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# **CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK RELATING TO PUBLIC PRIVATE PARTNERSHIP IN INDIA WITH REFERENCE TO INFRASTRUCTURE SECTOR**

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## **1.1. INTRODUCTION**

The legal framework for Public Private Partnership in India ranges from the Constitution of India to rules and regulations notified from time to time by various state instrumentalities. In addition to legislations relevant to particular sector like the National Highway Authority of India Act, 1988, laws governing normal commercial transactions like the Indian Contract Act, 1872, Sale of Goods Act, 1930, Negotiable Instruments Act, 1881, etc., will also have a bearing on PPP arrangements. In addition, various statutes governing dispute resolution like the Code of Civil Procedure, 1908, Specific Relief Act, 1963 and Arbitration and Conciliation Act, 1996 also assumes relevance.<sup>1</sup> There is no dedicated PPP law at the central level. General procurement by the government is governed by the Ministry of Finance, General Financial Rules, 2005. For PPP projects, the Department of Economic Affairs has notified Model Request for Qualification on May 18, 2009 and Model Request for Proposal on July 14, 2009 through office memoranda which contain specific procedures for PPP projects. Further, procuring authorities also release model concession agreements that contain the basic terms and conditions for PPP projects in their respective sectors. Together, these comprise the regulatory framework for PPPs in India.

## **1.2. THE CONSTITUTION OF INDIA**

At the apex of the Indian legal framework governing public procurement is Article 299 of the Constitution of India, which stipulates that all contracts made in the exercise of the executive power of the Union of India, or by a State Government, shall be made in the name of the President of India or by the Governor of the State, as the case may be, and be executed on

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<sup>1</sup> K.S Harisankar,G. Sreeparvathy, Rethinking Dispute Resolution in Public–Private Partnerships for Infrastructure Development in India *Journal of Infrastructure Development* 21–32, available at: [http://www.nlujodhpur.ac.in/downloads/JOI\\_5- 1\\_02.pdf](http://www.nlujodhpur.ac.in/downloads/JOI_5- 1_02.pdf) (last visited on October 11, 2016).

behalf of the President or the Governor by such person as he may direct.

The foremost step, in assessing compliance with the prevalent legal framework, is to ask the following two questions:

1. Whether the project is feasible/ permissible under the law of the land viz. the constitution?
2. Whether the process adopted for procurement is permissible under the Constitution?

The Constitution of India divides the responsibility of legislation between the National Parliament and State legislature bodies. The Seventh Schedule of the Constitution of India contains a Union List, a State List and a Concurrent List. The Indian Parliament is competent to make laws on matters enumerated in the Union List. State Legislatures are competent to make laws on matters enumerated in the State List. While both the Union and the States have power to legislate on matters enumerated in the Concurrent List, only Parliament has power to make laws on matters not included in any list.<sup>2</sup>

The key areas that have been included in the Union List are ports, airports, railways, national highways, inland water transport, telecommunications, oilfields and mineral resources.<sup>3</sup>

The key areas that have been included in the State List are police services, prisons and corrective facilities, regulation of local governments, public health and sanitation, state highways, city roads, water supply and irrigation.<sup>4</sup>

There are sectoral legislations at the national level in certain areas covered in the Union List, such as the in the sectors of airports, national highways, major ports, power and cable TV. These legislations provide the legal framework for infrastructure projects including private participation in the key infrastructure sectors. In addition to these sectoral legislations, at the central level, the legal framework consists of a set of administrative controls, programmes and policies.<sup>5</sup>

At the State level, some key states of India like Gujarat, Punjab, Karnataka, and Andhra Pradesh have developed legal frameworks for private participation in infrastructure, specifically in areas in the jurisdiction of the State legislature and the State government. As each State has the right to promulgate legislations in the areas covered in the State List, the situation in each State is different in the context of infrastructure development. The following table provides a list of

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<sup>2</sup> Overview of PPP in India, *available at*: <http://toolkit.pppinindia.com/ports/module1-ooi-india-lffpii.php?links=oindia1b> (last visited on September 21, 2016).

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

States and the key features of the legal framework put in place by them for private investment in infrastructure.<sup>6</sup>

### 1.3. LOCAL –SELF GOVERNMENT

The constitution of India, 1950 provides for the constitution of local government institution at the village and municipal levels Panchayats (local institutions of self governance), have been in existence in India since pre- independence times; the extent of their strength however, varied from state. Article 40 of the Constitution of India, 1950 is a directive Principle of state policy that provides for states to take steps to organize village Panchayats and to endow them with such powers and authority as may be necessary to enable them to function as units of self-Government.<sup>7</sup> Matters that relate to infrastructure sector in the area within jurisdiction of a Panchayats, that can be delegated to Panchayats by law are:

- (i) Land improvement<sup>8</sup>
- (ii) Minor irrigation, water management and watershed development<sup>9</sup>
- (iii) Rural housing<sup>10</sup>
- (iv) Roads, culverts, bridges, ferries, waterways and other means of communications<sup>11</sup>
- (v) Rural electrification including distribution of electricity<sup>12</sup>
- (vi) Non conventional energy sources<sup>13</sup>
- (vii) Health and sanitation<sup>14</sup>

The matters that relate to infrastructure sector in the area within the jurisdiction of a municipality, that can be delegated to a municipal body by law are:

- (i) Urban planning including town planning<sup>15</sup>
- (ii) Regulation of land use and construction of buildings<sup>16</sup>
- (iii) Road and bridges<sup>17</sup>

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<sup>6</sup> *Ibid*

<sup>7</sup> Piyush Joshi, *Law Relating to Infrastructure Project* 103-104 (Lexis Nexis Butterworths wadhwa, Nagpur, 2nd edn. 2003).

<sup>8</sup> Entry 2, Eleventh Schedule, Constitution of India, 1950.

<sup>9</sup> Entry 3, Eleventh Schedule, Constitution of India, 1950.

<sup>10</sup> Entry 10, Eleventh Schedule, Constitution of India, 1950.

<sup>11</sup> Entry 13, Eleventh Schedule, Constitution of India, 1950.

<sup>12</sup> Entry 14, Twelfth Schedule, Constitution of India, 1950.

<sup>13</sup> Entry 15, Twelfth Schedule, Constitution of India, 1950.

<sup>14</sup> Entry 15, Twelfth Schedule, Constitution of India, 1950.

<sup>15</sup> Entry 1, Twelfth Schedule, Constitution of India, 1950.

<sup>16</sup> Entry 2, Twelfth Schedule, Constitution of India, 1950.

<sup>17</sup> Entry 4, Twelfth Schedule, Constitution of India, 1950.

- (iv) Water supply for domestic, Industrial and commercial purposes<sup>18</sup>
- (v) Public health, sanitation, conservancy and solid waste management
- (vi) Provision of urban amenities and facilities
- (vii) Public amenities including street lightening, parking lots, bus stops and public conveniences

The above discussion leads to the following conclusion regarding the PPP/Project Finance:

1. Depending on the Infrastructure sector in question the relevant government entity empowered to enter into a PPP Project contract may be form any of the three tiers of the Government.<sup>19</sup>
2. Further with the differences across states in terms of effective delegation of powers to local Government, the relevant government entity for PPP Project, the relevant government entity for PPP projects in sector like urban water supply or municipal solid waste may vary from state to state. Also, even though a sector may be the exclusive preserve for the state or local government there may still be certain aspect of any project in such a sector that are subject to central government legislation. For instance environmental aspects, land acquisition and tax income.<sup>20</sup>
3. In sector like power where both the union and state government share the jurisdiction the relevant government entity may be from either tier of the government though in terms of the overall regulatory or legislative framework, there should not be any conflict with central government legislation like the Electricity Act 2003. In other sectors like ports and highway other than major ports and all highways other than national highway are in the domain of relevant state government.<sup>21</sup>

Given the division of jurisdiction in the Indian Constitution, one implication is that there cannot be an umbrella legislation covering PPP at the national level that applies to all PPP projects. At the state level, some states like Gujarat, Punjab and Andhra Pradesh have come up with specific legislation for infrastructure development that cover some aspects of PPP including statutory body responsible for the development of such PPP infrastructure projects whereas other states have only announced only policies that are not legally binding. These may also be

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<sup>18</sup> Entry 5, Twelfth Schedule, Constitution of India, 1950.

<sup>19</sup> Prabhuddha K.Das, *PPP And Project finance: Development and use of financial Models 56- 57* (TataMcGraw Hill Education Pvt. Ltd., New Delhi), available at: <https://books.google.co.in/books?id=d0nIez9crd0C&printsec=frontcover#v=onepage&q&f=false> (last visited on September 30, 2016).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

policies governing specific aspect of PPP project, for example, a policy for determining the amount of tolls to be levied on a privately developed and maintained highway.<sup>22</sup>

The policy framework primarily covered by the General Financial Rules (GFRs) 1963 (amended in 2005 and 2017) framed by the Ministry of Finance by executive order and the Delegation of Financial Powers Rules 1978 (again framed by the Ministry of Finance). The GFRs 2017 were issued by the Ministry of Finance on 11 February 2017 and came into force on 8 March 2017. Rule 153(iii) of the GFRs 2017 allows the Central Government to provide (by way of notification) mandatory procurement of any goods or services from any category of bidders or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services. Pursuant to this, on 15 June 2017, the Ministry of Commerce and Industry issued the Public Procurement (Preference to Make in India) Order 2017.

The main features of GFRs are as follows:

- Defines works, goods, and services to be procured and the scope of public procurement
- Outlines the fundamental principles of public procurement like enhancing transparency and efficiency, instilling fair practice, and promotion of competition
- Prescribes monetary thresholds for using specific procurement methods across the categories of procurement, i.e., works, goods, and services
- Describes different procurement methods and their applicability
- Prescribes Code of Integrity
- Specifies tender award criteria
- Outlines general principles and rules of contract management.

### **SELECTION OF PROJECT SPONSER**

One of the key factors that determine the success of a PPP project is the criteria for selection of the project sponsor, especially as such projects typically involve large capital investments for providing essential infrastructure services to users on a long term basis. A bidder lacking in sufficient technical and financial capacity can jeopardise the project and compromise the services that the government is committed to provide.<sup>23</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> Public Private Partnership , Model RFQ Document , Planning Commission of India, *available at:* [http://planningcommission.nic.in/sectors/ppp\\_report/2.Model%20Bid%20Documents/01-A%20Model-RFQ-Word.pdf](http://planningcommission.nic.in/sectors/ppp_report/2.Model%20Bid%20Documents/01-A%20Model-RFQ-Word.pdf) (last visited on October 26, 2018)

### **Two-stage Process**

The bidding process for PPP projects is typically divided into two stages. In the first stage, eligible and prospective bidders are shortlisted. This stage is generally referred to as Request for Qualification (RFQ) or Expression of Interest (EoI). The objective is to short-list eligible bidders for stage two of the process. In the second and final stage, which is generally referred to as the Request for Proposal (RFP) or invitation of financial bids, the bidders engage in a comprehensive scrutiny of the project before submitting their financial offers.<sup>24</sup>

### **Request for Qualification (RFQ)**

The RFQ process should aim at short-listing and pre-qualifying applicants who will be asked to submit financial bids in the RFP stage. The objective is to identify credible bidders who have the requisite technical and financial capacity for undertaking the project. In order to encourage greater participation from credible domestic and international investors, the RFQ document should not require respondents to incur significant expense in preparing a response. The information sought for the purposes of prequalification should generally be restricted to technical and financial capabilities that are relevant to the project. Such information should be precise and quantified so that the process of short-listing is fair and transparent and does not expose the government to disputes or controversies.<sup>25</sup>

### **Number of bidders to be pre-qualified**

The number of bidders to be pre-qualified and short-listed for the final stage of bidding i.e. the RFP stage needs careful consideration. On the one hand, the number of pre-qualified bidders should be adequate for ensuring real competition in bidding. On the other hand, a large number of short-listed bidders is viewed as a factor that dampens participation by serious bidders, thus diluting competition, because credible investors are normally less inclined to spend the time and money necessary for making a competitive PPP bid if the zone of consideration is unduly large.<sup>26</sup>

Unlike a bid for procurement of goods and services, bids for PPP projects involve greater risks, significantly larger investments and long-term participation. Since PPP projects in infrastructure provide a critical service to the users at large, the quality and reliability of service

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

assumes greater importance. Considering all these factors, short-listing of about six to seven pre-qualified bidders has been specified in the RFQ with a view to securing high quality and competitive financial bids. Towards this end, a fair and transparent system of evaluation at the RFQ stage would be necessary.<sup>27</sup>

### **Request for Proposals (RFP)**

The RFP process is aimed at obtaining financial offers from the bidders pre-qualified at the RFQ stage. The information sought in the RFP would normally be restricted to financial offers only. The bidding parameter should be decided keeping in view the nature of the project and its revenue streams.

The RFP document should be simple and transparent and should require the bidder to quote only the value for a single bidding parameter. The contents of the Concession Agreement would constitute the bid conditions and would, therefore, be binding. A Feasibility Report should also be provided to the bidders but this would only be for their assistance, and its contents would not be binding. If a bidder feels that the proper tendering process has not been followed or that his bid has been rejected wrongly by the authorities, then the aggrieved bidder can approach the courts. This has been discussed thoroughly under this chapter.

### **1.4. GRANT OF RIGHTS**

The first main step in the development of an infrastructure project through private participation is the vesting of number of specific rights in the private entity undertaking such development. The manner of vesting of such rights and the scope of such rights is integral to the ability of the private entity to develop the infrastructure facility and will determine the scope, viability and bankability of the project.<sup>28</sup>

The Concession Agreement is, therefore, the agreement wherein the public-sector entity grants the private sector entity the right to implement an infrastructure project. In other words, Concession Agreement vest the concessionaire with all the rights necessary to implement the project and obtain the agreed returns in accordance with the terms of the concession agreement.<sup>29</sup> Different Infrastructure sectors have different Model Concession Agreement.

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 7 at 108.

<sup>29</sup> *Ibid.*

Concession Agreement is divided broadly into:<sup>30</sup>

- 1) Preamble: Important in litigation to clarify intention of Parties. It is used as a tool for interpretation.
- 2) Definitions: Definitions Have to be drafted and reviewed carefully. Private entities tend to either expand on rights or reduce obligations through definitions.
- 3) Grant of Concession: It should be drafted after review of applicable statutes to the sector/project and must be able to vest sufficient rights for the implementation of the Project. Type of rights depend on nature/structure of project and applicable statutory provision. For instance, usual rights vested are exclusive right to implement the Project and all necessary associated rights. Usual rights vested relate to develop, design, engineer, finance, procure, construct, operate and maintain the Project.
  - i. Conditions Precedent: Depend on status of project. Reflect the nature of risks parties have identified as needing to be mitigated prior to costs can be incurred on the Project or prior to obligations becoming effective. Usual conditions precedents: (a) land for site being provided; (b) obtaining necessary permissions to commence construction; (c) providing any required performance security.
  - ii. Obligations and Undertakings: Obligations of Concessionaire cover all aspects of project implementation i.e. making applications for approvals, ensure financing of the Project/financial closure, reporting requirements, ensure adequate design of project facilities to meet specified parameters, ensure construction and operation of Project to certain specified parameters
  - iii. Project Development and Operation Framework: it contains provisions like the construction of the project and its maintenance during the construction period. Monitoring of the construction by way of monthly progress report and inspection etc.
  - iv. Financial Aspects: it includes provisions related to Tolling, User Fee, Concession Fee etc
  - v. Generally Applicable Provisions like Force Majeure, Indemnity, Insurance,
  - vi. Assignment, Dispute Resolution, Miscellaneous Provisions
  - vii. Default and Termination: It contains provision related to termination of Project and payment on such termination. Termination Payments are different for

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<sup>30</sup> Legal Aspect of drafting Concession Agreement for PPP by Piyush Joshi, *available at*: [https://www.claruslaw.com/upload/file\\_ConcessionAgrLegalAspcts-7-7.pdf](https://www.claruslaw.com/upload/file_ConcessionAgrLegalAspcts-7-7.pdf) (last visited on October 26, 2018)

Natural Force Majeure event, Political Force Majeure, Termination for Concessionaire Event of Default, Termination for Granting Authority/Government event of default. In most of the project highest compensation is provided only for termination for Granting Authority event of default.

## 1.5. LIABILITIES

In respect of the nature of liability that a private developer could be exposed to while implementing an infrastructure project, developments in constitutional jurisprudence indicate that even a private body can be subjected to the writ jurisdiction of a high court under the Constitution of India.<sup>31</sup>

The essential principle is that under Article 226, writs can be issued to any person or authority. The term "authority" in Article 226 has a wider meaning than in Article 32 because it confers power to issue writs for fundamental as well as non-fundamental rights. The words "any person or authority" cover any body performing a public duty. It is not the form but the nature of duty imposed on the body which is relevant.<sup>32</sup>

A tenderer shall have a right to be heard if it feels the proper process was not followed or its bid was wrongly rejected. Such representation has to be sent to the specified authority and be responded to within one month.

No appeal lies as a matter of right but in cases of public importance, where significant questions of law are involved or where the high court decision is grossly erroneous, an appeal would lie with the Supreme Court. The period for the same is 90days<sup>33</sup>

So far there has been no reported case of a disadvantaged bidder claiming damages. However, in a 2007 decision (*Jagdish Mandal v State of Orissa*<sup>36</sup>), the Supreme Court held obiter that, in order to claim damages, the disadvantaged bidder must establish the process adopted or decision made by the authority was made in bad faith or intended to favour someone, or so arbitrary and irrational that the court can say that no responsible person acting reasonably and in accordance with the relevant law could have reached it, or the public interest is affected.

Apart from the Constitutional jurisprudence, Contractual liabilities of the parties can also arise

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<sup>31</sup> Supra note. 7 at 133 & 134

<sup>32</sup> Ibid.

<sup>33</sup> Sumeet Kachwaha Public procurement, July 2018, available at: [https:// getting the dealthrough.com/area/33/jurisdiction/13/public-procurement-2017-india/](https://gettingthedealthrough.com/area/33/jurisdiction/13/public-procurement-2017-india/) (last visited on October, 14, 2018)

under Contract Act, 1872. Sections 73<sup>34</sup> and 74<sup>35</sup> of Contract Act contemplates that in a contract the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. If parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree.<sup>36</sup>

In terms of force majeure, if the force majeure event occurs before the appointed date the financial close period is extended by a period equal in length to the duration of the force majeure event and the parties bear their respective costs. Likewise, if the force majeure event takes place after the appointed date but before the Commercial operation Date (COD) of the project, the COD is pushed back by a period equal in length to the duration of the force majeure event.

## 1.6. DISPUTE SETTLEMENT

In India, often there are considerable delays in judicial processes, which affect speedy and efficient resolution of dispute in Public Private Partnership Projects. Therefore, the central

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<sup>34</sup> (2007) 14SCC 517.

<sup>35</sup> Section 73 Of Indian Contract Act 1872: Compensation of loss or damage caused by breach of contract When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

<sup>36</sup> Section 74 of Indian Contract Act 1872: Compensation for breach of contract where penalty stipulated for when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation: A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception: When any person enters into any bail bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

government and state governments have given impetus to alternative dispute resolution such as conciliation, arbitration, expert adjudication and amicable settlement. The regulatory authorities such as Airport Economic Regulatory Authority, Tariff Authority of Major Ports, Central electricity regulatory commission and state level electricity commission are playing important role in resolution of disputes in PPP Projects.<sup>37</sup>

The existence of a credible and efficient dispute resolution mechanism (hereinafter DRM), which can settle the differences in a time bound manner is one of the key factors for the success of any PPP. In private investments, especially in those involving high capital, the perceived risks and costs of delay in resolution of disputes can be fatal to the country. Provision for an effective-both in terms of speed and quality- assumes relevance for PPPs taking into account the possible conflicts of interests, long-term and high investments involved, political and social sensitivity often attached to the projects etc. Thus it becomes imperative that the parties get the assistance of a body, with necessary technical, financial and legal expertise, to settle their disputes in a time bound manner.<sup>38</sup>

### 1.6.1. Alternative Dispute Resolution Mechanism—Various Models

Various methods of alternative dispute resolution like amicable settlement, conciliation mediation, arbitration, expert adjudication, etc., are generally provided for in the concession contracts. Reference to dispute settlement mechanisms are also made in model concession agreements promulgated by the union government, sectoral legislations like the Electricity Act, and the state PPP legislations. The draft national policy as well as the draft rules, promulgated by the government for public discussion, though sparse in details, also recognizes mutual discussion as the preferred mode of settlement of disputes. Some of the states already have in place separate dispute resolution mechanisms (see Table). In addition to these state legislations, the policy statements of various state governments also emphasise the need for setting up of a robust dispute resolution mechanism based on ADRs.<sup>39</sup>

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<sup>37</sup> Ankintola Akintoye, Mtthias Beck and Mohan Kumar Swamy, *Public Private Partnership: A Global Review*, 141(2016), available at: <https://books.google.co.in/books?id=BOWPCgAAQBAJ&printsec=frontcover&dq=public+private+partnership+a+global+review&hl=en&sa=X&ved=0ahUKEwiYvYrf2dfPAhVGjFQKH5BegQ6AEIJDAA#v=onepage&q=public%20private%20partnership%20a%20global%20review&f=false> (last visited on October 1, 2016).

<sup>38</sup> K.S Harisankar & G.Sreeparvathy, —Rethinking Dispute Resolution in Public– Private Partnerships for Infrastructure Development in *India Journal of Infrastructure Development* (India Development Foundation SAGE Publications Los Angeles, London, New Delhi, Singapore, Washington DC, 2013), available at: [http://www.nlujodhpur.ac.in/downloads/JOI\\_5-1\\_02.pdf](http://www.nlujodhpur.ac.in/downloads/JOI_5-1_02.pdf) (last visited on March 22, 2017).

<sup>39</sup> *Id.* at 26.

The following section discusses the various dispute settlement mechanisms available for PPPs in India, though their form and priority may vary depending on the sector and the regulator.

(i) Amicable Settlement, Mediation and Conciliation

As PPP relies more on trust and partnership between the government agency and the private investor, it has long been recognised that all the possibilities must be explored for amicable settlement of differences. Most of the concession contracts or the rules of the regulating authority provide for amicable settlement of disputes between the parties through negotiation and conciliation. It can either be through Infrastructure a consultation or co-ordination committee or through an independent engineer and auditor who will ensure compliance with the contract on a day to day basis. The FIDIC<sup>40</sup> form of contract provides for an independent engineer who shall act as a balance of interests by determining, certifying and approving the manner in which the contract is administered.

**State Legislations Governing PPP**

State Legislation	Mode of Dispute Resolution
Andhra Pradesh Infrastructure Development Enabling Act, 2001	A Conciliation Board is set up, which shall have the powers of a civil court. The settlement award shall have the same effect as that of an arbitral award under the Arbitration and Conciliation Act, 1930. There is a bar on the parties to resort to arbitral or judicial proceedings during the conciliation procedure.
Bihar Infrastructure Development Enabling Act, 2006	A Conciliation Board is set up which shall assist the Government Agency, or Local Authority and any Developer in an independent and impartial manner to reach an amicable settlement of their disputes arising under the Act or the Concession Agreement. Every proceeding before the Board shall be deemed to be a judicial proceeding and it shall be deemed to be a Civil Court. Jurisdiction of subordinate courts are barred by providing that dispute settlement or dispute resolution in respect of any matters under the

<sup>40</sup> The International Federation of Consulting Engineers (commonly known as FIDIC, acronym for its French name Fédération Internationale Des Ingénieurs-Conseils) is an international standards organization for the consulting engineering & construction best known for the FIDIC family of contract templates. The fact that the organisation has a French title bears testimony to its foundation in 1913 by three countries each wholly or partly francophone. The founding member countries of the FIDIC were Belgium, France and Switzerland, available at: <https://congrex.com/client/fidic/> (last visited on November 30, 2018)

	Act shall be heard only by the High Court and by no other court or courts subordinate to the High Court
Gujarat Infrastructure Development Act, 1999	No specific dispute resolution mechanism provided except mandating that a Concession agreement shall contain an arbitration clause providing inter alia that all parties to the agreement shall submit to arbitration. No procedure provided for selection of project or concessionaire.
Development and Regulation Act, 2002	Punjab Infrastructure Regulatory Authority, with powers of civil court to adjudicate disputes between two or more Concessionaires, operators of infrastructure projects, the State Government and the Board. Appeal can be preferred to the High Courts. Punjab Infrastructure Development Board, the apex and nodal agency to grant approval to projects or award concession contracts. Appeal may be preferred against PIDB order in HC. Bar on the jurisdiction of civil court where the Authority and Board are given powers. The concession agreement must lay down methods of dispute resolution including conciliation and arbitration.

(ii) Arbitration

Arbitration has become a viable means of dispute settlement between concessionaires and government entities. Most concession agreements provide for arbitration due to its advantages in terms of speedy disposal and technical know-how. Though the Indian Contract Act holds agreements in restraint of legal proceedings void, an exception safeguards arbitration. Arbitration in India is governed by the Arbitration and Conciliation Act, 1996, based on the UNCITRAL model law. However, intervention by courts defeats the advantages of arbitration and contributes to projecting the country as investor hostile. Refusal to submit disputes to arbitration and concomitant intervention by the judiciary have done damage to India's prospects.

Again, susceptibility of the award to judicial challenge makes arbitration less attractive. As retired judges and practicing lawyers often constitute the panel, there is a tendency to stick to procedural aspects.

(i) Expert Adjudication

Adjudication by quasi-judicial bodies comprising of technical and legal experts with a provision for appeal to a multi-disciplinary appellate body is becoming an increasingly preferred mode of dispute resolution in PPP. This can predominantly be attributed to the emergence of sectoral regulators like Central Electricity Regulatory Commission and the Appellate Tribunal for Electricity under the Electricity Act, 2003 Expert adjudication has many advantages.

For instance, under the Electricity Act there is a stipulation of one hundred and twenty and one hundred and eighty days respectively for the appropriate commission and the appellate tribunal to decide matters involving tariff fixing and these specialized tribunals have more often found to be sticking to time limit. The approach of the judiciary has also been in favour of promoting expert adjudication. For instance, in *Uttar Pradesh Power Corporation Ltd v. NTPC Ltd and others*<sup>41</sup> the Supreme Court held that:

Central Commission constituted under Section 3 of Electricity Regulatory Commissions Act, 1998 is an expert body which had been entrusted with the task of determination of tariff and as it involved highly technical procedure, requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, the Court is firmly of the view that the issues with regard to determination of tariff should be left to the said expert body and ordinarily High Court and even this Court should not interfere with the same.<sup>42</sup> (Supreme Court's observation in *Uttar Pradesh Power Corporation Ltd v. NTPC Ltd and others*) that recommended sector-specific monitoring agencies and regulators, and making these regulators independent of public sector interference.<sup>43</sup>

## 1.7. INFRASTRUCTURE PROJECTS IN RURAL AREAS

The Shyama Prasad Mukherji Rurban Mission (SPMRM) is a scheme launched by Government of India in 2016 to deliver integrated project based infrastructure in the rural areas, which will also include development of economic activities and skill development. The preferred mode of delivery is through Public Private Partnerships (PPPs) while using various scheme funds for financing.<sup>44</sup>

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<sup>41</sup> 2011[10] SCALE 499

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Shyama Prasad Mukherji Rurban Mission (SPMRM); available at: [http://www.arthapedia.in/index.php?title=Shyama\\_Prasad\\_Mukherji\\_Rurban\\_Mission\\_\(SPMRM\)](http://www.arthapedia.in/index.php?title=Shyama_Prasad_Mukherji_Rurban_Mission_(SPMRM)) (last visited on October 2, 2017)

### 1.7.1. Background

Shyama Prasad Mukherji Rurban Mission (SPMRM) was announced in the Union Budget 2014-15. This was following the Rurban development model of urbanization of the rural areas, adopted in the state of Gujarat through which people living in the rural areas are given efficient civic infrastructure and associate services. Ensuring availability of amenities to rural populace is on the top priority of the central government as 69% of India's population resides in villages. Government approved the Shyama Prasad Mukherji Rurban Mission (SPMRM) with an outlay of Rs. 5142.08 crores on 16 September 2015. Rurban Mission was launched by the Hon'ble Prime Minister on 21 February, 2016 at Kurubhata, Murmunda Rurban Cluster, Rajnandgaon, and Chattisgarh.<sup>45</sup>

### 1.7.2. Features

The Mission aims at development of rural growth clusters which have latent potential for growth, in all States and Union Territories (UTs), which would trigger overall development in the region. These clusters would be developed by provisioning of economic activities, developing skills & local entrepreneurship and providing infrastructure amenities. The Rurban Mission will thus develop a cluster of Smart Villages.<sup>46</sup>

For the purposes of SPMRM, Rurban areas refer to a cluster of 15- 20 villages having about 30 to 40 lakh population. The clusters will be geographically contiguous Gram Panchayats with a population of about 25000 to 50000 in plain and coastal areas and a population of 5000 to 15000 in desert, hilly or tribal areas. As far as practicable, clusters of village would follow administrative convergence units of Gram Panchayats. The funding for Rurban Clusters will be through various schemes of the Government converged into the cluster. To ensure an optimum level of development, fourteen components have been suggested as desirable for the cluster, which would include skill development training linked to economic activities. The SPMRM will provide an additional funding support of up to 30 percent of the project cost per cluster as Critical Gap Funding (CGF) as Central Share to enable development of such Rurban clusters.<sup>47</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

## 1.8. ENVIRONMENT ASPECT

A road cuts through pristine rainforest to give a community access to the city. A dam creates a reservoir to provide freshwater to a growing town. A platform that is miles from the shoreline gives access to oil reserves deep below the ocean floor. These are all examples of infrastructure—physical structures that provide the underpinnings for modern society. Infrastructure is a necessary part of the development associated with a growing human population, but it can also have devastating impacts on the environment. The road through the rainforest may fragment habitat or cut off the migration route for an endangered species. The dam may have diverted water from freshwater habitats already struggling through a drought. A spill from the oil platform may have killed marine organisms and left the shoreline polluted.<sup>48</sup> Development projects in the past were undertaken without any consideration to their environmental consequences. As a result the whole environment got polluted and degraded. In view of the colossal damage to the environment, governments and public are now concerned about the environmental impacts of developmental activities. So, to assess the environmental impacts, the mechanism of Environment Impact Assessment was introduced. Environment Impact Assessment (EIA) is a tool to anticipate the likely environmental impacts that may arise out of the proposed developmental activities and suggest mitigation measures and strategies.<sup>49</sup> The Ministry of Environment and Forest notified Environment Impact Assessment legislation in September 2006. The notification makes it mandatory for various projects such as mining, thermal power plants, river valley, infrastructure (road, highway, ports, harbours and airports) and industries including very small electroplating or foundry units to get environment clearance. However, unlike the Environment Impact Assessment Notification of 1994, the new legislation has put the onus of clearing projects on the state government depending on the size/capacity of the project.<sup>50</sup>

Certain activities permissible under the Coastal Regulation Zone Act, 1991 also require similar clearance. Additionally, donor agencies operating in India like the World Bank and the ADB have a different set of requirements for giving environmental clearance to projects that are funded by them.<sup>51</sup>

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<sup>48</sup> Overview, *available at:* <http://www.worldwildlife.org/threats/infrastructure> (last visited on October 4, 2016)

<sup>49</sup> Environmental impact Assessment, *available at:* <http://www.pmfias.com/eia-environmental-impact-assessment> (last visited on October 4, 2016)

<sup>50</sup> Understanding EIA, *available at:* <http://www.cseindia.org/node/383> (last visited on October 11, 2016).

<sup>51</sup> *Ibid.*

#### **4.7.1. International Finance Institutions Requirements**

Many international finance institutions, including the World Bank, and other lending institutions, will require adherence to environmental and social principles and environmental impact assessments to be carried out before a project can proceed.<sup>52</sup>

The World Bank and the International Finance Corporation (IFC) follow the IFC's Environment, Health and Safety Guidelines which were developed over an extensive period, with significant collaboration between the World Bank and IFC. For more on how these are to be implemented, particularly on World Bank and IFC funded projects, go to World Bank Environmental and Natural Resources and World Bank Webpage on Environmental Assessment.<sup>53</sup>

### **1.9. FINANCING ISSUES AND VIABILITY CONSTRAINTS**

PPP projects are facing financing issues. Reasons for such Financing issues are discussed as under:

1. Aggressive bidding and under-pricing of projects: Aggressive bidding and under-pricing of projects have been a big challenge in the transport sector, particularly in roads and ports projects. India witnessed a cycle of aggressive bidding between 2009 and 2012 under the Build-Operate-Transfer (BOT) model for NHAI projects. Under-pricing of projects can be observed in EPC and the newly adopted Hybrid Annuity Model (HAM) projects in roads and some ports projects during the last few years. Aggressive bidding is one of the major reasons for delays or cancellation of PPP project as banks are becoming more and more cautionary in funding such projects. It also causes low participation from genuine bidders. Two years later, the same project was re-tendered and the same company was given the project but at a much lower revenue share of about 35 per cent. In the process, not only was the project delayed by more than two years, its cost too had gone up significantly.<sup>54</sup>
2. Over leveraged balance sheet of developers: Balance sheets of most prominent developers in the country are stressed and over leveraged. This festers twin balance

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<sup>52</sup> Land environment and social issue, *available at*: <http://ppp.worldbank.org/ppp/legislation-regulation/framework-assessment/legal-environment/land-environment-social-issues#top> (last visited on October 2, 2016).

<sup>53</sup> *Ibid.*

<sup>54</sup> Revival of PPP momentum in the transport Sector, India PPP SUMMIT 2017, available on <http://ficci.in/spdocument/20931/Revival-PPP-momentum.pdf> (last visited on October 28, 2018)

sheet problem<sup>55</sup> and results in inter-twined economic issues of over leveraged and distressed corporate and NPA encumbered banks. It is estimated that around 40 % of the corporate debt was owed by companies, many of them in the infrastructure (especially power generation) and metals sectors, which had an interest coverage ratio less than 1, meaning they did not earn enough to pay the interest obligations on their loans.

3. Lack of equity in the market: Further, there is a shortfall in equity capital with local sponsors. Delays in execution of projects further lead to equity getting trapped in ongoing projects, thus not being available for newer projects. For example, in several sections (Motihari-Raxaul section, Rohtak-Jind section, Gurgaon-Kotputli-Jaipur section, Haridwar-Dehradun section etc.), the lack of equity with the concessionaires has delayed the projects much beyond the scheduled completion date. In some projects, this has also resulted in the bankers not disbursing even the loan sanctioned at financial close.

1. The International Finance Corporation (IFC) – a World Bank affiliate is the first major issuer of rupee denominated bonds in the name tag of masala bonds. Later, in September 2015, the RBI came out with detailed regulatory guidelines for the issue of rupee denominated bonds. As per the RBI's regulation on masala bonds, the money can be used only for infrastructure financing purposes. In August 2016, the RBI allowed banks to issue masala bonds to procure money to meet their capital needs and to collect fund to finance infrastructure projects. The overall guidelines for rupee denominated bonds will be same as that for External Commercial Borrowings.<sup>56</sup>
2. National Infrastructure Investment Fund (NIIF): One of the biggest hurdle for India's infrastructure expansion plans is lack of funds. The country need around \$1000 bn in five years to finance the infrastructure programmes extending from roads to communication. The proposed corpus of NIIF was Rs.40,000 crore, which may be raised from time to time, as decided by the Ministry of Finance. The Government's share/contribution in the corpus will be 49 percent. For the balance 51% NIIF will solicit equity participation from strategic anchor partners viz.,

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<sup>55</sup> the 'twin balance sheet' issue refers to the problematic balance sheets of Indian companies and banks—meaning, both the lenders and borrowers are under stress. More Information available on:<https://www.kotaksecurities.com/ksweb/Meaningful-Minutes/6-Things-to-know-about-Indias-Twin-Balance-Sheet-problem> (last visited on October 30, 2018).

<sup>56</sup> *Ibid.*

Multilateral/bilateral institutions, Sovereign wealth funds, International Pension funds and domestic Public sector enterprises.

Where it invests:

- Provides equity / quasi-equity support to those Non Banking Financial Companies (NBFCs)/Financial Institutions (FIs) that are engaged mainly in infrastructure financing. These institutions will be able to leverage this equity support and provide debt to the projects selected.
- Invest in funds engaged mainly in infrastructure sectors and managed by Asset Management Companies (AMCs) for equity / quasi-equity funding of listed / unlisted companies.
- Provides Equity/ quasi-equity support / debt to projects, to commercially viable projects, both greenfield and brownfield, including stalled projects.<sup>57</sup>

Besides these measures, the Government has taken many Policy decision to increase private sector funding in the Infrastructure Sector.

### **Project Monitoring Group (PMG) to expedite implementation of large projects**

The government has taken some concrete steps to tackle capacity and procedural challenges faced during implementation of PPP projects in the country. One such step is the setting up of the Project Monitoring Group (PMG) in 2013 under the Cabinet Secretariat to monitor and fast-track the stalled PPP projects in the country.

In the next section, an attempt has been made to evaluate the above discussed legal provisions, policies and Schemes. Some of the Suggestions are given under this chapter and rest are discussed in Chapter VII.

## **1.10. DEFICIENCIES IN LEGAL FRAMEWORK OF PUBLIC PRIVATE PARTNERSHIP IN INDIA**

### *1. Need to strengthen the regulatory regime through independent regulators:*

Due to the long-term nature of PPP contracts, uncertain market conditions, lack of capacity at both government and private player levels, etc. disputes are bound to arise during the life cycle of PPP projects. Absence of regulators or multiplicity of regulators results in many of these

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<sup>57</sup> *Ibid.*

issues and disputes being unresolved, leading to litigations and cases. This in turn leads to delays or cancellation of projects and results in cost escalation, thereby making the projects unviable.

2. *Major gaps and challenges in existing regulatory regime*

In the roads sector, NHAI has held the double portfolio of a highway regulator as well as a nodal agency for the development, operation and management of highways in India. At present, NHAI, also a signatory to PPP projects, plays various roles and is addressed as the accused and defendant in several cases. NHAI is also entrusted with making policy decisions on matters, creating a conflict of interest and raising the need for an independent regulator.<sup>58</sup> The Ministry of Road Transport and Highways (MoRTH) decided to constitute a regulator with adjudicatory powers to resolve issues around road projects and subsequently prepared the draft Regulatory Authority for Highways in India Bill, 2013.

3. *Absence of dedicated PPP policy or regulation at national level*

Some countries have a legal framework for PPPs in the form of PPP act/law/policy. A comprehensive National PPP act/policy which should clearly spell out the objectives, scope and implementing principles of the PPP program envisaged by the Government is required to impart an authoritative framework to implementing executive agencies as well as to legislative and regulatory agencies charged with oversight responsibilities. It may be relevant to mention that an attempt to formulate a National PPP Policy was made by the Ministry of Finance (DEA) in 2011 but it could not be concluded. Hence, there is a need to assess what went wrong in the process and whether we really need a Policy or Act to facilitate successful expansion of PPP in the country.

4. *Multiplicity of institutions and overlap in roles.*

Governments at all levels, including urban local bodies (ULBs), line departments, state agencies, are by and large unable to create a steady pipeline of projects due to institutional capacity constraints. The network of multiple agencies involved in project implementation and an overlap in the functions of these agencies is leading to inordinate project delays. Agencies

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<sup>58</sup> —The long road to a regulator, an article published in Business Standard, available at: [http://www.business-standard.com/article/opinion/the-long-road-to-a-regulator-114012600735\\_1.html](http://www.business-standard.com/article/opinion/the-long-road-to-a-regulator-114012600735_1.html) (last visited on October 30, 2018)

involved in PPP projects include NITI Aayog (erstwhile Planning Commission), Ministry of Finance, Department of Economic Affairs (DEA), various ministries, statutory entities like NHAI, AAI, and state governments. For example, in May 2015, the Union Ministry of Civil Aviation withdrew the —in-principle clearance granted in 2011, for the proposed KGS Aranmula International airport.

##### 5. *Issues Under Model Bid Document and Model Concession Agreement*

The Government of India has circulated a model bid document. The Model Bid Document provides for a two-stage process of competitive bidding. The first stage being the Request for Qualification (RFQ) or Expression of Interest (EOI) with the objective of short-listing eligible bidders for stage two of the process. The second and final stage is the Request for Proposal (RFP) stage in which the technical and financial proposals are obtained and the preferred bidder selected based on the evaluation of the bids received.

Unresolved because it has only been revoked with prospective effect in relation to only the national highways sector and continues to be applicable in relation to bid processes being sought to be undertaken in other sectors by the Government of India.

Existing legal principles of judicial review prevent scrutiny of executive decisions that fall under the category of —policy decisions. However most of the critical decisions, under public private partnership models, that determine the actual contours of various commercial and technical aspects and characteristics of an infrastructure project being implemented through public private partnership model, under a concession agreement structure, are —policy decisions that courts are limited by the principles of judicial review from scrutinizing.

The Competition Commission of India is not a general court of law that would be undertaking judicial review of administrative decisions, it is a specific regulatory authority constituted under a special law for the specific purpose of:

- i. eliminating practices having adverse effect on competition in markets in India,
- ii. promote and sustain competition in markets in India,
- iii. protect the interests of consumers in markets in India and
- iv. ensure freedom of trade carried on by other participants in markets in India

##### Scrutinizing Concession Agreement By Competition Commission Of India

Any enquiry into the structuring or terms and conditions of a concession agreement by the Competition Commission would have to be undertaken in accordance with the provisions of s.

19<sup>59</sup> read with s. 26<sup>60</sup> of the Competition Act. 2002.

When the Competition Commission reviews the structuring or terms and conditions of a concession agreement that has been drafted by a government department the generally applicable orders that the Commission could issue pursuant to s. 27<sup>61</sup> of the Competition Act, 2002 would be pursuant to s. 27(d) namely —direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission.; s.27(e) —direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any.; s. 27(g) —pass such other order or issue such other directions as it may deem fit.

Exclusivity Provisions: One of the issues relating to structuring of concession agreements that could be required to be looked into by the Competition Commission of India is that of granting of exclusivity and other provisions relating to protection of the concessionaire from competition which may be provided under the terms of the Concession Agreement (such as a right of first refusal to develop the competing facility).

The Government of India in its model concession agreement for National Highways and Major Ports is offering protection from competing facilities for a specified period of time.

In the National Highways Concession Agreement in fact a three tier protection is being offered:

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<sup>59</sup> Section 19 of The Competition Act deals with power of the Competition Commission to inquire into certain agreements and dominant position of enterprise.

<sup>60</sup> Section 26 of The Competition Act provides for the procedure for Inquiry made under section 19 of the said Act.

(a) <sup>61</sup> Section 27: Orders by Commission after inquiry into agreements or abuse of dominant position.— Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:— direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(g) pass such other order or issue such directions] as it may deem fit: Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause

(b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

First: there is a blanket assurance that no additional road between the relevant route would be opened before a specified period of time. This is assuring an exclusivity period to the concessionaire ; Second : if a competing facility is opened after the specified exclusivity period, the concession period of the relevant concession will be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period; and Third: NHAI has agreed to ensure that the toll charged from vehicles using the competing facility shall always be 133% of the toll charged on the project highway governed by the relevant concession. This protection will be provided for the entire duration of the concession agreement.

In the Model Port concession the exclusivity offered comprises of a blanket prohibition from development of a competing facility within a specified area that is applicable for the earlier of either: (i) a specified period of time of five years or (ii) the average annual volume of cargo handled at the Project Facilities and Services reaches a level of 75% (seventy five percent) of Project Capacity for 2 (two) consecutive years.

Consequently, the burden of disproving the presumption created by sec. 3(3) of the Competition Act, 2002 that such provisions of a Concession Agreement have an appreciable adverse effect on competition will be on the parties to the concession agreement. In light of sec. 4 of the Indian Evidence Act which defines the term - “shall presume”, the Supreme Court has held that in cases where the term — “may presumed” is used the Court has an option to raise the presumption or not, but where the term —shall presumed is used, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumption ceases and the fact is presumed, unless and until it is disproved. It has been held that in order to rebut a statutory presumption, the burden of proof is not that of disproving the existence of the presumption beyond reasonable doubt as is expected in a criminal trial, but at the same time mere denial will not serve the purpose. To disprove the presumption, the other party should bring on record such facts and circumstances, upon consideration of which, the non-existence of the presumed circumstances should seem so probable that a prudent man would under the circumstances of the case, act upon the plea that the presumed facts did not exist. Thus to rebut a statutory presumption the burden of proof is not that of beyond reasonable doubt but that of a prudent man under the circumstances of the case.

In order to protect an exclusivity provision from being held anti-competitive in light of the statutory presumption under s. 3(3) of the Competition Act, 2002, the Parties to the concession

agreement would have to provide sufficient data and circumstances to reasonably disprove the material adverse impact on competition that is presumed to be caused by such provisions. It should be noted that unlike in the case of judicial review of a government's authority decision to vest such rights, it would not be sufficient for the government authority/concessionaire to show reasons requiring the vesting of such exclusivity rights or to state that it is a policy decision to vest such rights and therefore not subject to judicial review.

### Sector Specific Regulatory Agencies & Competition Commission of India

There are various laws that have been enacted to regulate specific sectors and which have provided for the creation of sector specific regulatory bodies. Many of these laws vest the relevant regulatory authority with the function of promoting competition in the relevant sector and protecting the interests of consumers. One of the main issues that will arise as the Competition Commission commences its functioning is that of jurisdiction of the Competition Commission over particular sectors where sector specific regulators have already been created and the extent of such jurisdiction, if any.

### **RECOMMENDATIONS**

The Competition Commission of India has been vested with the statutory powers to be the main statutory authority regulating and evaluating competition issues in infrastructure sectors and ensure that no practice develop that have adverse effect on competition in infrastructure sectors, including competition for obtaining concession agreements in respect thereof. The Competition Commission of India has also been vested with the statutory powers to ensure that it promotes and sustains competition in infrastructure sectors, including the entire life cycle of concession agreements, (i.e. the structuring, granting, implementation and any renegotiation of concession agreements). The Competition Commission of India has been vested with the statutory powers to ensure that the interests of the consumers are also protected during in relation to the structuring, grating, implementation and renegotiation of concession agreements. A new jurisprudence in relation to regulation of the entire life cycle of a concession agreement would have to be developed in order to ensure efficient and effective implementation of concession agreements pursuant to the enactment and coming into effect of the Competition Act, 2002.

It is recommended that the Competition Commission of India, initially develop guidelines and regulations that provide a clear framework for various government departments on the main

competition principles that should be adhered to and the various process in respect to the entire life cycle of a competition agreement.

It is also recommended that the Competition Commission of India establish a coordination mechanism with other infrastructure sector regulators in order to enable a coordinated approach to competition issues and enable building of capacity in other regulators in relation to competition issues as well as allow other sector regulators to refer matters to the Competition Commission.

### Revisiting the Viability Gap Funding (VGF) Scheme

At present, the limit of the VGF scheme is 40% of the total project cost. The Government should consider increasing this limit. Further, there is a need to relook at the disbursement mechanism of the VGF fund. State governments may be allowed to disburse funds directly from their own corpus to project SPVs, which could then be reimbursed by the Central Government.<sup>62</sup>

The Government should incentivize innovation for financial support to PPP projects as long as the spirit of PPP is safeguarded. For instance, there is a current no-go in case state governments are willing to extend capital support beyond the threshold 40% of the total project cost in the form of innovative structures, such as deemed shadow toll and EPC for funded works. In light of improving the project economics, these initiatives could be revisited. Further, the basis of calculation of VGF should be as per market rates and not as per Schedule of Rates.

The Kelkar Committee has suggested that banks and financial institution be encouraged to issue Deep Discount Bonds or Zero Coupon Bonds (ZCB) in order to lower debt servicing costs during the initial phases of the project. Further, refinancing terms may be streamlined to allow automatic refinancing of infrastructure loans. In addition, there is an urgent need to develop appraisal skills and capacities among banks to evaluate lending proposals.

Infrastructure in India is in a developing phase. With the advent of the concept of public-private partnership (PPP), the role of government and the state is being redefined. In a welfare state like India, the state is bound to work for the welfare of the people and it has been interpreted by the courts that even the private players — wherever there is government participation involved like PPPs — cannot be absolved of the duty of taking care of public interest. It is for this primary reason that a number of regulatory bodies have been created. As the regulators are independent bodies with quasi-judicial powers, the state is also bound by their decisions. The

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<sup>62</sup> *Ibid.*

legal framework and processes enabling this are also significant.<sup>63</sup>

As the stakes are very high in most of the infrastructure projects, both the private players and the government are keen to have a binding and functional contract. Many a times, weak contracts lead to matters ending up in a court of law. Parties also resort to extra-judicial dispute resolution techniques. At times, easy accessibility to courts and explosion of public interest litigation (PIL) may create several hurdles in the path of an infrastructure project. Hence, it is important for senior management of institutions related to infrastructure to develop a perspective on legal and regulatory Issues.<sup>64</sup>

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