve SDGs

Since all aforementioned models of PPPs barring the "people first model to achieve SDGs" are familiar, we undertake a discussion of the same. This model of PPPs is a step forward from the unidimensional focus of traditional PPPs on risk allocation and financing. This model seeks to fulfil the Sustainable Development Goals, with special focus on people, planet and prosperity, which are elaborated upon below:[18]

> *"People*
>
> *We are detennined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment.*
>
> *Planet*
>
> *We are determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on*

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12 J. Salvador *et al*, *New Cairo Wastewater Treatment Plant,* IESE Business School & PPP for Cities <http://www.iese.edu/research/pdfs/ST-0425-E.pdf>.

13 Supra note 9.

14 Supra note 11.

15 W. Fang, *PPP Model to Develop New Smart Cities: The case in China*, International Conference on "Governance among partners in Public Private Partnerships (November 17, 2016) <http://www.pppcities.org/wp-content/uploads/2016/11/10.-FANG_ISOFTSTONE_okweb.pdf>.

16 *Ibid.*

17 *Ibid.*

18 *Transforming Our World: The 2030 Agenda for Sustainable Development*, United Nations <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

climate change, so that it can support the needs of the present and future generations.

Prosperity

We are determined to ensure that all human beings can enjoy prosperous and fulfilling lives and that economic, social and technological progress occurs in harmony with nature."

This model focuses on "transparency, accountability and multi-stakeholder involvement in decision making and clear governance arrangements."[19] It seeks to better the lives of people, create inclusive urban spaces, alleviate poverty and ensure environmental and ecological protection.[20] It hence leads the way to a "balanced and equitable urban development."[21]

PPP Concession Agreement in the SMART City of Bhopal: A Case Study

Bhopal was one among the first 20 cities which were selected to be beneficiaries of the Smart Cities Mission.[22] It has since then partnered with Hewlett Packard Enterprise India to use their Universal Internet of Things to create India's first cloud-based Integrated Command and Control Centre for the monitoring and administration of civic utilities and citizen services (e.g. traffic management, Smart parking, emergency response and disaster management).[23] Smart poles and intelligent streetlights, which are energy efficient, have environmental sensors, surveillance cameras, electric vehicle charging points and provide WiFi

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19 *Putting People First in PPPs for Sustainable Development,* UNECE <https://www.unece.org/info/media/news/economic-cooperation-and-integration/2016/putting-people-first-in-ppps-for-sustainable-development/doc.html.>

20 *How can the development goals be achieved?,* World Economic Forum <https://www.weforum.org/agenda/2015/09/how-achievable-are-the-sustainable-development-goals/>.

21 *Getting Started with SDGs in Cities,* Sustainable Development Solutions Network & German Cooperation (2016) <http://unsdsn.org/wp-content/uploads/2016/07/9.1.8.-Cities-SDG-Guide.pdf>.

22 A. Kalra, *First 20 Smart Cities announced*, Business Today (January 28, 2017) <http://www.businesstoday.in/current/policy/first-20-smart-cities-announced-pune-jaipur-chennai-top-list/story/228622.html>

23 *Bhopal to monitor civic utilities and citizen services through a central cloud,* Smart Cities Council India (November 2, 2017) <http://india.smartcitiescouncil.com/article/bhopal-monitor-civic-utilities-and-citizen-services-through-central-cloud>.

through optical fibres are to be features of the city.[24] The Smart City will include a Geographic Information System (GIS) system to create a Smart map of Bhopal.[25] The project seeks to create roads, housing, intelligent transport and to have Supervisory Control and Data Acquisition (SCADA) in water supply, while being guided by a Green Master Plan.[26]

The PPP for the development of the Smart City of Bhopal follows the Build-Own-Operate-Transfer (BOOT) Model. This has been laid down in the preamble of Bhopal's Concession Agreement, which reads, *"…to finance, construct, operate, maintain the Project, pay an agreed Revenue Share to the Bhopal Smart Cities Development Corporation Limited ("BSCDCL") during the Concession Period, and at the end of the Concession Period transfer the implemented infrastructure to BSCDCL, on the terms, conditions and covenants hereinafter set forth in this Agreement."*[27]BSCDCL is the Special Purpose Vehicle set up by the Municipal Corporation of Bhopal to execute the Smart City project.[28]

Clauses in the Concession Agreement

The concession period of this PPP agreement is 15 years.[29] One of the formative clauses in the Concession Agreement deals with the "Rights over the Project Site." It is the basis on which the ownership of the project site and assets are vested with the Concessionaire up till the completion of the term of the contract by expiry or termination. It states as follows:[30]

24 *Bhopal's multipurpose Smart poles to save energy and monitor air quality,* Smart Cities Council India (August 1, 2017) <http://india.smartcitiescouncil.com/article/bhopals-multipurpose-smart-poles-save-energy-and-monitor-air-quality>.

25 *Bhopal municipal corporation budget on April 2, may focus on Smart City,* Smart Cities Council India (April 20, 2017) <http://india.smartcitiescouncil.com/article/bhopal-municipal-corporation-budget-april-2-may-focus-smart-city>.

26 R. Thakur, *Proposed Smart City to have all modern amenities, says Bhopal Municipal Corporation Commissioner Chhavi Bhardwaj,* The Free Press Journal <http://www.freepressjournal.in/bhopal/proposed-smart-city-to-have-all-modern-amenities-says-bhopal-municipal-corporation-commissioner-chhavi-bhardwaj/1068173>.

27 Clause E, Preamble, Concession Agreement.

28 Page 6, Concession Agreement.

29 Article 2.2, Concession Agreement.

30 Article 2.1, Concession Agreement.

> *"The title of interest, ownership and rights with regard to project implemented by the Concessionaire along with fixtures/fittings provided therein shall rest with the Concessionaire until the expiry or termination of the Contract and rights related to the land allotted by the BSCDCL shall vest with the BSCDCL except that these will be operated and maintained by the Concessionaire as agreed in this Agreement."*

Article 8.1(a) of the Concession Agreement lays down the clause with regard to the financing arrangement. It reads, "*The Concessionaire shall at its cost, expenses and risk make such financing arrangement as would be necessary to finance the Project and to meet its obligations under this Agreement.*" This is the clause per which the private player brings in diversified sources of wealth for the funding of the project. The agreement ensures a sort of accountability or check on the financing arrangement that the private party enters into as Article 8.1(c) of the Concession Agreement mandates for the Concessionaire to submit a copy of the documents evidencing such financing arrangements to the BSCDL.

The Concession Agreement makes a provision for a Performance Security to be provided by the Concessionaire to ensure "*due and punctual performance of obligations during the Project Construction, Implementation and O&M Period deliver to BSCDCL a Performance Security.*"[31] The Performance Security is an irrevocable and unconditional bank guarantee valid for 120 days beyond the expiry date.[32]

The obligations of the Concessionaire are laid down in Article 5 of the Agreement. The Concessionaire's obligations are to "*Investigate, study, construct, operate and maintain the Project Assets/Project Facility in accordance with the provisions of this Agreement, Good Industry Practice and Applicable Laws,*"[33] and to "*Operate and maintain the Project at all times during the Operations Period in conformity with this Agreement including but not limited to the Specifications and Standards, the Maintenance Programme and*

31 Article 3.1(a), Concession Agreement.

32 Article 3.1(b), Concession Agreement.

33 Article 5.1(i), Concession Agreement.

Good Industry Practice."[34] Schedule B of the Concession Agreement lays down a detailed list of works and tasks to be achieved by the PPP.

The Concession Agreement lays down the obligations of the BSCDCL, which include "*providing Right of Way (ROW) for laying of fiber, installation of Smart Poles, provisioning Wi-Fi services, etc.,*"[35] "*allowing exclusive advertisement rights to the Concessionaire to earn revenue out of advertisements, digital information panel etc.*"[36]and "*providing uninterrupted electricity free of cost to the Concessionaire for the Smart poles, surveillance camera and Wi-Fi access points, Environmental sensors and any other devices.*"[37]

The procedure of collection and appropriation of revenue and that of revenue sharing is laid down in the Concession Agreement as follows:

> *"The Concessionaire shall, during Operations Period be entitled to demand and collect revenue from advertisements, LED Energy Saving, EV Charging, Wi-Fi, Intelligent street pole rentals etc. at the Project Site as specified and permitted by BSCDCL in the agreement."*[38]
>
> …
>
> *"The Concessionaire shall pay to the Authority a Revenue Share on a quarterly basis for each year of the Concession Period as per annual amounts."*[39]

The Concession Agreement specifies an "Officer in charge."[40] He is the Chief Executive Officer of the Smart City Special Purpose Vehicle. He is obligated "*to act independently on behalf of both the Authority and the Concessionaire to review and monitor all*

34 Article 5.1(xiv), Concession Agreement.

35 Article 5.4(a) to (j), Concession Agreement.

36 Article 5.4(k), Concession Agreement.

37 Article 5.4(n), Concession Agreement.

38 Article 4.1(a), Concession Agreement.

39 Article 9.1(i), Concession Agreement.

40 Article 6, Concession Agreement.

activities associated with construction, operation, and maintenance to ensure compliance with provisions of the Concession Agreement."[41] The Agreement deals with environmental protection as it states that the duty of the Officer in charge includes the duty to "*Review the environmental management plan for the Project during Implementation Period and Operations Period.*"[42]

The Concession Agreement specifies timelines to be adhered to by the Concessionaire.[43] The Agreement goes on to lay down sanctions in case such timelines are not adhered to. The relevant extract of the clause is reproduced below:

> *"If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than Force Majeure or reasons attributable to BSCDCL, the Concessionaire shall be liable to pay liquidated damages for delay beyond the Scheduled Project Completion Date."*

The Concession Agreement has a section dedicated to "Operation & Maintenance."[44] The relevant clause in that section reads as follows:

> *"The Concessionaire shall operate and maintain the Project/Project Facility and if required, modify, or make improvements to the Project/ Project Facility to comply with Specifications and Standards, and other requirements set forth in this Agreement (Maintenance Manual, maintenance schedule), Good Industry Practice, Specifications & Standards, Applicable Laws and Applicable Permits."*

It is to be noted that the Agreement specifically lays down provisions relating to maintenance in the Maintenance Manual[45] and in a "Maintenance Programme."[46]

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41 Clause 1(i), Schedule D, Concession Agreement.

42 Clause 2.1(v), Schedule D, Concession Agreement.

43 Article 7.2(c). Article 5.2(iii) states that *"(the Concessionaire should) adhere to the Project Completion Schedule and to achieve Project Completion under and in accordance with this Agreement."*

44 Article 7.4, Concession Agreement.

45 Article 7.5, Concession Agreement.

46 Article 7.6, Concession Agreement.

The Concessionaire is obligated to purchase and maintain insurance, such as workmen's compensation insurance, third party insurance, insurance to protect the Concessionaire, its employees and its assets (against loss, damage or destruction).[47] The Concessionaire then has to supply evidence of the aforesaid insurance covers having had been, to the BSDCL.[48]

The part of the Agreement dealing with default & termination is quite detailed in nature. It lays down the events of default, such as non-maintenance, failure to adhere to schedule, false warranties, the Concessionaire creating an encumbrance on the project site, shareholding of the concessionaire falls under the minimum prescribed, winding up of the Concessionaire, delay of payment to BSCDL, breach of the terms of the Agreement, etc.[49] The BSCDCL is to give notice to the Concessionaire and up to 30 days time for it to cure the breach.[50] The effects of termination are then underlined in the Agreement and they include:[51]

1. Bank Guarantee furnished by the Concessionaire may be forfeited;

2. BSCDL to take possession and control of Project Assets;

3. Prohibition of the Concessionaire from entering upon the Project Assets/dealing with the Project or any part thereof;

4. The Concession Agreement deals with employees in the following clauses:

> *"Where any national, regional law or regulation relating to the mandatory or automatic transfer of the contracts of employment from the selected Concessionaire to the, then the Parties shall comply with their respective obligations under such Transfer Regulations."*
>
> ...

47 Article 11.1, Concession Agreement.

48 Article 11.4, Concession Agreement.

49 Article 14.1, Concession Agreement.

50 Article 14.2.1, Concession Agreement.

51 Article 14.4, Concession Agreement.

> *"To the extent that any Transfer Regulation does not apply, BSCDCL may make an offer of employment or contract for services to such employee of the selected Concessionaire and the selected Concessionaire shall not enforce or impose any contractual provision that would prevent any such employee from being hired by the BSCDCL or its nominated agencies or any Replacement Concessionaire."*

5. The Concession Agreement deals with the recovery of balance revenue share by way of the following clause:

> *"The share of Authority due in the cumulated revenue receivable of the concessionaire at the end on Concession Period as reflected in the last audited project account shall be recovered by Authority from the performance security and the amount of project bank balance under lien of Authority. The balance remaining unrecovered amount, if any shall be paid by the concessionaire to Authority along with the Revenue Share payable for the last quarter."*

The conditions that lead to a Force Majeure situation are laid down in the Concession Agreement.[52] The Agreement provides for a dispute resolution clause, which states that amicable settlement and arbitration are the two options among which the parties can choose to resolve any issues arising out of the contract.[53]Besides these clauses, the Agreement has several general clauses such as representations, warranties and disclaimers,[54] assignment and charges,[55] liability and indemnity,[56] confidential information,[57] severability,[58] governing law and jurisdiction[59] and change in law.[60]

52 Article 13, Concession Agreement.
53 Article 17, Concession Agreement.
54 Article 18, Concession Agreement.
55 Article 19.2, Concession Agreement.
56 Article 19.3, Concession Agreement.
57 Article 14.6.4, Concession Agreement.
58 Article 19.11, Concession Agreement.
59 Article 19.4, Concession Agreement.
60 Article 15.1, Concession Agreement.

Analysis of Select Important Clauses

Cross Sector Cooperation

It is crucial to involve personnel across all city departments concerned in the Smart City project, as it would lend diversity to the project in technological innovation, by virtue of exchanges between sectors. Article 5.4(l) of the Concession Agreement brings about the said cross sector cooperation. The Article states, *"BSCDCL shall coordinate with other governmental departments if any required for faster implementation of this Project."*

Internal Communication

Internal communication is important to build reliability and trust between partners. A provision for internal communication has been made in Article 7.1(a) of the Concession Agreement, which reads, *"Concessionaire shall furnish to BSCDCL monthly reports on actual progress of the Implementation Works, adherence to Good Industry Practice, schedule of the project."*

Support from Political Parties

A PPP seeking to develop a Smart City is a long-term project, which is capital intensive. Hence it is necessary that all political parties support the project, regardless of whether they are the ruling party or not. The Concession Agreement indirectly ensures this by classifying indirect political events and political events as Force Majeure events, on the basis of which contracts cannot be terminated. These events are: *"(a) Change in Law, (b) Expropriation or compulsory acquisition by any Government Agency of any Project Assets or rights of the Concessionaire, (c) Any unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire to perform their obligations under the Project."*[61]

Revision & Renegotiation

The Concession Agreement includes the provision of its revision and renegotiation. It provides for the change of scope of the Agreement

61 Articles 13.3 and 13.4, Concession Agreement.

by way of its Article 12.1, which states, "*addition/deletion to the works and services on or about the Project which are beyond the scope of the Project*," on the condition that all parties should agree to the amendments.[62]

R&D Clause (Innovation Clause)

As stated before, it is crucial for a Smart City PPP to be flexible and responsive in order to keep up with latest, international standards. The Concession Agreement allows for this by means of Article 7.4, which states, "*The Concessionaire shall operate and maintain the Project/Project Facility and if required, modify, or make improvements to the Project.*"

Further, the Concession Agreement also requires the Concessionaire to adhere to "*Good Industry Practice*", which is defined below:[63]

> *"Good Industry Practice means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and acting generally in accordance good engineering practices in the design, engineering, construction and project management and which would be expected to result in the performance by the Concessionaire of its obligations and in the operation and maintenance of the Project in accordance with this Agreement, Applicable Laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency."*

Suggestions Regarding Contractual Clauses

Governance: Monitoring and Evaluation

The process of contract governance, i.e. the monitoring and evaluation of the contract, has been entrusted in the case of Bhopal to the Officer in charge. Ideally, the functions of such an officer would be as follows:

62 Article 19.9, Concession Agreement.

63 Page 11, Concession Agreement.

1. To follow up on the project & contract;
2. To ensure coordination between all stakeholders;
3. To follow up on timelines;
4. To identify issues with the project;
5. To identify non-performance in the project.

However, the scope of functions of the Officer in charge in the Bhopal case is severely restricted and it should be amended to incorporate all the aforementioned elements. The person or body monitoring &evaluating the project should comprise of representatives of all the stakeholders in the project. Hence, ideally the Officer in the case of Bhopal would be an impartial party, but as per the Concession Agreement, he is the representative of the government only. Further, it is suggested that an impartial project/ contract management team with the following sub-teams be put in place because just a single officer like in the case of Bhopal, would not have technical expertise to monitor all activities spanning across the scope of the project, such as:

1. IT & innovation;
2. Finance & audit;
3. Public service;
4. Communications.

Expert consultants can be punctually hired to follow up on the financial, legal aspects etc. of the contract. By putting such a system in place, an independent assessment of the performance of the contract would be able to be brought about, thereby ensuring credibility to the monitoring.

IPR Clause/Licensing Rights

There is the need to clearly define an IPR strategy with regard to intellectual ownership in the PPP Concession Agreement. This would help the city municipality to gain the benefit of innovation. With regard to this, it is crucial for the municipality to ensure maximum control over the distribution license of the innovation in question, to circumvent the circumstance of the purchasing of the rights of such products and services from arising.

Private Data Protection Clause[64]

What makes a city "Smart" is the centrality of technology and information in it to improve its processes. Technology accurately gathers, analyses, and acts on information about city systems and services. Policing, surveillance, crowd control, emergency response, are all historically state functions, and citizens might expect the very sensitive data involved to be held by the state, yet the likelihood in a PPP-built city is that that the data finds itself (at least partially or non-exclusively) in private control. Further there is the lack of opportunity in a Smart City environment for the giving of meaningful consent to the processing of personal data. Hence this causes a threat to personal privacy, as there is the susceptibility of data being either accidentally or deliberately breached as a result of technical or organisational failures. This results in the loss of control over personal data to third parties, most often seen in contexts such as social networks, search engines, targeted advertising insurers, employers or law enforcers. Hence it is necessary to have a private data protection clause to protect 'personal data' – the data relating to persons, which makes them 'identified or identifiable.' The European Data Protection Directive for instance mandates that data controllers have a lawful ground for processing of personal data, with consent being only one such ground among several.[65]

Defining Transfer of Knowledge between the Private Partner and the Municipality

Smart City projects involve technical and high-level management capacities. Hence arises the need to explicitly lay down a clause in the PPP contract about the transfer of knowledge between the private player and the Urban Local Body. This is crucial to ensure the flow and continuity of the project after the completion of the term of the PPP contract and to ensure that the municipality functions autonomously and technologically independent of the private party. This skill transfer can be brought about by the private party arranging for training sessions of the city's civil servants before the completion of the PPP contract.

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64 L. Edwards, *Privacy, Security and Data Protection in Smart Cities: A Critical EU Law Perspective,*2, European Data Protection Law Review, 28, 30 (2016).

65 Article 7, European Union Data Protection Directive, 95/46/EC, 1995.

Awards when Expected Outcomes Exceeded

The PPP Concession Agreement could have a provision by which the private party would be given awards in case it exceeded expected outcomes. This award could be given by means of Social Impact Bonds. A Social Impact Bond is defined as "*an agreement by which the government agrees to pay back (public sector) savings gained from an initiative to private investors plus a return on investment if the initiative produces the desired social outcomes.*" It is also called Pay for Success Financing, or a Social Benefit Bond.[66] This will incentivize the private player to work with more efficiency and ensure the inclusion of latest innovation and technological developments.

Deciding the Right PPP Model Depends on the City's Needs and Resources

A city should not enter into PPP contracts on the basis of "ready to use" solutions put forth by private parties. Instead, the municipality of the city should be aware of the resources of the city and the objective it seeks to achieve by entering into the PPP contract, on the basis of which PPP contracts can be tailored to meet the customized needs of each city.

Following a People First Approach

It has already been mentioned that the "people first approach" seeks to fulfil the Sustainable Development Goals, which include poverty alleviation, inclusiveness of all people, environmental protection, sustainable development and "*transparency, accountability and multi-stakeholder involvement in decision making and clear governance arrangements*."[67] These elements should be explicitly dealt with in the contract. This is elaborated upon below:

(a) Sustainability & Environmental Protection

A study has criticised the Smart Cities Mission in India stating that it lays emphasis on infrastructural development, while not "supporting the resource requirements of such development."[68] It

66 J. Kohli et al., *What Are Social Impact Bonds: An Innovative New Financing Tool for Social Programs*, Center for American Progress, 12, 14 (2012).

67 Supra note 18. Supra note 19.

68 *Smart or dumb? The real impact of India's proposal to build 100 smart cities,* The Conversation, <https://theconversation.com/smart-or-dumb-the-real-impact-of-indias-proposal-to-build-100-smart-cities-80458>.

remarks, "The planning goal must reach a point where resources are adequate for the fully functioning metabolism of a city. In this case, the results indicate that metabolism does not increase linearly with density but accelerates instead, so the detrimental environmental impact will increase at a greater rate than the population increase" and that Smart cities in India are neither "Smart" nor "sustainable."[69]

Hence, it is the need of the hour to ensure that PPP contracts in Smart Cities lay generous consideration on the environmental aspects. Clauses such as the following from the Environmental Guideline for Smart Cities of Mauritius, 2015 can be incorporated into contracts:[70]

- *"Promote environmental ethics, code and conduct for citizens to have a green culture and attitude;*
- *Generate its own resources in terms of energy and water;*
- *Create and maintain continuous green belts with parks and endemic gardens/open spaces to promote biodiversity corridors with health and/or bicycle tracks within for human enjoyment of nature;*
- *Promote state of the art connectivity; Promote Smart, modern and sustainable mobility and reduce traffic congestion across the island;*
- *Promote energy conservation in buildings in a way so as to protect the environment and be more sustainable;*
- *Adopt sustainable lifestyles and sustainable consumption patterns through waste minimization, composting, rooftop rainwater harvesting and modern communication technologies;*
- *Solar panels and/or photovoltaic panels may be encouraged for residential and commercial areas, bus stop, traffic light, advertisement/road signage and street lighting.*

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69 *To maintain 100 new 'smart cities', India must rethink on infrastructure,* Dailypost (July 22, 2017) <https://dailypost.in/india/to-maintain-100-new-smart-cities-india-must-rethink-on-infrastructure/>.

70 *Environmental Guideline for Smart Cities of Mauritius, 2015,* Ministry of Environment, Sustainable Development, and Disaster and Beach Management <http://www.investmauritius.com/media/302490/Environmental-Guideline-for-smart-citiesdocx-July-2015.pdf.>

- *Grey water recycling – Water from baths, showers, washing machines and wash-hand basins may be captured and recycled within a building."*

(b) Inclusivity in the Community, Employment and thereby Poverty Alleviation

The Environmental Guideline for Smart Cities of Mauritius, 2015 rightly states, "*Sustainable communities depend upon the effective delivery of community infrastructure, which if well planned and designed may provide places for people to meet and interact. The objective is to ensure that the proposed development encourages and supports a vibrant, diverse and inclusive community spirit, which can integrate with the surrounding communities*." The relevant clause allowing for this sense of community is as follows:

> *"The development may be planned around a key asset of the site. It may be the focal point where people will be able to meet and socialize to create socially inclusive communities and encouraging positive interaction between groups and the fostering of an enduring community spirit."*

This has been integrated with environmental protection as follows:

- *"To allow for the creation of artificial lakes/wetlands/ reservoirs/ponds around which greeneries will attract all communities for enjoyment of nature.*
- *Create and maintain continuous green belts with parks and endemic gardens/open space to promote biodiversity corridors with common health and/or bicycle tracks within, for collective communities' enjoyment of nature."*

This has again been coupled with creating employment, which in turn leads to poverty alleviation and therefore, social inclusivity:

- *"Integrate people of all social fabrics including those within the surrounding areas through job creation including green ones;*
- *Create working, living and leisure space that will be environment-friendly and socially inclusive."*

Multi Stakeholder Involvement and Communication

Involvement of multiple stakeholders from different sectors such as the government, citizens, civil society organisations, academia and commercial entities and across different age groups brings together different ideas, viewpoints, knowledge, expertise and resources.[71] It is necessary to engage these stakeholders in early stages of the PPP contract to "bring citizens along" rather than to "convince them" later on. Such participation by multiple stakeholders should be aided by communication, which should be sustained, as opposed to one off, to ensure transformation.[72] Transparency and communication with regard to stakeholders by taking measures such as making information publicly available, ensures "acceptance, participation & legitimacy" of the project.[73]

Good Governance and Including Stakeholders in Decision Making

The people first approach necessitates "ensuring responsive, inclusive, participatory and representative decision making at all levels."[74] This also includes the following:[75]

"1. Empowering the public to enable them to effectively participate in decision making;

2. Developing and strengthening good governance;

3. Developing the capacity of public and the government in increasing welfare of the people."

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71 M. Hemmati *et al, Multi-stakeholder Engagement and Communication for Sustainability,* CatalySD Sustainability (2015) <https://sustainabledevelopment.un.org/content/documents/1894CatalySD_MSEC_for_Sustainability_300615.pdf>.

72 *Policy Coherence for Sustainable Development and Multi-stakeholder Involvement*, IISD (2017) <http://sdg.iisd.org/commentary/guest-articles/policy-coherence-for-sustainable-development-and-multi-stakeholder-involvement/>.

73 *Ibid.*

74 *Good governance: the Pandora's box of sustainable development goals*, The Guardian (September, 2015) <https://www.theguardian.com/public-leaders-network/2015/sep/25/good-governance-sustainable-development-goals-united-nations>.

75 *Good Governance in Sustainable Development*, Partnerships for SDGs <https://sustainabledevelopment.un.org/partnership/?p=1545>. *See Information for Integrated Decision-Making & Participation*, United Nations <https://sustainabledevelopment.un.org/topics/information-integrated-decision-making-and-participation>.

Transparency & Accountability

The people first approach requires the government to be open and transparent,[76] corruption should be reduced, an improved access to information and the promotion of rule of law.[77] It has been stated that "*Freedoms of information and association, and participation in decision-making are crucial. These freedoms are expected to contribute to improved development outcomes by providing citizens with the means to access information held by governments to extract greater accountability.*"[78]

Conclusion

This chapter has given a brief overview of the Smart Cities Mission in India and then shown why PPPs are the way to go to implement the Smart Cities project. The paper discussed what makes a Smart City PPP stand out from traditional infrastructure PPPs or those which dispense public service, before the discussion proceeded to various models of PPP that have been employed in the development of Smart Cities across the world. In this section, special emphasis was laid on the "people first approach" that has been adopted to achieve Sustainable Development Goals. The Concession Agreement drafted for the development of the Smart City of Bhopal and its important clauses were extensively studied. Light was thrown on clauses crucial for PPPs which are for developing Smart Cities such as cross sector cooperation, internal communication, R&D or innovation clause, etc. The researchers proposed suggestions regarding contractual clauses and methods that can be adopted in the Concession Agreement to make it more capable to deal with the issues that arise in the construction or development of Smart Cities, such as an IPR clause, private data protection clause, following a people first approach (with specific emphasis on sustainability, environmental protection, inclusivity, employment, poverty alleviation and good governance), among other issues.

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76 *Resilient Cities,* OECD <http://www.oecd.org/cfe/regional-policy/resilient-cities.html>.

77 *Is adoption of governance as a SDG an empty gesture,* World Bank (October 21, 2015) <http://blogs.worldbank.org/governance/adoption-governance-sdg-empty-gesture>.

78 *How can the Open Government Partnership Accelerate Implementation of the 2030 Agenda,* Open Government Partnership <http://www.opengovpartnership.org/sites/default/files/OGP_SDGs_ReportV3_OnlineVersion.pdf>.

Chapter 4

PPP in the Ports Sector

Deepanshi Ahlawat

Introduction

India has a coastline of more than seventy-five hundred kilometres that is serviced by thirteen major ports and one hundred and eighty-five notified minor and intermediate ports. National economic development of India requires a well-functioning seaport system as it accounts for 90% of India's international trade.[1] In the 1990s, the ports sector was lagging behind its global peers, mainly due to higher turnaround time for ships, delays in berthing and inadequate back-end infrastructure.[2] The Public Private Partnership [hereinafter "PPP"] model was seen as a valuable mode to fasten this development of port infrastructure in India and to remedy the problems. It sought to redefine performance through capacity augmentation, efficiency and productivity enhancement and increased competition. With the introduction of 1996 Guidelines for Port Privatisation, the sector was opened up and since then the number of port PPP projects has increased exponentially. The Nhava Sheva International Container Terminal (NSICT) at Jawahar Lal Nehru port was the first terminal developed on PPP basis.

1 1.3, Maritime Agenda 2010-2020, Ministry of Shipping, Government of India (January 2011) <http://shipping.nic.in/showfile.php?lid=261> (visited on September 30, 2017).

2 S. Paradkar and A. Reddy, *Ports by PPP – TAMP as Market Regulator*, 2 TATA Strategic Management Group (2013) <http://www.tsmg.com/download/article/Ports_%20by_PPP-TAMP_as_Market_Regulator.pdf> (visited on September 30, 2017).

Today, India offers the biggest market for PPPs in the world.[3] The era post the 1996 guidelines also saw the infusion of foreign investments in the sector. In 1997, further guidelines were issued to enable major ports to setup joint ventures with foreign ports, minor ports and private companies. These positive trends continued in the first decade of the 21st century. This growth was supported by the government's favourable policy reforms as well as regular financial support for the PPP projects.

In a PPP contract, the Port Trust and the private player, through a contract, agree to share responsibilities related to implementation of an infrastructure project at the port. This process of privatization is regarded as a trade-off between efficiency and social objectives. While it increases operational efficiency and innovation, it may also allow for the abuse of the consumers, employees and the environment. Thus, the establishment of a proper regulation and a suitable mechanism to let a private company operate in the market becomes crucial.

Figure 1: The Major Ports in India

3 V. Kumar, *PPP in Infrastructure gets a big push,* The Hindu (July 11, 2014) <http://www.thehindu.com/business/budget/ppp-in-infrastructure-gets-a-big-push/article6197995.ece> (visited on September 30, 2017).

Background to PPP in Ports Sector

The Indian economy was liberalised with the introduction of the 1991 reforms. These reforms also encouraged private participation in sectors that had previously been open only to public institutions. The pre-1991 era witnessed only a few instances of PPP projects and the public infrastructure suffered due to a lack of financial resources and requisite skills. Provision of quality infrastructure was essential for the economy to attain, on a sustained basis, the high growth trajectory that had been projected. Thus, PPP projects received a major boost in the liberalised economy.[4]

PPP projects in the ports sector in India have been majorly undertaken in operations and management of ports, as well as the construction of container terminals, deep water ports, bulk ports and shipping yards. The port privatisation programme was officially flagged of in India in 1996 when the Government of India issued guidelines for participation of private players in major ports. The law governing major ports is the Major Ports Act, 1963 [hereinafter 'the 1963 Act'] and the guidelines were formed in accordance with the legislation. S. 42(3) of the 1963 Act provides the Board of Trustees of the Port may authorise, with prior sanction of the Central Government, any person to provide any of the services that the Board is required to provide, such as developing infrastructure facilities at the port. S. 46(1) further empowers the Board to *permit* erection of a private wharf, dock, jetty *et al.* Leasing out of any of the powers proscribed to the Board also requires prior sanction of the Central Government under S. 57. Thus, the 1963 Act did not impose any bar on participation of the private players in the ports sector, and only required sanctions to be taken. Subsequent amendments to the 1963 Act further facilitated PPP models. For instance, S. 42(3A) was added which allowed the Board, with permission of the Centre, to enter into an agreement, by way of partnership, joint venture or in any other manner with either a body corporate or any other person, in order to perform any of the services (under S. 42) and functions assigned (under S. 35) to the Board under the Act.

4 *Getting the Deal Through- Public Private Partnerships*, Law Business Research, 45 (I. E. Mattei and A. R. Jacobo eds., 2017) <https://www.khaitanco.com/PublicationsDocs/GTDT-PPP-KCOCoverage061115.pdf> (visited on October 2, 2017).

The 1996 guidelines provided for private sector investment in – leasing of equipment for port handling from the private sector, construction of additional assets, leasing out existing port assets, pilotage and captive facilities for industries based on port. The policy guidelines required that private participation should be by tender on a build, operate and transfer (BOT) basis. They further provided that the Board of Trustees of the respective Ports will continue to maintain their regulatory role under the 1963 Act but an independent Tariff Regulatory Authority would be set up to fix and revise port tariffs. Additionally, the Guidelines allowed Central/State Public Sector Undertakings to create port facilities for their own captive use.[5]

Guidelines were also introduced in 1997 to enable major ports to setup joint ventures with minor ports, foreign ports and even private companies. This was done mainly with the aim to cover up the shortfall of finance to achieve the target of reaching 424 Million Tonnes port capacity by 2002. It would also attract new technology, create optimal port infrastructure and introduce better managerial practices. These arrangements were allowed for construction of new ports or port facilities and even improvement of existing port facilities.[6]

These guidelines are still in force. Disputes have arisen in the past about the legislative capacity of the Port Trusts to allow private investment in the sector, but they were all decided in favour of the Government. For instance, in the case *United Port and Dock Employees Union v. The Government of India*,[7] the Andhra Pradesh High Court examined the provisions of the 1963 Act, i.e. SS. 35, 42 and 46 and concluded that calling for invitation of tender was not outside the power and competence of the Board. The Board was competent to enter into contract with a corporate entity to entrust the work of iron ore handling under PPP mode.

5 *Guidelines to Be Followed By Major Port Trusts for Private Sector Participation In The Major Ports,* 1996 (Ministry of Shipping, Government of India) <http://shipping.gov.in/writereaddata/l892s/78061666-PSPMajor.pdf> (visited on October 2, 2017).

6 *Guidelines for Private Sector Participation in Ports through Joint Ventures and Foreign Collaborations,* 1997 (Ministry of Shipping, Government of India) <http://shipping.gov.in/writereaddata/l892s/80273874-PSPForeign.pdf> (visited on October 2, 2017).

7 United Port and Dock Employees Union v. The Government of India, 2014 (6) ALT 237 (High Court of Andhra Pradesh).

Developments Over the Years

With time, as private investment in the sector increased, the government standardised the process. The 1963 Act was amended in 1997 to establish the Tariff Authority for Major Ports [hereinafter "TAMP"] as the tariff regulator in the sector. The main aim of TAMP is to fix tariff on all major ports for the PPP projects. The tariff is fixed on the basis of tariff guidelines issued the Central Government. The bidding for PPP projects is also done on the basis of these guidelines. However, the PPP operators at minor ports are allowed to fix tariff. As a consequence, there has been a shift in traffic to these non-regulated ports. While the traffic at major ports grew by a CAGR of 4% from 2007-2012, the figure was 14.6% for non-major ports.[8] They now account for 42% of the country's cargo share, a steep rise from the 10% they had in 1997.[9]

Table 1: Cargo Traffic Handled by Major and Non-Major Ports in India

(2001 to September 2017)[10]

		(In Million Tonne)
Years	Major Ports	Non-Major Ports
2001-2002	287.58	95.52
2003-2004	313.55	108.3
2003-2004	344.8	118.86
2004-2005*	383755	138203
2005-2006*	423568	155420
2006-2007*	463839	181112
2007-2008*	519313	206379
2008-2009	530.53	213.22
2009-2010	561.09	289.32
2010-2011	569.91	314.64
2011-2012	560.19	353.74
2012-2013	545.83	387.92
2013-2014	555.49	416.96
	(1.8)	(7.5)
2014-2015	581.34	470.89
	(4.7)	(12.9)
2015-2016 (P)	606.37	466.1
	(4.3)	(1.0)
2016-2017 #	315.42	234.32
	(5.2)	(4.9)

8 1.2, *Report of the Inter-Ministerial Task Force on Draft Port Regulatory Authority Bill*, Planning Commission (July 2012) <http://planningcommission.gov.in/sectors/ppp_report/3.Reports%20of%20Committiees%20&%20Task%20force/Railways/21.Report_Port_Regulatory_Bill.pdf> (visited on October 2, 2017).

9 P. Manoj, *India's Port Tariff Reforms Gather Speed,* Live Mint (February 6, 2015) <http://www.livemint.com/Opinion/5fARUBNRCFXdAu9RkpkxUL/Indias-port-tariff-reforms-gather-speed.html> (visited on October 2, 2017).

10 Source: Ministry of Shipping, Government of India <https://www.indiastat.com/table/transport/30/cargotraffichandled19552016/379737/390118/data.aspx> (visited on November 7, 2017).

An Inter-Ministerial Panel formed in 2012 to examine the draft Port Regulatory Authority Bill observed that since these emerging trends clearly indicated that there was sufficient competition in the ports sector because of introduction of the PPP model, that there was no need for TAMP to regulate tariff. It suggested the Ministry of Shipping to take measures to allow the tariffs to be determined by competitive market forces as is the international practice.[11] Thereafter, new tariff fixation guidelines were introduced in 2013 and 2015 by the government which provided the much needed flexibility to the major ports. Under these guidelines the rates are set under a normative cost-based system and not the cost-plus method that was used earlier. The tariffs are determined on the basis of a certain defined criteria and assumptions on capital costs and operating expenses which are unrelated to actual costs. They reduced the role of TAMP to only scrutinizing and setting the upfront ceiling rates.[12]

The Port Regulatory Authority Bill sought to establish a national regulatory authority as well as state level regulatory authorities in the maritime states. These authorities would have regulated the tariff rates at all major and non-major ports and monitored the performance standards of ports facilities and services. However, critics argued that the success of non-major ports was a result of the operational freedom given to the private operators and the same should continue. The Task Force Report finally recommended that instead of subsuming the TAMP under the national regulatory authority, the Government should revise the role of TAMP from fixation of tariffs to regulation of performance standards and quality of service at major ports.[13] Following this, the Bill was dropped.

Furthermore, a Model Concession Agreement [hereinafter "MCA"] was finalised in 2008 to bring in uniformity and transparency to those contractual agreements which major ports would enter into, only with selected bidders for projects under the PPP model. The standard Request for Qualification, Request for Proposal were released to ensure there is uniformity and

11 Report of the Inter-Ministerial Task Force, Supra note 8, at 5.3.

12 Manoj, Supra note 9.

13 Report of the Inter-Ministerial Task Force, Supra note 8, at 5.6.

transparency in the PPP process.[14] The Government has also allowed 100% FDI under automatic route for construction and maintenance of ports and harbours[15] as well as tax rebates and a tax holiday for these investors.[16]

The Maritime Agenda 2010-2020 was released in 2012. It identified the major areas which had been thrown open for private investment, mainly on BOT basis – construction of container terminals, cargo handling berths and warehousing facilities, construction of dry-docks and ship repair facilities, installation of cargo handling equipment, etc. Among other things, it provided for development of ports in the country with ₹ 2.34 lakh crore under the PPP mode.[17]

The Government's Scheme and Guidelines for Financial Support to Public-Private Partnerships in Infrastructure, popularly known as the Viability Gap Funding (VGF) Scheme and Guidelines provides VGF to promote PPP projects that are economically sound but lack adequate finance. The project must provide a service against payment of a pre-determined tariff or user charge. The maximum amount of VGF is 20% of the total project cost, after a final approval of the committee and an assurance that the viability gap cannot be funded in any other manner.[18]

After all these efforts, at present, total of thirty-nine PPP projects are operational at a cost of around US $ 2219.4 million and capacity of 240.72 Million Tonnes Per Annum (MTPA). Apart from these, thirty-two PPP projects, at an estimated cost of around US$ 3917.6 Million and capacity 264.77 MTPA have been awarded

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14 Staff Reporter, *Ports to be developed in PPP mode*, The Hindu (March 10, 2012) <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/ports-to-be-developed-in-ppp-mode/article2980699.ece> (visited on September 30, 2017).

15 *Sector Specific Guidelines for Foreign Direct Investment - Press Note No.2 (2000 Series*), Department of Industrial Policy & Promotion <http://dipp.nic.in/node/86222> (visited on October 2, 2017).

16 *Private Participation at Indian Ports,* 3 Bureau of Research on Industry and Economic Fundamentals (February 2017) <http://briefindia.com/wp-content/uploads/2017/05/PPP-report.pdf> (visited on October 2, 2017).

17 Maritime Agenda, Supra note 1, at 4.3.2.

18 *Scheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure* (2013) <https://www.pppinindia.gov.in/documents/20181/21751/VGF_GuideLines_2013.pdf> (visited on October 2, 2017).

and are under implementation.[19] However, increasing litigations, fierce competition from non-major ports and the failure of the current PPP model to remain flexible with respect to the changes in regulatory environment and international market have reduced the number of investments in the sector. Therefore, there is a need for re-examination of the regulations and policies for PPP projects in the ports sector.[20]

To this end, two recent major changes have already been introduced. The Ministry of Shipping released a revised MCA to attract more private sector investments in the development of port infrastructure across the country. It addresses many of the concerns that have been raised over the time. Additionally, the new Major Port Authorities Bill, 2016 has been approved by the Cabinet and is still pending before the Parliament.

Amendments to the Model Concession Agreement

The revised MCA was proposed in 2016 and comments were invited from the stakeholders. It proposed to ensure a more equitable allocation of risks in the PPP projects, remove the existing ambiguities with respect to some existing provisions, incorporate provisions to handle unforeseen circumstances and ultimately, encourage private investment in the sector. To this end, the revised MCA proposes a change in the equity holding requirement to 51% for three years from Commercial Operation Date and then 26% for another three years. After these six years, the party will be free to exit. It also allows the Concessionaire to issue bonds, subscribed by a Debt Fund, vide a Tripartite Agreement, after one year of operation.[21] This will allow it to refinance the debt and obtain long term funds at a low cost. Additionally, an amendment to the definition of 'Change of Law' has been proposed to include imposition of new taxes, duties and imposition of standards and conditions arising out of environmental law and labour law.[22] This

19 *Ports,*India Brand Equity Foundation, 28(July 2017) <https://www.ibef.org/industry/ports-india-shipping/showcase> (visited on September 30, 2017).

20 BRIEF, Supra note 17.

21 Concessionaire is the private entity in the PPP project.

22 *Ministry of Shipping Proposes New Model Concession Agreement for Port Sector,* Press Information Bureau (September 22, 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151034 (visited on September 30, 2017).

will ensure that the Concessionaire is adequately compensated for any of these changes that can affect the viability of the project.

The new MCA also proposes the much needed change by allowing the Concessionaire to commit to minimum guaranteed revenue (updated for 60% variation in WPI) as opposed to minimum guaranteed cargo that was usually a fixed value throughout the concession period. It also postulates a provision for sharing of traffic risk which provides that there would be no increase/decrease in the concession period if there is up to 20% variation from the targeted traffic. It also provides for sharing of the discount rates offered, by providing that if the Concessionaire gives a discount of more than 10% to keep the charges competitive, the Board may allow for a discount on the ceiling tariff on which the revenue share is payable. The revised MCA makes it flexible to permit the Concessionaire to deploy higher capacity equipment/facilities for the project if it ensures higher productivity as well as improved utilization of project assets.[23]

An important aspect missing from the earlier version of MCA was the presence of a Grievance Redressal System for the consumers. The new MCA proposes to allow them to register their complaints on the Grievance Redressal Portal on the Concessionaire's website, which would be linked to the Authority's website and will have an adequate monitoring system and timelines for redressal. These are the concerns that had been raised over the years and their incorporation in the new MCA is a positive step towards attracting private investment.[24]

Major Port Authorities Bill, 2016

Major Port Authorities Bill, 2016 was cleared by the Cabinet, examined by the Parliament Standing Committee and is pending before the Parliament. It has been introduced with the aim of infusing professionalism as well as increasing the autonomy of the thirteen port Boards. It seeks to replace the Board of Trustees with a Board of Port Authority at each major port. By doing so, it proposes to redefine the role of TAMP. The Port Authority will now

23 PIB, Supra note 22.

24 BRIEF, Supra note 17, at 7-8.

fix the reference tariff for bidding for the PPP projects. The PPP operators will have the autonomy to determine the tariff based on market conditions. The Port Authority will also fix the scale of rates for other port services and assets.[25]

Further, the Port Authority will now get the power to lease the land of the port for *"port-related use"* for a maximum period of forty years and for *"non-port related use"* for a maximum period of twenty years. These leases can be further extended with approval from the Central Government. The Port Authority also does not need the government's approval for raising loans, execution of contracts, appointment of consultants and creation of service posts.[26] These are the steps taken towards increasing the autonomy of the Port Trusts, to reduce delays and increase efficiency of the projects undertaken for improvement of project infrastructure.

The Bill also proposes to establish an independent Review Board that will carry out the residual functions of TAMP and also adjudicate disputes between the ports and the concessionaries as well as the complaints against ports/private operators. It will also review the stressed PPP project and suggest means to revive them.[27]

As per the bill, PPP projects are the ones which are about royalty and revenue sharing between the parties. The government can set up tariffs only in the initial bidding process, after which the private party can set up tariffs based on the market conditions. All the tariffs will be as per the specific concession agreement.[28]

As per the bill, every major port must have a Major Port Authorities Board which should constitute of the railways ministry, the defence ministry, a representative from every state, the customs department, four other independent members and one member to represent the interest of the employees working for major port

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25 BRIEF, Supra note 17, at 7-8.

26 *Major Port Authorities Act, 2016: Cabinet clears Bill to raise Autonomy of 12 major ports*, The Indian Express (December 15, 2016) <http://indianexpress.com/article/business/economy/major-port-authorities-act-2016-clears-4427452/> (visited on September 30, 2017).

27 Brief, Supra note 17, at 8.

28 The Major Port Authorities Bill, 2016 as Introduced in Lok Sabha, Bill No. 328 of 2016, <http://www.prsindia.org/billtrack/the-major-port-authorities-bill-2016-4502/>.

authorities. The member who is representing the employees must remain in office for a term of three years. He cannot be elected for more than two consecutive periods and his membership agreement co-terminus with retirement.

The board will be allowed to use its property for developing a port. The board can regulate the availability of its assets and services for port related activities such as setting up new ports, jetties and exemption from payment of any charges on goods and services. It can enter into and perform any contract which is relevant for its functioning. The board can provide infrastructure facilities when it feels it necessary, it can take charge of the goods from the owners for performing any port related activity, it can also direct the master or owner of a sea- vessel to not bring or remove any vessel from the dock/pier under the control of the Board. It can permit construction and development by any person or itself of a dock, building, pier or structure or undertake any reclamation of foreshore within the limits belonging to the board or on the land on which the employees of the board reside. The board is supposed to work on promoting maritime education, training skills of coastal communities and sea farers welfare.[29]

The board is responsible for preparing budget, maintain accurate accounts and have relevant records which will assist in preparing annual statements of accounts including the balance sheet as prescribed by the central government in consultation of Comptroller and Auditor General in India.

The Comptroller and Auditor General of India shall audit accounts prepared by the board. Any such other person can also be appointed by the central government in respect of such audit. The Comptroller and Auditor General or any other person who is appointed by the government for the same function shall possess same rights and privileges with regard to auditing of government accounts. These rights shall be right to demand books of accounts, vouchers, documents, papers and inspect any office of the authority. Accounts certified by comptroller and auditor general or any person appointed for the same in this behalf shall be sent to central government annually which shall be produced to the parliament.

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29 *Ibid.*

An Adjudicatory Board was also set up by the bill which included a Presiding Officer and two other officers on the board. The Presiding Officer and the other members of the adjudicatory board would be appointed by the Central Government on behalf of the selection committee. The work to be done by the Board includes functions carried out by the Tariff Authority for major ports, adjudicating on claims with regards to rights and obligations of major ports and PPP concessionaires, looking into complaints received against port services and reviewing stressed PPP projects.

Penalties have also been set for violating any rules of provisions of the bill. If a structure is constructed on a port without permission, then the fine may extend to 10,000 rupees. The penalty for not paying any rates or fines may be 10 times the rate. Penalties for violating a rule in the bill would extend up to 1 lakh rupees.[30]

Whether we can bring about a comparative study (in brief) about the handling of the Port sector in other countries in a PPP manner? If so, one can look at two countries, in a general overview of the system of running these projects.

Magampura port in Hombantota is one of the latest additions to ports in Sri Lanka. There has been establishment of privately run container terminals specially at Port of Colombo [(South Asia Gateway Terminals (SAGT) and Colombo International Container Terminals (CICT)] has further revolutionised the port operation process. These terminals operate on a leasehold basis from the Sri Lanka Ports Authority (SLPA) for a period of no longer than 35 years. They are generally operated through a special purpose vehicle (SPV) in which a minority stake is held by the SLPA on behalf of the government of Sri Lanka.[31]

State policy has been developed with regard to main international ports from strict operation by public sector to the opening of investment and operational opportunities to private sector on a model based on PPPs.

30 *Ibid.*

31 Getting the deal through, Ports & Terminals, Nov. 2017, <https://gettingthedealthrough.com/area/81/jurisdiction/90/ports-terminals-2018-sri-lanka/>.

There has been no specific law or regulation on port tariff which has been regulated from time to time by SLPA. Terminals that are operated are not bound by these tariffs and are entitled to impose and collect their own tariffs from service users.

SLPA is empowered to enter into contractual agreements with private entities in relation to port services based on negotiated terms, including port access and development. There is SPV created for these purposes. SPV is to be held by SLPA of Sri Lanka which confines its stake to 15%.

The main purpose in determining the awarding of projects and port concessions are,

1. The highest return to the government of Sri Lanka (net present value).
2. Expertise in current port operations internationally.
3. The financial stand of entity.

Bids are subjected to technical evaluation by Technical Evaluation Committee, managed and reviewed by cabinet appointed procurement committee.

Unconsolidated reports are submitted as "strategic projects" which were previously considered under Strategic Development Project Act. However, recent governmental policy indicates that projects will no longer be considered under the provisions of this Act.[32]

These are the developments and the current status of the PPP projects in the ports sector over the years. The next section of this paper will outline the various PPP models that are used in the port projects in India.

32 *Ibid.*

Table 2: Number of PPP Projects at Ports (Excluding Captive)[33]

Status	Number of Projects	Total Project Cost (In INR Crore)
Pre-Construction	15	34,003
Under-Construction	45	58,140
Operation and Management	48	42,701
Terminated	14	-
Total	122	1,34,844

*as of December 2016 Source: www.pppindia.org

PPP Models in Ports

Each PPP project is characterised by identification of all the risks related to the projects as well as their allocation between the parties to the arrangement. The way these risks are allotted depends on which model the PPP project is based on. The PPP model varies according to a number of factors, such as, the sector, nature of the project, time duration, whether the project involves construction of new assets, what roles is the private sector needed to carry out, who will finance, design and construct, what is the duration of the project, who will own the asset during and at the end of the PPP contract, *et al.* Sometimes even within the same sector, different models are used, depending on the nature of work and the differentiation in the risk allocation framework that is employed.[34] The task of characterizing the project to this level of detail and defining it in the concession agreement is usually carried out by the specialist transaction advisors.

A number of PPP models are prevalent in the ports sector in India. These are:

A. **Build-Operate-Transfer (BOT)** - This model is usually followed when there is a greenfield project as there the allocation of risk to the private entity is huge and includes finance risk, volume risk and potentially price risk, but it is often used for expansion of existing facilities as well. A number of variants are possible, which depend on the way

33 Brief, Supra note 17, at 8.

34 *PPP Guide for Practitioners*, Department of Economic Affairs, Ministry of Finance, 12 (April 2016) <https://www.pppinindia.gov.in/documents/20181/33749/PPP+Guide+for+Practitioners/> (visited on September 30, 2017).

the roles and risks are allocated.[35] The variations BOOT (Build, Own, Operate& Transfer) and DBFOT (Design, Build Finance, Operate & Transfer) are also prominently used. The BOT model used prominently is the user fee-based model. Here, the concessionaire must build, operate and then transfer the project to the government once the concession period expires. They are permitted to levy user-fee on the facility, during the concession period, to recover the cost of the project.[36] The infrastructure models are usually based on this type. The other type, annuity-based is used in sectors where cost recovery by user charges is not possible due to socio-political-affordability considerations. In these cases, the Government provides a guaranteed cash flow.[37] Construction of offshore container berths and development of container terminal at Mumbai Harbour (2007) and development of oil jetty to handle liquid cargo and ship bunkering terminal at Old Kandla (2013) were undertaken on BOT basis. Construction and operation of two multipurpose bulk cargo berths at Mormugao (1999) and upgradation of mechanical handling infrastructure at Tuticorin (2013) are instances of projects awarded on BOOT basis. Upgradation of existing facility and creation of new facility for iron ore handling at Visakhapatnam (2013) was awarded on DBFOT basis.

B. **Management Contracts** – In these kinds of contracts, the main aim is to improve efficiency of service within limited budget.[38] The most important feature here is that the Government or any other public entity engages a private entity for managing a number of activities for a shorter duration (3 to 5 years). These projects are specific to the task and the main focus is on the inputs. The ownership of the project related assets and the investment are mostly with the government.[39] It has various variants such as basic management-for-fee contract, management contract with performance incentives related to cost & quality and management and finance

35 *Ibid.*

36 Getting the Deal Through, Supra note 4, at 46.

37 *Ibid.*

38 *Ibid.*

39 PPP Guide for Practitioners, Supra note 29.

contract with some rehabilitation and expansion. Under the Operation & Maintenance Concession agreement, the private entity is given the task of operating an asset that is owned by the public entity, for a specified period of time.[40] A multi-user liquid terminal at Cochin Port (2014) was constructed under the Construction, Operation and Maintenance model and so was the international ship repair facility there in 2013.

It is intriguing to note that as we move from BOT contracts to service contracts, the level of risk that is transferred to the private entity increases. An instance is that in cases of service contract, that is often considered similar to outsourcing, only a limited portion of O&M risk is actually transferred to that private entity, while in case of management contract, whole risk for O&M, including the risk for revenue, is taken over by the private entity. In both these types of contracts, the risks for finance, design, construction and even the ownership of the assets rest with the government/public entity. While in concessions and BOT projects, almost every risk related to the project is transferred to the private entity; while the public entity remains the owner at all times. Only in case of the BOO kind of models is the ownership of assets transferred to private entity and in BOOT, this same is done for a specific time period.[41] When it comes to sharing revenue risk, the Government may choose to share the costs of the project with concessionaire to the limited extent that those can be attributed to a political or non-political force majeure event, covered under the concession agreement.[42] Most of the model concession agreements in infrastructure sectors also have provision for a "revenue shortfall loan" which the Government may give to the concessionaire in case the shortfall in revenue is a result of a non-political event or government default or political event.[43] The various ways of allocation of risks between private and public entities in different models have been depicted in the diagram below:

40 *Overview of PPP Modal Variants - Ports*, PPP Toolkit for Improving PPP Decision Making Process <https://www.pppinindia.gov.in/toolkit/ports/module1-oopmv-raudpm.php?links=oopmv1c> (visited on September 30, 2017).

41 PPP Guide for Practitioners, Supra note 29, at 15.

42 Supra note 167.

43 Supra note 167.

Figure 2: Risks allotted to Private Entity Move as we Move from Service Contracts to BOO/BOT Contracts[44]

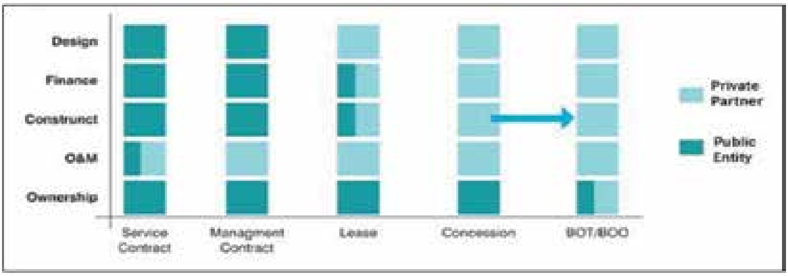

Table 3: Which Entity is Ideally well-suited to Manage which Risk?[45]

Risk Category	Example	Partner Likely Well-Suited to Manage Risk
Force majeure	Loss from war and natural disasters	Public
Regulatory/Political risk	Delay in project approvals, land acquisition, changes in law/policy affecting revenue	Public
Revenue/Demand risk	Deficient revenue due to low traffic volume or lower price due to demand elasticity	Mostly public - Some private
Design/Technical risk	Engineering or design failures	Private
Construction risk	Cost escalation due to delay or faulty techniques	Private
Operating risk	Costly operation and life-cycle maintenance	Private
Environmental risk	Damage and liability/mitigation costs from adverse environmental events	Private
Financial risk	Costs of inadequate revenue hedging and debt management	Mostly private - Some public
Project default risk	Project bankruptcy from any/all of the factors above	Shared public/private

Changes Proposed by the 2016 Bill

The 2016 Bill proposes conversion of the major ports from 'Service Port Model' to 'Landlord Port' Model. Under the Service Port Model, the port authorities own the land as well as the assets, whether fixed or mobile and also manage and perform all regulatory and port functions. Most port trusts in India are involved in terminal operations as well, which results in a hybrid model of port

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44 Source: *PPP Guide for Practitioners*, Department of Economic Affairs, Ministry of Finance, 15 (April 2016) <https://www.pppinindia.gov.in/documents/20181/33749/PPP+Guide+for+Practitioners/> (visited on September 30, 2017).

45 Source: *Overview of PPP Modal Variants - Ports*, PPP Toolkit for Improving PPP Decision Making Process <https://www.pppinindia.gov.in/toolkit/ports/module1-oopmv-raudpm.php?links=oopmv1c> (visited on September 30, 2017).

governance. On the other hand, under the Landlord Port Model, the port authority, being the regulatory body and the landlord (maintains ownership), leases out the infrastructure to the private companies. These companies carry out the port operations, mainly in cargo handling activities, maintain their own buildings and install their own equipment for this purpose. They share the revenue with the Port Authority. The shift to this model will allow the Port Trust to focus on governing functions while commercial activities will be taken care of by the private operator in a market oriented and competition driven way. It favours efficiency and innovation and is expected to give a boost to private investment in the sector.

The Contractual Issues – A Case Study

The researcher has conducted a case study of the project '*Setting Up of Barge Jetty on Captive Use Basis at Kandla Port – BOT Basis'*. The contract for this project was signed between the Board of Trustees, Kandla Port Trust and IFFCO Kisan Bazar & Logistics Limited in February 2011 to set up the barge jetty for handling raw material and finished products of fertilizers at the Kandla Port, for a concession period of thirty years. Being based on the BOT model, the concession agreement has an EPC contract for *"design, engineering, procurement of equipment and materials and construction of the Project"* and an O&M contract.[46] After examining the concession agreement, the researcher has highlighted the following:

- A unique feature of this contract, as compared to concession agreements for airports is that here, the concessioning authority is the Board of Trustees of that port and not the Government. This is because under the 1963 Act, the Board of Trustees of each major port is entrusted with all the powers and functions for provisions of services at the port. They are also empowered to delegate these functions and powers, although only after approvals from the Central Government. There is no independent regulatory authority in the ports sector (for instance, the DGCA for airports) and the Board of Trustees along with the TAMP exercise those functions.

46 Art. 1.1, Concession Agreement *between* Board of Trustees for Kandla Port and IFFCO Kisan Bazar & Logistics Limited (February 17, 2011).

Hence, having the Board of Trustees as Concessioning Authority is likely to impact the bargaining power that the Concessionaire can have in the agreement.

- Unlike the agreements in other sectors such as highways and airports, a State support agreement, between the Concessionaire and the Government, is not a condition precedent for this contract.[47] While the Concessionaire needs to comply with a long list of conditions precedent, the Concessioning Authority only needs to hand over the physical possession of the project site.[48] Further, unlike the agreements for highways and airports, the extent of responsibility on the Concessioning Authority with respect to aiding the Concessionaire to obtain the applicable permits is lower. This is evident from the phrases used in Art. 12.2(a) wherein while the Authority is required to *"issue recommendatory letters and make best efforts"* to assist the Concessionaire in obtaining approvals, it does so *"without guarantees and/or without assuming any responsibility in that behalf"*.[49]On the other hand, NHAI is required to *"make all reasonable endeavours"* and *"cause to grant"* the applicable permits to the Concessionaire.[50] In the agreement for Bangalore airport, the Ministry of Civil Aviation itself is required to *"use its good office"* to procure the clearances for the Concessionaire.[51] This indicates that the burdens on the Concessionaire in the case at hand are way more cumbersome than those on the Concessioning Authority.

- The contract provides for appointment of an Independent Engineer, who is a technical advisor for the project. He is responsible for approving the drawing and designs of the project, ensuring all standards are complied with, approving

47 *Ibid* at Art.3.1(a).

48 Kandla Port Concession Agreement, Supra note 41, at Art. 3.1(b).

49 Kandla Port Concession Agreement, Supra note 41, at Art. 12.2(a).

50 Art. 4, Concession Agreement *between* National Highways Authority of India and Jaypee DSC Ventures Limited (April 18, 2002).

51 Art. 5.1.2, Concession Agreement *between* Ministry of Civil Aviation, Government of Indian and Bangalore International Airport Limited (July 5, 2004).

extension in the concession period among other things.[52] However, the Concessioning Authority is responsible for his appointment and it also has the ultimate discretion with respect to who gets appointed.[53] This is unfair and affects the bargaining power of the Concessionaire, especially when the expenses of the Engineer are to be borne by both the parties equally.

- The agreement also has a provision specifying that the Concessionaire unconditionally guarantees that it will handle the specific minimum quantities of cargo throughout the concession period and in case of a shortfall, it will be liable to pay the wharfage charges for the full minimum guaranteed cargo (MCG).[54] Appendix 14 specifies 1.0 Million Metric Tons per year as the MCG for a period of 28 years. This clause fails to provide the much needed flexibility to the Concessionaire.

- The agreement is also unique with respect to its revenue sharing model. The Concessionaire is required to pay license fee, waterfront charges, royalty (25% of cargo handling charges) *and* other charges. Since the barge jetty is for captive use of the Concessionaire, the Authority will not levy any tariff. However, if the jetty handles cargo from other users, the Concessioning Authority itself will collect berth hire charges (give 50% to the Concessionaire) and wharfage charges. The Concessionaire is required to collect the cargo handling charges (must give 25% of it to the Authority as royalty) as well as cesses and remit them to the Authority. All these charges are to collected are rates fixed by TAMP. The agreement also provides that any discounts offered by the Concessionaire would be ignored for the purposes of calculating the Gross Revenue.[55] Even after paying all these charges, the Concessionaire is required to pay all the taxes, duties, levies, VAT, cess, charges with respect to the project/ project facilities & services.[56] Such a complex and intensive

52 Kandla Port Concession Agreement, Supra note 41, at Appendix 7.

53 Kandla Port Concession Agreement, Supra note 41, at Art. 5.1.

54 Kandla Port Concession Agreement, Supra note 41, at Art. 7.1(a)(xii).

55 Kandla Port Concession Agreement, Supra note 41, at Art. 8-9.

56 Kandla Port Concession Agreement, Supra note 41, at Art. 12.9(b).

revenue sharing model is likely to discourage the private investment in the sector.

- The agreement does not provide any means of grievance redressal in case disputes arise while the Concessionaire is handling cargo from other users.
- The Model Concession Agreement for the port projects, vide Art. 11.2 provides the mandatory requirement of the Applicant holding at least 51% of its paid up equity capital for three years and then at least 26% for the remaining concession period.[57] Even the agreement for the Bangalore airport has a lock-in clause requiring various stakeholders to continue to hold a certain minimum percentage of the paid up capital for a specific time.[58] However, in the case at hand, this requirement has been done away with and it only requires the Concessionaire to ensure that the Applicant maintains *Management Control* throughout the concession period.[59]

The Way Forward

Preceding part, discussed some contractual with the concession agreement of a PPP project at Kandla port. These issues are specific to that contractual agreement. This Chapter will discuss the broad challenges faced by the implementation of PPP projects in the ports sector and suggest some recommendations. The success of PPP projects in the roads sector was sought to be replicated in the ports sector when it was opened up in the 1990s and the Government accordingly formulated policies and investments. However, the performance has still fallen short of the target. In the XI[th] Five Year Plan, there was a shortfall of more than 50% in the private investments in the ports sector. Only three out of the targeted twenty-three project contracts were awarded in 2012-13.[60] The Comptroller and Auditor General (CAG) of India observed that the PPP model to develop the port sector had been *"defeated"* as it contributed only 33% of the total capacity of major ports up

57 Art. 11.2, Model Concession Agreement for Private Sector Projects in Major Ports.

58 BIAL Concession Agreement, Supra note 46, at Art. 6.2.

59 Kandla Port Concession Agreement, Supra note 41, at Art. Art. 11.2.

60 S. Paradkar, Supra note 2, at 3.

to March 2014, due to tardy implementation.[61] The situation has improved over the last two years, owing to the *"modernization and Port efficiency operations"*.[62]More such reforms are underway.

When the Major Ports Authorities Bill, 2016 was being examined by the Parliament Standing Committee, the Ministry of Shipping highlighted some key reasons for the introduction of the new Bill. These had led to lack of sufficient private investment in port projects and ceding of ground by the major ports to minor ports. These reasons were – the 1963 Act is based on the 'service model' and not the 'landlord model' which is less attractive for the private players, the Board of Trustees of each port is composed of representatives of port users, labour and trade associations, which have vested interests and make the decision making process cumbersome and imbalanced, the requirement that the Board of Trustees have to seek the Centre's approval for almost every key decision leads to delays in operational matters, the 1963 Act also provides only limited options to raise financial resources and finally, the inflexibility to fix the tariffs at market rates makes the major ports non-competitive as compared to minor ports. As a consequence of this, the Board of Trustees has been unable to achieve the basic objective of providing effective services to the port users.[63]

Additionally, the delay in obtaining approvals from the various agencies, delays in land acquisition, disputes over interpretations of the clauses in concession agreement that often lead to litigations, way lower than expected revenues from the projects, are some other concerns with the PPP model in this sector.[64] The prolonged gestation period for these projects also affects their financial

61 *Slow Execution of Port Projects Defeats Public-Private-Partnership Model: CAG*, The Hindu (July 27, 2017) <http://www.thehindu.com/business/Industry/slow-execution-of-port-projects-defeats-publicprivatepartnership-model-cag/article8005354.ece> (visited on September 30, 2017).

62 9, Department-Related Parliamentary Standing Committee on Transport, Tourism and Culture, Rajya Sabha, Two Hundred Fiftieth Report - The Major Port Authorities Bill, 2016 (2017).

63 Parliament Standing Committee Report, Supra note 57, at 7-8.

64 *India's PPP model can revive private investment: Moody's*, The Hindu (October 21, 2016) <http://www.thehindu.com/business/Economy/India's-PPP-model-can-revive-private-investment-Moody's/article16076834.ece> (visited on September 30, 2017).

viability and leads to an increase in the difficulties for the private players in raising necessary funds.[65]

Table 4: Examples of Failed Bids for PPP Project in Major Ports[66]

Case Study	Successful Bidder	Scope of Project	Reason for Failure / Delay
Chennai Port Trust (CPT) - Mega container terminal project	Vadinar Terminal Ltd and Essar Port & Terminal Ltd	• Capacity - 4 Mn TEUs terminal at Rs 3,700 Cr investment • Revenue Share –5.25%	• Revenue share offered was deemed too low by CPT • Initial bidding saw poor response
Ennore Port Trust - Mega Container terminal project	Bay of Bengal Gateway Terminals	• Capacity - 1.5 Mn TEUs terminal • Revenue Share – 39.99%	• Winning bidder was unsuccessful in finalising the funds
JNPT – Container Terminal Project	Port Singapore Authority and ABG Ports	• Capacity - 4.8 million TEUs • Revenue Share – 50.08%	• Winning bidder did not sign the concession agreement

In light of the above concerns, the sector is in dire need of reforms. The Kelkar Committee had recommended taking steps to strengthen the systems in order to fasten the environmental clearance process by increasing manpower and competencies with statutory authorities and improving infrastructure. It also suggested that the MCA be revised to include some of the best practices adopted by the minor ports, such as stipulating specified cargo handling capacity and qualitative parameters of facilities in the agreement. Further, the concessioning Authority can also be made responsible for providing support infrastructure facilities such as land and reliable through enforceable obligations. Introduction of the concept of minimum guaranteed revenue instead of minimum guaranteed cargo to provide flexibility to the Concessionaire was also proposed. The Committee also recommended to have a mechanism for moving from the old TAMP guidelines' regime to the current one, as and when new ones are introduced.[67]

In addition to the above, having reforms to reduce TAMP's role with respect to fixation of tariff and having them linked to the market, having an independent regulatory authority for the sector and a permanent adjudicatory authority for resolution of disputes would also be attractive to the private sector. Further, amending the MCA to increase the bargaining power of the Concessionaire

65 S. Paradkar, Supra note 2, at 3.

66 S. Paradkar, Supra note 2, at 3.

67 *Report of the Committee on Revisiting and Revitalising Public Private Partnership Model of Infrastructure*, 54-55, 75 (Chaired by Dr. V. Kelkar, 2015).

and streamlining of the risk sharing pattern between the Concessionaire and the Concessioning Authority are also required, as highlighted in the case study in Chapter III.

A number of the above concerns and recommendations have already been incorporated by the Ministry of Shipping in the Major Port Authorities Bill, 2016 and the revisions proposed to the MCA, which have been discussed in Chapter I. What needs to be ensured is that the existing PPP projects in operation get absorbed in the reform process and derive maximum benefits in the renewed system. This was also emphasised by the Parliament Standing Committee examining the 2016 Bill. They suggested that the existing projects be given the flexibility to implement the revised tariff rates with retrospective effect in specific circumstances such as where the annual escalation or the revision in tariff cycle is due.[68] Concerns had been raised that the 2016 Bill was a step closer to the privatisation of the major ports and hence, the Committee recommended that the Ministry assuage these fears and ensure that the managerial and financial control of the ports would always remain with the Port Authorities.[69] Thus, the Ministry should incorporate the recommendations of the Parliament Standing Committee and bring in these much needed reforms in the sector to attract private and foreign investment for these infrastructure projects.

Conclusion

The Indian port sector breathed a new life in 1996 when it was opened up to the private sector. Arrangements with the private players were permitted with the aim that they will bring in the much needed financial resources, efficiency and professionalism to the sector. While this initiative had a great start and attracted a number of private players, over the years, the PPP projects in the ports sector have been marred by a number of issues that have affected the investments. This prompted the Government introduce some reforms and more are underway. This paper discussed the background of introduction of the PPP model in the sector and highlighted the developments over the years that have streamlined

68 Parliament Standing Committee Report, Supra note 57, at 124.

69 Parliament Standing Committee Report, Supra note 57, at 15.

the model. It then discussed the various PPP models adopted and conducted a case study to bring forth some contractual issues in the concession agreements for the projects. Finally, it pointed up some general concerns that have slowed down the success of these projects and suggested reforms that could be undertaken to attract investment. The Ministry of Shipping has, recently, put forth some wide ranging reforms in terms of a revised Model Concession Agreement and the new Major Port Authorities Bill, 2016 which look promising. These proposals address a number of concerns and it is hoped that these reforms are implemented without any delay and achieve the objective of making this sector attractive again.

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Chapter 5

PPP in the Power Sector

PRAKSHAL JAIN

Introduction

In the year 2005, the Govt. of India released its Integrated Energy Policy. The policy identified power to be one of the most important factors towards ensuring the economic growth of the country and getting rid of poverty in the country.[1] In that policy, the Ministry of Power had set a target of adding 100,000 MW of generation capacity by 2012.[2] However, the Govt. was not able to achieve this target. There are several concerns that need to be resolved before such policy targets can be met.

The primary challenge is that in spite of a reform process spreading across two decades involving participation from the private sector, the demand of energy has grown at a higher rate than its supply. As a result, India faces acute energy shortage.[3] The average per capita consumption of electricity in India is 704 kWh which is much below the worldwide average of 3,240 kWh.[4] Even if we were to completely disregard the possible increase in electricity demand, India needs huge capacity additions to remove the current gap between demand and supply. As opposed to the

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1 The Planning Commission of India, Integrated Energy Policy: Report of the Expert Committee, (2006), <http://planningcommission.gov.in/reports/genrep/rep_intengy.pdf> (Visited on October 9, 2017).

2 *Ibid* at 4.

3 See Dr. Shree Raman Dubey, Energy Crisis in India: A Comment on India's Electricity Sector, (2015).

4 Mohua Mukherjee, Private Participation in The Indian Power Sector: Lesson from Two Decades of Experience, 1 (2014).

97, 269 MW of demand in 2005-6, the peak demand in Fiscal Year 2016-17 is expected 218,209 MW.[5]

The introduction of the Electricity Act of 2003, enacted by the Central legislature, brought about a paradigm shift in Indian power sector. The most important change was the move from previously prevailing practice of negotiated MoU's with investors to a situation driven entirely by market forces. This would ensure aggressive competition among investors for obtaining generation and eventually even transmission contracts.[6]

The regulatory mechanism now comprises of Central and State Electricity Regulatory Commissions (CERC and SERC) and an appellate tribunal which is the appellate body against the decisions of the two regulators.[7] The main focus of the Electricity Act is to bring about increased competition, private participation and independent regulation.[8] De-licensing of generation, open access for transmission networks based on common carrier principle and allowing for parallel distribution networks are some of the steps that demonstrate the above mentioned focus of the Act.

These reforms have produced significant response from the private sector in generation, lesser but still encouraging response from private sector in transmission and a below par response in distribution.[9] With regards to electricity generation, private participation has existed from a decade before the enactment of the Electricity Act in 2003 and exists till date. Thus, there is two decades' worth of experience with regards to private participation in the generation segment.

Power Generation and Private Participation

As mentioned above, private participation in power generation has been existent for about two decades. In the 1990's, in the initial

5 *Ibid* at 1.

6 KPMG, *Public Private Participation in Indian Infrastructure- Poised for Growth: A background Note*, <https://www.ibef.org/download/India_Infrastructure.pdf> (visited on October 9, 2017).

7 Pallavi Bedi and Rohit Rajagopal, *Electricity Regulation in India: Overview*, <https://uk.practicallaw.thomsonreuters.com/6-525-5272?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> (visited on October 9, 2017).

8 KPMG, Supra note 6, at 7.

9 Mukherjee, Supra note 4, at 2.

phases of private participation where Independent Power Producers were involved, the risk was borne mainly by the public sector. One of the main reasons behind this was the inexperience of state electricity boards. These boards were not capable of negotiating high value commercial contracts with private legal teams as they had previously dealt with only public sector entities.

However, after passing of the 2003 Act, there was gradual removal of the practice of generating investments through MoU's guaranteeing fixed percentage of rate of return. Under the Act, generation capacity can only be procured by competitively determined tariff method. Private generation investors as well as public sector generation investors have to participate in the competitive bidding.[10]

As discussed above, there exists a large demand-supply deficit in electricity generation segment. This shortfall along with the positive changes brought about due the Electricity Act (competitive bidding, easy borrowings etc.) has attracted maximum private players to the generation segment. These are mainly Indian companies from both infrastructure and non- infrastructure sector, along with, a few foreign players with limited generation capacity like China Light and Power.[11] Today, private sector investment in power generation accounts for about 27 percent of overall power generation capacity in India.[12] One of the most important developments is the establishment of ultra mega power projects which are based on PPP and ensure cost effective power generation on a large scale. Sasan and Mundra projects are examples of Ultra Mega Power Projects which function on a PPP basis.[13]

These power projects do not have public equity. However, public participation is present in the form of a govt. organisation doing the groundwork such as land acquisition, environmental clearance etc. and the giving the project to a private participant based on competitive bidding.[14]

10 Mukherjee Supra note 4, at 2.

11 KPMG, Supra note 6, at 7.

12 Mukherjee, Supra note 4, at 31.

13 *See,* Rajesh Ganagakhedkar and R.K. Mishra, *Public-Private Partnership in Power Sector: A Focus on Ultra Mega Power Projects*, 4(1) Journal of Infrastructure Development 27, (2012).

14 *Ibid,* at 28.

Power transmission and Private Participation

Due to its strategic importance and monopolistic nature, power transmission is mostly controlled by national Power Grid Company of India Limited for interstate lines and state owned companies for transmission lines within states.[15] Thus, the presence of private sector in the transmission segment is limited.

However, notwithstanding the limited presence, there are several approaches for private participation in the power transmission segment. First, is the Joint Venture Company Route under which there is equity partnership between the private participant and the state or central transmission utility, the latter usually being the minority partner. Secondly, the Independent Private Transmission Company (IPTC) Route where the private party provides provides 100% equity and fund mobilisation.[16] The Joint Venture Company Route is expected to be more popular as by providing equity to pubic entity, it allows better resolution of issues such as environmental clearances, obtaining Right of Way etc.[17]

Apart from this, a state wanting private investment in transmission segment can opt for two other methods. *First* is the method proposed by the Ministry of Power. It is a design-build-own- operate model. In this model, the private participants owns the transmission line forever, the bid variable is the tariff and the private participant need not have any prior transmission experience.[18] A example of this is the Suratgarh-Bikaner intrastate transmission line in Rajasthan which was awarded to Adani power by Rajasthan Electricity Regulatory Commission.[19]

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15 Tanmoy Mondal, *Private Participation in Power Transmission*, The Hindu (November 30, 2007), <http://www.thehindubusinessline.com/todays-paper/tp-opinion/private-participation-in-power-transmission/article1676121.ece> (visited on October 9, 2017).

16 *Ibid.*

17 KPMG, Supra note 6, at 9.

18 Mukherjee, Supra note 4, at 51.

19 Shreya Jai, *Adani Power's premium bid to win project in Rajsathan*, Business Standard (March 9, 2016), *<http://www.business-standard.com/article/companies/adani-power-s-premium-bid-to-win-project- in-rajasthan-116030901438_1.html>* (visited on October 9, 2017); Adani Power made a bid that was 20 percent lower than the 'unitary charge' prescribed by the state utility and it offered to pay the difference as premium to the utility.

The other method is the one proposed by the Planning Commission. It is a design-build- finance-operate-transfer (DBFOT) model. In this model, the state utility specifies a tariff with a viability gap grant.[20]

However, it is important to note that the practical implementation of all these models (Except JV) is in its nascent stage and it would be too soon to examine the success or failure of these models for private participation in power transmission.

Power Distribution and Private Participation

The Problem

Distribution continues to be the faulty link of the power sector. There has been a significant increment in the generation capacity from 2006/07 till now. However, it is the distribution segment where the power sector interacts with the customer and revenue collection takes place. This is where the cause of the current deteriorated financial condition of the entire power sector lies.

At the distribution stage, the revenue collected from customers needs to cover the cost incurred in the entire process of generation, transmission, distribution and retailing (meter, bill, collecting). In reality, a significant portion of the power that the distribution company purchases is lost in theft or unpaid bills. Thus, while the distribution company has spent on the purchase, it unable to collect revenue on the stolen units or the units for which the bill remain unpaid.[21] Furthermore, due to the poor condition of the grid, some part of the power purchased by the distribution company cannot be delivered to the customer due to technical losses. Thus, distribution company is unable to collect revenue on the lost units of electricity.[22] In India these losses are around and average of

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20 See The Planning Commission of India, Report of the Task Force on Measures for Attracting Private Investment in Transmission of Electricity, (2014), <http://planningcommission.gov.in/sectors/ppp_report/reports_guidelines/Report%20of%20the%20Task%20Force%20on%20Measures%20for%20Attracting%20Private%20Investment%20in%20Transmission%20of%20Electricity.pdf> (visited on October 9, 2017).

21 Sheoli Pargal and Sudeshna Ghosh Banerjee, *More Power to India: The Challenge of Electricity Distribution*, 5 (2014).

22 *Ibid.*

twenty seven percent, some of the highest in the world.[23] Even if there is no theft or technical loss, sometimes, the rate at which the distribution company sells one unit is less than the rate at which it purchases that unit, specially when the purchase is from private suppliers. This further increases the losses.[24]

As a result of the above losses, distribution companies remain dependent on subsidy by the state to be able to function. Sometimes, the situations are so bad that despite subsidies, the companies are not able to pay back their loans.[25] Due to their poor financial status, the distribution companies are sometimes unable to pay their dues to the generation companies. Thus, this significant risk of nonpayment keeps pvt, investors away from making investment in the generation segment. Thus, private investment in entire power sector is threatened due to financial weakness of distribution segment.[26]

The Solution: Public Private Partnership

The problems that distribution companies face are not resolved because there is a lack of commercial culture in these companies. These companies which are run by the state have a typical bureaucratic setup and no one is accountable for the operational inefficiencies that occur in electricity distribution.[27]

Thus, need of the hour for the distribution segment is commercial focus and management practices that come through private participation by way of PPP model.[28]It is interesting to note that the first PPP in the distribution segment was before the enactment of the Electricity Act of 2003. In the year 2000, Delhi enacted the Delhi Electricity Reform Act, 2000. The Act provided that Delhi Electricity Regulatory Commission may grant a license to a private party for distribution of electricity.[29] The Act also provided that the license may vest the private licensee with

23 Mukherjee, Supra note 4, at 59.
24 Pargal and Ghosh, Supra note 21, at 6.
25 Pargal and Ghosh, Supra note 21, at 11.
26 Mukherjee, Supra note 4, at 59.
27 Pargal and Ghosh, Supra note 21, at 11.
28 Mukherjee, Supra note 4, at 4.
29 Section 20, The Delhi Electricity Reform Act, 2000.

the authority to take actions for revenue realization, prosecution for theft, meter tampering, diversion of electricity and similar matters affecting the distribution and supply of electricity to the consumer.[30] Moreover, the Act also provided that the Delhi Electricity Regulatory Commission may enquire into the conduct or functioning of a licensee and revoke a licence, if required in public interest.[31]

Under Section 20 of the Delhi Reforms Act, for the first time anywhere in India, a PPP vehicle was granted a license for power distribution

New Delhi Power Limited was formed as joint venture between Tata power and the Government of the National Capital Territory of Delhi. The former held 51% stake in the company and the latter held 49% stake in the company. The company was later renamed Tata Power Delhi Distribution Limited (hereinafter "TPDDL").[32]

Features of the PPP Model for Distribution of Electricity

Recently, in the year 2012, the Planning Commission came up with a report on Public Private Partnership in Distribution of Electricity. In this Report, the Planning Commission has proposed a model for PPP in the distribution segment.[33] In this Section, the researcher will discuss the salient features of the PPP Model and the contractual arrangement proposed by the Planning Commission. While doing so, the researcher will also make comparisons with the TPDDL project in New Delhi. Selection Criteria:

The selection of the Concessionaire shall be based majorly on the process of open competitive bidding. All project parameters consisting of but not limited to the wheeling and distribution charge, subsidies, period of concession, technical parameters, T&D losses, supply margin as well as performance standards shall be distinctly specified at the very beginning.

30 Section 20(10), The Delhi Electricity Reform Act, 2000.

31 Section 23, The Delhi Electricity Reform Act, 2000.

32 Prof. (Dr.) Sairam Bhat, *Infrastructure Contracts* in Law of Business Contracts In India, 30, 46, (Prof. (Dr.) Sairam Bhat ed., 2009).

33 The Planning Commission of India, *Report of the Sub-Group on Public Private Partnership in the Distribution of Electricity*, (2012), <http://www.gajendrahaldea.in/download/Report-on-PPP-in-Distribution-of- Electricity.pdf> (visited on October 9, 2017).

The bidders who are short-listed shall then be required to hand in their financial bids based on these terms. The bidder who offers and proposes the highest level of premium, or seeks the lowest level of grants, as the case may be, shall be awarded the contract. Finally, a Design, Build, Finance, Operate and Transfer (DBFOT) model shall be implemented. It is important to note that criteria for selection of successful bid may vary from one project to another. It may comprise of any one or a combination of all the factors listed above. For instance, in the TDDPL project, the selection criteria was only *AT&C loss reduction trajectory for next five years* proposed by the bidding parties against trajectory proposed by the GNCTD.[3434]

Feasibility Report

It would be required that the State Government engage a qualified and experienced firm as a technical consultant in order to prepare the feasibility report. This report shall be given to the bidders along with and as part of the official bidding documents.

This Report of Feasibility is expected to delineate the financial and physical characteristics of the currently existent system, including a stock of the assets, mention the present standing of the network and the investment that is to be undertaken in the course of the initial three years. The report, moreover, would evoke the preferred benchmark of the system of distribution, containing the time frame required to arrive at that benchmark.

Regulatory Oversight

According to the Electricity Act, distribution is a licensed business.[35] The concessionaire shall therefore need to obtain a licence for distribution as per the Electricity Act.[3636] For the purpose of facilitating this process, the Authority shall provide assistance and support to the concessionaire for acquiring the above mentioned licence as well as any other permits necessary under the appropriate

34 The Energy Research Institute, *Public Private Partnership in Electricity Distribution: Case Studies of Delhi and Odisha*, <http://www.teriin.org/eventdocs/files/TERI-GSEP-PPP-in-Electricity- Distribution_Case-Studies.pdf> (visited on October 9, 2017) (hereinafter "TERI")

35 Section 12, The Electricity Act, 2003.

36 Section 14, The Electricity Act, 2003.

laws. Since the concessionaire has been granted a license under the Electricity Act, it would be bound by the regulatory oversight of the Authority as prescribed in the Act.

Concession Agreement

The Government and selected private entity shall sign a concession agreement explicitly laying down the rights and duties of the parties. Doing this would allow the latter to obtain finances from the financial institutions in order to carry out its expenses. The agreement shall stipulate the essential principles, while at the same time imparting adequate flexibility to the private entity to handle the system of distribution in accordance with the appropriate set out requirements. The Government would undertake regular and constant monitoring to enforce the rules laid down and provisions mentioned in the agreement. The concession agreement would cover topics such as tariffs for different types of consumers, maintenance of standards, suspecnsion/termination in the event of breach, safety requirements, investments to be made etc.

Government Participation

In some cases, the State Government possesses a share in the equity of the company of the concessionaire. For instance, in the TDDPL Project, the Government of Delhi had a 49% share and Tata Power had a 51% share in the company.[37]

However, it is not necessary that the State Government would have a share in the equity of the company of the concessionaire. In certain cases where the State Government has no share in equity, it is granted what is popularly called a golden share. The concession agreement specifies certain privileges that the Government obtains by virtue of holding the golden share. These include power to nominate a director, veto power in important matters specified in the concession agreement, power to purchase the company's own shares, power to reduce the company's share capital etc.

A comparable disposition or arrangement has been implemented in a few of the concession agreements pertaining to metro rail projects and power transmission. For instance, in case of the

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37 TERI, Supra note 34, at 19.

Hyderabad Metro Rail Project, L&T Metro Rail Hyderabad Limited was the concessionaire company and its golden share was handed over to the Andhra Pradesh Government[38]

Period of Concession

The concession would be allowed for a span of 25 years in compliance with the terms of the Electricity Act.[39] The agreement might even account for extension of the agreement for another decade on the terms mentioned in the agreement and shall be dependent on the consent of the SERC.

Use of Assets by the Concessionaire

Although the exclusive rights of using the distribution assets would be given to the concessionaire, the Government would retain the ownership of these assets. The use of these assets, shall be regulated, in their nature and extent, according to the agreement and in light of other applicable laws.

Attainment of Bulk Supplies

Specified in the agreement, would be the current Power Purchase Agreements (PPAs) that will be consigned to the concessionaire in order to provide electricity to the regulated consumers. By making arrangements with the approval and consent of the SERC with regards to supplies to the regulated customers, or by undertaking new PPAs, the concessionaire would be able to acquire additional power.

Continuation of Financial Support:

As the current situation stands, there are three ways in which the electricity tariff is subsidised. First of all, there are the direct subsidies provided by the State Government Secondly, the practice of charging different tariffs for various different categories helps to subsidise a number of distinct groups of consumers. Lastly,

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38 V. Rishi Kumar, *L&T Metro Rail hands over 'Golden Share' to Andhra Pradesh Govt*, The Hindu (February 11, 2012), <http://www.thehindubusinessline.com/companies/lt-metro-rail-hands-over-golden-share-to-andhra-pradesh-govt/article2882253.ece> (visited on October 9, 2017).

39 Section 15(8), The Electricity Act, 2003.

a certain amount of losses incurred by distribution companies remains uncovered. It is necessary to quantify all these categories individually and reach a satisfactory agreement on their phased decrease.

This implies that the State Government may be required to grant a significant amount of subsidies to the concessionaire for the purpose of avoiding a steep increase in the level of tariffs, principally during the first few years of the period of concession. Direct subsidies like this one may be displayed distinctly in the consumer bills, under the heading of support provided by the State Government. The extent of such subsidies must not surpass the existing encumbrance, whether direct or otherwise, on the Government. This accordingly implies that introducing the PPP will not lead to an added strain on the Government. Nonetheless, in the case where these subsidies have to be constrained, then a subsequent increase in consumer tariffs must be taken into consideration.

Handling of Existing Employees

The current staff and employees of the distribution company should ideally be absorbed by the State Government against unoccupied posts beyond the system of distribution. The concessionaire, however, must be provided with the option to employ particular staff on deputation. Alternatively, it is possible for the concessionaire to be instructed to absorb or employ a definite number of present employees on pre-arranged footings.

The extra costs of this kind of stipulation shall be included as an element in the bids. It must however, at any rate, be guaranteed that the entitlements and rights of current employees are not unfavourably impacted. The State Government will have to determine the obligations with regards to employees, upfront, and these obligations must be stated unambiguously in the bid documents.

In the TDDPL project, the interest of existing manpower of Delhi Vidyut Board was protected as there was a provision for transfer of existing manpower of DVB to the distribution licenses with protection of their service conditions.[40]

40 TERI, Supra note 34, at 20.

Transfer of Assets on Expiry of Concession

By the termination of the period of concession, the concessionaire would necessarily have to transfer an entirely operational system of distribution to the Government. The terms for ascertainment of the termination payment that will have to be paid to the concessionaire by the Government on expiry of the period of concession will have to be stated upfront.

Incentives and Penalties

The boundaries of output shall be defined in accordance and comparison with the level-best practices. In order to ensure reliability and quality of the supply provided by the concessionaire, a prearranged framework of both incentives as well as penalties will be stated, which will be on the basis of essential indicators of performance. The essential indicators of performance would consist of, although not be limited to, quality of supply, upkeep of the system for distribution and applicable yardsticks for operation, so as to guarantee exceptional service to consumers.

Enforcement and Inspections

The agreement shall be enforced by constant reviews and inspections as well as checking for quality assurance. Rigid penalties for acting against the terms of the agreement or for falling short of the performance indicators, would exist.

Capital Investment

Keeping the Feasibility Report in mind, the bid document will mention the extent and magnitude of investment that shall be made by the concessionaire in order to augment and upgrade the present system of distribution in accordance with specified standards. If there is any utility shifting that would be required in the process of the upgradation, the same would have to be undertaken by one of the Government or the concerned utility at Government cost. When talking of the electrification of townships and new colonies among others, the capital cost will have to be recouped from the consumers in accordance with the norms agreed upon by the SERC in compliance with the Electricity Act.

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Chapter 6

Land Acquisition for PPP Projects in India

Raghav Parthasarathy

Introduction

India is a country largely dependent on agriculture and it serves as a backbone of the Indian economy, as almost 58% of rural population is reliant on agricultural income for livelihood. Lately, due to industrialization and rapid urbanization, the trend is altering as there has been a surge in the secondary and tertiary sector. Growth of secondary and tertiary sectors is due to the fact that the Governments are focusing more on economic development leading to exploration in different areas to strengthen the economy. Since the focus has shifted to economic development, the Governments are keen on hosting big projects for which land is an essential component. The Governments, be it the Central or State, intend to carry out various developmental works like building highways and freight corridors, ports, special economic zones for industrial development, bridges, dams, flyovers, mines and quarrying areas and so on. For implementation of these projects large swathes of land is required.

Land, as a resource, has been gaining value since the time India came out of isolation post liberalization and globalization in 1991. For a developing country like India which has vast geographic advantage with varying terrains, suitable for different types of businesses, play a vital role in its economic development. With large tracts of land at its disposal, big projects can be set up, creating a bigger economic and revenue cycle, which will impact not only local economy but also the national economy.

Land Acquisition in India is an act of eminent domain, which means, a sovereign power of the Government to acquire lands from private persons for public projects without the consent of the owner, but it is the duty of the acquiring authority to compensate for such acquisition which can also be considered as a right of the land owner. The justification for such a power can be founded from two Latin maxims; *salus populi est suprema lex* (regard for the public welfare is the highest law)and *necessitas publica major est quam privata* (public necessity is greater than private necessity)[1]. Land acquisition in India was previously governed by the Land Acquisition Act of 1894, which is a pre-independence legislation. However, the Government of India passed a new enactment in 2013 i.e., the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Subsequent to which the land acquisition for various projects undertaken by the Central Government are covered by the new enactment.

Post-Independence, India witnessed tremendous changes in its socio, economic and cultural fabric. Increasing population and growing demands led the Government to improve the infrastructure which acts as a foundation for the development of other sectors. By then, the Government had also recognized the need to improve the infrastructural facilities in different sectors and the non-availability of necessary infrastructure hindered every aspect of growth. Over reliance on public funds for infrastructural growth proved to be ineffective and dawdling. However, policies of the Government evolved gradually allowing private companies and investors to involve in public projects. Subsequently, private investments in the public projects also found piquancy. Role of private entities in terms of financial investments and sector specific expertise have largely contributed to the public projects. Such investments have also increased exponentially. The concept of Public-Private Partnership ('PPP' for short) has witnessed an upper trajectory. Association of private entities by the Governments for public projects has been a success story so far and several mega scaled projects have been launched. The PPP projects focuses more on improving the efficiency

1 Report on the Law of Acquisition and Requisitioning of Land, Tenth Report, Law Commission of India, Government of India Ministry of Law, lawcommissionofindia.nic.in/1-50/Report10.pdf.

of the infrastructure projects through long term collaboration of the public sector entities with the private entities. The objective of such association is also to share expertise and finance, and the associated risks and rewards. However, innumerable issues and concerns relating to acquisition of land for execution of PPP projects cropped up. The issues with regard to the land acquisition are numerous and diverge from each sector. Acquisition of land is mostly for the purpose of infrastructure development, which could be for the purpose of Railways, Highways, Ports, Airports, Defense, and Energy and for other social welfare projects which includes Housing, Schools, and Hospitals amongst others. Robust investments in infrastructure development are the need of the hour, for which, the private entities have to join hands with the public bodies. Any major infrastructure development projects cannot be taken up alone by the public bodies. The requirement of immense funding can be fulfilled by joining hands with the private investors. This article deals with the land acquisition aspect for the development of infrastructure through the PPP model and issues involved therein.

Land Acquisition Pre and Post 2013

Development of an economy, at least in the late 20th and present 21st century, is dependent on industries, for which land is an essential component. State, as a sovereign authority has exercised the power of acquiring lands for the growth and developmental activities. Land acquisition laws exist in several countries as the public purpose always trumps the private rights of ownership over property. However, in a democratic set up, there cannot be scope for coercion and transfer of land should be absolutely by consent. In that view, any transfer of land should be only through purchase thereby the scope of acquisition of land by Government should be eliminated.[2]

In India, history of land acquisition laws can be traced back to first enactment for Bengal province wherein, land acquisition law was first enacted in the year 1824 i.e., the Bengal Regulation I. The act provided for the acquisition of land or other immovable property

2 Land Acquisition: Rationale and the way forward, Arvind Panagariya, Vice Chairman, NITI Aayog.<http://niti.gov.in/writereaddata/files/document_publication/NITIBlog5_VC.pdf>

at fair value for building roads, canals or other public works. Bombay and Madras also had their land acquisition laws in 1839 and 1852 respectively. However, the first comprehensive legislation on land acquisition came in the year 1857 wherein, several other land acquisition laws were consolidated for British India. The Act provided for fair compensation to the land owners to be determined by the Collector, appointed for this purpose. However, in case of a dispute, the same was referred to an arbitrator who was the final authority. Decision of arbitrator could not be impeached other than on the grounds of corruption or misconduct. However, the method of compensation settlement by arbitrator was unsatisfactory or in some cases found to be corrupt. Therefore, another Act was brought in 1870 where a reference could be made to Civil Courts for determination of compensation. However, the 1870 enactment was found to be defective. Hence, a new legislation in 1894 was enacted with an objective of acquisition of land for public purposes and companies and for determination of compensation in view of acquisition. Whereas, the Princely states of Mysore, Hyderabad and Travancore had their own land acquisition laws of 1894, 1899 and 1914 respectively, which followed the Land Acquisition Act, 1894. The determination of compensation without an opportunity to raise objections led to discontentment among the land owners. Accordingly, the Act was amended in 1923 to include Section 5A[3], as the provision incorporated within its ambit the doctrine of *audi alterem partem*. As the technology advanced, infrastructure development was found to be necessary for laying down railway lines, postal and telegraph lines, roads, bridges and canals. Post-

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3 Section 5A. Hearing of objections - (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard [in person or by any person authorized by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, [either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government]. The decision of the [appropriate Government] on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.]

Independence, as the industrialization picked pace, lands were acquired for setting up industries for metal, textile, fertilizer etc. The Government also started procuring lands for defence and other social projects like urban development including housing.

The Act of 1894 contained provisions and principles which did not suit the needs of a developing society and evolving laws. The Act conferred powers on the Government to acquire lands without sufficiently compensating the land owners. Neither did it provide for rehabilitation and resettlement. The sequel of such acquisition were that the land losers were rendered homeless and eventually moved out of their place to an urban agglomeration as slum dwellers thereby, compromising their quality of living with deteriorated standards. This led the Government to enact the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act of 2013).

The objective of the Act of 2013[4] provided for acquisition of land for various developmental activities like the industrialization, improvements of essential infrastructure and urbanization in a humane, participative, informed and transparent manner, in consultation with the local self-governments and gram sabhas. The provisions of the Act are more beneficial to the land owners as it provided for just and fair compensation and adequate provisions have been made for rehabilitation and resettlement. The objectives contained in the Act seem more beneficial and fair for the land losers. Unlike, the previous enactment, sufficient provisions have been made for the compensation, rehabilitation and resettlement. The process of acquisition under the present enactment is more democratic and transparent when compared with the old Act.

4 An Act to ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post acquisition social and economic status and for matters connected therewith or incidental thereto.

Section 2 of the Act of 2013 consolidates land acquisition for various purposes under its sub-sections. The classification of public purpose as contained in sub-section (1), wherein, the Government can acquire lands for its own use, hold and control including for Public Sector Undertakings. Alternatively, sub-section (2) not only provides for acquisition of land, but also for consent, rehabilitation and resettlement of the erstwhile land owner. The other important aspect of this provision being that of land acquisition for the purpose of PPP Projects mandates the consent of 70% of the affected families and for the acquisitions for private companies consent of 80% of the affected family members is mandated. Since, the acquired land will vest with the Government, as it was acquired for the purpose of PPP Projects, the provisions of consent has been added to this. However, another conspicuous inclusion to the Act of 2013 being that of rehabilitation and resettlement provisions for the land acquired by the private companies through private negotiations and also for those acquisition proceedings initiated at the request of private companies.

The Act, in-principle, distinguishes the acquisition of land for a specified set of public purposes wherein the Government will own, use, hold and control such lands and on the other hand, acquisition of land for public purpose but for private or public private partnership projects. The distinctive feature of the two aforesaid acquisitions is with regard to consent of land owner. Whereas, it is not required for the Government to obtain consent for acquisition of land which is to be held, owned and used by the government but, for the private or public private partnership projects consent up to 80% and 70% is required.

The Central Government, in 2015, attempted to bring an amendment to the Section 2(2)[5] which provided for consent of land owners, by exempting five categories of projects from the provisions which are as follows;

a. Defence;

b. Rural Infrastructure;

5 LARR (Amendment) Bill, 2015 as passed by Lok Sabha,<http://www.prsindia.org/administrator/uploads/media/Land%20and%20R%20and%20R/Land%20Acquisition%20Act%202013%20and%20Bill%20as%20passed%20by%20Lok%20Sabha.pdf>.

c. Affordable housing;

d. Industrial corridors;

e. Infrastructure and social infrastructure including PPP projects where the Government owns the land.

The other key amendment introduced to the Act were exemption of thirteen laws including National Highways Act, 1956 and Railways Act, 1989 along with several others, from the purview of the Act of 2013. But, it provided for incorporation of compensation, rehabilitation and resettlement provisions into those enactments in consonance with the Act of 2013. The Government repeatedly tried to amend the Act of 2013, which did not go well with the people with different political principles. Therefore, the amendment failed to pass muster in the Council of States though it found success in the House of Representatives.

Highways

Land acquisition for the Highways is governed by the National Highways Act, 1956 which is a special legislation governing the declaration of certain highways as national highways. Section 3A[6] of the Act provides for the acquisition of land for the purpose of building, maintaining, management or operation of a national highway. Though, the Act of 2013 exempts the National Highways Act, 1956 from its purview and applicability, the provisions for compensation are governed by the Act of 2013.

In the year 2006, the erstwhile Planning Commission formulated a Model Concession Agreement (MCA) to bring uniformity, transparency and quality in large scaled infrastructure projects. Long term contracts or the concession agreements entered into between a Government / statutory entity / Government owned

6 See, Section - 3A. Power to acquire land, etc.— (1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.
(2) Every notification under sub-section (1) shall give a brief description of the land.
(3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language.

entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity and the private entity who is chosen on the basis of open competitive bidding, receives performance linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative[7].

Land acquisition process, to launch an infrastructure project, is initiated by the Government wherein, the lands will be acquired by the Government but the same will be developed and maintained by the private operators, for which the Government will enter into contracts with those private entities for revenue distribution which could be through periodic payments by Government or through toll collection. The allotment of highway projects to private entities were based on the three models namely, Build Operate Transfer (BOT)-Annuity, BOT-Toll and Engineering Procurement and Construction (EPC). Further, an alternative model i.e., Design, Build, Operate, Transfer (DBOT) was developed by the Planning Commission which later on shifted to the EPC model. However, due to financial limitations of the Government and sloppy implementation of the aforesaid models, the Government came up with the Hybrid Annuity Model (HAM). The Cabinet Committee on Economic Affairs chaired by Prime Minister approved HAM for implementation of the Highway projects[8]. This particular model was introduced to replace the BOT-Toll model, under which several projects had already been allotted. National Highway Authority of India has come up with HAM model as it is an amalgamation of BOT-Annuity and EPC.[9]

7 Public Private Partnerships in India, Department of Economic Affairs, PPP Cell, Infrastructure Division, <https://www.pppinindia.gov.in/faqs#q1>.

8 Hybrid Annuity model for implementing highway projects, Cabinet Committee on Economic Affairs (CCEA), <http://pib.nic.in/newsite/printrelease.aspx?relid=135821>.

9 *All you wanted to know about… HAM*, Muthukumar K., The Hindu Business Line. <https://www.thehindubusinessline.com/opinion/columns/slate/all-you-wanted-to-know-aboutham/article22060197.ece>

The HAM arose out of the need to have a better financial mechanism for the highways development, as the projects under the BOT-Annuity and BOT-Toll ran into rough weathers. The new model of association spreads the risks between the private developers and the government wherein, the government pitches in 40% of the project cost and the remaining 60% is arranged by the developers. The issue with regard to land acquisition being that, the cost of acquisition[10] the land has increased exponentially due to the new Act of 2013 which provides for higher compensation. Whereas, the Act of 2013 was legislated to smoothen the process of acquisition the mandatory requirements under the garb of procedures have increase causing massive delay in the setting up of project. Furthermore, farmers who are entitled to certain amount of compensation approach the Courts seeking enhancement of compensation which further add up to the delay in acquisition process.[11] Government provides for incentives to private investors to undertake preparatory work including the land acquisition and utility removal and also providing for Right of Way to be made available to concessionaires free from all encumbrances.[12]

In the year 2000, the then Central Government had nurtured the idea of connecting the four major metros through an Expressway called the Golden Quadrilateral, the largest highway project in India. The aim of establishing the golden quadrilateral was to enhance the connectivity between the four major economic hubs. The project was to be executed through the PPP mode on BOT basis for a period of 20 years.[13] Nevertheless, subsequent to completion of the concession period, the private entity is duty bound to hand over the project back to the Government. The PPP contract entered into between NHAI and Jaypee Industries-DS

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10 Section 3(i) of the Act of 2013.

11 Shanta Kumar, *Report of the Committee on Public Undertakings on the National Highway Authority of India* <http://www.prsindia.org/administrator/uploads/general/1504243558~~Report%20Summary-%20NHAI.pdf>.

12 Ramakrishna Nallathiga and Mona N. Shah, *Public Private Partnerships in Road Sector in India*, International Conference on Public-Private Partnerships: The Need of Hour, At Hyderabad, Volume: Bloomsbury Publishers, New Delhi, January 2014.

13 Public Private Partnership projects in India, Compendium of case studies, The World Bank and Department of Economic Affairs, Ministry of Finance, Government of India. <https://www.pppinindia.gov.in/toolkit/pdf/case_studies.pdf>.

Constructions Ltd., wherein the parties had several obligations on their part. Obligation of acquiring land was always vested with the Government. However, various issues in acquiring land for project execution cropped up which included[14];

a. The acquisition process had to be initiated on those lands belonging to several authorities like the Ministry of Defence, GAIL, BPCL, Delhi Jal Board, Government of Haryana, Airports Authority of India among others, for which, necessary approvals had to be obtained from numerous authorities and their demands met, which was not only complex, but also time consuming process.

b. Obligation on the part of National Highways Authority was to provide the concessionaire with Right of Way, for which, lands had to be acquired in densely populated areas which adversely affected the delivery of the project. Failure to provide Right of Way to the Concessionaire within a specified time made NHAI liable to pay damages.

c. Litigation seeking stay and enhanced compensation added up to the delay.

The delay in acquiring land resulted in cost escalation[15] and also made the private investor vulnerable to the revenue loss accruing to the Concessionaire owing to the delay in commencement. The commitment on the part of the Government to acquire lands for the project and its subsequent implementation in the thickly populated areas were difficult to acquire and failure to address it beforehand led to cost escalation and delays. The project was ultimately launched in the year 2008, by granting a concession period of 20 years.

Since, land acquisition has been one of the prime issues, which inevitably affects execution of any project, it becomes essential to ascertain the feasibility for private parties to procure lands by purchasing it directly rather than Government acquiring the same for such mega projects. The land acquisition issues for the highway construction are numerous. However, for a PPP project

14 *Ibid.*

15 *Ibid*, Table 19 – Risk allocation framework.

the associated perils are shared between the Government and the Private entities. Thus, imposing an obligation on both the parties to do their respective part in a time bound manner.

Railways

In India, Railways was started by the British in the year 1843. It accrued tremendous significance and it was declared as a public asset and acquisition of land for Railways was considered to be as public works, which was inserted in the first land acquisition law.[16]

Railways, was previously governed by the 1890 Act and later replaced by the Railways Act, 1989. It was in the year 1951 that Railways was nationalized and came under the absolute control of the Central Government, through the Ministry of Railways, under which functions the Indian Railway Boards (IRB)[17]. The IRB is the authority which exercises all the Central Government Policy powers, administers, supervises and directs the other entities which are in the service of providing most of the railway services to the public. Indian Railways is the second largest in terms of carrying passenger and fourth largest in terms of carrying freight. With a total route length of 67,368 kilometres[18] and passenger volume of 8116 million, the requirement of infrastructure is abundant for which, there must be substantial investments. With the growing economic activities, improvement in rail infrastructure has become necessary and this requires massive investments. Therefore, the Railways have given nod for 100% Foreign Direct Investments[19] which will infuse the railway sector with necessary capital to boost the infrastructure. Involvement of private entities through the model of PPP will also provide the sector with required capital. However, due to high degree of control by the Government over

16 Supra note 1

17 Railway Reform: Toolkit for improving rail sector performance; Case Study - Indian Railways. <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/railways_toolkit/PDFs/RR%20Toolkit%20EN%20New%202017%2012%2027%20CASE6%20INDIA.pdf>.

18 Indian Railways Fact and Figures, 2016-2017, Ministry of Railways (Railway Board), Government of India. <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/stat_econ/IRSP_2016-17/Facts_Figure/Fact_Figures%20English%202016-17.pdf>.

19 FDI in Railways for Developments of Modern Railways System, <http://railanalysis.in/articles/fdi-indian-railways-development-modern-railway-systems/>.

the railways, private participation is not happening to the fullest possible extent. The Ministry of Railways in order to attract the private capital for accelerated construction of rail infrastructure formulated a participative policy for the Rail-connectivity and capacity augmentation projects[20].

Till date the PPPs have been concentred in the Roads and Highways sector, accounting for more than 50% of all the PPP Projects.[21] The shift in focus towards improvements in infrastructure has led to the collaboration of railways with the private entities. Indian Railways has recently come up with a new policy to strengthen, modernize and expand the railway network, which cannot be developed only from the public funds. It is necessary for the private investors also to contribute to the growth of railway infrastructure. Therefore, the Ministry of Railways, in order to attract private investments, has come up with the PPP investment modes, which, depending on the project will either grant direct permission or to choose the competitive bidding to award any project.[22] Furthermore, the policy also provides for different types of rail connectivity and capacity augmentation projects which are only for the purpose of PPP, as follows;

a. BOT model;

b. Capacity augmentation with funding by customers;

c. Capacity augmentation through Annuity model.

The issues with regard to land acquisition are not restricted only to the Railways, but it also extends to the intra-city connections which are the Metro rail systems. Due to litigation and unavailability of land for construction of metro rails, project implementation has taken a backseat. The Mass Rapid Transport Systems like the Metro rails, though have a positive impact on the economic and

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20 Participative Policy for the Rail-connectivity and Capacity Augmentation Projects <http://railwayengineering.in/wp-content/uploads/2014/03/participative_101212.pdf>.

21 Public Private Partnership – The next continuum, FICCI and Ernst & Young. <http://www.ey.com/publication/vwluassets/ey-public-private-partnership-the-next-continuum/$file/ey-public-private-partnership-the-next-continuum.pdf>.

22 Tojo Jose, *PPP in Railways: the Participative policy of Investment in Infrastructure*.<https://www.indianeconomy.net/splclassroom/ppp-in-railways-the-participative-policy-of-investment-in-infrastructure/>.

environmental growth, the delay in its execution will affect the general public in several ways. Land acquisition for the metro rail projects have always been on the top of the list contributing to the delays and subsequent cost escalation. Though, the Mass Rapid Transport System provides for easy commutation within a big city, land acquisition of these projects has always been an issue. The project hits a roadblock due to issues arising in land acquisition, poor performance of the contractors, delay in tunnelling and varying land conditions which adds up to the existing problems.

Airport

For an individual to travel between the cities, which are physically separated by distance, it is relatively easy to travel by air which not only reduces travel time but is also economical. The correlation between the airport developments and the economic development is closely interlinked, as it reduces travel time to reach a particular town/city thereby, also providing connectivity. The relationship between the airport and the economic development surrounds around the key factors including the public finances and economic development.[23]

Development of an airport not only requires huge finances but also large tracts of land, for which the Government has to initiate the acquisition process. However, the issue with regard to acquisition of land for the airport is not limited to the construction of it, but, the Government must also keep in mind the rehabilitation and resettlement of the land losers i.e., the affected families[24] as provided for in the Act. There are several issues which crops up while land acquisition for such huge projects are initiated. Under the new Act of 2013, for establishing any project the government has to compulsorily award compensation. That apart, the provision for relocation and resettlement are also provided for in the Act of 2013 for those displaced families[25] who are affected by the project. It is essential to understand that to achieve the economic growth and in the name of serving a larger public good, the affected families

23 Melanie Green, "The Impact of Airport Development on Economic Development", Urban Economics, <https://sites.duke.edu/urbaneconomics/?p=1248>.

24 Section 3(c) of the Act of 2013.

25 Section 3(k) of the Act of 2013.

should not be deprived of the same by snatching their lands, which once was a means of livelihood. Requirement of large tracts of lands for the airport development leads to displacement and dispossession which has a direct impact on the livelihood of the people around the areas.[26] To establish any project and to acquire the required lands, Government has to follow certain set of procedures which are follows;

a. Identification of land for public purpose;

b. For determining Social Impact and public purpose;

c. Appraisal of Social Impact by an expert group;

d. Notification and Acquisition;

e. Preparation of rehabilitation and resettlement Scheme.

For the purpose of better understanding the issue related to the land acquisition for the airports, the issues faced by the Cochin International Airport[27] at its developmental stage can be considered. This illustrates as to how the Cochin International Airport was developed in a rural area as a Greenfield Airport, with a minimal budget. Since, the Government did not have the budget of Rs.200 Crores in the year 1993 and a novel method was conceptualized to involve private participation, which led to many other airports to be established subsequently.

In the making of this project, Mr. V.J. Kurian played a huge role and he was the sole harbinger for the project from CIAL. Second challenge was the design of the terminal building itself. It was estimated around 500 crore. Shri V. J. Kurian was not

26 Aneesh T.V., and R.R. Patil, Development and Displacement in Kerala: An experience of Cochin International Airport (CIAL), European Scientific Journal, June 2015, ISSN: 1857-7881.

27 Cochin International Airport – Making of a Wonder, Cochin International airport, the country's first greenfield airport built under public private partnership is a trendsetter and a path breaker in aviation infrastructure development. The unique rehabilitation package, the astonishing public participation and a sustainable business model have made Cochin International Airport Limited (CIAL) - the company which operates the airport - an international brand. The saga of making of Cochin International Airport has been inspiring. When a novel concept, its meticulous execution and a motivating leadership blended together, a dream was set to be realised. <http://cial.aero/contents/viewcontent.aspx?linkId=51&linkLvl1Id=50>.

inclined to accept this huge figure, and instead advised KITCO, a local consultancy organisation owned by Kerala Government to prepare a low cost design for the terminal building. His fascination for the unique temple architecture style of Kerala was received well by KITCO. KITCO did the very fantastic job and proposed the very economical and innovative design at 1/5 of the cost which was proposed earlier by the US consultant company.[28] Another important technical challenge was the tedious license process. The procedure was very much extensive and a lot of agencies were involved in it. It took 5 year to complete the task. In order to obtain flight path clearance, CIAL had to cut off trees from land adjoin the airport for which relevant sections of the Aircraft Act could have been invoked which would have delayed the project.[29] The last but not the least challenge was to get the final aviation clearance from the DGCA.

Land acquisition became a major issue and turned out to be a huge challenge, as an area of around 502.5 hectares, roughly around 1253 acres. The lands belonged to 3824 land owners and 822 households[30]. There was stiff opposition to the same and with the active support of the local leaders, without differentiating between the parties, opposed vehemently. That apart, the lands identified also consisted of three temples and two churches which were later on demolished. In order to build the runway, four major roads, three high tension lines and even a river had to be realigned. Subsequent to this, the issue of land acquisition turned worse, when there was lack of funds to pay compensation to the land losers and the opposition became voluble in its demands. It became imperative for the Government to convince the land owners of the importance of the project and the benefits that it would bring with it. Around forty one rounds of negotiations were held in the presence of local leaders with the land owners. Total of 719 persons initially agreed to part with their lands. The authorities, in order to, appease the land owners, came up with a novel scheme to provide the following benefits to those who parted with their lands;

28 Dr. Mohan B. and Dr. Filomina P. George, *Airport Solarisation - Cial Steals The Thunder*, <http://cial.aero/userfiles/CIAL_SCMS.pdf>.

29 *Ibid.*

30 *Ibid.*

a. Negotiated rated for the property;

b. Multiple rehabilitation benefits, includes 6 cents of fully developed property like roads with street lights, bituminous roads, water supply and drain facilities and other essential facilities without cost.

c. A sum of Rs.10000/- was paid as rehabilitation sum, apart from providing permits to run taxis with other business opportunities.

The rehabilitation policy was unique in nature, sent out a strong message to others in the locality and they also realised the benefits that came with it. However, the other major threat that was looming large was lack of finance[31], as the negative sentiments were running high. Nevertheless, the project was successfully launched in the year 2000 and is now one of the busiest airports in India.

Within the National Aviation Policy, 2016 AAI will take up new Greenfield or Brownfield airports subject to the following conditions:

i) Project should be financially viable with non- zero IRR, except for no-frills airports developed under RCS. (Regional Connectivity Scheme)

ii) State/Central government will provide VGF to AAI if the project is strategically important but financially unviable.

iii) Land will be provided free of cost and free from all encumbrances by state government without treating it as equity.

iv) Land will include sufficient space on city side for commercial use as per applicable law.

To state the land acquisitions and the issues relating to land procurement for airports, it would be best understood by discussing a few instances of how land is introduced for these projects. Airports under Regional Connectivity Scheme, and Airport Authority of India

31 *Ibid.*

When an airport is operated under Regional Connectivity Scheme (RCS), the National Civil Aviation Policy (NCAP), 2016 specifies in sub clause f) of clause 4), that the State Government will provide land free of cost and free from all encumbrances and also provide multi-modal hinterland connectivity (road, rail, metro, waterways, etc.) as required. Thus, land for airport under RCS will not earn any return.

- Guidelines on airport development by AAI are also specified in NCAP, 2016. In clause 13, sub-clause a), point iii), NCAP states that AAI will take up new greenfield or brownfield airports subject to condition that land will be provided free of cost and from all encumbrances by state government without treating it as equity. Thus, land in an airport which is under the development of AAI, will not garner any returns.

- Where the agreement expressly requires the operator to pay for land

In case the agreement between the airport operator and the government stakeholder clearly states that the operator has to pay for the use of land along with the quantum of such payment, then the Authority will not intrude in such a situation. In India, the most common practice is seen to be a lease agreement between the operator and the concerned government. In such an agreement, the operator either pays only a lease amount calculated as per specified in the agreement or in some cases pays a nominal lease rent in addition to revenue sharing with the government concerned.[32]

Content of the New Land Acquisition and Rehabilitation Legislation vis-a-vis Upcoming PPP Projects

Land acquisition and rehabilitation act, 2013 provides that being a sovereignty authority it can acquire lands for development purpose without the consent of the landowner but when government wants to acquire land for public private partnership and for private company, then it need consent of 70% and 80% landowners or affected family respectively. Now the government is trying to make

32 Ernst and Young, Public Private Partnership: The next continuum, 2013, <https://www.ey.com/publication/vwluassets/ey-public-private-partnership-the-next-continuum/%24file/ey-public-private-partnership-the-next-continuum.pdf>.

some changes therefore it brought Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill 2015, also known as Land Bill 2015 which has been passed by the Lok Sabha on March 10, 2015. In this the government made nine amendments to the bill, all of them were adopted.

Government is trying to exempts some types of projects from certain provisions: The Bill seeks to exempt the following five types of projects from certain provisions of the Act: (i) defence (ii) rural infrastructure; (iii) affordable housing; (iv)industrial corridors (set up by the government); and (v) infrastructure projects. The provisions of the Act which will not apply to these five types of projects are: (i) obtaining the consent of 80% of land owners when land is acquired for a private project and the consent of 70% of land owners when land is acquired for the public-private partnership project.[33]

Moreover, it also put the clause of "returning of unutilised land", according to which if land which is acquired under it remains unutilised for next five years, then it has to be returned to the original owners or the land bank. The Bill states that the period after which unutilised land will need to be returned will be the later of: (i) five years; or (ii) any period specified at the time of setting up the project.[34]

Conclusion

This article has laid emphasis on the Land Acquisition Act of 1894 and the new Act of 2013, which contains starkly different principles and provisions. Further the focus of this article has largely been on the issues pertaining to land acquisition pertaining to Public-Private Partnership models in different sectors like the Highways, Railways and the Airports. The impact of the Act of 2013 and the scenario prior has been dealt with in the foregoing parts of the Article. Further, dealing with the aspect of rehabilitation and resettlement, the obligation on part of the Government to suitably

33 PRS Legislative Research, The Right to fair compensation and transparency in land acquisition, rehabilitation and Resettlement (Second Amendment) Bill, 2015, May 2015, <http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Bill%20Summary-LARR%202nd%20Amendment.pdf>.

34 *Ibid.*

compensate, rehabilitate and resettle the project affected families in different cases has also been dealt with.

The issue of land acquisition for the PPP projects in India cropped up only after the Act of 2013 came into force. Till then, the land acquisition by the Government was done only for the public purpose and also for the private companies, but the same did not provide for the rehabilitation and resettlement unlike the new Act of 2013. Further, the land acquisition has been provided for under different enactments for their respective purposes. However, the process of initiation of land acquisition under one particular enactment cannot be challenged or be quashed under a different enactment, as it was held by the High Court of Karnataka[35].

It is essential to understand that the PPP model in India is turning out to be a successful model for the development of any particular sector or area. However, the policy framework in this regard has to be strengthened in order to prepare a strong platform for furthering the development of different sectors. The reason behind this being that the requirement of the infrastructure needs financial impetus along with expertise i.e., technical and know-how about the subject for economic development for which the private participation is very essential. Therefore, the several successful models from the past can be kept as a sample before proceeding with PPP projects in the future.

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35 M/s. Evershine Monuments and Others v. State of Karnataka, W.P. No.17852-856/2014.

Chapter 7

Assessing PPP and Policy Formulations of Indian Railways Infrastructure

Pavithra R.

Introduction

An essential strength of an economy lies in effective and stabilised core sectors of transportation. In India, Railways form part of these core sectors and thereby undergoes modernisation and expansion to strengthen itself every growing year. The Railways as it is now was built with millions of capital received from Indian taxpayers during the British period. Today, it has been rated the world's third largest network considering the services rendered in both passenger and commercial front. The railway infrastructure has widened up from its basic passenger and commercial operations to the first/last mile connectivity in the areas of need and to ensure connectivity to the main line. For the process of infrastructure development including the expansion, modernisation and technological assistance, huge funds were needed in the sector. Realisation of growth, increasing urbanisation, rising income, wide-spread industrialisation, achieving benchmarks of international standards was sought after, for which purposes, huge capital was required from the Government. Witnessed historically, railways have attracted finances through internal funding and budgetary support rather than from external sources.[1]

1 Surendra Bansal et.al., *Strategy and its Implementation for Growth and Sustainability of Infrastructure and Operation: A Case Review of Indian Railways* <http://www.iricen.gov.in/iricen/ipwe_seminar/2017/37.pdf> (visited on May 1, 2018).

It was then the Government realised that the requirement of capital in railways is far more than the adequate and that resource constraints made the government to look for alternative sources of funding, including the search for private capital and participation to mitigate the pressure and to meet the demands of railway infrastructure.[2] Traditionally, railways were in the hands of the Ministry with domination of public sector. Private players entered the field as support system connected with allied activities including maintenance of track, coaches, stations, construction of bridges and into telecommunication works for purposes of railways. At present, through various policy initiatives, private sectors were encouraged to proactively participate in railways investment. There is increased attention by the private participants due to returns that one might generate with new tracks, more wagons, better signals that would eventually come into place with investment.

Recently, certain innovative ways to improve railway infrastructure through encouraging participation from across State Governments, private sector players, multilateral and bilateral agencies are considered essential to overcome the difficulties of land acquisition and finance for improved railway infrastructure.[3] The resource mobilisation from private sectors and establishment of win-win partnership through public private partnership (PPP) was identified to be the need of the hour in the Vision 2020 document released by Indian Railways in 2009. The document in turn covers wide range of issues in the railways sector and has identified priority areas where PPP could be used as a tool to achieve funding for infrastructural growth where projects of high priority could be identified, sanctioned and assured through interaction of both private and public sector.[4]

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2 MoR, *Projects to be Taken Up Through SPV Model through State JVs* (10 Feb. 2016) <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/works/pdf/2016/Letter%20to%20GMs%20-%20Projects%20to%20be%20taken%20up%20with%20States%20under%20SPV-10_02_2016.pdf> (visited on May 1, 2018).

3 *Policies and Governance for Faster and More Attractive Rail Transportation*, p.35 <https://www.tillvaxtanalys.se/download/18.1d7fbce414d2f83fc76a570b/1431521650454/Wp_PM_2013_04_.pdf> (visited on May 2, 2018).

4 MoR, *Indian Railways Vision 2020* (Dec. 2009) Para.6.6 <http://www.prsindia.org/uploads/media/Railways%20Vision%20Document%202020.pdf> (visited on May 2, 2018).

Understanding the increased demand for funding and attempts taken by Indian Railways to bring in policies where PPP could be enhanced, this chapter in particular would focus and shall analyse policies that promote private sector participation in railways with an in-depth analysis of varied PPP models that were proposed in each policy to attract private investment associated with series of case studies where PPP has worked to the best of Indian Railways and to identify certain unresolved issues, areas and challenges that are still faced by the Indian Railways to attract alternate means of funding.

PPP in Indian Railways- Historical Relook

The first railway track developed in India was through a private enterprise with British shareholders with an element of PPP in it to the that extent that government supported the development of the track line with means and modes.[5] There was gradual takeover of railways under the Government control and with nationalization of railways sector, the Indian Railways took up the railway zones, manufacturing units, associated units and corporations. With nationalisation, all the manufacturing, operation, development and management were exclusively left to the hands of the MoR with minimal interface of private parties for allied activities. Post-independence till 2000s, private sectors were significant in services related to sidings, wagons, catering, loading and unloading and the rest being majorly in the hands

During the periods of State monopoly on railways, majority participation of private sectors could be traced back to very few instances. The first instance being MoR tie-up with Maharashtra Government's City Industrial and Development Corporation to develop rail connectivity to Navi Mumbai establishing a case of PPP.[6] However, of the early joint venture railway projects using PPP model in India is establishment of *Konkan Railway Corporation Limited* in 1998. Departing from the usual practices, the MoR, underwent partnership with four State Governments-

5 IPFS, *History of Rail Transport in India* <https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/History_of_rail_transport_in_India.html> (visited on May 2, 2018).

6 G. Raghuram and Rachna Gangwar, *Lessons from PPPs of Indian Railways and Way Forward* (Aug. 2010).

Karnataka, Kerala, Goa and Mumbai to connect south of Mumbai with Mangalore and build the Konkan Gap through construction of coastal rail-line.[7] The railway line was constructed on Build, Operate and Transfer (BOT) principle with concession period of ten years. It was transferred to have its own operation and management in 2008 by replacing the transfer clause to Build Operate Own (BOO) model. The project involved crores of investment in form of debt and equity where MoR held equity of 51% and helped in various ways to restructure and innovate the corporation to changing times.[8]

Utmost use of PPP models are also witnessed in catering services including ancillary services by the Indian Railway Catering and Tourism Corporation (IRCTC). In the present day, the portals, the immediate services using internet, the expansion in the network, the increasing PPP models in the sector deserves special mention. It is through these initial steps that Ministry of Railways (MoR) realised the need for private funds and participation to increase rail connectivity and thereby came up with policy frameworks to boost private capital inflow into Indian Railways Sector.

Railway Policies Attracting Private Sector Participation

Erstwhile R3i and R2CI Policies

The Railways' Infrastructure for Industry Initiative (R3i) policy came into being in 2010 superseding the 2008 R3i Policy with an object of attracting the private sector to boost rail connectivity, to escalate the capacity of rail transport and to encourage freight traffic and private participants in rail share. The 2010 policy carved out an exception by not focussing on direct or indirect connectivity to coal mines and iron ore mines.[9] Considering the fast growing demand in coal and iron ore, a new policy was introduced called Policy for Rail Connectivity to Coal and Iron Ore Mines (R2CI), 2011 for specific purposes, therefore had been specifically excluded in R3i Policy.

7 Konkan Railway Corporation Limited, *The Beginning* <http://www.konkanrailway.com/pages/viewpage/the_beginning> (visited on May 2, 2018).

8 *IR-A Glimpse* <http://shodhganga.inflibnet.ac.in/bitstream/10603/24433/12/12_chapter2.pdf> (visited on May 2, 2018).

9 Para. 2- Objectives of R3i Policy.

The R3i policy sought to address the issues and underlying bottlenecks of previous railway infrastructure schemes via two means by bringing about change in participative models and by expediting decision making process to promote more investment flow into the sector. R3i aimed at attracting investment for lines more than twenty kilometres in length, however for the purposes, the length of siding would not be taken into consideration.[10] In order to attract more investment from private participates, the policy sought after four models of investment with the option for participants to decide upon the model they would prefer, however subject to the finality in the hands of MoR[11]. The policy allows investment through four diversified models, they are: (a) Cost sharing-freight rebate model; (b) Full contribution-Apportioned earning model; (c) the SPV Model and (d) the Private Line Model. It would be relevant to understand the models in the R2CI Policy, since they are to be read with R3i Policy. The models as incorporated under R2CI are (i) Capital Cost Model and (ii) SPV Model.

All the models provided, require the land to be acquired by the applicants, which would be refunded by the railways once the concession period is over which would not include escalation price whatsoever. Each model vests ownership with the railways from the beginning, except in the private line model where the railway would acquire the line at the end of twenty five years without any cost. All would be sanctioned as railway project and cost-revenue sharing would be negotiated for each model which would be reflected in the agreement agreed upon. Under these models, the right to provide connectivity to customers, regions, industry and other sectors would be retained by the Railways[12].

The *Cost Sharing Freight Rebate Model* requires company or group of companies to contribute in the form of advance where the minimum contribution of the applicant would not be less than fifty percent. In this model, the applicant would be allowed to recover the advance contribution through rebate. Further, the model provides an option for the party to make available the land, in which case, the railways would construct the line within specified

10 R2CI also possess same eligibility criteria- Para.2 of R2CI Policy, 2011.

11 Para. 3- Eligibility of R3i Policy.

12 *Ibid,* Para.8.

time and cost.[13] Under the second model, full contribution, i.e., hundred percent contributions have to be made by the applicants to subsume a project The applicant under this model would be retain maintenance for twenty five years and also be enabled to receive apportioned earnings with the right of the railways to charge certain percentage on the gross apportioned earnings, therefore called the *Full Contribution Apportioned Earning Model*. Since applicants are permitted to maintain the lines for twenty five years, the advance provided by the applicant for land acquisition would be refunded at the end of such period.[14]

The third model provides for two options wherein the applicant can embed lines to the existing lines or could draw lines to dead end terminals including ports and steel plants. In the *Special Purpose Vehicle Model*, railways would share equity of 26% and an agreement would be effectuated between railways and the applicant. Though it would be the duty of the SPV to acquire lands, railways would assist in case of required assistance for acquisition for forest and environmentally sensitive areas. This model would require SPV to mainly focus on construction, operation and maintenance of lines. SPV would be granted consideration as share in revenue generated on project line on agreed basis, as per policy. Opportunities to SPV are provided in terms of assigning construction which could be via any of the following: competitive bidding, railways, RVNL for SPV, at cost of SPV and at the option of SPV.[15]

Though R3i and R2CI have similar SPV Models, there are certain essential points of consideration under the R2CI Policy whereby it is made clear that the railways would charge the entire freight and no sharing of revenue would be admissible. The SPV model under R2CI is different from capital cost model, such that the former becomes relevant when these large number of participants, whereas the latter becomes relevant when there are two players. The SPVs in here could be brought up through combinations of government departments, PSUs, private players and state governments with token participation from MoR.

13 *Ibid*, Para. 4.

14 Para. 5 of R3i Policy.

15 Para. 6 of R3i Policy.

Under the SPV model of R2CI Model, developer involved in construction of line to can levy surcharge on freight spread for a period of twenty five years. The surcharge thus arisen would be charged further by the railways upon the amount accrued in the escrow account of SPV. To protect the interests of the consumers and other players who would be willing to participate at the subsequent stage, the SPV would be required to prepare a master plan with future require requirements and the late entrants would be given liberty to choose their feasible location. However, they would be required to pay pre-specified contribution to SPV which would further be used to compensate original investors.[16] Whereas the *Capital Cost Model* of R2CI provides for the participants or concerned private sector or JV to fully bear the cost of construction and does not provide for the scope of alteration during the construction period and approval of change in exceptional circumstances is at the sole discretion of MoR. The concept of surcharge and charge to be imposed by the railways remains the same as in SPV model of R2CI policy.[17]

Private Line Model is another feature of the policy where any private line built by applicant on privately acquired non-railway land could be connected to the railways network. For such purposes, applicant would be allowed to construct and maintain the land for a period of thirty years and retain revenue of prescribed percentage with a fee to be paid to railways on gross apportioned earnings. Through this model, railways would have an option to take over the line after the expiry of thirty years.[18]

Except for the first model, all other models including models of R2CI are provided with an exit policy. For SPV model, a lock in period could be incorporated within the terms of shareholder agreement. Regarding exit policies of Full Contribution and Private Line Model, otherwise for exceptional circumstances, change of ownership would not be permitted for a period of one year from the date of commencement of agreement.[19]

16 Para. 3 of R2CI Policy.

17 *Ibid.*

18 Para. 7 of R3i Policy.

19 Para. 9 of R3i Policy.

Railroad to Dharma Port Under the R3i Policy

With the rolling out of R3i policy, the Ministry received to an extent of seven policies, out of which railroad linking to Dharma Port in Odisha turned to be a success and first reported case under new concept. Dharma Port which required rail connectivity was achieved by creating a joint venture between Tata Steel and Larsen & Turbo. The line came to be of essence, since movement of goods from the port to the main land was under great difficulty. The location of the port was estimated to be around 62 km away from the mainline of Indian Railways Howrah-Chennai line and the total track length was estimated to be around 120 km including the loops, sidings and additional facilities.[20] To establish connectivity, port had acquired corridors that could accommodate rail tracks with service lines. The framework utilised for rail linking through BOOST basis (Build Own Operate Share & Transfer) under a Concession Agreement signed by the Commerce & Transport Department, Government of Odisha with a concession period of 35 years.[21] This connectivity was carried on under the private line model of Ri3 policy wherein the Railways agreed to share portion of its revenue with Dharma Port Company Ltd. The railroad to Dharma port is appreciated till date despite the fact that it became a Non-Government Railway Line after the Participative Policy of 2012 came into place. During the period R3i was in operation, seven proposals apart from Dharma came into in tune for private sector participation.

However, there were certain inherent issues that the new policies for connectivity could not address by itself including the inter-ministerial approvals for proposals. There again remained huge pending projects that required investments despite policy measures. During this phase, it was also identified that there was lack of execution and implementation of the schemes, which continued to attract private investments below the required level. The policies fail to address the prevailing concerns and to match

20 The Hindu-Business Line, *Joint venture for rail link to Dhamra port* (17 Apr. 2011) <https://www.thehindubusinessline.com/economy/logistics/joint-venture-for-rail-link-to-dhamra-port/article23047472.ece> (visited on May 4, 2018).

21 IDCO, *RFP for Selection of Technical Consultant for Preparation of Conceptual Master Plan and Feasibility Study for Port Based Manufacturing PRIDE at Dharma in Odisha* (August 2015), p.5.

the standards of Vision 2020. Thereupon, the railway sector figured that its long term plan of traffic requirements, technology upgrading and modernization account not be achieved without new policies being introduced. Thereafter in 2012, the Government rolled out the Participative policy with broad parameters, wherein they provided an option for the already existing developers to opt for the new policy for further governance.

Participative Models for Rail Connectivity and Capacity Augmented Projects, 2012

The Cabinet Committee on Infrastructure in 2012 approved a policy framework of railways that sought to encourage private participation in enhanced rail connectivity and capacity augmentation projects.[22] The policy came up superseding the earlier policies including the R3i and R2CI. The policy primarily aimed at drawing private capital to supplement the governments' investment in railways. It addressed concerns of private investors including their ownership of railway line and issues relating to repayment of investment. Of the major goals the policy sought to achieve was in terms of involvement and funding by States, which would in-turn result in common public good[23], to achieve the State of *laissez-faire* and therefore including State Governments as one of their major participants. It aimed at reaching out varied participants including *inter alia* the State Governments, local bodies, ports, beneficiaries, companies, cooperatives, foreign investors and other investors.[24] The policy in itself provides for six broad investment models in which a public private partnership can be ventured out in railways sector. However, finality of each model was left in the hands of the MoR taking into consideration aspects of land acquisition, cost-revenue sharing, period of operations and the unique nature of the particular case in hand.

The policy framework proposed for five models where private participation and investment were sought to be attracted. The five models are: (i) Non-Government Railways Model (**NGR**); (ii) Joint

22 PIB, CCI- Participative Models for Rail Connecticity and Capacity Augumentation (22 Nov. 2012).

23 Para. 5 of 2012 Policy- Objectives.

24 Para. 2 of 2012 Policy- Who can Participate.

Venture with Equity Participation by Railways Model (**JV**); (iii) Build Operate Transfer Model (**BOT**); (iv) Capacity Augmentation through Funding by Customers Model (**Consumer Funding**) and (v) Capacity Augmentation Annuity Model (**Annuity**). Out of these five models, the BOT and Annuity models are pure PPP models, whereas the other three involve participation of investors and customers to arrive at major investment.

NGR Model

The NGR model imbibes in it the facility for the private participants to develop and own the railway line by acquiring land and making investment in the line. The track development would be applicable for those interested in investments to develop the first and last-mile connectivity including ports and mines, to the main line, which would thereby enhance the logistic chain. The Participative Policy declares that all the rules and regulations under the Railway Act of 1989 would be made applicable to the lines under this model. It requires the owner to provide funding for infrastructure, construction, maintenance and allied activities. Upon construction and proper maintenance, the Indian Railways would have an inherent right to use such lines for carriage of goods and passengers, as the case maybe, however with the requisite user fee that would be paid to the owner-developer.[25]

This model aims at reducing government interference for the development of line. Further, since Indian Railways does not participate in the funding, the facility of no concessionaire period to transfer the assets to Government is a remarkable feature of this model. Under this model, it would be the duty of undertaking construction of new lines or sidings from the private lines, for which purposes, the owner-developer would not bear any costs. Since no investments are made by MoR to develop such lines, all proposals relating to lines under NGR model would be approved by the Zonal Railways. However, the MoR would retain the right to terminate the agreement with the private participant in case of default arising out of or in the agreement. The MoR would take over the control of the railway line on termination and in case of proved loss, costs shall be borne by the defaulter to the railways.[26]

25 Para 6.1 of 2012 Policy- Non-Government Railway Model-Salient Features.
26 *Ibid.*

Joint Venture with Equity Participation Model

In order to expedite funding and execution of railways lines, the Participative Policy provides an alternative route that could be adopted by strategic investors through Joint Venture with equity participation, where the JV shall operate on 'common carrier' principle for public transportation of goods and services. The new policy allows any of the railways' Public Sector Undertaking to participate in the JV formulation to implement the projects, where the participating PSU or MoR would undertake the project development. To formulate a JV, it is mandatory to call for an expression of interest to ensure accountability and transparency in selecting the joint venture partners and the model requires the government participant to invest its own fund in the joint venture as far as possible. It is to be used when it is operationally necessary for new line and gauge conversion, where in the Indian Railways should have a minimum of 26% equity participation with the JV. The model provides for a concession period of thirty years in flexible nature and to reduce or increase the period to twenty five or thirty five years depending on the project undertaken through the JV.[27]

The model provides for a separate agreement that could be entrusted for the purposes of maintenance of the developing railway line under the JV Model. Also, the land for construction of track and line would be provided by the MoR and thereupon, the JV would not be provided with the flexibility to charge their own tariff and fees and a portion of apportioned earnings would be shared with the private participant of the JV. Since the model is the resultant of a combination of the public and private sector, there is a demand for opening of an escrow account which would be strictly monitored with respect to the cash inflow and withdrawal. Since the model operates on the basis of equity sharing, the risks involved would be shared proportionately by the parties involved and hence, the requirement of traffic guarantee is not mandated under this model. JV as whole would be held responsible for default or breach and shall bear all losses directly to MoR. Further, MoR shall terminate the agreement with JV in case of specified material defaults that cannot be cured.[28]

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27 Para 6.2 of 2012 Policy- JV Model for Operationally Necessary/Bankable Sanctioned/To Be Sanctioned Railway Projects -Salient Features.

28 *Ibid.*

Build Operate Transfer Model

The BOT model is a pure public private partnership model incorporated under the 2012 Participative Policy where the concession would be awarded to the private sector through the process of competitive bidding. BOT could be used for long rail corridors, gauge conversion projects, dedicated freight corridors etc. For a concession period of twenty five years, the concessionaire would be allowed to design, build, finance, construct and maintain the rail line issued under the project. The model permits sharing of risks between the private party involved and the Ministry. BOT is unique, since it offers 'Golden Share', i.e., one equity share offered in favour of MoR by the concessionaire. Golden share ensures to keep minimal, the micromanagement of the Government in the project assigned. The rights and duties of the parties are clearly provided in the Model Concessionaire Agreement where the MoR is under an obligation to procure right to way, approvals and permits that are essential for the implementation of the project whereas the concessionaire would be under the obligation for due performance, finance and construction of the undertaken project in a time bound manner.[29]

The model requires the cost of utility shifting to be borne by the Ministry since the Ministry would have better control of the costs than any other agency. The concessionaire, here, would be required to appoint an independent engineer to oversee the project completion and ensure neutral judgments relating to the supervision of the rail line undertaken as the part of the project. Further, the model introduced in it, concept of projected revenue which would be shared between the participants and requires an escrow account to ensure accountability of finances. Similar to the JV model, the compensation by the participants and termination at the discretion are left in the hands of the Ministry.[30]

Customer Funded Model

An escrow account created for the purposes of speeding up the railway track, sidings or construction, funds from willing customers would be collected under the capacity augmentation through funding by customers model. It provides for a system where the

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29 Para. 6.3 of 2012 Policy- Railway Projects on BOT awarded through Competitive Bidding - Salient Features.

30 *Ibid.*

Indian Railways develop, build, operate and maintain the project using the funds provided by the customer, for which the customer would receive freight rebates on freight volumes every year until such time the customers recover the money invested along with the interest. For this purposes, an agreement or a memorandum of understanding would be signed between the Railways and the willing customers. On the completion of the estimated project, a completion certificate would be issued and the Railways shall make repayment in the form of rebate. The project shall be approved as Railway Project. Default on either side may result in termination and the default on the customer's part would result in forfeiture of disbursed amount by Railways whereas, default on part of Ministry would require the MoR to pay the customer an amount equal to 120% of the disbursed amount.[31] The Customer funded model is effectively utilised for approved projects including Bhaktiyarpur-Karnauti Flyover where 100% funding is done by the customers, Manpur-Tilaiya-Bhaktiyarpur, 132 km line where 100% funding is made for electrification by customers and for Katwa- Balgona GC and 50% funding provided by customers for doubling of the Hutgi- Kudgi- Gadag for around 284 km. [32]

Annuity Model

Annuity model of enhancing public private partnerships allows undertaking and execution of those policies that are and could not generally be covered under the BOT model. Where the funding from specific user or private participant is not possible, this model is generally used, wherein the construction risks are normally allocated to the concessionaire and other risks including direct and indirect risks are assigned to the MoR. In this model, the formulation of project, land acquisition etc., would be done by Railways and the parts including financing and construction would be done by private players chosen through competitive bidding who would be paid annuity as determined in consonance with the bidding. This model is usually adopted to execute doubling, third lining and

31 Para. 6.4 of 2012 Policy- Capacity Augmentation (Doubling/Third line/Fourth line, etc) with funding provided by customers.

32 PIB, *Railway Projects During Twelfth Five Year Plan under PPP Model,* (4 Dec. 2015) <http://pib.gov.in/newsite/erelcontent.aspx?relid=132562> (visited on May 7, 2018).

fourth lining of railway tracks.[33] Approved projects under this model include Badrak-Nargundi third line in Odisha, Nagpur-Wardha third line in Maharastra and Kazipet-Vijayawada third line with electrification in Telengana-Andhra Pradesh region.[34]

Case Studies under the Participative Policy, 2012

1. *Pipavav Railway Linking (NGR-JV Combination)*

Pipavav Railway Corporation Limited (PRCL) is the product of Railways taking proactive step towards formation of special purpose vehicles and public private partnership to boost rail connectivity in the first and the last mile. The corporation is a 50:50 equity based JV Company registered under Companies Act, 1956 and created in terms with MoR and Gujarat Pipavav Port Ltd. (GPPL). The concessionaire agreement was signed for construction, maintenance and operation of 271 kilometers long broad gauge railway line that would connect Pipavav Port with Surendranagar main line railway connection in Gujarat on Built Own Operate Transfer (BOOT) model.[35] It is one of the first established PPP model infrastructures and enjoys the status of Non-Government Railway status of Railway Administration under the Railway Act, 1989.[36] The MoU to that effect was signed in 2000 along with the concession and lease agreement for a period of 33 years and has acquired licences to run container trains serving to Ports of Pipavav, Mundra, Chennai, Ennore, Vizag, and Kochi. The project cost was estimated to Rs. 249 crore.[37]

Following which, varied agreements including the Construction Agreement, Transportation and Traffic Guarantee Agreement,

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33 Para 6.5 of 2012 Policy- Capacity Augmentation (Doubling/Third-line/Fourth line, etc)- Annuity Model Applicability.

34 PIB, *Railway Projects During Twelfth Five Year Plan under PPP Model*, (4 Dec. 2015) <http://pib.gov.in/newsite/erelcontent.aspx?relid=132562> (visited on May 7, 2018).

35 Gujarat Infrastructure Development Board, *Statement Showing Details of PPP projects involving Revenue Realisation* <http://www.gidb.org/ppp-ppp-project-database-port-2016> (visited on May 7, 2018).

36 Pipavav Railway Corporation Limited, *About Us* <http://www.pipavavrailway.com/> (visited on May 8, 2018).

37 CAG Report, *Public Private Partnership Projects in Indian Railways*, chap. 1- Introduction <https://www.cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Railways_Public_Private_Partnership_Projects_3_2014_chapter_5.pdf> (visited on May 8, 2018).

O&M Agreement and Port Siding Agreement were signed in order to strengthen the PPP alignment of Indian Railways. As part of PRCL project, apportionment of revenue is to be with zonal railways with no separate concession fee and can claim a benefit of income tax exemption for a period of ten years.[38] The agreement provided for demand risk and project risk to be borne by SPV and MoR is to lease existing assets to PRCL. The revenue collection under the railway linking is to be collected by MoR which on apportionment would be shared with PRCL after operational expenses are deducted.[39] The corporation is one of the most successful PPPs that was formulated under the wings of Indian Railways despite its losses during certain years. The corporation as it stands today is debt free and registers growth in revenue that contributes to the Indian economy.[40] Thus, Pipavav Port Rail Connectivity stands today as one of the classic case studies of a JV Model combined with NGR model that was sought to be achieved under the Participative Policy on Rail Connectivity, 2012.

2. *Rail Connectivity to Tuna Port (NGR-BOT Combination)*

The Tuna Port Rail Connectivity which had its completion in 2015 was apprised for the PPP model including the Build Operate Transfer (BOT) with a concession period of thirty years. The project was implemented at a cost of Rs.142 crore and connected Tuna to the Gandhidham main railway line.[41] The rail connectivity and improvement in infrastructure inside the Port area was tendered for the purposes of design, supply, installation, testing etc.[42] The Kandla Port Trust awarded the project to Adani Port and Special Economic Zone on BOT to have funded the project and marked its

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38 Mohd. Jamshed, Pipavav Railway Corporation Limited, <http://www.aitd.net.in/pdf/6/6.%20Pipavav%20Rail%20Corporation%20Case%20Study%20%20Mohd%20Jamshed.pdf>(visited on May 8, 2018).

39 G. Raghuram and Rachna Gangwar, *Lessons from PPPs of Indian Railways and Way Forward* (Aug. 2010).

40 PIB, *Pipavav Railway Corporation Limited Registers 30 Per Cent Growth in Revenue during Fiscal 2013-14* (25 Sep. 2014) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=110022> (visited on May 8, 2018).

41 DIPP, Make in India, *Railways Sector-Achievement Report* (18 Jan. 2017) <http://pibphoto.nic.in/documents/rlink/2017/jan/p201711801.pdf> (visited on May 9, 2018).

42 Western Railways, *Tuna Port Rail Connectivity Tender Details* <http://www.wr.indianrailways.gov.in/TenderDetails_cpp.jsp?T_ID=7107&lang=0&id=0,3> (visited on May 9, 2018).

journey as second private railway line with around seven kilometres railway line being laid by Kandla Port Trust.[43] The project as approved by the Railway Board was completed in a year and was executed in two parts, one being a eleven kilometre Gandhidham-Tuna Rail Line executed by Western Railway and the other being the six kilometre Tuna-Tekra Line executed by Kandla Port Trust with Adani Group and it was the Tuna-Tekra part of railway line that received the status of NGR under the Participative Policy, 2012. In furtherance to the success of the railway line, sidings for about ten kilometres were approved under Tuna project at a cost of Rs.15 crore.[44] It was expected that this line would be useful for transportation of coal, fertilizer etc. and was estimated to generate crores of revenue.

A series of other successful models under the PPP initiative under the Indian Railways include the rail connectivity to Mundra Port where in the financial aspects are done completely by Adani and thereby became NGR, hence access charges are paid by Indian Railways for usage of such tracks since complete operation and maintenance are left to the private participant. Others include rail connectivity to Hassan Mangalore, Gandhidham-Palanpur Gauge Conversion Project, Kutch Railway Connectivity, Krishnapatinam Port New Line, Haridas Paradeep New Line, Bharuch Dahej Railway Line, Angul Sukinda New Line that were undertaken as joint venture by MoR with private players.[45]

3. *JV Agreements with State Governments- 2012 Policy Stepped Up*

As part of the 2012 Participative Policy, MoR took rigorous steps to enhance their tie-ups with different State Governments to encourage and achieve active participation in developing rail infrastructure in their respective States. The JVs thereupon

43 Exim News, *Gandhidham-Tuna Tekra Private Railway Line Inaugurated by Railway Minister* <https://www.seair.co.in/exim-news/gandhidham-tuna-tekra-private-railway-line-inaugurated-by-railway-minister.aspx> (visited on May 9, 2018).

44 Planning Commission, *Report of the Committee of Secretaries Road Rail Connectivity of Major Ports* <https://www.ibef.org/download/road_rail.pdf> (visited on May 9, 2018).

45 MoR, *Two and a Half years achievements of Ministry of Railways (May 2014 to Nov. 2016)* <http://pibphoto.nic.in/documents/rlink/2016/nov/p2016111102.pdf> (visited on May 10, 2018).

entered into between MoR and States would *inter-alia* focus on surveys, preparation of Detailed Project Report and getting requisite approvals. Further, efforts would be taken for processing, sanctioning and monitoring identified projects including last mile connectivity, capacity enhancement and station redevelopment projects.[46]

- One of the well-established PPP SPV structures even before the pronouncement of the Participative Policy, 2012 is the Hasan Mangalore Rail Development Company (**HMRDC**)[47]. The Company is a resultant of JV between Rail Infrastructure Development (Karnataka) Limited and the State Government of Karnataka, who came together in order to render early completion of four identified projects in the State of Karnataka. First such SPV formulated for that purpose is HMRDC with equity participation from MoR, Karnataka and K-RIDE. The alliance also allowed strategic partners and other financial institutions to take part in the equity contribution, which resulted in enhanced private participation. Apart from the above, Government of Karnataka agreed for funding of three rail projects by contributing two-thirds of the cost.[48]

- A JV signed with the State of Jharkhand in 2017 to promote infrastructure development in railways wherein State would be stimulated to provide an active representation in planning and implementation of railway projects with speeding up the development policies as prioritised by the Government itself. Further, the JV requires State to identify ways to generate more financial resources through State participation as well as the participation of other stakeholders by promoting their inputs in project oriented subsidiaries. Based on viability, bankability and financial closure, Government of Jharkhand has been provided with three initial phase projects. For this

46 PIB, *JV Between Railways and State Governments* (6 May 2018) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=145001> (visited on May 10, 2018).

47 HMRDC, *The Beginning* <https://hmrdc.com/the-begining/> (visited on May 10, 2018).

48 DIPP, *RailwayInvestment Promotion* <http://dipp.nic.in/sites/default/files/Rail.pdf. (visited on May 10, 2018).

purposes, Jharkhand is to hold 51% equity, where MoR would take initiatives and assist States for focussed project development, resource mobilization, land acquisition, project implementation and monitoring of critical rail projects.[49]

- Similar agreements were entered into by Odisha, Tamil Nadu, Kerala, West Bengal, and Bengaluru for the purposes of enhancing rail connectivity and sub-urban connectivity.

The new policy, apart from being an improvised version of the R3i and R2Ci also provides viable options for long term connectivity and increases burden and risk sharing with the end users and private participants. The policy aims at making multi-user lines and investment avenues with commercial returns for development of rail infrastructure. Therefore, through the identified PPP models and the case studies thereunder, it is clear that the new policy would succeed and go a long way in ensuring timely availability of rail infrastructure to the beneficiaries. It also opens unexplored paths and opportunities to investors who would obtain guaranteed returns through rail investments.

Foreign Direct Investment Policy in Railways, 2014

Railways sector has been well-known for the Governments having monopoly on them and to allow private participation in support and assistance to that of the main project which would primarily be in the Government domain. Following the Participative Policy of 2012, it was in 2014, that the Government opened its gates and removed its barrier for the first time to allow large commercial and foreign investments come into Indian Railways through Foreign Direct Investment (FDI) notification issued by the Department of Industrial Policy and Promotion (DIPP).[50] This notification led to amendment in the Consolidated FDI Policy, 2014 to allow foreign participants to invest in railways. Before liberalization in accordance with this policy, FDI was permitted only in Mass Rapid Transport System (**MRTS**) in all metropolitan cities under automatic route from 2001.

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49 PIB, *Ministry of Railways Signs Joint Venture Agreement with the Govt. of Jharkhand* (20 Jan. 2017) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=157555> (visited on May 11, 2018).

50 DIPP, *Policy for Private Investment in Rail Infrastructure through Domestic and Foreign Direct Investment* (Press Note 8/2014, 27 Aug. 2014) <http://dipp.nic.in/sites/default/files/pn8_2014_1.pdf> (visited on May 11, 2018).

The new policy allowed private participation in certain sectors where Government funding was identified to be inadequate. The major areas which attracted investment under the policy include (a) Suburban corridors through PPP; (b) High speed train projects; (c) Dedicated freight lines; (d) Rolling stock including trains sets and locomotive/coaches manufacturing and maintenance facilities; (e) Railway electrification; (f) Signalling system; (g) Freight terminal; (h) Passenger terminal; (i) Infrastructure in industrial park pertaining to railway line/siding; (j) MRTS.[51] For the areas and sectors identified, 100% FDI under automatic route is allowed for construction, operation and maintenance of assigned project. The prime aim of the policy is to generate funding from foreign investors to enhance capacity augmentation and modernize with required technological assistance to the Indian Railways.

The policy though permits for full foreign investments have been made subjected to the Sectoral Guidelines that would be issued by MoR and to Cabinet Committee on Security (**CCS**) where FDI proposals received beyond 49% in sensitive areas as considered by MoR from the perspective of national security where approval would be granted on a case to case basis.[52] To that effect, Government of India notified Sectoral Guidelines for Domestic/ Foreign Director Investment in Railways.[53] The guidelines proposed are complementary to already existing guidelines and state that MoR shall reserve the right to verify foreign collaborations to ensure healthy competition.

Foreign investors would be at liberty to choose any of the models under Participative Policy, 2012. The guidelines have made it expressly clear that to develop rail connectivity through NGR-JV or through Customer Funded Model, bidding process would not be required. In cases where the projects seek funding under Viability Gap Funding (VGF) Scheme, the same has to be approved by the

51 PIB, *FDI in Railways* (7 Apr. 2017) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=160691> (visited on May 11, 2018).

52 Aishwarya H et. al., *Emerging India: Railways and Defence Open to Foreign Investment* (12 Sep. 2014) <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/test-2.html?no_cache=1&cHash=9c55aeb1965f69d5265f9d79914dbd3d> (visited on May 12, 2018).

53 MoR, *Sectoral Guidelines for Domestic/Foreign Direct Investment in Railways* (20 Nov. 2014) <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/infra/downloads/FDI_10114.pdf> (visited on May 12, 2018).

Department of Economic Affairs, Ministry of Finance and Cabinet Committee on Economic Affairs. The VGF scheme of Government is a policy initiative taken where Government would take an attempt to share the burden of cost of project with private players to attract investments in case of inadequacy of funds for completion of undertaken projects.[54]

Required certification and project approvals with benefits along with financial viability are to be looked into by MoR along with the PPP Cell. PPP Cell would further take up the responsibility of necessary technical and financial due diligence and bid management.[55] Therefore, the Sectoral Guidelines, 2014 has considered the importance of PPP Cell in awarding bids to foreign participation in railways.

Trends in Private Participation Post FDI Policy, 2014

The liberalized FDI Policy, 2014 combined with Participative Policy, 2012 had attracted remarkable foreign investors including EMD (USA), Bombardier Transportation (Canada), GE (USA), Siemens (Germany) and Alstom (France).[56] After permitting FDI in railways, the equity inflow till the end of 2017 was marked with US$ million 389.83 which have been effectively utilised for manufacturing of coaches, wagons and parts along with signalling equipment, locomotives and parts of locomotives. It is also remarkable move that MoR has entered into Memorandum of Understanding with countries including China, France, Spain, South Korea, Japan, United Kingdom, Russia and Germany for cooperation in the area of High Speed Railways.[57]

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54 PPP Cell, Department of Economic Affairs, *Scheme for Financial Support to Public Private Partnerships in Infrastructure (Viability Gap Funding Scheme)* <https://www.pppinindia.gov.in/schemes-for-financial-support> (visited on May 12, 2018).

55 See also, MoR, *Public Private Partnership (PPP) Cell* <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/secretary_branches/pdf/om/Public_Private_Partnership_PPP_Cell.pdf> (visited on May 12, 2018).

56 Make in India, Foreign Investors in Railways <http://www.makeinindia.com/sector/railways> (visited on May 13, 2018).

57 PIB,*Foreign Direct Investment (FDI) inflow in Indian Railways* (10 Apr. 2018) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178552> (visited on May 13, 2018).

Of the noteworthy foreign investments in Indian Railways is the Make in India initiative by Bihar Madhepura Electric Locomotive Facility that entailed foreign direct investment inflow in Rolling Stock manufacturing that was awarded to French investor in 2015. The project was awarded with JV between Alstom, the French investor with MoR at a ratio of 76% and 24% respectively and has been successfully completed as of April, 2018 under the freight rail movement in India with an investment worth more than Rs. 1300 Crore.[58] This falls as a major step in the locomotives and power trains on the Dedicated Freight Corridors of Indian Railways. Procurement cum maintenance agreement was signed with a maintenance period of over eleven years[59] and the project also ensures technological assistance from the foreign partner along with required sustenance.[60]

These trends inherently prove that opening up the railways sector to attract foreign investment is a positive step. With this policy, Indian Railway Network and its infrastructure could be improved and further strengthened with required technological assistance for modernisation and upgradation from foreign investors to set railways sector of India to be at par with international standards.

PPPs in Metro and New Metro Rail Policy, 2017

With wide ranging success of PPPs, an extension to increase funding into railways was sought to be achieved in the metro rail scenario. With success in the experiments, Government introduced the New Metro Rail Policy, 2017 to further realise sectoral growth in metro rails. The policy is an enabling legal framework since the policy makes it mandatory to have PPP to avail assistance for new projects. It provides for rigorous assessment of new proposal through third party agencies. The policy requires the States

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58 <http://railanalysis.in/rail-news/honble-prime-minister-india-dedicates-alstom-indian-railways-madhepura-e-loco-manufacturing-facility-nation-flags-off-first-12000-horsepower-electric-locomotive/> (visited on May 13, 2018).

59 PIB, *Investment to Upgrade infrastructure in Railways* (27 Dec. 2017) <http://pib.nic.in/PressReleaseIframePage.aspx?PRID=1514322> (visited on May 13, 2018).

60 Smriti Jain, *Indian Railways goes green with 12,000 HP 'Make in India' electric locomotive* (Financial Express, 10 Mar. 2018) <https://www.financialexpress.com/infrastructure/railways/indian-railways-electric-locomotive-alstom-make-in-india-madhepura-features-speed/1093976/> (visited on May 14, 2018).

concerned to adopt innovating financing tools and mechanisms to mobilize financial resources and to increase share in assets value. It enables States to take up metro projects exercising one of the three options including PPP with central assistance under the VGF Scheme, Grant by Government of India where 10% of project cost would be given lump sum as central assistance or 50:50 equity sharing model between the Central and State Governments, thereby making it mandatory to have private participation to enter into metro projects. The new policy encourages Design Build Finance Operate Transfer (DBFOT) Model.[61]

The policy also encourages private sector participation in Operation and Management of metro services in different ways including cost plus fee contract where the private operator would be paid monthly or annual payment in the system; the gross cost contract where the private operator would be paid fixed sum in contract duration and operator would bear O&M risk whereas the owner would bear the revenue risk and finally the net cost contract where the operator would collect complete revenue for services provided and if the revenue generation is below the O&M cost, then the owner may agree to compensate.[62] Successful metro projects include Delhi, Bengaluru, Chennai, Mumbai, Gurugram and Hyderabad.

PPP Attempts in Metro- Success and Lessons

PPP in Mumbai Metro

Mumbai Metro Project, through its success, remarks a tale of the creation of a public private platform that would cater the needs of the nation. It was the first of its kind since all the phases of its making, including construction, operation and maintenance, were in the hands of private participants. The project was a result of a JV of Reliance Infrastructure, Veolia transport (France) and Mumbai Metropolitan Region Development Authority (**MMRDA**).[63]

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61 Ministry of Housing and Urban Affairs, *New Metro Rail Policy, 2017*, Private Participation and Public Private Participation, <http://mohua.gov.in/upload/whatsnew/59a3f7f130eecMetro_Rail_Policy_2017.pdf> (visited on May 14, 2018).

62 *Ibid*, para. D (xiv).

63 PPP Toolkit, *Case Study on Mumbai Metro,* <https://www.pppinindia.gov.in/toolkit/ports/module3-rocs-mm1.php?links=mm1> (visited on May 19, 2018).

The project was put forward to build an elevated 11 KM Light Rail Transit and involved the construction of 146 KM of track, 32KM of them being underground. Reliance Infrastructure held 69% of the total equity share, 26% was held by MMRDA and the rest of the share rested with Veolia Transport build on BOOT model.[64] The Versova-Andheri-Ghatkopar line has 12 stations and a car depot across its length.

The project marked a progressive step towards an ambitious plan and provides lessons for future. Noteworthy takeaways of the project include firstly, that the entire bid process after getting its approval from the Government of Maharashtra took more than two years which led to a drastic fall in the number of bidders. Secondly, they realised that the process of acquiring land for the project can also cause delay to the system and therefore all associated actions must be planned accordingly. Thirdly, the approval for VGF also took considerable time which resulted in a further push to start the project. Furthermore, the project also threw light on the need of public support for a project of this magnitude to be commenced and completed.

2. ***PPP in Hyderabad Metro***

The Hyderabad Metro had also paved the way for development of commercial properties close to metro stations for utilising the available utmost use. The main objective of such development was to make the metro rail commuter friendly and welcoming to its users. The Hyderabad Metro Rail Project aimed at constructing an elevated metro rail network along 72 KMs across the region. The private parties involved in the project were L&T companies and a consortium of Hyundai Rotem who mainly supplied rail coaches to the project. The project was therefore known for involving a reputed developer which was a big plus point and L&T management referred to this project as transformational since it will not only change the facilities for a chunk of commuters in the city but also because it had the capacity to take the citizens along the development of the city.[65]

64 Reliance, *Mumbai Metro* <http://www.reliancemumbaimetro.com/overview.html> (visited on May 19, 2018).

65 V Rishi Kumar, *Hyderabad Metro- A Test Case for PPP Projects Business*

A French firm Keolis was also instrumental in the project as they provided for facilities needed in maintenance and operations of the company. However the project had several hurdles to cross with regard to the acquisition of properties during the process. Hyderabad Metro was considered to be a test case for PPP Projects for Metro Railways and is therefore keenly watched for its success in implementation. The cost of such projects is very high and the Central Government wanted to experiment partnerships with private parties and instead use their funds for other essential activities of the state such as health, education etc. This can also help the citizens to get access to world class facilities while accessing such systems.

Other Policy Initiatives

- Automobile Freight Train Operator Scheme, 2013 where the focus is to increase the private sector share in automobile traffic with an opportunity to increase their investments in logistics service providers. The policy also aimed at bringing about tie-ups with end users and train services to ensure private freight operations.[66]

- Special Freight Train Operator Scheme, 2014 was pronounced to increase rail share in commodities including fertilizers, molasses, edible oil, caustic soda etc., where rail coefficient would considerably be low and attract private investment in special purpose wagons with a concession period of twenty years extendable till expiry of codal life of wagon, with minimum investment in three rakes.[67]

- Special schemes were proposed in relation to wagons including the Wagon Leasing Scheme, 2014 which promotes third party leasing of wagons in order to bring in better wagon designs and also procurement for leasing of High Capacity Wagons,

Line, (Business Line, 30 Sep. 2012) <https://www.thehindubusinessline.com/economy/logistics/Hyderabad-metro-a-test-case-for-PPP-projects/article20507142.ece> (visited on May 19, 2018).

66 PIB, *Railway Formulates Automobile Freight Train Operator Scheme 2013* (6 Mar. 2013) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=93150> (visited on May 15, 2018).

67 MoR, Freight Marketing Master Circular, *Special Freight Train Operator Scheme* (22 Dec. 2014) <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/traffic_comm/Master_Circulars/sfto0001_221214.pdf> (visited on May 15, 2018).

Special Purpose Wagons and Wagons for Container Movement.[68] The Liberalised Wagon Investment Scheme, 2014 allows investments in different kinds of wagons by the end-users with the prime objective of attracting private investments to increase rail co-efficient and to induct higher capacity wagons.[69]

- The Private Freight Terminal Policy of 2010 as revised in 2015 provides facilities for private firms to take active part in transportation of commodities using Indian Railway network in containers. The Policy also allows construction of freight terminals by private investors on private land and operation be based on assigned licences and lease basis.[70] The scheme provides for a mechanism where the rakes would be owned by Container Train Operates with an exclusive right to haul the brakes provided in the hands of MoR. To boost PPP investments and freight revenue further, working plan has been proposed to utilise adjacent lands to the stands to have more private freight terminals.[71]

- Indian Railway Stations Development Corporation Limited, SPV was created in order to undertake the development and re-development of railway stations and amenities in the stations. To develop railway infrastructure, Station Redevelopment Policy, 2015 where the PPP models that could be adopted include Build Operate Transfer (BOT), Build Own Operate Transfer (BOOT), and Build Lease Transfer (BLT) based on the suitability and funding viability.[72]

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68 MoR, Freight Marketing Master Circular, *Wagon Leasing Scheme* (19 Dec. 2014) <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/traffic_comm/Master_Circulars/WLS_Master_Circular_191214.pdf> (visited on May 15, 2018).

69 MoR, Freight Marketing Master Circular, *Liberalised Wagon Investment Scheme* (8 Dec. 2014) <http://www.indianrailways.gov.in/railwayboard/uploads/directorate/traffic_comm/Master_Circulars/master_circular_0.pdf> (visited on May 15, 2018).

70 Dedicated Freight Corridor Corporation of India, *Private Terminal Freight Policy*, <http://www.dfccil.gov.in/upload/dfccil-private_freight_terminal_policy.pdf> (visited on May 16, 2018).

71 PIB, *Freight Terminals* (10 Aug. 2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=124695> (visited on May 16, 2018).

72 MoR, *General Guidelines on Redevelopment of A-1 & A Category Stations* (14 Sep. 2015) <http://www.indianrailways.gov.in/StationRedevelopment/Guidelines.pdf> (visited on May 16, 2018).

- Launch of Foreign Rail Technology Cooperation Scheme to primarily focus railways and their technological upgradation through JVs and MoUs with foreign investors, PSUs, customers etc.[73]

All these policies and ancillary schemes proposed by MoR are mainly focused on bringing about resource mobilisation into the sector and to capitalise the opportunities from the private sectors. The policies framed provide for diverse PPP models and new revenue models in order to meet required funding for improvisation, growth and modernisation of Indian Railways Network. Further, the scope of PPP is likely to increase multi-fold apart from the construction, operation and maintenance as it exists today. With pro-active steps being taken by railways to improve electronic facilities, customer satisfaction and services, Wi-Fi facilities, private participation for innovation and technological solutions is bound to steeply increase which would thereby lead to much expected private participation in the sector.

Conclusion and Way Forward

Adoption of varied policies to enhance private participation has projected billion dollar growth in the railway sector and has to larger extent achieved what is projected for in the twelfth five year plan of 2012-2017. The increased metro rail projects and the success accompanied with them enhance the capital inflow into the sector. Also, the liberalised FDI policy combined with the PPP models of Participative Policy boosts and strengthens private participation into the sector. Through series of policies introduced back and forth, the number of railway projects identified and set to launch with private capital being a part has increased multi-fold. Investments were found to rise in construction of new lines, elevation of rail corridor, in DFC, PFT and major PPP instances include station redevelopment to equip with international standards and into mechanisms of power and energy saving projects. However, PPP into railways requires proper implementation and execution of policies to realise full capacity and potential of private participants

73 PIB, *Foreign Rail Technology Co-Operation Scheme Proposed to be Launched* (26 Feb. 2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=115925> (visited on May 16, 2018).

and capital contribution. Hence, it remains to be an sector with greater possibilities yet to be achieved.

Despite this, there are certain issues of concern including the bankability part in case of JV models and increasing government interference in cases of JV, SPVs and other models (except NGR model) created with MoR as a part of it, tend to act as setbacks in drawing private capital into the sector. Most of the models proposed in the policy framework operate on the basis of cooperative federalism whose inherent balance has to be maintained for best results. It is pertinent to note that there exists no independent regulatory mechanism to address any concerns relating to the undertaken or assigned project which might create a negative impact on the private sector's willingness to invest and hence becomes an area of concern. It is also remarked that risks have to be appropriately allocated to best achieve PPP in railways. Further, laying down certain benchmarks for appraisal of relevant projects to be financed and for the purposes of identification of viability of projects are major issues of concern and therefore calls for immediate attention of the Ministry.

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Part III

Analysing Nature of PPP

Chapter 1

Risk Management In Public Private Partnership

Shraddha Nigam

Introduction

In the widest meaning of a Public Private Partnership Project (hereinafter "PPP Project"), it may be defined as "a long term relationship between public and private sectors that serves the purpose of producing a public service or an infrastructure. Governments in developing nations face the challenge of providing social development and services while arranging for adequate funding. The private sector is an attractive option and a reliable partner in the quest for taking care of these economic needs.

Therefore, the general idea of a PPP Project is to mobilize the capital arranged by the private sector for generating economic development and for delivering value for money to the public sector. The goal of a PPP Project should be to outweigh the funding and rate of returns expected by the private sector with the reduced lower-life costs and better risk transfer abilities.

A PPP Contract is a legally binding contract between two entities: the government and the private player. The partners to a PPP agree to share responsibilities, collaborate for expertise, allocate risks and reap the rewards. A PPP Partnership implies sharing of accountabilities and perils for the outcome. It is different from other partnerships between the government and private entities in which the control over policy decisions is retained by the public. In a nutshell, the assignment of Responsibilities, Resources, Risks, Rewards form a PPP arrangement.

In a PPP agreement, risk sharing between parties is essential for determining the project structure. The risks are identified up-front in a project and accordingly the institutional arrangements, financing and contractual arrangements are designed to mitigate those risks. Several stakeholders from the public and private sector collaborate in a PPP Project. Therefore, risks abound in such an arrangement at every stage of the project. The risks also depend on the kind of project being undertaken and its location. PPP Projects aim at increasing efficiency in implementation of projects by entrusting the public sector with sovereign tasks and the private sector with execution.

Introduction to Risk Management

The definition of a 'risk' is extremely broad and covers the wide spectrum of factors or events which are accompanied with the potential to hinder the implementation of a project that has been undertaken. Such risks can emanate from dynamics related to cost, schedule, quality, revenue estimates etc.[1] Thus, the presence of a risk in a project can thwart its successful completion thereby inhibiting the achievement of the project objectives. Owing to such uncertainties, the management of risks is a task of utmost importance.[2]

Types of Risks

Before delving into the process of controlling this risks, it will be helpful to identify the various types of risks that may arise. These include:

- Technical risks which arise due to failure in engineering design

1 Vijayanti Padiyar *et al,Risk Management in PPP* <http://www.globalclearinghouse.org/infradev/assets%5C10/documents/Padiyar%20et%20al%20-%20Risk%20Management%20in%20PPP%20(2004).pdf> (visited on September 20, 2017).

2 Ministry of Finance, *PPP Guide for Practitioners* (2016), <https://www.pppinindia.gov.in/documents/20181/33749/PPP+Guide+for+Practitioners/> (visited on September 20, 2017).

- Revenue risks arise as a result of failure in extraction of resources from the project
- Escalation in operating or maintenance cost of the project lead to operating risks
- Any unexpected changes in cost or obstruction in revenue generation will result in financial risks
- Any changes in the legal regime or non-cooperative government policies lead to political or regulatory risks
- Environmental risks may arise if the project poses any hazards to the environment
- Force majeure risks are triggered when any calamity occurs due to an act of god or war
- Management risks come into the picture only after finalisation of the project. They arise during the operating stage
- Project default may also arise due to combination of any of the risks mentioned above as it may lead to closure of the project.

Risk Allocation

The risks can be assigned by the parties to a PPP contract on the basis of the level of influence exercised by them over those risk inducing events and the level of information that they can procure in the present and the future.[3]

The State has more authority in exercising control over acquisition of land and is better suited to execute tasks associated with such acquisition and also assume responsibility for the incidental risks. However, the private sector parties to a PPP are more adept in handling management arenas and are technologically more advanced as well. Such a superiority arises due to exposure to competitive forces. Therefore, they may be better placed to manage design and construction aspects of the project and risks accompanying the same.[4]

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3 Supra note 2, at 120.

4 Supra note 2, at 121.

The effort put in by the private sector partner will be in proportion to the incentives provided to it as a private party's involvement in a PPP is solely for earning profits unlike the government which is fulfilling its obligation of public welfare. Therefore, the incentives and performance requirements need to be laid down in the PPP contract in advance.[5]

However, the responsibilities endowed on the government are more diversified since it will be held accountable by the people. It needs to retain the expertise to be able to monitor the private entity and it needs to fulfil its obligations as well. Owing to the private sector's expertise in technology and data management, there may arise a situation where an imbalance is created between the two partners and the government must ensure that there are clear and detailed reporting requirements.[6]

Despite discharging successfully the herculean task of allocating the risks that may arise in a PPP Project, some risks may be left out or be unforeseeable owing to the long term nature of most of these projects. Since, all possible contingencies cannot be anticipated at the inception of the contract, the parties must be willing to renegotiate the terms later in time to accommodate such threats or eventualities.[7]Another likelihood in a PPP Project is the failure of the project or the termination of the project prior to the stipulated time due to changes in government policies or a force majeure accident. Such untoward incidents, if not envisaged in the contract, shall have to be dealt with in the course of the project.[8]

Risk Management

The process of risk management is a long and continuing one. It involves identifying, analysing and addressing the risks. The purpose of risk management is to minimise unfavourable outcomes and make the process more proficient. The process continues throughout the life of the project.

5 *Benefits and risks of PPPs*, World Bank Group <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> (visited on September 23, 2017).

6 Gyanendra Kumar et.al, *Risk Management in PPP (Public Private Partnership) Projects*, 3(5), International Journal of Engineering Technology Science and Research, (2016).

7 Supra note 5.

8 Supra note 5.

Risk management is the process of identifying, analysing and addressing the risks that may arise in a project. The process is a continuous one. It is useful in avoiding negative outcomes and improving efficiency in delivering the project.[9]

There are various stages in the process of risk management. These are risk identification, risk assessment, risk allocation, risk mitigation and risk review and monitoring.

An analysis of the risks foreseeable is undertaken several times in the lifecycle of a project. Some of the most important stages are listed hereunder:

Stage 1: During Project Contextualization-

Several documents pertinent to the PPP Project such as strategy of execution, schedule, design, stakeholder analysis etc. are used to establish the organisational structure and project environment. The key elements in the project are identified in the project at this stage in order to ensure that all issues are put in place so that risks can be identified. Objectives and criterion can be identified through documents such as project execution strategy, cost and schedule predictions, designs, analysis of the economic aspect of the project, stakeholder analysis and other documents relevant to the project's purpose.[10]

Stage 2: Identification of Risks

At this stage, a crucial role is played by the public sector and the role of the private sector is a rather passive one. The public sector establishes the bidding procedures and appraises the bidders in term of affordability, the value-for-money (VFM) criteria, and the impacts of risk allocation under different alternatives.[11] The public sector plays an important role at this stage by undertaking the following: (i) ascertaining the scope of the public utility services required to be delivered from the project (ii) establishment of a bidding procedure and evaluating the bidders for affordability and VFM (iii) assessing the impacts of risks and their allocation

9 Supra note 6.

10 Supra note 6.

11 Supra note 6.

under each bidder (iv) creation of a shadow financial model which shall be revised throughout the lifecycle of the project (v) full and proper assessment of the bidder (vi) preparation of a risk matrix for the project (vii) preparation of a 'Information Memorandum' which contains the main features of the project and handing over the same to the private sector

Stage 3: Risk Assessment

This stage is crucial to the private entity in the PPP. The bidder must form a definite opinion about the sustainability of the project. It must also develop an initial assessment of opportunities and risk.[12] Some aspects that must be focussed on by the private sector during this stage include: (i) formation of an opinion about the suitability of the project to the business activities of the private entity (ii) assessment of risks and opportunities in the project (iii) selection of partners for the project (iv) finalisation of bidding strategies. The private sector can seek help from expert opinions in forming such opinions as well.

Stage 4: Risk Allocation between the Parties

At this stage, the government and the private entity work in consonance to achieve a more favourable risk distribution. A comprehensive qualitative and quantitative analysis must be undertaken to ascertain the returns from the project and the risks in obtaining the same must be re-evaluated in more detail.[13] Most of the risks that are present in PPP projects can be shared between Government & the private company. The challenge is to reduce the uncertainty to an acceptable level and allocate responsibility to the party best able to handle it.

Stage 5: Final Risk Negotiation

This stage includes signing the contract and financial closure. Until this stage, most of the risks involving project would have been assessed and allocated during the earlier stages.[14] If there are any major issues that will hinder the project or will prove to be

12 Supra note 6.

13 Supra note 6.

14 Supra note 6.

deal breakers in the future, they must be sorted out at this stage. External consultants are also engaged to conduct due diligence in order to re-check the estimations and enquire into shortcomings on the legal front, if any.

Stage 6: Continuing Risk Negotiations

It is important to notice that the risk negotiations should take place between the time the initial risk estimation is undertaken and the time the final risk negotiation is reached. These activities would ensure the risk feedback between the private sector and the public sector.[15]

Mechanism of Risk Transfer

In the preceding section we have understood the various stages in a project through which risk management takes place. In order to assign risks to the parties in a PPP Project, the parties can decide to entrench the rights related to the risk which involve allocation of the risks as well as an obligation to undertake them to the party at the time of bidding itself. The risks can also be calculated through the Material Adverse Effect (MAE) of the risk which requires altering the concession, financial contribution or reallocation of risks to the parties. The parties can also renegotiate the risk at the time of its realisation.[16]

Misallocation of Risks

Sometimes the parties to a PPP Project improperly assess risks and consequently they are inappropriately allocated to the stakeholders. At such a juncture, the risks must be transferred to the party which is best suited to handle it. The risks can arise due to a variety of reasons. Most of the times, the party that is in the dominant position in the contract or has more bargaining power, tries to pass off more risks to the other stakeholders. Risks can also be improperly analysed owing to insufficient information availability

15 Supra note 6.

16 Prof M Kakati, *Optimal Risk Allocation in Public-Private Partnership Projects in India*, presented at The 2016 WEI International Academic Conference Proceedings (Boston USA, September 2016) <https://www.westeastinstitute.com/wp-content/uploads/2016/09/Munindra-Kakati-Pallav-Baruah.pdf> (visited on September 15, 2017).

at the time of bidding for the contract. Risks also arise during the operation stage of the project and could not have been foreseeable at the time of bidding.[17]

Factors Influencing Success of a PPP Project

Amongst the risks that most affect a PPP Project, Operation and Management risk plays a prominent role. Those projects which have a low Operation and Management risk have been successful projects. Land acquisition risk is considered to be a critical risk. However, the sovereign authority of the State in acquiring land reduces its impact on success of a project. The risks of cost overrun, resettlement and rehabilitation and political risks, however, can turn a successful project into an unsuccessful one.[18]

Model Concession Agreement

Model Concession Agreement (MCA) forms the core of public private partnership (PPP) projects in India. The MCA spells out the policy and regulatory framework for implementation of a PPP project.[19] It addresses a gamut of critical issues pertaining to a PPP framework like mitigation and unbundling of risks; allocation of risks and returns; symmetry of obligations between the principal parties; precision and predictability of costs & obligations; reduction of transaction costs and termination. The MCA allocates risk to parties best suited to manage them.[20]

Sector Specific Analysis

After having looked at the varied spectrum of risks that may arise in a PPP Project, the researcher shall make a brief enquiry into the specific risks that may arise in the port and highway sector in this chapter.

Port Sector

An example of the standard risk allocation clause in a port sector PPP is as follows:

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17 Supra note 18.

18 Supra note 18.

19 Supra note 2.

20 Supra note 2.

"18.4 Risk- Until transfer in accordance with this Article 18, the Port's Assets and the Project Facilities and Services shall remain at the sole risk of the Concessionaire except for any loss or damage caused to or suffered by the Concessionaire due to any act or omission or negligence on the part of the Concessioning Authority under this Agreement."[21]

The most important risks that may arise in a port sector PPP include the risk of external linkages. It includes those risks that occur due to unavailability of timely connectivity to the project site. Such a risk impacts the pace and timeline of the project development.[22] Another risk that occurs in the port sector is risk of planning. It refers to the studies undertaken before the development stage of the project which are insufficient or under-equipped to deal with any deviations from the expected course of the PPP.[23] Any delay in obtaining approvals can lead to cost over-runs.[24] Use of technology that may become out-dated during the lifetime of the PPP can lead to new and increased cost for replacement of the same. This is known as technology risk.[25] Traffic risks may arise if the demand from the port varies from the initially expected demand. This also leads to change in the revenue expected from the project. Such a risk, however, arises only in those PPPs where tariffs from the port are a source of revenue for the project and not in port management PPPs.[26]The risk of payment may also arise if the tariffs for port services are not collected fully or are not set at a level that allows recovery of costs. In projects where revenue is derived from tariffs, the private sector carries the risk of non-payment on its shoulders. The same risk rests with the public sector under management contracts.[27]

21 Clause 18 of Model Concession Agreements for Ports <http://pppshipping.nic.in/writereaddata/MCA_for_Major_Ports.pdf> (visited on September 19, 2017).

22 Typical risks in ports PPP projects <https://www.pppinindia.gov.in/toolkit/ports/module1-racfopd-mriip.php?links=risk1a> (visited on September 19, 2017).

23 Supra note 24.

24 Supra note 24.

25 Supra note 24.

26 Supra note 24.

27 Supra note 24.

Highway Sector

There are several risks that arise in a highway PPP Project. A political risk may arise due to unexpected government intervention. For instance, the government may unilaterally decide to nationalize or expropriate parts of the project.[28] Highway projects are also subject to the risk of delays in obtaining environmental clearance and lead to such environmental and social risks.[29] Any delays in terms of time and cost over-runs, design and engineering changes in the later stages of the project and hindrance in cash flows give rise to construction risks.[30] Lastly, the maintenance specifications of the highway may differ from what had been expected earlier and it may also lead to changes in costs involved in providing for maintenance.[31]

Key Learnings

Risk allocation in PPPs needs to follow the simple thumb rule of "allocating risks to the party which is best able to manage them". Standardizing risk allocation on the basis of this rule has the potential to reduce the transaction time and costs during the stage of tendering and negotiating the contract. In the nascent stage of the project, a risk matrix is created that ascertains risks that can be foreseen at that time. These include uncertain event that can be identified and quantified to a great extent. However, there will be risks that cannot be ascertained at the beginning of the project and therefore risk allocation schemes need to be sufficiently flexible. The problems faced in the execution of a PPP Project can be resolved by setting up an independent regulatory authority in every sector where PPP Projects are undertaken. Setting up of independent regulators can facilitate formation of sector wise model concession agreements, assist in dispute resolutions before the arbitration tribunals or the court, ascertaining benchmarks for performance,

28 Ministry of Finance, *Post- Award Contract Management Manual for PPP Concessions, Volume 1- Highway sector*, (2015), <https://www.pppinindia.gov.in/documents/20181/33749/Post+Award+Contract+Management+for+Highway+PPP+Concessions/65db7f64-fb67-4ca0-b5a1-e40185602bfb?version=1.0> (visited on September 23, 2017).

29 Supra note 30.

30 Supra note 30.

31 Supra note 30.

restructuring of risks etc. For instance, in the case of electricity sector, every state has a regulatory body in India.[32]

Port Sector

Under the existing structure for ports, all the risks associated with the developments in logistics and government policies are solely absorbed by the concessionaire. Evidently, the risk sharing pattern between the government and the private sector entity has been a cause of concern and screams for adequate intervention and revision. At present, traffic risks are also not shared.

Currently, there is no provision for sharing of traffic risks. It has been suggested that there should be a provision in the concession agreement regarding no increase or decrease in concession period for variation of up to 20 per cent from the targeted traffic, which is defined as traffic equivalent to 70 per cent of the capacity of the project.[33]

There is a Tariff Authority for Major Ports (TAMP) that regulates tariffs and supervises them for the private sector service providers. However, it is not a regulator in the wider sense of the term.

Highway Sector

The private sector is mostly ahead of the public sector on the technological front. Therefore, the private sector should be endowed with the responsibility to handle risks which it is capable of managing as it can lead to innovation and efficiency in costs and execution.

Risks that arise in the operation and maintenance of the project should be assigned to the Concessionaire who shall be best suited to manage them. The risk of traffic in a Port PPP Project is alleviated significantly because a port is a natural monopoly and traffic volume can be accurately measured. However, political risks are out of the control of the private sector and are best suited to be handled by the public sector or the State.[34]

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32 Supra note 2.

33 Policy Brief, *Private Participation at Indian Ports: Resurgence through Reforms* (Feb, 2017) <http://briefindia.com/wp-content/uploads/2017/05/PPP-report.pdf> (visited on September 20, 2017).

34 Supra note 30.

As mentioned earlier, there is a growing need to set up a regulator in highway PPPs. The regulator is needed because of the long duration of the PPP Projects and fluctuating types of risks. The role of the regulator should involve overseeing the ongoing projects and intervening in times of clashes. It could also suggest measures to the upcoming projects in order to reduce risks on the basis of such interventions. All in all, a regulator can be a panacea for hindrances faced in highway PPPs.[35]

A comprehensive Model Concession Agreement has been created by the National Highway Authority of India (NHAI). The government has also made a clear financial commitment to stabilise the source of finance in the form of a Central road Fund (CRF). The planning has been successful beside some drawbacks.[36]

The major issue arises with respect to the small size of NHAI projects. The average size of PPP projects (BOT, annuity and through pure contracting SPVs) is 44.6 km. Thus, the consequences of this piecemeal approach of the NHAI are higher per unit capital cost and making the project non-lucrative for large players.[37] The smaller projects lead to a higher per unit capital cost which reduces only when the size of the project reduces. Additionally, even though the CRF is a ring-fenced body, the funds to it are released by the Consolidated Fund of India upon direction from the central government. Therefore, the CRF is rendered a toothless body which has to rely on timing and quantum of allocation of funds by the government. Perhaps more autonomy or setting up of an independent body can cure this drawback.[38]

Concluding Remarks

In PPPs, the concept of risk allocation follows the simple rule of assigning risks to the party which is most capable of managing them while incurring the lowest cost. As simple as the rule may sound,

35 Satya Kalidindi *et.al*, *Financing Road Projects in India Using PPP Scheme* presented at Mid-Continent Transportation Research Symposium (Ames, Iowa, August 20 to 21, 2009) <https://www.intrans.iastate.edu/publications/_documents/midcon-presentations/2009/slide-presentations/1F%20Kalidindi%20Satyanarayana.pdf> (visited on September 26, 2017).

36 Supra note 37.

37 Supra note 37.

38 Supra note 37.

however, it is a challenge when it comes to implementation. Over time, standard model concession agreements have been developed for most PPPs. But these generalisations sometimes ignore that risks can vary owing to an array of factors such as type of the project, model, time, resources, political circumstances, number of stakeholders etc. Therefore, it is a better approach to assess the risks each time before allocation of the same at the time of entering into a project.

The structure of a project is framed largely on the basis of the assignment of risk between the stakeholders. The private sector is best able to take care of risks arising in the development, operation and management stages of the project whereas the public sector is adept in handling risks associated with regulations and approvals. Therefore, creating a matrix of these risks and allocating them before starting a project is instrumental in the successful execution of the project.

The risk allocation needs to be more than a mere formality. Consequently, it needs to be creatively undertaken and customised to the demands of the project being undertaken in order to prove effective. The risks envisaged should not only be those which are foreseeable at the time of execution of the contract between the stakeholders but contingencies must also be created in the contract to manage risks that may arise during the tenure of the project but could not have been predicted earlier.

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Chapter 2

Dispute Resolution in Public Private Partnership

Shraddha Gome

Introduction

Investment in infrastructure is crucial for economic growth and development of the country.[1] It is also necessary for the growth of business and industry sector and to give a competitive advantage to the country. Given the financial constraints and lack of requisite expertise, the government often turns up to private sector to fill in the gap in infrastructure development projects.[2] Public-Private Partnership enables the government to capitalize on private sectors' skills and provide public infrastructure while minimizing the financial burden.[3] Due to its numerous benefits, PPP has emerged as a preferred mode for funding infrastructure.

Infrastructure development and maintenance require long term investment both in terms of cost as well as time. Considering the long duration and complex nature of these projects, contingencies are bound to occur during the course of the project. Parties might be required to re-negotiate the terms of the contract or in certain cases, the contract may frustrate due to reasons beyond the control of the parties such as change in law, force majeure.[4] While some

1 L. Lakshamanan, *Public-Private Partnership in Indian Infrastructure Development: Issues and Options*, <https://www.rbi.org.in/scripts/BS_VIEWContent.aspx?ID=1912> (visited on September 25, 2017).

2 *Ibid.*

3 World Bank, *Government Objectives: Benefits and Risks of PPPs,* (2016), <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> (visited on September 25, 2017).

4 Department of Economic Affairs, Ministry of Finance, *Report of the*

of these issues will be addressed in the PPP agreement, it is likely that some of them will need to be managed during the term of the project. The uncertainty over project details such as risk factor, feasibility study and clearances may make the situation worse. These contingencies and uncertainties may result in disputes between the parties, thereby, delaying the project and escalating the cost. Therefore, efficient dispute resolution mechanism is essential for public private partnership in order to restore the confidence of private investors in the government and the concept of public private partnership.

The chapter endeavours to comprehensively discuss the framework for dispute resolution in public private partnership contract. The chapter is divided into four parts. In the *first* part, the author gives a detailed overview of the public private partnership in India. The author discusses the different modes of entering into public private partnership, importance of dispute resolution clause in public private partnership contracts and extent of judicial interference in PPP contracts. In the *second* part of the paper, the author examines the various mechanism of dispute resolution in public private partnership contracts. The author comprehensively analyses the two most popular modes of dispute resolution i.e. arbitration and expert adjudication in light of major public private partnership projects. In the *third* part, the author highlights the concerns regarding the current state practices in dispute resolution in public private partnership projects. The author also discusses the recommendations in relation to 3P India and Kelkar Committee report. The author concludes the chapter with recommendations to improve the current framework of dispute resolution in public private partnership contracts.

Dispute Resolution in PPP Contracts: An Overview

In India, public private partnership was introduced as part of 'liberalization–delicensing and privatization' regime.[5] The primary purpose of introducing public private partnership was to encourage

Committee on Revisiting and Revitalizing Public Private Partnership Model of Infrastructure, (2015), <https://infrastructureindia.gov.in/documents/10184/0/kelkar+Pdf/0d6ffb64-4501-42ba-a083-ca3ce99cf999> (visited on September 25, 2017).

5 Confederation of Indian Industry, *Private-Public Partnership in Indian Infrastructure: Poised for Growth*, <https://www.ibef.org/download/India_Infrastructure.pdf> (visited on September 25, 2017).

private investment in infrastructure sector to match the huge upsurge in demand. There is no standard definition of public private partnership as it depends on the nature of arrangement between the parties. The Draft National PPP Policy, 2011 defines Public Private Partnership as participation of private entity in provision of public services or assets.[6] There are different modes of entering into Public Private Partnership in India which may broadly be classified into following[7]:

Modes of Entering into PPP

- ***Public Ownership and Public Operation***: Under such arrangement, ownership and control is retained by public and private entity is involved for limited purposes such as to get financing.
- ***Public Ownership but Private Operation*:** Under such arrangement, Operation and Management (O&M) activities are contracted out to the private entity.
- ***Private Ownership and Operation***: In such scenario, private party not only operates but also owns the facility.

The legal framework for PPP in India includes the Constitution of India, legislations and state rules and regulations notified from time to time. Legislations can be general in nature that apply to all PPP contracts such as the Indian Contract Act, 1872[8], Sale of Goods Act, 1930[9], Negotiable Instruments Act, 1881[10] or they can be sector specific such as National Highway Authority of India Act. Apart from these, there are special legislations governing dispute resolution in PPP contracts which include Arbitration and Conciliation Act, 1996[11] and Specific Relief Act, 1963[12].

6 Draft National Public Private Partnership Policy, 2011.

7 UNCITRAL, *Legal Analysis on Public-Private Partnerships regarding Model PPP Rules,* (2012), <https://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf> (visited on September 25, 2017).

8 Indian Contract Act, 1872.

9 The Sale of Goods Act, 1930.

10 The Negotiable Instruments Act, 1881.

11 The Arbitration and Conciliation Act, 1996.

12 The Specific Relief Act, 1963.

Active "measures have been taken by both Central and State Governments to encourage public private partnership through policy reforms and changes in regulatory frameworks. Introduction of standardized contractual documents, establishment of institutional mechanism like India Infrastructure Project Development Fund (IIPDF), streamlining clearance of PPP projects and encouraging FDI in infrastructure sector were some of these initiatives.[13] Various state governments such as Andhra Pradesh, Assam, Bihar, and Gujarat also adopted PPP policies and put in place the necessary institutional mechanisms for the promotion of PPP.[14]

Unfortunately, despite government's efforts, the PPP model has not been a uniform success story all throughout. There are great regional as well as sectoral disparities both in terms of the number of projects and volume of investments. Though, sectors like highway and port development have seen a huge upsurge in the number of PPP, PPP in sectors such as education, health etc. remains under-utilized.[15] Similarly, disparities are apparent if one looks at the state wise distribution of PPP projects. There are numerous reasons for the uneven distribution of private investment in the country.[16] These include the poor economic condition of the state, high land acquisition rate, lack of clear policy and regulatory frameworks, unfavourable political climate and lack of advocacy."

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13 Harisankar K.S. and Sreeparvathy G., *Rethinking Dispute Resolution in Public–Private Partnerships for Infrastructure*, 5(1) Journal of Infrastructure Development (2013).

14 *Ibid.*

15 Department of Economic Affairs, PPP Database, <https://www.pppinindia.gov.in/projects-summary?p_p_id=projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2&_projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj_jsppage=%2fhtml%2fprojectsummarydisplay%2fview.jsp&_projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj_curtabs=sector+wise+summary> (visited on September 25, 2017).

16 Department of Economic Affairs, PPP Database, <https://www.pppinindia.gov.in/projects-summary?p_p_id=projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2&_projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj_jsppage=%2fhtml%2fprojectsummarydisplay%2fview.jsp&_projectsummarydisplay_war_pppinindiaprojectportlet_instance_pxby5cotkthj_curtabs=state+wise+summary> (visited on September 25, 2017).

Dispute Resolution in PPP Contracts

Disputes may arise at any stage of public private partnership. Therefore, it is important to understand the various stages of PPP and the nature of disputes that may arise in each stage.

There are generally seven stages in a PPP project implementation.[17] The *first* stage is the identification stage. In the identification stage, potential projects are identified and their suitability for PPP is assessed. The second stage involves constitution of project management and project review unit. The *third* stage is full feasibility wherein a detailed consideration of potential project identified in the first phase is undertaken. Risk analysis is undertaken at the *fourth* stage involving project structuring wherein indicative project cost and contractual framework is decided. In the *fifth* stage, preparation for bid documents is undertaken. They include request for qualification, request for proposal and concession agreement. The *sixth* stage is Procurement. Under this stage, application for final approval is made and the bidder is chosen. It takes the project close to its operational stage. The final stage is Contract Management and Monitoring and Project monitoring begins at this stage.

Though, the dispute may arise at any of these stages, however, disputes in relation to private partner and disputes under the scope of PPP contracts usually depend on the kind of arrangement between the public and private partner.

Nature of Disputes

Before we delve into the different modes of dispute resolution, it is important to understand the nature of disputes that may arise between the parties. These include[18]:

1) Differing interpretation of express terms of contracts or terms implied on facts

2) Obligation implied in law

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17 Harishankar and Sreeparvathy, Supra note 13.

18 *Importance of Arbitration in Government Contracts*, <https://blog.ipleaders.in/importance-arbitration-government-contracts/> (visited on September 25, 2017).

3) Allegations of breach of contract

4) Payment for work done

5) Extension of time

6) Duty of 'reasonable skill and care' by the contractor

Reasons for Increasing Number of Disputes in PPP Contracts

There are several reasons for frequent disputes including[19]:

1) Standardization of contract documents without adapting it for individual activity results in unnecessary misunderstanding.

2) Lack of clarity about the project at the time of bidding is another major factor.

3) The delay in payments by government organisations has been a long-standing issue. It often results in dispute between the contracting parties.

4) Poor drafting of the contracts without understanding the consequences can result in dispute.

5) Construction contracts being executory claims arise naturally as per terms of contract.

According to the Economic Survey, 2014-15, the stock of stalled projects in India amount to 7% of the gross development product which is equivalent to Rs.8.8 trillion.[20] They act as a major burden for the banking sector and have worsened the infrastructure bottlenecks in India.[21] High value contracts with inadequate dispute resolution mechanism and the costs of are perceived as very high risks. Therefore, time bound resolution of disputes is of utmost importance to the parties as delay in project often translates into cost escalation. It is primarily for this reason that dispute

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19 *Ibid.*

20 Asit Ranjan Mishra, *Kelkar Panel Suggests Easier Funding for PPP Projects*, (Dec. 29, 2015), <http://www.livemint.com/Politics/Rx7GPI7mRInq5bJVRC5nhO/Kelkar-panel-suggests-easier-funding-for-PPP-projects.html> (visited on September 25, 2017).

21 *Ibid.*

resolution clauses are incorporated in the PPP contracts which clearly lay down the preferred method of dispute resolution and other procedural details. A detailed discussion regarding the pros and cons of various methods of dispute resolution adopted in PPP contracts will be undertaken in the next section.

Extent of Judicial Interference in PPP Contracts

As a general policy, judiciary in India refrains from interfering with the policy matters. They are the prerogative of the government and separation of power requires minimal court interference.[22] Non-interference is also in public interest as it ensures avoidance of unnecessary delay caused by challenge to economic policies which may be counter-productive to public interest. However, this does not mean complete non-interference. The court has the duty to ensure that effective checks are put in order to remove any illegality or procedural impropriety.[23] Generally, when the matter related to bidding and award of the projects, the courts refrain themselves from interfering unless the arbitrariness and illegality is apparent on the face of it. Further, the nature of disputes which arise at the stage of Contract Management generally lie under the domain of civil court. For instance, disputes may arise over the validity of contract, interpretation of term/clause, enforceability, non-performance of a contractual obligation or for seeking relief which fall within the domain of civil courts.[24]

A Critical Study of the Dispute Resolution Mechanisms in PPP Contracts

Quick and efficient method of dispute resolution is crucial for the success of the public private partnership. Dispute resolution mechanisms in PPP may vary from litigation to mediation and decision to opt for a particular mode of dispute resolution often depends on the nature of contract that the parties enter into. Litigation in India is both cumbersome and expensive. Most court systems are backlogged and it can take months or even years before a case is heard. Therefore, parties often turn to alternative dispute resolution. Parties prefer alternative dispute resolution

22 Harishankar and Sreeparvathy, Supra note 13, at 26.

23 Harishankar and Sreeparvathy, Supra note 13, at 26.

24 Harishankar and Sreeparvathy, Supra note 13, at 26.

mechanisms for several reasons. *First*, alternative dispute resolution mechanism is less expensive and quicker as compared to litigation. *Second*, alternative dispute resolution negotiations and settlements are confidential, unlike trials, which are part of the public record. *Third*, alternative dispute resolution mechanisms promote party autonomy and allow flexibility.

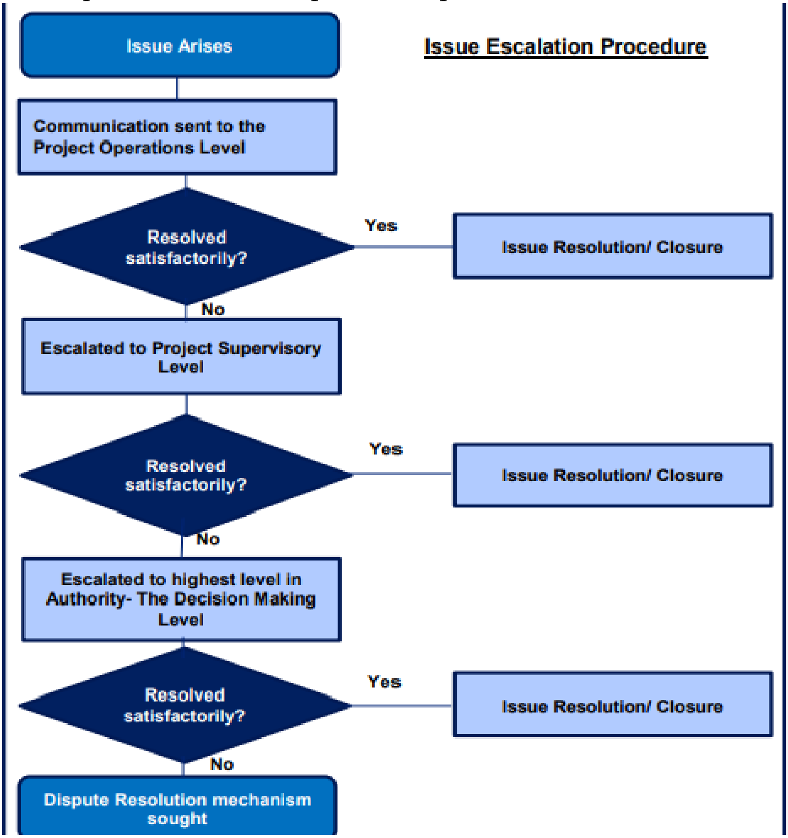
Generally, the following types of alternative dispute resolution mechanisms are used by the parties:[25]

- ***Negotiation***: The first preferred method of resolution of disputes is to arrive at an amicable settlement through negotiation. If parties reach amicable settlement, the terms agreed upon are converted into an agreement which is binding on both parties.
- ***Facilitated Negotiation***: Under facilitated negotiation, a facilitator is appointed by the parties to assist them in the analysis of the merits of the case. However, the facilitator does not give any opinion.
- ***Mediation***: Another method adopted under PPP contracts is mediation wherein mediator tries to assist parties to reach a settlement through joint as well as individual sessions with the parties.
- ***Conciliation***: Conciliation is a non-binding procedure and settlement agreement signed by both parties and authenticated by a conciliator is binding like a decision of court of law.
- ***Non-binding expert appraisal***: A neutral third party provides an appraisal on the merits of the cases and suggests an outcome for their consideration.

Two very important and most popular method of alternative dispute resolution mechanism in PPP contracts is arbitration and expert adjudication which are discussed in detail below. However, reference to dispute resolution mechanism is not made the moment dispute arises. They are first sought to be handled at the project

25 The World Bank, *Dispute Resolution Systems*, <https://ppp.worldbank.org/ppp/legislation-regulation/framework-assessment/legal-environment/dispute-resolution> (visited on September 25, 2017).

operation level or supervisory level. If they still remain unresolved, the dispute is referred as per the dispute resolution clause.



Arbitration in PPP Contracts: Advantages and Disadvantages

In India, Arbitration is governed by the Arbitration and Conciliation Act, 1996.[26] The Act, which is based on UNCITRAL Model Law, lays down a framework for legally binding arbitration awards and challenge to its enforcement. It allows for both institutional and ad hoc arbitration. Few states have made reference to arbitration mandatory in their contracts such as the Punjab Infrastructure Development and Regulation Act, 2002.[27] The choice of arbitration

26 The Arbitration and Conciliation Act, 1996.

27 Punjab Infrastructure Development and Regulation Act, 2002.

excludes court interference. Though, Section 28 of the Indian Contract Act[28] holds any agreement in absolute restraint of legal proceedings to be void, but an exception exists to provide for arbitration.

In disputes between a concessionaire and government entity, arbitration is the most preferred method of dispute resolution.[29] Arbitration is widely known for its speedy disposal and technical expertise which can help the parties to avoid unnecessary delay in the project owing to disputes. Active efforts have been undertaken by several state governments to adopt arbitration as dispute resolution mechanism in government contracts. Enactment of Madhya Pradesh Madhyastham Adhikaran Adhiniyam Act, 1983[30] and adoption of arbitration clause [and reference to Karnataka Arbitration Centre] in contracts of State of Karnataka[31] are some examples of this.

Unfortunately, in recent times, arbitral proceedings have itself become one of the major contributors to the delay in PPP projects. Further, frequent court intervention in arbitral proceedings defeat the purpose why parties opt for arbitration. These concerns are best illustrated through the example of Nathpa Jhakri Hydro-electric Project and Dhabol Power Project.

Nathpa Jhakri Hydro-electric Project: Concern Regarding Delay

The importance of efficacy of arbitration in resolving disputes in PPP model cannot be over emphasized. Unfortunately, arbitration often results in excessive delay and cost thereby adding to project cost and making the environment for investment hostile. One prime example of this is the Nathpa Jhakri Hydro-electric Project.[32] The project was related to the construction of 1,500 MW hydro-electric dam across river Sutlej. Phase I of the project required

28 Sec. 28, Indian Contract Act, 1872.

29 *Importance of Arbitration in Government Contracts*, <https://blog.ipleaders.in/importance-arbitration-government-contracts/> (visited on September 22, 2017).

30 Madhya Pradesh Madhyastham Adhikaran Adhiniyam Act, 1983.

31 Government of Karnataka, Circular No. Law 273 LAC 2012 (January 10th, 2014), <http://arbitrationcentreblr.org/images/Incorporation%20of%20Arbitration%20Clause%20in%20Government%20Contracts.pdf> (visited on September 25, 2017).

32 Harishankar and Sreeparvathy, Supra note 13, at 28.

river diversion and was stipulated for a period of 56 months. However, it took 131 months to complete the phase I.[33]Moreover, expenditure far exceeded the estimated cost. One of the major contributors to the delay and increase in cost was the arbitral proceedings. Several recommendations of the Dispute Resolution Board were not accepted by the parties and repeated requests for extension were made. The final payment was made after a delay of 10 years out of which 3 years were contributed by the delay in arbitral proceedings.[34]

Dhabol Power Project: Frequent Court Intervention

Frequent intervention of courts in arbitral procedures is yet another concern which defeats the purpose why parties choose arbitration.[35] This is evident from the case involving the Dhabol Power Project which was a major foreign investment in India during the 1990s phase. Both the central and the Maharashtra state government opted for international arbitration despite the enactment of 1996 Act. Though, the arbitration clause was duly incorporated in the agreement, however, there were a number of issues like lack of transparency, allegations of corruption, environmental and human rights issues, which remained unaddressed by the government.[36] The government's refusal to submit the dispute to arbitration and frequent court intervention judiciary hindering the arbitration procedure adversely impacted the project.[37] Given the fact that arbitrators are often the retired judges, they have the tendency of being overly cautious about the procedural aspects which does more harm than good. Greater flexibility has its pros and cons and can at times adversely affect the efficiency of arbitral proceedings.

Adjudication by Sectoral Regulators v. Arbitration: A Comparative Analysis

Another commonly used dispute resolution mechanism in PPP contracts is expert adjudication. Expert adjudication gains

33 Harishankar and Sreeparvathy, Supra note 13, at 28.
34 Harishankar and Sreeparvathy, Supra note 13, at 28.
35 Harishankar and Sreeparvathy, Supra note 13, at 28.
36 Harishankar and Sreeparvathy, Supra note 13, at 28.
37 Harishankar and Sreeparvathy, Supra note 13, at 28.

importance when dispute is of technical is nature or requires expert inputs.[38] In such cases, dispute may be referred to quasi-judicial body comprising of technical and legal experts. One of the major causes for their rise is the emergence of sectoral regulators such as the Central Electricity Regulatory Commission and the Appellate Tribunal for Electricity under the Electricity Act, 2003.[39]

Expert adjudication has additional advantages as compared to arbitration. *First*, the regulator has relevant expertise to resolve the disputes in a timely manner. It includes technical, legal as well as financial inputs. One such example is the Central Electricity Regulatory Commission which has diverse experience and expertise including in fields like finance, engineering, law, management and commerce.[40] *Second*, often regulators have the duty to assist the government and provide advisory services in matters related to formulation of policy. Therefore, regulators are well equipped with relevant knowledge and expertise needed for adjudication of the disputes. *Third*, adjudicatory authority is required to decide the matter in time bound manner. Often, a fixed time period is laid down to decide on the disputes. This increases the efficiency of proceedings.

An example of this is the Electricity Act which lays down the time frame of one hundred and twenty days for commission and one hundred and eighty days in case of appellate tribunal.[41] Judicial trend also seems to favor expert adjudication. The Supreme Court in *Uttar Pradesh Power Corporation Ltd* v. *NTPC Ltd*[42] noted that since the Central Commission which is constituted under Section 3 of Electricity Regulatory Commissions Act, 1998 is an expert body, judiciary should refrain from interfering with its decision. Being an expert body entrusted with the task of determination of tariff, it is best suited to decide on such technical aspects which require high level of knowledge in the specified field. Given the concerns regarding the delay and high cost involved in arbitration, expert adjudication is a better alternative.

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38 UPSEB v. Banaras Electric Light & Power Co. Ltd, 2001, 7 SCC 637.

39 The Electricity Act, 2003.

40 Section 77(1), The Electricity Act, 2003.

41 Section 111, The Electricity Act, 2003.

42 Uttar Pradesh Power Corporation Ltd v. NTPC Ltd, Civil Appeal No. 1138 OF 2007.

Dispute Resolution in PPP Contracts: Concerns Regarding Current State Practices

As discussed above, settlement of disputes in time bound manner requires an effective and efficient dispute resolution mechanism. Given that PPP involves high capital and investment, the perceived risks and costs of delay in resolution of disputes can be fatal to the country. Thus, it becomes imperative to have a neutral third party to assist the parties with necessary technical, financial and legal expertise and settle their disputes expeditiously. Unfortunately, despite the several options available with parties to settle their disputes, the current state of dispute resolution in PPP is a major concern for all stakeholders. In 2013 alone, there were over 135 cases before arbitral tribunal with over Rs. 10,000 Crores being disputed with regard to National Highways Authority of India.[43] Moreover, there cases involving over Rs. 2000 crores of arbitral awards were being contested in courts.[44] This is separate from the pending cases from different departments of Central Government like Railways, Military Engineering Services and other State Government departments. To improve the state of dispute resolution in PPP contracts in India, several recommendations have been made.

Recommendations for Revamping Dispute Resolution in PPP Contracts

Constitution of India 3P

Idea of 3P India was revived after the recommendations submitted by Kelkar committee constituted to look into PPP in India.[45] 3P India is an infrastructure think-tank that was proposed to be set up in 2014. The planned 3P India entity will act as a Centre for excellence and enable research.[46] It will examine issues related

43 Mihir Mishra, *Rs. 11,048 Cr. Arbitration Claims on NHAI*, The Business Standard (January 20, 2013), <http://www.business-standard.com/article/economy-policy/rs-11-084-cr-arbitration-claims-on-nhai-111042600105_1.html> (visited on September 25, 2017).

44 *Ibid.*

45 Asit Ranjan Misra, *Government looks to Strengthen Dispute Resolution Mechanism in PPPs*, The Live Mint, (Jan. 7, 2016), <http://www.livemint.com/Politics/b19mWFzPc0Y7bhtxP8Nv7K/Govt-looks-to-strengthen-dispute-resolution-mechanism-for-PP.html> (visited on September 25, 2017).

46 *Ibid.*

to regulation, financing structure, management of Public-Private Partnership projects. It is likely to be a non-profit company on the lines of the National Skill Development Council (NSDC). It will not have a regulatory role and policies will be made by the finance ministry.

Kelkar Committee Recommendations

The Kelkar panel recommended enacting a statute under Article 323B of the Constitution of India and the creation of the two-tier dispute redressal mechanism.[47] According to the committee, any dispute between a private party and the government under a PPP should be submitted to the IPAT i.e. adjudication tribunal.[48] After judging the admissibility, IPAT will set up a multi-disciplinary expert committee (IPRC) with relevant expertise for the specific case. After reviewing the recommendations of the IPRC, IPAT will hear representations from all stakeholders and pronounce an order within a specified time frame. The final order of the IPAT can be challenged only before the Supreme Court.[49]

India's success in deploying PPPs as an important instrument for creating infrastructure in India will depend on a change in attitude and in the mind-set of all authorities dealing with PPPs, including public agencies partnering with the private sector, government departments supervising PPPs, and auditing and legislative institutions providing oversight of PPP's.

The Government may take early action to amend the Prevention of Corruption Act, 1988. The Act does not distinguish between genuine errors in decision-making and acts on the report of the Committee on Revisiting and Revitalising the PPP Model of Infrastructure. Measures may be taken immediately to make only malafide action by public servants punishable, and not errors, and to guard government officers and bureaucrats from unreasonable acquisition for decisions taken with bonafide intention. The government may speed up amendment of the Prevention of

47 Misra, Supra note 43.

48 Misra, Supra note 43.

49 Misra, Supra note 43.

Corruption Act, Vigilance and Conduct rules applicable to government officers.[50]

There is also an immediate need to further strengthen the three key pillars of PPP frameworks namely Governance, Institutions and Capacity in order to build an established foundation for the next wave of implementation.

Apart from changing the mind-sets of the people, there is an urgent need to rebuild India's PPP capacities. Structured capacity building programmes for different stakeholders including implementing agencies and customized programmes for banks and financial institutions and private sector need to be evolved. The need for a national level institution to support institutional capacity building activities must be explored. Each and every stakeholder has strongly emphasised on the urgent need for a dedicated institute for PPPs as was announced in the previous Budget.[51]

The Committee cannot overstate the criticality of setting up of independent regulators in sectors that are going in for PPPs. The Committee recommends setting up these independent regulators with a unified mandate that encompasses activities in different infrastructure sub sectors to ensure harmonized performance by the regulators.

The Committee welcomes the current review and amendment of the Arbitration Act, and also has strongly encouraged the need for time limits on hearings.

The primary concern of the Committee was the optimal allocation of risks across PPP stakeholders. Inefficient and inequitable allocation of risk in PPPs can be a major factor in PPP failures, acting in the disadvantage of the citizens of India. The Committee notes that the adoption of the Model Concession Agreement (MCA) has meant that project specific risks are rarely addressed by project implementation authorities in this "One-

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50 Press Information Bureau Govt of India Ministry of Finance, Report of the Committee on Revisiting & Revitalising the PPP Model of Infrastructure Development Chaired by Dr. V.Kelkar, Dec. 28, 2015, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133954>.

51 *Ibid.*

size-fits- all" approach. A legitimate allocation of risks can only be undertaken in sector and project-specific contexts.

For the next generation of PPP Contracts, the Committee suggests the following broad guidelines while allocating and managing risks:

1) an entity should bear the risk that is in its normal course of its business;

2) an assessment needs to be carried out regarding the relative ease and efficiency of managing the risk by the entity concerned;

3) the cost effectiveness of managing the risk needs to be evaluated;

4) any overriding considerations/stipulations of a particular entity need to be factored in prior to implementing the risk management structure.

5) DEA, or preferably the 3PI, should deploy sophisticated modelling techniques that exist to assess risk probabilities and the need to provision for them; and

6) there should be ex-ante provisioning for a renegotiation framework in the bid document itself.[52]

The final decision on a renegotiated concession agreement must be based on:

1) Full disclosure of the renegotiated estimated long-term costs, risks and potential benefits;

2) Comparison with the financial position for government at the time of signing the concession agreement; and

3) Comparison with the existing financial position for government just prior to renegotiation. This will permit the authority regulating the Report of the Committee on Revisiting and Revitalizing the PPP Model of Infrastructure xi concession to take a decision based on a full comparison of the likely outcomes over the future of the concession.[53]

The authorities may be advised against adopting PPP structures for very small projects, since the benefits of delivering small PPP

52 *Ibid.*

53 *Ibid.*

projects may not be in consonance with the resulting costs and the complexity of managing such partnerships over a long period. The transaction costs of well-structured PPP projects are significant, including essential but expensive expert advisory services.

Improving a PPP project's risk profile so that it is more suitable for overseas and domestic long-term investors can be accomplished through partial recourse to credible third-party institutions. This could be implemented through a partial credit guarantee or cash flow support mechanisms. The following points were mentioned with regards to reinvigorating the sectors:

a. Independent sector regulators essential.

b. Build upon maturing landscape in Roads and Ports PPP and move into the next phase: Roads: avoiding delays, institutionalized dispute resolution, improved project development activity, monetization of operational assets, efficiency and transparency by electronic tolling, etc.

c. Ports: review of role and need of Tariff Authority for Major Ports (TAMP), review of MCA, quicker clearances, rationalized leases and stamp duties.

d. Airport: PPPs to be encouraged where viable in Greenfield and brownfield projects, have policy that addresses potential demand for airport services in the country, notify a unified regulatory structure, clarity in delineation of Till policy,

e. Encourage use of PPPs in sectors like Railways, Urban, etc. Railways to have an independent tariff regulator, tap potentially useful PPP opportunities including brownfield assets.

Conclusion and Recommendation

"Dispute resolution mechanisms are slow and not very well developed, often derailing project timelines and freezing funds, thus derailing project timelines"

-Vijay Kelkar Committee Report[54]

54 Department of Economic Affairs, Ministry of Finance, *Report of the Committee on Revisiting and Revitalizing Public Private Partnership Model of Infrastructure,* <https://infrastructureindia.gov.in/documents/10184/0/

Profit maximization is the primary motive of private investors when they enter public private partnership. Disputes are major cause of concern for private investors since disputes result in delay in projects which further translate into escalation of project cost. In fact, disputes do not just harm the private investors but also adversely impact the government by stalling the delivery of public service/assets. Therefore, effective dispute resolution mechanism is crucial in attracting private investment and ensuring timely delivery of services. The most effective and efficient way to resolve the dispute is through amicable means. Parties may also resort to conciliation wherein the conciliator may assist the parties to reach a settlement at the earliest.

However, given the complex nature of PPP contracts and involvement of huge capital, dispute settlement through amicable means is not always a feasible or possible option for the parties. In such circumstances, parties resort to arbitration. Arbitration offers numerous advantages to party such as low cost, expediency, procedural flexibility and enforceability of award. Unfortunately, frequent judicial intervention and lackadaisical approach of arbitrators coupled with parties increasing abuse of due process has resulted in a situation where arbitration is no better than litigation.

The author concludes that under such circumstances adjudication by regulatory bodies like the Electricity Appellate Tribunal is a better alternative to arbitration. Expert adjudication offers several advantages such as availability of requisite expertise, statutory time frame and restrictions on interference by judiciary. The author believes that efforts should also be made to lay down a detailed framework for dispute resolution in PPP by making suitable changes to Draft PPP Rules, 2011.[55] A harmonized system of dispute resolution with a single appellate authority at the Centre would go a long way towards speedy disposal.

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55 Draft Public Private Partnership Rules, 2011.

Chapter 3

Changing Contours of Competition: An Analysis on Market Regime in Critical Infrastructure Development by Public Private Partnership

BHAGYALAKSHMI R.

Introduction

The economic stature of a country is well resonated by the efficient critical and social infrastructure it possess[1]. The developed economies in the world have magnificent infrastructure utilities in comparison with the developing economies like India. The infrastructure requirement for India accounts to an extent of Rs.40, 992 billion in the twelfth five year plan (2012-2017) with the expectation of fifty percent investment by the private players[2]. This projected increase in investment for development of infrastructure is approximately estimated to be 43 trillion in the year 2022[3]. Thus the ever increasing demand for infrastructural facilities in numerous economies has led to the development of the concept of Public Private Partnership (PPP). The contracting out of essential facilities to the private player was not only due to the symbolic gulf between public funding and expenditure required for development[4]

1 N Bhanu Prakash and Rama Lingeswara Rao, *Infrastructure in India: Contribution of Ports to the Economy and the Road Ahead*, The IUP Journal of Infrastructure, Vol.9, No.4, 2011.

2 Indrani Roy Chowdhury and Prabal Roy Chowdhury, *Public-Private Partnerships and Governance* in Swapnendu Banerjee et.al., *Understanding Development an Indian Perspective on Legal and Economic Policy*, Springer India, 2016.

3 Asit Ranjan, *India needs 43 trillion of Investment in Infrastructure over next five years: Jaitley*, Livemint, April 1, 2017 <http://www.livemint.com/Politics> (visited on December 30, 2017).

4 Seungwoon Son, *Legal Analysis on Public-Private Partnership regarding Model PPP Rules*, Dankook University in Republic of Korea, June 2012.

but also to captivate the private sector's management skills, experience and expertise[5]. There is no statutory definition of the concept of PPP in the Indian context but the extensive practice and usage of PPP gives a broad understanding of the concept as the contract between a private party and a government entity for long term with the greater intention for providing public asset or service wherein the significant risk and management responsibility are undertaken by the private party and the remuneration is attached to the performance[6]. PPP models have tremendously imparted their presence in the development of critical infrastructure and presently trading its way to social infrastructure development as well. Undoubtedly public private partnership models have been adopted as the successful project implementation model in India and it has invariably stabilized the growth of the infrastructural sector[7] in the country.

The infrastructural development either by traditional procurement or public private partnership is essentially undertaken in a relevant market. Competition is inevitable in every market economy across the globe and ensuring fair competition is the primary goal behind the adoption of allied competition legislations[8]. The implementation of PPP project essentially entails the engagement of private entities in the market for management as well as sharing risk responsibilities. The very inception of PPP project from the selection of concessionaire to the completion of project has serious implications upon Competition across various sectors. The free entry of private players into the project and the easy exit after successful completion implies the competitive efficiency of the relevant market. Unfortunately the concession agreements and the policy parameters fails to ensure such free entry and exit leading to unfavorable competitive environment. Similarly there is no accountability or transparency with respect to bidding and selection of concessionaire. Since the PPP project

5 David W Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnership in the United States,* 39 Pub. Cont. L. J. 351,352-353.

6 Public Private Partnership Reference Guide, World Bank, Asian Development Bank and Inter American Development Bank, 2014.

7 Compendium of PPP Projects in Infrastructure, PPP& Infrastructure Division, Government of India, March 2014. <http://planningcommission.gov.in> (visited on December 30, 2017).

8 Shikhar Kacker and Kartik Ganapathy, *Competition Law and Infrastructure*, Competition Law Reports, Vol.1, Oct-Dec 2008.

involves the engagement of private players in the market, the issues concerning their selection and allocation of procurement process has significant impact on the Competition. The PPP model is also met with the issues pertaining to abuse of dominance by virtue of exclusivity provision in the concession agreement. The regulatory overlap of sector specific regulators with Competition Commission of India (CCI) is another serious concern. Hence, the paper intends to analyze the regulation of competition in Infrastructure project development by Public Private Partnership and also extends to figure out the emerging as well as inherent issues pertaining to competition in the market regime of PPP projects.

Regulation of Competition in PPP Projects

The industrial licensing system with excessive governmental regulation has resulted in unsatisfactory growth of Indian economy[9]. The trajectory of economic growth was staggered by investment and trade barriers leading to inefficient competition in market. This has led to the adoption of liberalization policy in the year 1991 with the greater intention of enhancing economic relations and industrial growth[10]. The reform has allied objective to foster the nation into a market driven economy and contributed to the development of structured economic policies and economic legislations. The evolution of market based legislation in India has its roots firm on Mahalanobis Committee,[11] which was suggestive of a substantive inquiry of industrial structure. The recommendations down the line resulted in setting up of Monopolies Inquiry Commission, 1964 and subsequently Monopolies and Restrictive Trade Practices Act (MRTP), 1970 was enacted. The MRTP Act primarily dealt with regulating monopolistic behavior in the market and could not evolve and pace with the changing dimensions of market behavior. The inherent need for fostering competition in the market led to the repeal of MRTP Act by the Competition Act, 2002[12].

9 K R Gupta, Liberalisation and Globalisation of Indian Economy,Vol.3, Atlantic Publishers, 1999, p.151.

10 Atul Kohli, *Politics of Economic Growth in India 1980-2005 Part II: The 1990s and Beyond*, Economic and Political Weekly, April 18, 2006, pp.1361-1370.

11 S Charkavarthy, *Evolution of Competition Law and Policy in India* in Pradeep S Mehta (ed.), *Evolution of Competition Law and Their Enforcement A Political Economy Perspective*, Routledge, 2012, p.75.

12 Section 66 of The Competition Act,2002.

The Competition Act, 2002 substantially in its preamble invokes the ideal of preventing practices having adverse effect on competition whereby competition in markets are promoted and sustained. The preamble is also set in tune with the objective of ensuring protection of interest of consumers and enhancing freedom of trade. The Act set forth the establishment of Competition Commission of India (CCI) as the market regulator and Competition Appellate Tribunal as the appellate body for greater compliance of the enshrined objectives. The Act permeates its regulatory extension to infrastructural projects as well, since it falls under the ambit of commercial agreement between a private player and a government entity[13]. The exception for government in this regard is only with respect to functions which are effectively sovereign in its nature and by virtue of which the CCI has its regulatory power over concession contracts. The concession contracts are purely commercial agreements entered for the implementation of PPP projects. There are sector specific regulators in most of the infrastructure sector like Telecom Regulatory Authority of India (TRAI), National Highway Authority of India (NHAI), Petroleum and Natural Gas Regulatory Board (PNGRB) etc but these regulators have little advocacy with competition concerns emerging in the sector. Hence the CCI governs the competition and allied matters in relation to infrastructure sectors amidst independent sectoral regulators.

The duties of the Competition Commission of India (CCI) are well aligned with the preamble of the Act[14]. Apart from the significant duties entrusted on CCI, there are extensive powers and functions conferred on the Commission which ranges from power to undertake inquiry[15] to regulate its own procedure[16]. Thus, there should be adequate caution in structuring and granting a concession agreement in PPP projects so that the process eliminates an appreciable adverse effect on competition. The project cycle of PPP essentially starts from identification of a potential project by the government and the selection of private

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13 Piyush Joshi and Anuradha R V, *Final Report of Study on Competition Concerns in Concession Agreements in Infrastructure Sectors*, June 2009.

14 Section 18 of the Competition Act, 2002.

15 Section 19, 20, 26 and 29 of the Competition Act, 2002.

16 Section 36 of the Competition Act,2002.

player (concessionaire)[17]. Though diverse methods can be employed in identifying the potential private player, the most prominent method envisaged in the Indian regime is competitive bidding process[18]. The Planning Commission, Government of India has initiated a Model bid document comprising of two stage processes which includes Request for Qualification (RFQ) and Request for Proposal (RFP)[19] .The process needs to be effectively competitive in nature as the selection of private player from the market envisages greater scrutiny of competitive advantage to the project. A detailed discussion on competitive issues pertaining to selection of concessionaire is extensively dealt in the subsequent part of this chapter. The Competition Act does not prevent dominance in a market but it intends to eliminate abuse of dominance[20]. The contracting out of essential facilities to a private party can result in dominance in market but it should not result in dilution of public interest[21]. The decision clearly demarcates the competitive advantage and the significance of effective scrutiny in contracting out of essential facilities to the private entity or the consortium. Apart from the selection of concessionaire, competitive concerns emerge in structuring of concession agreement, granting of project, implementation as well as critically the re-negotiation prospect which is inevitable in a long term contract like PPP.

Relevant Market for Infrastructure Development by PPP

The competitive regime and its regulation by CCI are specific to a relevant market. The establishment of abuse of dominance and anti-competitive agreements of an undertaking is closely linked to the determination of relevant market in which the entity exists. There is profound discussion of relevant market under the EU

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17 The PPP project essentially entails a concession agreement which is entered between the government entity and private player for the implementation of project. The authority which contracts out the essential facility for PPP implementation process is regarded as the Concessioning Authority and the private entity to which the project is awarded is known as the Concessionaire. <www.pppindia.gov.in> (visited on January 5, 2018).

18 Supra note 13.

19 <www.planningcommission.nic.in> (visited on January 5, 2018).

20 The Indian position on elimination of abuse of dominance is largely influenced by the American Jurisprudence on Abuse of Dominance. United States v Grinell Corporation, 384 U.S. 563 (1966).

21 VST Industries Ltd v VST Industries Workers Union and Anr.,(2001)1SCC298

competition regime. The definition of a market is crucial since it defines the boundaries of competition between the firms and the allied objective of defining a market in its product and geographic dimensions also relates to identifying the actual competitors and prevent them from behaving independently of effective competitive pressure[22]. It is prominently regarded as an analytical tool that assists in determining the competitive constraints upon undertakings and thereby assessing the market power[23]. The definition of a relevant market under the Indian Competition regime is also in close nexus with the EU definition[24]. The definition enlisted is inclusive of relevant geographical market[25] as well as relevant product market[26]. The determinants for identifying such market are also enlisted under the provisions of the Act. The decision of Supreme Court speculated on the definition of enterprise and relevant market for determining abuse of dominance, it was held that there needs to be a functional approach in determining an entity engaging in particular activity as an enterprise for the purpose of Competition law[27]. The decision throws light on to the jurisprudence of determining relevant market for Infrastructural projects.

The competition concerns regarding structuring of an infrastructure project by virtue of a Concession agreement is extremely moulded by the nature of the market in which the contract is implemented. The project implementation is purely a policy decision and hence there is more flexiblity to amend the stature of the project. This would ultimately result in a shift in the nature of the project as intended in the initial process to a more complex one according to the concessioning authority. The anticipated shift have significant ramifications upon the competition regime i.e. there will be substantial change in the competitive bidding process envisaged for the concerned development project as there can be completely

22 Notice on the Definition of the Relevant Market for the Purposes of EU Competition Law, OJ[1997]C 372/5.

23 Richard Whish and David Bailey, Competition Law, Oxford University Press, 8th ed., 2015.

24 Section 2(r) of Competition Act, 2002.

25 Section 2(s) of Competition Act, 2002.

26 Section 2(t) of Competition Act, 2002.

27 Arshiya Rail Infrastructure Limited v. Ministry of Railways and Container Corporation of India, 2012 CompLR 937 (CCI).

different private entity approaching for the bid process. The glaring example would be the Hyderabad Metro Rail which effectuated a real estate approach to the development project by leasing out the commercial spaces inside and outside of the metro station for ensuring revenue[28]. This is effectively a change in relevant market regime from purely an infrastructure development project which is normally advocated in a PPP arrangement to a rather complex real estate project. This shift in the market regime may get adversely affected by the changes in the related or even unrelated markets. Similarly the competitive advantage is always set in balance with the protection of interest of consumers. The shift in relevant market turned sour for the Delhi International Airport development where the real estate component added to the concession agreement pressurized the end users to bear the cost due to the slowdown of real estate market. Similar experience was witnessed in Mumbai International Airport development as well. The honorable Supreme Court on consideration of the facts has ruled that the concessionaire cannot levy the development fee from the users unless and until the regulatory authorities issues orders on that behalf[29]. The shift to a regime which subsequently faced slow down ultimately affected the revenue outcome and pressurized the concessionaire to levy fee from the end users poses a serious concern over competitive advantage and consumer protection. Thus the effective structuring of the concession agreement truly reflects the determination of relevant market and thereby potential competitive bidders for the development of infrastructural projects.

Emerging Competition Issues

The evolving jurisprudence of the Competition law in India symbolizes the significance of the legislation in regulating the market economy. The public procurement through PPPs in its economics paradigm emphasizes the need for efficiency in relevant market through competition which could be the functional best method for utility or welfare gain[30]. The journey to effective

28 PTI, *Hyderabad Rail Metro Rail Opens to Public,* The Hindu Business Line, 29th November, 2017.

29 Consumer Online Foundation v. Union of India & Ors., (2011)5SCC360.

30 Christopher H Bovis, *State Aid and Public Private Partnerships- Containing the threat to Free Markets and Competition*, European Public Private Partnership Law Review, Vol.5, 2010,p.

disbursement of public utilities through private engagement is not structurally rendering a smooth course. There are several constraints involved in the effective competitive dialogue for infrastructure development through PPP model. A few of the issues are identified and discussed in this chapter which is not in itself exhaustive.

Barriers to Entry and Exit

The competitive advantage in a market economy stands for free entry and exit of the enterprises in the relevant market. The competitive bidding process envisaged for the selection of concessionaire in PPP projects effectively resonates on the precept of entry into the relevant market and the concession agreement provision for exit after the commencement of operation date reflects on the exit regime for the private player from the project. The entry or exit barrier has the effect of reducing or limiting the competition[31]. The entry of the private player to the PPP project is envisaged by the policy document or Model Bid documents. This is more specific to the competitive bidding process and has serious ramification on the Competition regime. A careful analysis of the Request for Qualification (RFQ) document reveals that though the document presupposes the notion of ensuring adequate number of pre qualified bidders for effective competition, but such number is fixed to maximum of 6 to 7[32]. Apparently, the justification for prefixing the bidders is stipulated as ensuring competition however it inherently poses a question over the competitive effectiveness itself. The pre fixation of number of bidders arbitrarily to 6 or 7 will eventually exclude the potential bidders who have technical expertise since the selection of concessionaire is based on the quoted financial bids. Thus the RFQ document in the entry parameters is more or less hindering a competitive regime for PPP development project.

The private player can exit the PPP project in conformity with the provisions of the Concession Agreement. Along with

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31 Organisation for Economic Co-operation and Development (OECD*), Policy Brief on Competition and Barriers to Entry*, January 2007. <www.oecd.org> (visited on January 13, 2018).

32 Request for Qualification Model RFQ Document, Planning Commission, Government of India, April,2014. <www.planningcommission.nic.in/sectors/ppp_report/2> Model Bid Documents (visited on January 13, 2018).

the substantial sharing of the risk in the PPP model, the private player is also envisaged with the majority equity holding. Initially the Model Concession agreement in various sectors devolved upon the private player a more stringent regime for exit. The glaring example would be Model Concession Agreement in the Port Sector. The Model Concession Agreement in 2008 envisaged the private player to hold 51% of the equity until three years of the Commercial Operation Date and 26% for rest of the concession period[33]. This was further relaxed in the Model Concession Agreement 2016 which proposed the complete exit of the private player after six years[34]. Finally in the Model Concession Agreement 2018, the private player can divest off equity up to 100% after completion of two years from the Commercial Operation date[35]. This appreciable development is worth promoting competition and successfully attracts the private investor for development projects. The revision of the concession agreement was done in consultation with the stakeholders and is substantially in conformity with the MCA in highways. This policy development can be implanted to other sectors which are viable for PPP projects to enhance the competitive efficiency. The exit policy should be effectuated with a greater caution of risk regulation between the public and private partner. Effective risk regulation can be only a good competitive dialogue for exit regime since the divesting of the equity shares can stall the PPP project and results in financial difficulty.

Competition Issues Pertaining to Transparency in Bidding and Selection of Concessionaire

The crucial need for an institutional framework is effectively based on the argument for transparency in the bidding and selection of concessionaire. Even after the inception of Model document for bidding process, there has been significant rise in the litigations on selection of Concessionaire. The Supreme Court in *APM Terminals*

33 BRIEF Empowering Growth, *Policy Brief Private Participation at Indian Ports Resurgence through Reforms*, British High Commission, New Delhi, February 2017.

34 *Ibid* at P.7.

35 Press Information Bureau, Cabinet Approves Revised Model Concession Agreement for PPP in Major Ports, Ministry of Shipping, Government of India, 3rd January 2018. <www.pib.nic.in> (visited on January 14, 2018).

B.V v. *Union of India and Anr.*[36], decided on the exclusion of the appellant from the bidding process for the fourth Container Terminal development at Jawaharlal Nehru Port Trust (JNPT), Mumbai. The Court held that the licensee is vested with right to bid in order to effectuate competition in accordance with law. The dictum throws light on the competitive dialogue for transparency in the bidding process. The elimination of a potential bidder from the bidding process in accordance with the regulation is justified on the ground of awarding of project is in effect being a policy decision. But such elimination should not be effectuated in a manner that the bidder is eliminated from subsequent bidding process by using an entirely different criterion.

Similarly in *State of Kerala* v. *M/s Zoom Developers Pvt. Ltd.*[37], wherein the consortium Zoom developers has challenged the selection of Lanco Developers consortium for the development of Vizhinjam International Deep Water Multipurpose Seaport led to considerable delay in implementation of the project. The allegation raised was that the bid submitted by the Zoom Developer was rejected by the authority on the grounds of incompatibility with the RFP procedure. The Court has directed to reconsider the bid submitted by the private entity. The decisions throw light on the issue of transparency in the bidding process leading to non competitive advantage.

Exclusivity Provisions and Abuse of Dominance in Concession Agreement

The concession agreement also advances exclusivity provision for the concessionaire with the intention to limit competition and protect the interest of the allied developer. The glaring example would be the Model Concession Agreement for the Port Sector[38]. The agreement provides for prohibition of competing facility in the vicinity of the project development area, within stipulated time frame or until the facility reaches an optimum cargo volume[39]. The

36 (2011)6SCC756.

37 (2009) 4 SCC563.

38 Revised Model Concession Agreement for PPP project in Major Ports, 2018 <http://www.shipping.nic.in> (visited on January 20, 2018).

39 Article 12 of Revised Model Concession Agreement for PPP project in Major Ports, 2018.

exclusivity provision is justified by the Ministry that the clause is incorporated for attracting potential investors for the project. But the provision is inherently posing question on the competition in the relevant market. Since the article incorporated in the agreement is a standard clause it cannot be even customized. Exclusivity provision is prohibited under the Competition Act 2002 since such clauses in the agreement which limits or rather control the services or market poses appreciable adverse effect on competition in the market[40]. Exclusivity, a clause in the agreement thus has to pass the test of reasonableness to ensure that the insertion of such a beneficiary clause for the concessionaire will not result in appreciable adverse effect on competition for which inherently the onus of proof lies with the parties to the concession agreement.

The allegations of abuse of dominance in the market are also evidenced in the infrastructural development project. Section 4 of the Competition Act, 2002 advocates for prevention of abuse of dominance and thereby prohibition of such practices which have adverse effect on Competition. The probability of abuse of dominance in the market occurs when a large project is divided into smaller capacity building project wherein the significant project share is taken by a single potential private consortium. The major facet of abuse of dominance in the market arises by bundling of essential activities in an infrastructure facility. There was allegation on APM terminals for using its dominant position in the JNPT for dictating prices and limiting competition in the Container Freight Station Markets[41]. The allegation raised by the Indian Competition Review to CCI rest on the facts of bundling of services in the CFS and fixing predatory prices for its usage. Thus abuse of dominance is a competition concern for infrastructure project. The Supreme Court in *JSW Infrastructure Limited & Ors* v *Kakinada Seaports Limited & Ors*, has upheld the policy clause which prevented creation of monopoly by restricting the same bidder for further facility procurement in Port development project. The decision is way forward in enhancing competition but the there is still lack of coherence in the structuring of bidding process as well as concession agreement to prevent adverse competitive practices like abuse of dominance.

40 Section 3(3) of the Competition Act, 2002.

41 Mamuni Das, *Maersk is Abusing its Dominant Position at JN Port: Indian Competition Review*, The Hindu Business Line, June 5, 2016.

Regulatory Overlap of CCI and Sector Specific Regulators

There has been considerable shift in the regulatory regime in India since the liberalization policies. States have withdrawn from the direct provision of services with greater private sector participation and expanded role of markets with a substantive transformation from the role of service providers to service regulators[42]. There has been emergence of independent regulators for sector specific regulation. The numerous sectoral regulators and the competition regulation in such sector specific legislations have inherently posed a dilemma over the jurisdiction of CCI in regulating the competition in the market. The provisions of sector specific legislations were more identical with the provisions of the Competition Act, 2002. The glaring example would be the Telecom Regulatory Authority Act, 1997. There need to be greater balance in reconciling the powers and function of the sector specific regulator with the CCI through harmonious interpretation.

Conclusion

The infrastructure development through PPP model is significantly a way forward in pursuing the goal for a more stable economy. The effective implementation of the PPP project in India in consonance with the global market for PPP is potentially an undiscovered area of thrust. The PPP model in its financial structure is having diverse variants ranging from BOT, BOOT, BOOST, and DBFOT by restructuring the elements in accordance with the specific requirement of each project. These variants of PPP model is governed under the regulatory regime of various sectors in which it is employed. The legal framework of PPP model of Infrastructure development is significantly tied up with diverse legal arenas ranging from Contracts, Competition, labour laws, environmental law which is not exhaustive. The literature on the field of PPP legal framework is emerging and the study in this paper is completely shifting its paradigm to competition concerns in the legal framework of PPP contracts. The issues analyzed in

42 Arun K Thiruvengadam and Piyush Joshi, *Judiciaries as Crucial Actors in Regulatory Systems of the Global South: The India Judiciary and Telecom Regulation (1991-2012)* in Navroz K Dubash and Bronwen Morgan (Ed.),The Rise of the Regulatory State of the South Infrastructure and Development in Emerging Economies, Oxford University Press, 2013.

this study are not exhaustive and there are growing concerns over competitive regime in infrastructure contracts. The study primarily highlighted the issues regarding the structuring of concession agreement and the need for effective competitive dialogue in the relevant market. The policy framework developed by the Ministry should effectively ensure that the concession agreement are structured in a manner which essentially enhances and promote competition in the market. A concrete concession agreement and structure policies by the concerned ministry to an extent prevent the emergence of anti-competitive practices which hampers the successful implementation of PPP project.

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Chapter 4

Comparative Analysis of Public Private Partnership in India, Japan and Australia

Bhuvanya Vijay

Introduction

Public Private Partnerships (PPP) have gained popularity throughout the world as models that seek to bring together the best of both the private and public sector towards hauling a nation's infrastructure. In this regard, several different frameworks are followed and varied models have emerged, however the common thread that sews them all together is the confidence in PPP to deliver value for money and benefit to all stakeholders.

In this light, in the current paper, the researcher has chosen three countries: Australia, Japan and India, to compare, contrast and cull out the best practices from a study of the PPP legal framework in these countries. Australia is chosen for it was among the pioneers to adopt PPP, Japan for having a thoroughly comprehensive and codified set of guidelines and regulatory statute to deal with PPPs and finally, India for being the researcher's native country, to which she seeks to draw parallels and imbibe learnings.

Following the Introduction, and an Overview of PPP in India and the world, the researcher has delved into a country-by-country analysis. For every nation, starting with Australia, then proceeding to Japan and finally reverting to India, the researcher has commenced the respective segments with an overview of that nation's PPP panorama. Thereafter, the meat of the matter, viz., the legal framework surrounding the existence and functioning of PPP in that country, has been looked into. This includes the various types of PPP models which are employed in that country, the authorities that regulate PPP-related matters and the various requirements of PPP contracts. The same has also been sought to be conceptualized using charts and diagrams created by the researcher for better clarity and prompter grasp.

After dealing with the legal framework, the researcher has looked into the bidding and award procedure followed by that country. Next, the PPP contract itself has been detailed, with a keen eye on clauses dealing with payments, state guarantees, distribution of risk, ownership, termination, etc. Wherever possible, the researcher has sought to take help from recent decisions. However, in this sphere, a decision in the jurisdiction of Australia was the only one that caught the researcher's eye, this being *Murphy* v. *State of Victoria*. Finally, the segment dealing with each country is concluded with the future prospects and the way ahead.

The country-wise analysis leads the researcher to cull out some best practices from every jurisdiction and propose some key learnings for India in the conclusion.

Overview of PPP in India and the World

While India's Public Private Partnership mechanism has witnessed reasonable success over the past couple of decades, the level of activity has been relatively low in this field in the last four fiscal years.[1] India's economy is set to grow at the fastest pace among major economies.[2] In this context, PPP can ensure that such GDP growth is not unduly constrained by inadequate investment into and development of accompanying infrastructure. However, in order to let PPP realise its true potential, including the above-mentioned objective of allowing for a GDP-concomitant infrastructure haul, India must make adjustments to its PPP framework to align it with more mature markets. This can be achieved by taking cue from economies like Japan and Australia who have been dealing with PPP mechanisms for a longer time than us.

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1 *Moody's: Enhancement to India's PPP Model could boost infrastructure investment*, Moody's Investor Services (20 October 2016) <https://www.moodys.com/research/Moodys-Enhancement-to-Indias-PPP-model-could-boost-infrastructure-investment--PR_356571> (visited on August 28, 2017).

2 *India's economy will pick up pace next year: IMF*, The Hindu Business Line (24 July 2017) <http://www.thehindubusinessline.com/economy/indias-economy-will-pick-up-pace-next-year-imf/article9786797.ece> (visited on August 20, 2017).

What is the Problem with PPP Projects?

Governments have increasingly reached out to the private sector for large infrastructure projects to see the promise of time and cost efficiency through access to specialized skills being met. While this is indeed a promising benefit of the PPP model of infrastructure development, often such a PPP mechanism has a rigid design which "inhibits the asset owners from drawing the requisite balance between tightly composed contracts", on one hand, and "injecting adequate flexibility to accommodate unforeseen scenarios, on the other hand".[3]

Owing to such rigid designs, long-term projects with multiple stakeholders face financial difficulties and contract disputes leaving little or no room for structured resolution. Several PPP projects across developing and developed countries have failed primarily due to mismanaged risk and lack of a structured response to unplanned situations.[4] Thus, there were problems involving terms of the concession agreements being cast in stone.

As a solution, the concept of re-negotiation emerged in response to the limits of human ingenuity while drafting a contract, which makes it possible to predict only a limited set of possibilities. Since nobody has the ability to write a contract that lasts for 20-30 years, due to varying nature of the risks of revenue, construction, financing (currency and interest rate), input costs and project costs, change in regulations, unanticipated competitive projects, etc., re-negotiation was introduced when a concession contract underwent a significant change or amendment not envisioned or driven by stated contingencies. Thus, of the 1000 concessions granted in Latin America and the Caribbean region during 1985-2000, almost 30 percent were renegotiated;[5] while in the transportation sector this figure was 55 percent.[6] Similarly, a total of 17 early concessions in

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3 Suresh Subudhi and Neetu Vasantha, *Making PPP Projects deliver*, The Hindu Business Line (10 May 2017) <http://www.thehindubusinessline.com/opinion/making-ppp-projects-deliver-in-india/article9691534.ece> (visited on August 20, 2017).

4 These would include international concessions in developed countries like Spain, Italy and Chile, as well as in developing countries of Latin America, where re-negotiations form the norm, not the exception.

5 J. Luis Guasch, *Granting and Re-negotiating Infrastructure Concessions: Doing it Right*, Wolrd Bank Institute of Development Studies 12 (2004).

6 *Ibid.*

Spain, were renegotiated as many as 121 times in total, making it an average of about seven times per concession.[7]

Such re-negotiation may give rise to issues such as the bidders who initially lost out could now take government bodies to court arguing that the incentives which have arisen out of the re-negotiation process were not afforded to them at the bidding stage, claiming they have been unfairly edged out. Further, the sanctity of a bid-out contract is violated, such that this will encourage a culture where several project developers will begin to expect a post-win renegotiation. A significant moral hazard also exists since private bidders know that their losses will be "wiped clean by subsequent government largesse while their profits do not have to be shared". Finally, "distinguishing between projects that are unviable because of genuine unforeseen developments and projects that are unviable because the bidders bid at predatory prices or made commercial errors of judgement, are difficult to sift."[8]

A Theory-Practice Dichotomy?

The above discussion leads the author to mention a theory-practice dichotomy. Thus, theoretically, large infrastructure projects possessing multiple stake-holders who need to collaborate over long periods, require that the risks associated with the projects, are allocated to parties which are in the best position to manage the said risks. However, in practice, this requirement translates to contracts which are not only over-prescriptive but also inflexible, to address the inherent incompleteness of contracts.

Despite the attempt made to draft contracts that are as complete as possible, this still proves to be a self-defeating exercise because even before the project commences, identifying all possible risks is not feasible. Thus, the need for dynamic risk management is more profound.[9] Further, the challenge is to renegotiate in a transparent

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7 *Ibid.*

8 Vinayak Chatterjee, *Renegotiating PPP contracts*, Business Standard (20 May 2013); *See also* Luis A. Andres and J. Luis Guasch, *Negotiating and Renegotiating PPPs and Concessions* in Gerd Schwartz, Ana Corbacho and Katja Funke (*eds.*), Public Investment and Public-Private Partnerships 197-227 (2008).

9 *Making PPP Projects deliver*, Supra note 1.

and equitable manner and the cost of non-adjustment could be very high.[10]

Due to the above-mentioned theory-practice dichotomy, a problem known as the “winner’s curse” is brought about, which may be explained to be a tendency for the winning bid in an auction to exceed the intrinsic value of the item which the bidder so purchases.[11] Finally, the largest possible overestimation of the involved item’s value ends up winning the auction.

Country-Wise Analysis: Australia, Japan & India

Australia

Overview

PPPs in Australia have been in vogue for over 30 years. Initially, they commenced as State governments developing their own implementation and development models. In this regard, the State of Victoria with Melbourne as its capital was a trail-blazer after it established the Partnerships Victoria policy and further developed models based on the UK’s “private finance initiative” in the early 2000s.[12]

This Victorian model was followed thereafter by other States and finally, in 2005, the federal government of Australia implemented a national approach through the National PPP Policy and Guidelines, which aimed at harmonising the slightly varied approaches of the State Governments to the implementation and development

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10 This statement is attributed to World Bank Country Director for India, Onno Ruhl, who has been replaced by Junaid Ahmad in October 2016.

11 Karin Knorr Cetina and Alex Prada (eds.), The Oxford Handbook of the Sociology of Finance 553 (2012). This phenomenon may arise due to information asymmetry, varied emotions felt by different stakeholders and other subjectivities involving the intrinsic value of the item involved. In practice, perfect information is not available to everyone, and even if it is, every participant is not completely rational in decision-making or impeccably skilled in valuation, hence overpayments occur due to players pushing up prices beyond the true value of the assets involved.

12 David Donnelly, Nicholas Ng and Barton Donaldson, *Australia*, in Public Private Partnership Review (*eds.* Bruno Werneck and Mario Saadi) at 10 (March 2015).

of PPP.[13] This national policy threw light on areas such as the procedure which authorities should follow for the investment, procurement, development and operation stages of PPPs, and what must be the standard risk allocation and commercial principles to be adopted. State governments could only make slight departures.

PPP is percolating into the governmental policies not only in areas involving construction of new infrastructure, but also in the realms of the sale of government assets to re-build them differently or to lease out government assets with a view to having a long-term lease during which time the private entity shall be responsible for the upkeep and maintenance of the said government asset, by charging a nominal fee. This suggests that the political climate in Australia is conducive for PPP. The economic climate too seems comforting to allow PPP to thrive due to the capital recycling policy.[14]

Very prominent examples of PPP in Australia include the Ravenhall Prison in Victoria, the North West Rail Link PPP, the New Generation Rollingstock PPP, the Gold Coast Rapid Transit project, and the Northern Beaches Hospital in the state of New South Wales. Most of the PPP projects in Australia are to do with transport and social infrastructure, although fields such as telecommunications projects, water, energy, etc., are also keeping pace with embracing the PPP wave.[15]

Legal Framework

Australia has adopted several PPP frameworks such as DCMO (design-construct-maintain-operate), DCM (design-construct-maintain), BOO (build-own-operate), and BOOT (build-own-operate-transfer). The most commonly employed is the DBFO (design-build-finance-operate) paradigm under which the whole-

13 The National Public Private Partnerships (PPP) Policy Framework and National PPP Guidelines, Australian Government, Department of Finance and Deregulation, Finance Circular No. 2009/02, <https://www.finance.gov.au/sites/default/files/FC-2009-02_0.pdf> (visited on September 4, 2017).

14 Linda M. English, *Public Private Partnerships in Australia: An Overview of their Nature, Purpose, Incidence and Oversight*, 29(3) UNSW Law Journal 250 (2006).

15 David, Supra note 12.

of-life approach is adopted.[16] Recently, the government also contributes in cash during the phase of development, either as soon as completion ends or when steady-state functions may be commenced.

The authority regulating PPP affairs may be both at the federal and state levels, an example of the latter being Projects Queensland.[17] Such authority is directly associated with the treasury department. In some states, the specific ministry or department most closely linked to the on-going PPP project may be the regulating authority for that PPP project. In this light, Infrastructure Australia has emerged as a statutory body under the Infrastructure Australia Act 2008 which often coordinates with other departments of both the government and industry to develop PPP related aspects of the concerned project.[18]

When it comes to the pre-requisites which must be fulfilled subject to which a PPP contract may be entered into in Australia, such limitations are very few. Ordinarily, governments perform a detailed "business-case assessment" to assure themselves that the proposed PPP has a great probability of returning more value for money to the State as compared to other more traditional forms of government. At times, there is also a value threshold, such as anywhere between A$50 to 100 million. Additionally, certain State governments might insist on requirements such as the project being in public interest, or benefit, or that a policy test be undertaken when considering the PPP mode of executing a project.

Apart from certain licensing requirements, foreign entities may also freely participate in the PPP process in Australia. The Victoria Desalinisation Plant is a leading example in this sphere. Thus, apart from functioning within the broad ambit of the National PPP Policy and Guidelines, there are no stringent limitations nor are there any projects designated as "off limits" with respect to PPP in Australia.

16 *Public Private Partnerships in Australia and Japan: Facilitating Private Sector Participation*, Japan External Trade Organisation (JETRO) in August 2010.

17 *See also*, Queensland Government, *Project Assessment Framework: Queensland PPP Supporting Guidelines* (July 2015) <https://s3.treasury.qld.gov.au/files/paf-supporting-guidelines.pdf?v=2> (visited on August 2, 2017).

18 *See*, Australian Government, Infrastructure Australia <http://infrastructureaustralia.gov.au/policy-publications/public-private-partnerships/> (visited on September 4, 2017).

Bidding and Award Procedure

This procedure commences with the publication of a broad invitation to submit an expression of interest. Thereafter, the request is targeted in nature, looking out for proposals from only a shortlist of selected tenders. After this stage, the government publishes a detailed set of evaluation criteria in the request for proposals (RFP) documents which are sent to tenderers. The criteria would include components such as the technical solution, proposed form of contract, the scope and desired output from the project, etc. After receiving these, the government picks a preferred bidder and enters into negotiations.[19]

Of late, the government in Australia has also started considering several unsolicited proposals. These have particularly gained popularity due to reduced bid costs and often, there is a certain 'unique' element that the private party has to offer in such proposals which does not exist elsewhere. Thus, this is a value for money in a different context. However, this 'uniqueness' feature must also be balanced with the requirement of transparency. A good example of such an unsolicited proposal would be the NorthConnex project in NSW.

The Contract

In Australia, the payment under the contract would usually depend on the type of the asset that will be brought into existence at the completion of the project or during the execution of the contract. The system employed may be either that in which the end-user pays, for example that on toll roads, or alternatively, an availability-based system, which relies on direct payment from the government.

The various State governments in Australia do not generally provide state guarantees, although New South Wales has put into place certain legislative procedures for its treasury to issue sovereign guarantees. Risk analysis in the contract is generally performed at the preliminary stages of the bidding and award procedure by both the public and the private party in PPP. Such

19 *How does Infrastructure Australia assess submissions?*, Australian Government, Infrastructure Australia <http://infrastructureaustralia.gov.au/projects/how-do-we-assess.aspx> (visited on September 4, 2017).

a risk analysis includes taking into account the heads of project delays, risks which are beyond the control of the contracting parties, insurance related matters, and risks involving the political, legal, and, macroeconomic climate of the country.

If there are variations to the technical scope of the contract or changes in its commercial terms during the concession period, PPP contracts usually have an "inbuilt-change or modification regime".[20] This calculates the economic implications of the variation, and whether there are any consequences on the performance and execution of the contract. The ownership of underlying assets in Australia in PPP contracts sees various permutations and combinations:

i. Usually, the State's party is the one that owns the assets right from the commencement of the operations phase. This follows a well-specified handover period at the end of which the private party transfers the asset, in a serviceable condition.

ii. Till as long as the private party owns the assets, the public party usually prohibits the private stakeholder from collateralising those assets.

On the issue of early termination, the government party usually has greater rights than the private party. The most common example of cases involving early termination are to do with breach of PPP agreements, *force majeure* events, and the private party becoming insolvent.

Judicial Decision

In the case of *Murphy* v. *State of Victoria*,[21] the fact situation involved the A$15 billion proposed East West link in Melbourne in the state of Victoria. This was a motorway project, the case being brought by one Tony Murphy who alleged that the proponents of the project, including the State of Victoria and the LMA (Linking Melbourne Authority), another State entity, have made

20 Arshad Ali Javed *et al.*, *Output Based Specifications for PPP Projects: Lessons for Facilities Management from Australia*, 11(1) Journal of Facilities Management 5 (2013) <https://doi.org/10.1108/14725961311301448> (visited on September 5, 2017).

21 Murphy vs. State of Victoria, (2014) 313 ALR 546.

representations that are deceptive and misleading, in order to enter into a contract with the East West Connect consortium. The application was based on an alleged contravention of Sec. 18 of the Australian Consumer Law, under the Australian Consumer Law and Fair Trading Act 2012.

At the level of the trial court, this application failed and the contract was nevertheless entered into in September 2014. However, later, the Court of Appeal in Victoria made comments about the allegations pertaining to the misleading representation by the State. Among these comments, the Court of Appeal envisaged that it is possible to have such a situation where the State entity is making misleading representations, since it has a business motive involved as soon as it commences taking steps to acquire a certain asset, or procure a given contract. Even while performing seemingly core sovereign functions, with due knowledge to the public of proposed benefits, the government can be said to be carrying out a business and hence would be raised to the strict standard hitherto maintained exclusively for private entities.

Although no final determination was made by the Court of Appeal, the *obiter dicta* in this case, as mentioned above, is useful to gain insight into the judicial approach towards PPP contracts in Australia.

Japan

Overview

Japan is a leading developed country in the world which has an extensive, comprehensive and as much as possible, uniform, legal framework, most of which is painstakingly codified, governing PPP contracts and projects. This is encapsulated under the Act on the Promotion of Private Finance Initiatives enacted in 1999 (*hereinafter* "PFI Act"). As can be gauged from the title of the statute, PPP projects in Japan go by a different nomenclature, that of PFIs. The PFI Act underwent a major uphaul in 2011, making it even more relevant for comparative study.[22]

22 Masanori Sato, Shigeki Okatani and Yusuke Suehiro, *Japan*, in Public Private Partnership Review (*eds.* Bruno Werneck and Mario Saadi) at 99 (March 2015).

PFIs or PPPs, as we call them, have gained a lot of popularity in Japan as a part of several national revitalisation strategies and in the wake of fiscal constraints to maintain and improve existing infrastructure, which often face the brunt of regular natural disasters. Airports, water supplies, roads, and, sewages, comprise the core priority areas.[23] The Japanese Revitalisation Strategy of "Japan is Back" since 2014 has also contributed to providing a major boost towards the demand for such PFI projects. A good example is the Sendai Airport.[24]

The 2011 amendment to the PFI Act, introduced the concept of "user-pays" or concessions, where a State authority grants to the private concessionaire the right to operate existing infrastructure as well as earn income by charging the end-user certain prescribed fees. This was in contrast to the then existing traditional PFI model where under the private entities received availability payments from the State authorities. The major and most relevant portions of the Japanese law on this subject is contained less in the PFI statute and more in the subsequent guidelines.[25]

Legal Framework

The most popular PPP framework in Japan is the Build-Transfer-Operate (BTO) model, where the private entity constructs a desired facility, thereafter at the end of a pre-decided period, the said facility is transferred to the State's relevant authority, although it is continued to be operated by the private entity which earns its revenue by charging the end-users some fee and sharing the same with the government. Since 2011, the BOT model has also gained credence,[26] and so have concession projects.[27]

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23 Japanese Revitalisation Strategy – Japan is Back (14 June 2014) <http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf> (visited on September 2, 2017).

24 Masanori Sato and Shigeki Okatani, *Recent developments in PPP in Japan*, Energy and Infrastructure 2016 <http://www.mhmjapan.com/content/files/00022762/Recent_develop_ments_in_public-private_partnerships_in_Japan.pdf> (visited on September 3, 2017).

25 *Amendment to the Law of Private Finance Initiative (PFI): Implementation of the Concession System*, Baker and McKenzie (June 2011).

26 The international passenger terminal and the international air cargo terminal at the Haneda Airport was constructed in 2010, under this BOT arrangement.

27 An example of this would be the National Women's Education Centre of Japan.

PFIs in Japan are usually promoted through the PFI Promotion Office, which functions from within the national government's Cabinet Office. This is the office responsible for putting into effect several thorough and deeply helpful standardised model project agreements, as well as guidelines.[28]

In terms of the requirements for PFI/ PPP contracts in Japan, only those public facilities and infrastructure realms as mentioned under Art. 2, paras 1 and 2 of the PFI Act are permissible to embrace PFI projects, but these are several in number and the list is near comprehensive. Another limitation could be understood in terms of the scope of the concessionaire's rights, such as to what extent can the private entity make renovations or expansions that are necessary for it to maintain and operate the facility.

A VFM analysis is most crucial to determining whether or not to go forward with a given PFI project, although this has increasingly become a time-bound process now. Most PFI traditional arrangements last anywhere between 15 to 30 years, at times some airport concessions also extending to 50 years.[29] The concession term may also be extended.

Bidding and Award Procedure

Hereunder, authorities are first encouraged to invite and assess EoIs, proposals and RFIs (Request for Information) from the private sector,[30] which more often than not, end up influencing policy. An implementation policy is drawn up by the State entity detailing the project, its desired execution and bidding procedure,[31] a VFM analysis is conducted and the scope of the project identified,[32] and finally a bidding process conducted and projected is awarded to the selected project sponsor.

28 Some examples of these guidelines would include the Concession Guidelines, the Contract Guidelines, the Risk Allocation Guidelines, the Procurement Process Guidelines, the Value-for-Money (VFM) Guidelines, the Monitoring Guidelines, etc.

29 Minister of Land, Infrastructure, Transport and Tourism, Basic Policy for Airport Concession of National Airports, 2013, Section 2. Strictly speaking, the Public Finance Act provides 5 years but the PFI Act extended the term to 30 years (PFI Act, Article 68); National Property Act, Article 21, Paragraph 1, Item (iii); Concession Guidelines, Section 15(2).

30 Procurement Process Guidelines, Sec. 1-2.

31 PFI Act, Art. 5.

32 PFI Act, Art. 7.

The bidding process commences by issuing a RFP and a tender package. In 2011, the revised PFI Act introduced the unsolicited proposal system through which the private sector may propose a PFI project.[33] However, competitive bidding is still required even if the unsolicited proposal induces the relevant authority to start a PFI procedure. Thus, the proponent must participate in the bidding process, although the relevant authority is required to protect the proponent's intellectual property that is contained in the proposal.

At the stage of evaluation and grant, the bidders are short-listed to around 3, based on documentary submissions. The process followed is either the competitive dialogue procedure or the open and competitive bidding procedure.[34] In the former the State entity is allowed to engage in dialogue with multiple bidders.

Finally, the contract is awarded by taking into consideration not only the bid price but also factors such as service quality. The weighted distribution of such parameters is usually pre-informed to the bidders. Generally, the winning bidder is not at liberty to seek to re-negotiate the prescribed terms and conditions once awarded the PFI contract. Initially, the relevant authority and the selected sponsor enter into a basic agreement, which contains the sponsor's obligations regarding preparations for the project. Afterwards, the contractor or the concessionaire and the relevant authority execute a project agreement (or a concession agreement for concessions), the main document containing their rights and obligations regarding the project.

The Contract

The payment under traditional arrangements happens through availability fees and for concessions through user fees.[35] Generally, there are no state guarantees on a relevant authority's payment obligations to either the contractor or the concessionaire. The Risk Allocation Guidelines are very thorough in mentioning who must bear the risk; this is usually, as per principle, the party that is in the best possible situation to bear that risk. Different heads such

33 PFI Act, Art. 6.

34 PFI Procurement Process Guidelines, Sec. 4-1(11).

35 PFI Contract Guidelines, Sec. 4, and PFI Act, Art. 23.

as *force majeure*, changes in the legal scenario of the country, latent defect of existing facilities, etc.

Adjustments and revisions are very rarely permitted, mostly with these being restricted to a limit or an index, dealing with inflation.[36] However, a concessionaire might still adjust his user-fees as per discretion but while staying within the limits of the concession agreement. In Japan, there is a bias to maintain ownership of the underlying asset with the State, although this depends on the type of model framework adopted. As far as early termination is concerned, in traditional project agreements, the relevant authority agrees to pay the contractor, if termination occurs during the construction phase, the purchase price for the part of the building that the contractor has completed at the time of the termination else the unpaid construction costs are paid.[37]

India

How is PPP defined in India?

As per the Draft National Public-Private Partnership Policy released by the Department of Economic Affairs, Ministry of Finance, Government of India in 2011, a PPP (or 3P) is a commercial legal relationship which is "an arrangement between a government / statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity and the private entity receives performance linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative."[38]

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36 Contract Guidelines, Sec. 4-4.

37 Contract Guidelines, Sec. 5-4.

38 Draft National PPP Policy 2011, Department of Economic Affairs, Ministry of Finance, Government of India: Clause 1.1.

Why does India Need PPP?

Infrastructure in India is poor when compared with other similarly developed nations or the types of nations that India seeks to join the league of (e.g., most prominently China). In this light, the Government of India has identified PPP as a way of developing the country's infrastructure. However, such development, construction and maintenance of infrastructure in the country requires large capital outlays, and as of now there is a deficit in supply.

In its 12th (and last) Five Year Plan for the period 2012-2017, India had an ambitious target for investment in the field of infrastructure, to the tune of US \$1 trillion. However, notwithstanding such a gargantuan target, the requirement has only increased. Quoting Abhishek Tyagi, a Moodi's Vice-President and Senior Analyst, "Historical underinvestment and rapid economic growth are straining India's existing infrastructure".[39]

PPP is also the way forward, given the stellar infrastructure plans that the current Modi regime in India has, including programmes such as "Housing for All", "100 Smart Cities" and other stiff, seemingly inflexible goals for increasing the capacities of power projects, in the fields of both conventional and renewable energy. Thus, the need for PPP in infrastructure is imminent and profound; but whether the government has been successful this far in creating the necessary institutional structures and policies in place for facilitating and regulating PPP, is a question that still begs conclusive answer.

An Overview of India's Institutional Structures and Policies Surrounding PPP

Currently, in India, PPP in infrastructure is regulated and governed by the following stakeholders:

- The Ministry of Finance, working under the Government of India, is the central focal point for the coordination of PPP, through its Department of Economic Affairs (DEA) PPP Cell.

39 Abhishek Tyagi: *Moody's*, Supra note 1.

- In the year 2011, the DEA came out with a draft National Public-Private Partnership Policy, which may be described as guidelines which deal with the aspects of formulation and approval of PPP projects. The endeavour was to strengthen and streamline PPP procedures as well as the regulatory environment, at the national level, not only to infuse more certainty in the entire process, but also to expedite PPP projects' approval, reassure private parties regarding their interests being watched out for and incentivise them to enter the Indian PPP market.
- PPP project appraisal at the central level is done by the PPPAC, the Public-Private Partnership Appraisal Committee.
- The Government has also created a "Viability Gap Funding Scheme" in order to promote and ensure the sustainability of PPP projects in infrastructure. Under this scheme, financial support or grants are given in favour of infrastructure projects. These are normally stylised as capital grants and are furthered right at the stage of project construction and may include up to 20 percent of the total project.
- The India Infrastructure Finance Company Limited (IIFCL) set up by the Government, also chips in financially, in terms of providing long-term debts for financing infrastructure projects. It was set up in 2006 and is limited to the sectors of social and commercial infrastructure, energy, transportation, communication and sanitation.
- In 2007, the Government of India launched the India Infrastructure Project Development Fund (IIPDF) which is intended to support 75% of project development expenses. Thus, it will finance costs incurred towards the development of PPP projects, which can be pretty enormous, particularly when the costs of transaction advisors are included.
- Finally, the PPP Cell as mentioned above has also produced a series of guidance papers and a PPP Toolkit to support project preparation and decision-making processes, and consequently the quality of PPPs.
- Different PPP models such as BOT (Annuity and Toll), BOO, BOLT, DBFOT, BOOT, etc. are being employed in India.

The legal framework in terms of the requirements for the PPP contracts are very project specific. The documents must clearly specify details about the proposed project, general and specific requirements for qualification, evaluation criteria for meeting technical and financial requirements by the proposing entity, restrictions applicable and set standards to be achieved under the project. A significant limitation seems to be the requirement to not have any conflict of interest.

Bidding and Award Procedure

A plethora of guidelines, schemes and standardized model documents for specific Ministries and private players have been drafted by Government of India. There is currently a two-stage bidding process: Technical and Financial Bid. The former entails a Request for Qualifications or EoI component. Hereunder, the procuring entity must elucidate the subject matter of the procurement, the method of procurement that it seeks to follow along with any criteria of prequalification as well as any restrictions on bidders that it intends to place before executing a framework agreement or initiating the procurement process.[40]

The objective at EOI stage is to identify experienced bidders who have the requisite technical and financial capacity for undertaking the project. The prospective bidders at the EOI stage are shortlisted for next stage of bidding process, which is the Financial Bid (RFP) stage. Here, the pre-qualified bidders are required to submit their financial offers. Only those bidders that have been shortlisted under the EOI or at RFQ stage are required to present their financial bid.

Following these two stages, the final evaluation and grant happens, bearing in mind the following criteria:

- Construction/ project experience in specified/ core sector
- Bidder offering the lowest financial bid based on grant, or, bidder offering the highest premium based on a revenue-sharing and upfront payment mechanism

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40 Sunil Seth and Vasanth Rajasekaran, *India*, in Public Private Partnership Review (*eds.* Bruno Werneck and Mario Saadi) at 110 (March 2015).

- The government also has the discretion to select other bidders on a reasonable, fair, transparent and non-arbitrary basis.

The Contract

The payment under Indian PPP contracts depends on the type of model contract that is executed between the State party and the private entity. At times, especially for road construction, the Government pays the private party directly, not making them rely entirely on tolls to be collected. Such payment is usually an annuity, i.e., an annual lump-sum payment. On some other occasions, the terms of payment may also be performance-based.

Generally, state guarantees in India come in the form of certain relaxations issued by the Central and State governments, such as loan assistance to meet financial obligations in the event of any *force majeure* event occurring due to political compulsions, helping procure land through streamlining the otherwise exhausting and long-drawn land acquisition process, facilitating getting swifter environmental clearances, etc.

The distribution of risk is sought to be efficiently allocated and mitigated, such that the entity in whose normal course of conduct of business, the given risk features must be made to bear it. Further, as suggested by the Kelkar Committee,[41] sophisticated modelling techniques must be employed to assess the probabilities of risks and the need to provide for them. Additionally, there is a need for *ex ante* provisioning of a renegotiation framework in the bid documents. Presently, the standard MCAs do not consist of any clauses or reference of adjustment or revision of contract terms and conditions, although the Kelkar Committee report has also acknowledged the need for renegotiations and has given recommendations to the DEA.

The ownership of underlying assets depends on the type of model agreement chosen. Regarding early termination, certain model MCAs (for example, the MCA on national highways) contain provisions to protects the private entities by ways of compensatory

41 The Report of the Committee on Revisiting & Revitalising the PPP model of Infrastructure Development chaired by Dr. V. Kelkar (December 2015).

payments from arbitrary and discriminatory termination by the government in exceptional situations such as political force majeure and continuing default from a public entity.

The Learnings

This segment discusses how India can enhance her infrastructure through PPP mode by learning from Australia and Japan. By the year 2050, India's working age population would be 1,100,000,000.[42] It's a number big enough to be proud about but at the same time scary if it is left to assume unmanageable proportions. It is reported that the three big levers of economic potential, namely population, participation and productivity, is set to surge in India ensuring that it cements Asia at the centre of the world's economy and its growth. These 3Ps can be linked to the Ps in PPP. Notably, in this regard, the World Bank Director to India has noted that, "[T]o capitalize her working-age population, it's about time India starts enhancing its infrastructural capacity through PPP model having (1) well-developed regulatory frameworks, (2) largely standardized project contracts, (3) a large and sophisticated investor base, and (4) predictable project pipelines."[43]

PPPs are a key form of procurement for the delivery of major infrastructure projects throughout Australia. The Australian Government have used PPP procurement successfully to deliver many large and complex projects, achieving good value for money and superior outcomes. India is one of the fastest growing economies in the world. Infrastructure development is the most critical prerequisite not only for sustaining the high growth momentum of the economy but also for ensuring the inclusiveness of the high growth process. In a developing country like India, Public Private Partnerships represent the most appropriate method available

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42 *India to lead next wave of economic growth with 1.08 billion working population by 2050: Report, Indian Express* (19 September 2017) <http://indianexpress.com/article/business/economy/india-to-lead-next-wave-of-economic-growth-with-1-08-billion-working-age-population-by-2050-deloitte-report-japan-china-4850841/> (visited on September 20, 2017).

43 Nandita Roy, With Economy on an Upturn, India Needs to Unlock Investments to Accelerate Growth, says World Bank, World Bank Press Release (28 April 2015) <http://www.worldbank.org/en/news/press-release/2015/04/28/economy-upturn-india-unlock-investments-accelerate-growth> (visited on September 4, 2017).

to the government to deliver large and complex infrastructure projects, and learning from the Australian example will only help us progress better.

Australia, in partnership with Japan, can offer India significant expertise in Infrastructure PPP. Japan has historically been actively engaged in India's infrastructure sector. Japanese official development assistance (ODA) program has proven to be vital for the growth of Indian Infrastructure, including landmark projects such as the Delhi Metro rail, Mumbai-Delhi Freight Corridor, Delhi Mumbai Industrial Corridor, and the Simhadri power station.[44]

While the key learning from Australia can be the efficient way in which the country has managed complex projects, with amicability between the public and private partners, Japan teaches us a lot in terms of their work ethic, and having a streamlined, well-codified and even better regulated procedure and guidelines to navigate through PPP contractual law.

Conclusion

With the above comparative analysis among the three countries and after culling out the best practices and learnings and suiting them to the Indian context, it can be concluded that both Japan and Australia teach worthwhile lessons to the Indian PPP experience. Inter-jurisdictional learning is what the researcher seeks to stress upon through this paper, be it from Australia's successful management of complicated PPP models such as DBFO and coming out with success stories like the Ravenhall Project at Victoria, or be it from Japan's comprehensive and well-codified guidelines providing universal reference for PPP projects.

In this regard, India can gain on the following points:

- We can look towards having both availability-payment and demand risk PPP models.

44 *See also, India larger than Japan in PPP terms, says WB*, Business Standard (30 April 2014) <http://www.business-standard.com/article/economy-policy/india-larger-than-japan-in-ppp-terms-says-wb-114043000075_1.html> (visited on September 3, 2017).

- Relatively more standardized bid documents may be prepared, which serve the value of universal reference just as Japan has done.
- The number of regulators and stakeholders involved may be effectively reduced so that too many cooks do not end up spoiling the broth!
- A standardized legislation may be enacted governing various aspects of PPP, and leaving it to the various Ministries to come forth with more specific, area-suited guidelines.
- The private sector may be involved at relatively early stages of the entire PPP journey so that they are more aware of the risk and scope involved.
- A more certain mechanism for re-negotiation and early termination cases may be postulated in India, to ward away any disadvantages that PPP in India may be suffering from due to uncertainty of the legal mechanism
- The work culture may be bettered and some guidelines introduced that cover all stages of PPP, rather than dealing with PPP only in the stages involving financing, maintenance, etc.
- An effective dispute resolution mechanism may be put forth.

If the following take-away points are well implemented in India, PPP promises to be more successful here than anywhere else in the world.

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Chapter 5

Applicability of Right to Information in Public Private Partnership

Aditi Shukla

Introduction

PPPs have recently achieved great significance in the socialistic development model adopted by India. With the increasing reliance of the government on the PPP Model as a tool for economic development and the significant amount of public money involved, it becomes pertinent to examine the extent of transparency and information available to the citizens.

The benefits of disclosure and transparency of the functioning of PPPs are plenty as it would lead to better governance and management of fiscal costs. However, it has received staunch opposition from the private players who do not wish to come under the scrutiny of the public for economic reasons. This calls for an approach that maintains a balance between accountability of the public funds and the competitive interests of the private entities.

The aim of this paper is to analyse the current framework in India with respect to right to information of the citizens under PPP contracts and suggest a balanced approach benefitting both the conflicting parties involved. The first part of the paper covers the arguments made for and against providing a right to information under PPP Model. The second part provides an analysis of the Indian legislative framework on Right to Information along with an assessment of the role played by government constituted authorities in ensuring disclosures. Finally, the paper provides certain parameters against which the disclosure policy of PPPs must assessed and provides certain recommendations and practices that may be adopted to meet the set parameters.

Arguments for and Against Right to Information under PPP Model

Private players are naturally against the idea of facing public scrutiny in their commercial dealings. They fear that divulging information could compromise their competitive edge in the market. Furthermore, it could open a floodgate of RTI appeals leading to delay in the project and increased costs for them. The possibility of frivolous RTI appeals is evident from the PPP in the NICE Highway Project wherein 570 cases were filed. [1]

Yet another concern for the private entities is that it would lead to heavy reliance on the departmental efficiency of documentation. There have been instances of misplaced or incomplete files in the past and providing such partial information or misplacing files could be heavily damaging to the private parties.[2] The private entities also resort to illegal/ immortal methods to skew the revenue models heavily in their favour due to corruption or inefficiency of the government. Bringing them under the purview of RTI would take away their personal arrangements with government officials.[3]

There is some weight in the arguments of the private players since it is unreasonable to expect a state of the art project at low cost within a limited time frame while at the same time imposing restrictions and bottlenecks on them in the form of RTI. It would certainly hamper their work and might act as a disincentive to many market players from investing in the PPP model.

The RTI activists on the other hand strongly propound a right to information to the general public under PPP Model. Since an element of public interest is always involved in PPPs, it is argued that the citizens must be aware of the manner in which the public funds have been utilized and the extent to which they are audited.[4] It is also argued that providing such a right would lead to better

1 Sebastian PT, *Drop the Iron Curtain*, Outlook Business, 4 (November 26, 2011).

2 *Ibid.*

3 Supra note 1, at 4.

4 Press Statement, *Make Public Private Partnership Projects RTI Compliant*, National Campaign for People's Right to Information (July 25, 2011).

governance and increased efficiency of the government. It would be beneficial for the private parties as well since it would result in more sustainable contracts and reduced risks of renegotiation.[5]

There is no doubt in the premise that a project that involves the government in any capacity must be carried out openly and should be subject to certain checks and balances. The profit drive of the PPP model should be leveraged for public good. However, it is essential to maintain the commercial confidentiality of the business players and protect their interests in order to run the PPP model successfully. Thus, the approach towards disclosure must be tailored accordingly.

Legislative Framework in India

In India, the regulatory framework for RTI in PPP encompasses numerous regulatory authorities and legislations, with the primary legislation being the Right to Information Act, 2005 ["RTI"]. Apart from RTI, the Comptroller and Auditor General of India, Ministry of Personnel, Public Grievances and Pensions and various industry specific regulators exercise jurisdiction. Prior to 2017, Planning Commission also played an important role in regulating PPPs. The role of each of the institutions and the legislation has been discussed at length below.

Right to Information Act, 2005

As there is no specific legislation for information disclosure on PPPs, the RTI Act being the general legislation for seeking information would apply. The Act guarantees a right to information to all citizens and imposes certain information disclosure obligations on public authorities. [6]

'Information' under section 2(f) of the Act means any material in any form including contracts thereby including PPPs. [7] Under section 2(h) of the Act, the definition of 'public authority' includes "non-government organisation substantially financed, directly or

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5 *A Framework for Disclosure in Public Private Partnerships*, 23, The World Bank Institute (July, 2016).

6 Section 3 & Section 4, Right to Information Act, 2005.

7 Section 2(f), Right to Information Act, 2005.

indirectly by funds" provided by the government.[8] This test can be applied to PPPs as most projects, though not set up under any law or Constitution, do receive substantial funding directly/indirectly from the government.

Bringing PPPs within the purview of RTI is helpful as section 4 of the Act imposes an obligation on public authorities to maintain records accessible to the citizens. This could provide vital information about the PPPs in an easily accessible format. However, there exists a lack of clarity regarding the position of PPPs as public authorities. The appellate authority under the RTI Act, i.e the Central Information Commissioner (CIC) has on several occasions held that PPPs fall within the ambit of Public Authorities as defined under section 2(h) of the Act. However, the parties have appealed the decisions before the High Court and received a stay order from the Court.

This is evident from the case of the consortium modernizing the Delhi International Airport (DIAL) with Airport Authority of India. As per the 2006 PPP pact, DIAL is required to pay to AAI an annual fee of 45.99% of its gross revenues and AAI only has a 26% stake in DIAL. While the details of the concession agreement have been provided by AAI, no information was provided for the different revenue streams upon filing of an RTI as DIAL argued that it did not fall within the ambit of the RTI Act. The CIC held that DIAL was a 'public authority' under the RTI Act and must disclose the requested information.[9] However, DIAL subsequently got a stay from the High Court and the matter remains subjudice till date.

In certain cases CIC's decisions have only partly been effective as the parties refused to fulfil their disclosure obligations under section 4 despite being declared public authorities. In Mumbai Metro One Pvt Ltd (MMOPL), a consortium between Veolia, MMRDA and Reliance Infrastructure, an RTI activist sought information on the safety report given by the commissioner of railways from MMOPL. In its reply, MMOPL claimed that the letter has been transferred to MMRSA as it need not comply with the RTI Act. The PPP was subsequently declared as 'public authority' by the State Information

8 Section 2(h), Right to Information Act, 2005.

9 Anil Heble v. Airport Authority of India, Decision No. CIC/OK/C/2006/00125 (Central Information Commission).

Commissioner and this decision was not challenged by the parties.[10] However, MMOPL only disclosed the information sought under the RTI application and no other disclosure required under section 4 of the RTI Act, 2005 has been made.

The only authoritative judgement on this matter is that of the Bangalore High Court in the PPP for Bangalore International Airport Limited (BIAL).[11] BIAL is a partnership of KSSIDC, AAI and a consortium of private airport operators. The Bangalore High Court in 2010 held that it is amenable to RTI. The justification provided by the HC is that, were the concessions provided to the concessionaire by the state government (including cost of land acquired, loan, tax exemptions uninterrupted supply of power and water etc.) translated into cash flows, the figure arrived at would be a 'substantial amount' as required under section 2(h) of the Act. It upheld the decision of the Karnataka Information Commissioner noting that even the direct financing by the Government ie. 26% of the equity, is much higher than the private parties and thus if the non-direct sources are added, the government support will be 'substantial'. The Court observed, that as "substantial' has not been defined under the Act, the word should be understood in contradiction to the word trivial. Thus, whenever the funding by the government is not trivial, or to be ignored as pittance, it would amount to substantial funding, as in the case of public funds, the funding need not be cash flow but can be of any other kind. [12]

This landmark judgment is extremely important for determining whether a PPP can be considered a public authority under the RTI Act as it has interpreted substantial funding to include non-financial funding as well. This would expand the scope of the meaning of 'public authority' thereby bringing in most of the PPPs under the definition.

However, a case by case analysis of PPPs is a cumbersome process and delays the process of obtaining information by the

10 Shailesh Gandhi v. Mumbai Metro One Private Limited (MMOPL) C.No. 2636/02.

11 Bangalore International Airport Limited v. Karnataka Information Commission Writ Petition No. 12076 of 2008 (Karnataka High Court).

12 Bangalore International Airport Limited v. Karnataka Information Commission Writ Petition No. 12076 of 2008 (Karnataka High Court).

citizen. Thus, more clarity is required, through legislative or judicial pronouncements, to determine 'substantial' nature of funding.

Planning Commission

The Planning Commission played an important role in appraising the PPP project proposals until it was scrapped. Given its vital role in the past and the manner in which it has shaped the framework around RTI, it is important to discuss the Planning Commission.

Concerned by the stay orders of the High Court on most of the decisions of CIC, the Chief Information Commissioner Satyananda Misra wrote to the Planning Commission in 2011.[13] In his letter, he asked the Planning Commission to issue certain guidelines to make PPPs more RTI compliant and avoid unnecessary litigation. In its reply, the Deputy chairperson of Planning Commission Montek Singh Ahluwalia stated that it has published several Model Concessionaire Agreements for various types of PPPs & if these MCAs are followed by any PPP then any person can obtain certified copies of the concession agreements, maintenance manuals, maintenance programme and maintenance requirements in respect of each project directly from the concessionaire. It disowned any responsibility to bring PPPs under the RTI Act saying that individual ministries that tie up with the private entities must be held accountable for the same.[14]

It must be noted that the Model Concessionaire Agreements formulated by Planning Commission are not mandatory for the parties. In any case, they do not contain specific clauses for disclosure and confidentiality and do not declare the PPPs to be public authorities under the RTI Act.

Comptroller and Auditor General of India

The scope and power of CAG to conduct audits of PPPs has been debated for long. An RTI application filed in 2011 to examine the extent of PPP auditing done by CAG revealed that during the period April 2008 - August 2011 the CAG had not audited any

13 Montek Clarfies on Application of RTI Act on PPP Projects, Release ID 70554, Planning Commission (2011) <http://www.pib.nic.in/newsite/erelcontent.aspx?relid=70554>.

14 *Ibid.*

PPPs in Uttar Pradesh, Bihar, Goa and the Union Territory of Puducherry.[15] Only 15 projects were audited in West Bengal, 3 each in Delhi, Haryana and Kerala, 2 each in Maharashtra and Jharkhand, and 1 each in Karnataka, Rajasthan, Tamil Nadu, Sikkim and Uttarakhand. Furthermore, there is no mention of the States of Assam (projects worth Rs. 8,300 crores), or Gujrat (Rs 62, 300 crores) or Madhya Pradesh (Rs 18,200 crores) or Orissa (Rs. 16005 crores). It is not clear whether PPPs have been audited in these states at all.[16]

Additionally, the reply also stated that no separate audit report is prepared for PPP by the CAG as they are included in the regular audit reports of the department. No sector wise information is maintained by the CAG of the PPPs under the Central Government either.[17]

However, in a recent judgment of the Supreme Court it has been held that the accounts of any entity involving revenue-sharing agreements with the Government can be audited by the CAG by virtue of the powers vested in it under Article 149.[18] The Court, in this case, permitted auditing of private telecom companies by reasoning that:

> *"CAG's examination of the accounts of the Service Providers in a Revenue Sharing Contract is extremely important to ascertain whether there is an unlawful gain to the Service Provider and an unlawful loss to the Union of India, because the revenue generated out of that has to be credited to the Consolidated Fund of India."*[19]

This has opened a gateway for reviewing the accounts of private entities parties to a PPP arrangement. While there had been occasions of PPP auditing by CAG, the same have been in the nature

15 Reply of CAG to Shri Venkatesh Nayak for application under RTI <http://humanrightsinitiative.org/programs/ai/rti/india/national/2012/email_alearts/CAG-RTIreply-Sep11-Del- VenkatN.pdf>.

16 *Ibid.*

17 Supra note 16.

18 Association of Unified Tele Services Providers & Others v. Union of India Civil Appeal No. 4591 of 2014 (Supreme Court).

19 Association of Unified Tele Services Providers & Others v. Union of India Civil Appeal No. 4591 of 2014 (Supreme Court).

of audit of sectors with PPP as a whole rather than an audit of standalone PPP projects, e.g. a recent report on performance of major ports many of which have privately operated terminals.[20]

A CAG audit will create additional hurdles for the private entities, as this is in addition to the statutory audit conducted under the Companies Act, 2013. Further, the nature, ambit and scope of the audit are also not clear.

The High Court of Delhi in its judgment brought some clarity regarding the same by interpreting section 20 of the CAG Act.[21] Section 20 is a residuary clause which permits CAG to audit any 'body or authority' directed to be audited by the President/ Governor/Administrator. On a petition to audit Electricity Distribution Companies in Delhi, the Court laid down that such an audit under section 20 can be directed under only on the advice of Council of Ministers and in consultation with the CAG. The terms and conditions of the audit must be clearly set out by way of 'proposal for audit' agreed between CAG and the government and the public interest involved in the audit must be explained. The Court notably held that the public interest served by such audit is subject to judicial review. Another significant observation of the Court was that CAG audit of bodies within the supervision of sectoral regulators is a futile exercise and thus against public interest.[22]

The decision is extremely crucial in laying down the prerequisites of a CAG audit of PPPs. The Court, however, did not indulge in the constitutional validity of section 20 and whether private entities can be audited by the CAG at all, since the points were not raised before the Court.

Ministry of Personnel, Public Grievances and Pensions

The Ministry of Personnel, Public Grievances and Pensions has issued Circular No. 47 of 2016 as Guidelines on *Suo Motu*

20 Report No. 3 of 2009-10, *Performance Audit of Functioning of Major Port Trusts in India* - Ministry of Shipping (March 2009).

21 United Rwas Joint Action v. Union of India 2015 SCC Del 13089 (Delhi High Court).

22 United Rwas Joint Action v. Union of India 2015 SCC Del 13089.

disclosure under RTI Act, 2005.[23] It was formulated on the basis of recommendations of a Task Force set up for this purpose by the Government of India in 2011. The aim of the circular is to make public authorities transparent by making proactive disclosures. The Circular addresses disclosure of PPP projects specifically. It states that:

> *"All information relating to the PPPs must be disclosed in the public domain by the Public Authority entering into the PPP contract/concession agreement. This may include details of the Special Purpose Vehicle (SPV), if any set up, detailed project reports, concession agreements, operation and maintenance manuals and other documents generated as part of the implementation of the PPP project."*[24]

Additionally, information on form revenue resource, procedure of selecting the private entity as well as the outcomes and outputs may be proactively disclosed. It also provides for a periodic disclosure of all payments made under the PPP project. As per the circular, the documents exempted under section 8 of the RTI Act need not be disclosed *suo motu*[25]

While the Circular is a welcome step towards proactive disclosure of information by PPPs, it has been loosely drafted. The usage of word 'may' leaves immense scope for entities to avoid liability.

Furthermore, liability can also be avoided with great ease as the obligations under section 4 are upon the public authority as an institution. No liability can be fixed on any officer in case of non-compliance. As has been aptly held by the Delhi High Court, "*Section 4 merely sets out the obligations of the public authorities. It doesn't provide the machinery to enforce the implementation of these obligations.*"[26] As a consequence, very little information is disclosed proactively.

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23 Circular No. 47 of 2016, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training (April 15, 2003).

24 *Ibid.*

25 *Ibid.*

26 Delhi Development Authority v. Central Information Commission & Others the Delhi High Court Writ Petition (Civil) No. 4748 OF 2007.

Assessment of Regulatory Framework in India

The World Bank, in its 2013 report on Disclosure of Project and Contract Information in PPP reviewed the disclosure practices across 11 jurisdictions in the world. The assessment of these jurisdictions was primarily based on five broad parameters, which were, f*irst,* the extent of disclosure of contracts and related information by the Government; *second* guidance provided under legislations for redaction of confidential information; *third* disclosure of financial information and risk allocation between the government and the private entity; *fourth* information on the performance of PPP projects and *fifth,* validation of proactive disclosures made by the parties.[27]

Adopting practices in line with these parameters would result in an ideal and balanced legislation as they embody all the essential elements to cover under a broad umbrella. However, the aforementioned analysis of the legal framework in India clearly indicates that the parameters set out in the first section of the paper have not been met.

The disclosure of PPP contracts and related information is weak as there is little or no mechanism to hold the entities or the government accountable. Several departments of the Government of India have made voluntary disclosures disclosure such as the AAI on Delhi and Mumbai Airports or the NHAI on 150 highway contracts. However, the disclosures are incomplete and other departments are yet to proactively make project documents available for the public.[28] The implementation of obligations under section 4 of the Act and the Circular issued by MoPPP is evidently ineffective.

With respect to disclosure of financial information, risk allocation and transfers b/w government and the private party, the exact details of the lease agreements etc are not discloses. Similarly, while grant funding allocations under the VGF scheme of government are disclosed proactively, details of actual grant disbursals are not disclosed.[29]

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27 *Disclosure of Project and Contract Information in Public-Private Partnerships,* 23, The World Bank Institute (January, 2013)

28 *Ibid.*

29 World Bank Institute, Supra note 27, at 72.

While the RTI Act exempts disclosure of certain information under section 8, such as commercial confidence, trade secrets or intellectual property, there appears to be no specific guidance on redactions of PPP contracts.

Very limited information is disclosed proactively on project performance. For instance, while the NHAI releases information on state-wise land acquisition, no project-wise status of land acquisition is provided. This might give an overall status of the work but does not provide a picture of individual contract performance against the performance targets. Similar is the case with CAG audit reports which, as discussed earlier, only provide sectoral audit reports instead of standalone audits.

Conclusion

A PPP disclosure policy should ideally make provision for keeping the citizens fully informed about the contract services and the performance targets. It should also encompass information on the performance levels achieved, government grants utilized and the procurement procedure whilst still protecting the competitive edge of the entity providing services under the PPP.

It is evident from the observations made in this paper that there is an urgent need for judicial and statutory clarity on PPP being covered under the ambit of public authority. Exemptions must be provided to PPPs that are not 'substantially funded' by the Government and guidelines for determining 'substantially financed' must be issued.

Additionally, penal consequences must be imposed on public authorities for non-disclosure of information under Section 4 of the RTI Act, 2005. To provide an idea about the kind of information to be disclosed under Section 4, sector specific detailed guidelines must be issued as each industry works distinctly. Furthermore, a Public Information Officers as required under Section 5 of the RTI Act must be appointed in PPPs by the concerned ministry.

For the sake of clarity, guidelines on available redactions under section 8 of the Act must be issued in order to protect confidentiality of the private entities. Performance reports of all PPPs must also be made mandatory for the respective authority and CAG must be mandated to issue sector specific audit reports annually of PPPs in each state.

Finally, Standard form of Contracts (MCA) formulated by Planning Commission must incorporate these factors including clauses for confidentiality and disclosure requirements.

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