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ANALYSIS OF LEGAL AND REGULATORY CHALLENGES IN INFRASTRUCTURE PROJECTS IN INDIA

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Introduction

Infrastructure has always been a priority for governments. Rulers would often develop common facilities for their people and also to facilitate commercial operations in respective territories well before the political structures were modern as of now and its responsibilities and duties were established. However, numerous states after the second World War having figured that setups of government provision of public utilities to be unsatisfactory in terms of operational efficiency and its service. Popular demands also caused states to cave to a paucity of material resources as a result of low profits due to costs exceeding pricing. In addition to poor service quality, availability of amenities also was lacking, resulting in unfairness as well as the perpetuation of impoverishment, which infrastructural provision was expected to alleviate. As a result, the provision's essential aim was violated and failed. Besides that, governments in third world nations have faced economic hardship that have prompted them to ask the private sector to join in infrastructure supply in respective countries in order to address existing funding shortages. This would not have been anticipated that private sector engagement will indeed scoop up at a faster rate throughout the time frame anticipated.¹

The responsibility of the government in designing, organising and supervising privately controlled and managed infrastructure is enhanced by private sector engagement, which helps to harmonise public requirements and expectations with that of private players. Because private players engagement encourages government participants to consider if progress in economy is

¹ Harris Clive, "World Bank Private Participation in Infrastructure in Developing Countries: Trends, Impacts and Policy Lessons" [April 2003. Working Paper No. 5 World Bank Washington DC]

halted as a result of infrastructural development, the governmental authorities plan and regulate, however such role of the public sector introduces risks that are not commercial to the initiatives.²

PSPs are currently popular in our country, majorly as public-private partnerships (PPPs). This setup has been used to fund everything else including huge public projects to minor needs of the local community. Communications, roads, airports and power are just a few of the major infrastructural categories where the private player is gaining traction. Indian government has designed a single window clearing mechanism to expedite the licencing of infrastructure projects so as to stimulate building construction in India. And given huge budgetary investments, the Indian government's commitment to strengthening the infrastructure segment of the country is undeniable. The government is further anticipated to use the public-private partnership (PPP) method for delivery of the project. Despite the fact that many public private partnership projects in India proved impactful, many others failed to fulfil their targets because of the challenges such as poor demand forecasts, delaying in acquiring land, and procedural morass that includes infrastructure contracts. Therefore, this study is an attempt to identify the general as well as legal and regulatory challenges in Infrastructure projects in India with special reference to the contractual aspects.

Objectives Of The Study

1. To study the challenges that participants in infrastructure projects in India face.
2. To evaluate the idea of public private partnerships and the various forms of contract used in infrastructure projects.
3. To explore diverse methods to assure that the infrastructure project runs smoothly.

Research Question

What are the policy and Legal issues pertinent in infrastructure projects in India?

² Beato Paulina and Antonio Vives, "Private-Sector Participation in Infrastructure: Risk, Fiscal, and Efficiency Issues-in Public-Private Arrangements for the Provision of Services Infrastructure" [1996 Vol. 1, No.3 John Wiley & Sons, Inc] pp. 3-14

Scope Of The Study

Identifying the type of risks that arise in infrastructure projects and Public private partnership agreements. The scope of this study is limited to public-private partnerships in infrastructure projects. This study only looks at the facets of the contractual perspective. This research will only look at the legal and regulation issues surrounding Indian jurisdiction.

Significance Of The Study

Multiple kinds of public-private partnerships were used for building infrastructure in both advanced and emerging economies. On the one hand, initiatives are being established fortuitously utilizing this methodology, yet on the other hand, shortcomings also were recognised in PPPs around the globe. Yet another issue is the slow pace of planning and implementation of PPP due to policy and legal roadblocks, which results only in a tiny segment of facilities getting constructed through this method. Numerous Public private partnership issues remain unresolved or have been forced to abandon, exacerbating hardship for not only the developers but also for the banks. Countless initiatives were decided to abandon in our country. This necessitates the thorough study of legal and regulatory challenges the infrastructure project in India face.

Short Overview Of India's Infrastructure

India's economy is heavily dependent on infrastructures. Infrastructure is in charge of our country's entire growth of economy and receives a lot of attention from the state. This have put in place guidelines to promote that top-notch global infrastructures are built in a timely manner.

Bridges, Power, highways, urban infrastructural facilities and dams are all examples of India's infrastructure. According to the World Bank's Logistics Performance Index placed India 44th in 2018. India climbed 35th place in 2016 from 54th in the year 2014, owing to enormous capital investment made ever since 2014 in practically all modes of transportation (through major initiatives such as UDAN/DFCs/Sagarmala/Bharatmala etc.), substantial regulatory changes such EODB-supporting policies and even GST.³

³ India CSR Network, "What is the purpose of Logistics Performance Index for India?" <<https://indiacr.in/what-is-the-purpose-of-logistics-performance-index-for-india/>> accessed 8 August 2022

According to the IMF⁴, India is the world's fifth-largest economy, with a forecast growing rate of 12.5 percent in the financial year 2021-22⁵. Regardless of its strong progress, India has an infrastructural deficit. The rapid growth of India significantly raised the demand for infrastructural facilities in physical, such as roads, power, ports and airports. Year after year, because inadequacy infrastructures reduced India's growth in GDP by 1% or 2%⁶.

Railway tracks, constructions, roads, signalling systems, some airport facilities and runways, bridges, gas, telecommunication, electricity, distribution and transmission are all part of Country's 'infrastructure projects, according to the Ministry of Statistics and Program Implementation.⁷ The ability of India's infrastructure sector to improve is indeed an endearing trait for attracting worldwide attention, particularly from key stakeholders. Considering its attractiveness as a means of financing, infrastructure progress in our country falls short of its capacity, given the considerable invested capital.

The demand that entails to match India's growth in the economy to its infrastructure capacity. Increased physical investment and labour efficiency, as well as the country's progress, are aided by improved quantitative as well as qualitative infrastructures. Infrastructure improvements is a solution to a number of development issues. The country's goals, including a five trillion GDP, will only be met by addressing the country's challenges in infrastructure. However, Infrastructure in the country is likely to catch up the speed, owing to the govt's emphasis on delivering much-needed stimulus to the industry, as well as a coordinated drive from local players. International investors might even discover it is an excellent time to get involved in infrastructure of India.

⁴ International Monetary Fund, "GDP, Current Prices", [World Economic Outlook], <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/IND>

⁵ International Monetary Fund, "India: At a Glance", <<https://www.imf.org/en/Countries/IND#ataglance>> accessed 8 August 2022.

⁶ Abhimanu Kumar Gard, "Challenges faced by infra sector" <<https://abhipedia.abhimanu.com/Article/IAS/MTI4Mzkz/Challenges-faced-by-infra-sector-Economic->>> accessed 8 August 2022

⁷ Ministry of Statistics and Program Implementation, Government of India, *Introduction*, <<http://mospi.nic.in/81-introduction>> accessed 8 August 2022.

Public Private Partnership In India

Public-Private Partnerships (PPPs) are a dynamic and original way of incorporating the private players in improving the country projects and boosting the ability to deliver efficient goods and services to the public using JVs without overstressing the resources which are accessible in limit. According to the 11th Five Year Plan, enormous infrastructure investments would be required to maintain the expected high yearly growth rate. Given the government's restricted capacity for further mobilisation of the capital, it will be impractical for it to fulfil extremely large promises. The expected gap of at minimum 30% of planning and decision necessities⁸, that will be enormous, will have to be made up by enlisting the robust participation of the players that are not government in infrastructure development. In order to meet this issue, PPPs could be an effective prospect.

Conversely, involving the non-state-controlled entities in development of infrastructure is not a straightforward task. This necessitates a structure which allows the non-state players to earn a decent profit at a reasonable risk, assures users of appropriate quality of service at a fair price, and assists the state in getting the best value for taxpayer's funds. Such requirements are much challenging to meet than most people think. strategies for mitigating risk are highly complicated due to various participants chasing competing goals. Suboptimal preparation and planning in regards to the foundation for project identification, PPP project, private participant selection, project reports, strategic plan, drafting of contracts, and some other associated matters would only result in high management fees, delay in project for years, huge accrued liabilities for the state and poor quality.

Public private partnership in the infrastructure projects, including transportation, urban infrastructure and power, has just been enabled by laws and regulations. The Electricity Act, for an instance, enables the non-state players to participate as a franchise in the transmission and distribution of power in certain locations. Such acknowledgement of the franchise is a key step toward promoting PPP in electricity distribution. India's road sector has become the most active at promoting private sector participation, with Highway Development Project being the largest PPP project till date. Around 75% of all finished products are in the field of transportation. Apart from

⁸ Investments in Infrastructure during the Eleventh Plan; The Secretariat for the Committee on Infrastructure; Planning Commission (October, 2007).

the road sector, the port industry has experienced a lot of private investment. Whilst public private partnership project seems to be a resounding hit in India, it still has to be refined and evolved to making it even more effective.

Public private partnership: an overview

Public-private partnerships are defined by the United Nations⁹ as "innovative techniques being used by government sector to contract with the non-government sector who offer their assets and commitment to execute projects on schedule and within budget, whereas the government sector possesses the obligation to provide such services to the public in a manner that enhances the public and provides economic growth and improving the overall quality of life,"

In 2011, the Government of India defined a Public-Private-Partnership (PPP) as a business contractual arrangement. "An agreement of both a government or statutory entity or state entity on one hand and a private sector entity on another, for the provision of public assets and/or related services for benefit of the public, via capital invested by and/or management carried by the private entity for a given timeframe, in which there is considerable risk sharing with the private sector and the private sector receives performance-linked payments," according to the definition.

When it comes to building infrastructure, PPPs are a common approach. A PPP is a partnership with a statutory agency and a non-government entity. Such two types of businesses can, furthermore, work collaboratively in a variety of ways. Public entities have a dominating role under certain contracts, whilst private entities have a dominant role in others. Following are various types of contracts under infrastructure project.

BOT Contracts:

BOT contracts are generally greenfield contracts. The private entity has the dominant position in such type of contract. It is because the state supplies the property needed to build the project in these kinds of deals. A non-state player is responsible for the design of the project, its management and the construction. Such agreements are frequently issued considering private

⁹ Guidelines on Promoting Good Governance in Public Private Partnerships (UN-2006): United Nations Economic Commission for Europe.

firms possess skills which the public bodies lack. As a result, the state relies more on the private sector.

O&M contract (Operation and Maintenance Contracts):

In projects that involve infrastructure, contracts for operations as well as maintenance seem to be a prevalent technique. A state controls the building that needs to be monitored in this system. Regular interval contracts are provided to the non-state firms to keep such infrastructure in excellent shape. Such a setup can be accomplished in a number of ways. For example, in one sort of contract, the statutory agency could pay a project manager a set fee in return for giving the infrastructure in good repair. Lease agreements, on the other hand, are agreements wherein the state rents or lease a unit to a private player.

Rehabilitate-operate and Transfer or Rehabilitate Own and Operate Contracts:

The facilities and the buildings is already in place across many places around the globe. nonetheless, are becoming old and worn out as the passing years. Renovating and rehabilitating major construction projects necessitates a huge initial financial investment. States throughout the world are experiencing financial difficulties. As a consequence, such initiatives are pushed back.

ROT or ROO contracts are an effective way to enhance that such initiatives are not prolonged and also that the state's budgets are not burdened further. The state relinquishes ownership of a government owned property for a predetermined duration of time under such arrangements. In exchange, the non-government entity spends money in the asset's rehabilitation. In most cases, a rehabbed resource generates more working capital. For another few years, the private party has the right to the enhanced cash flow.

Divestitures Contracts:

Finally, utilising divestment contractual agreements, the public bodies and non-state players work collaboratively. The government sells all of its assets under such a arrangement. Therefore, as result, if somehow the state owns property on which a highway is to be built, it will sell the place to a private entity on the situation that the highway be built under a certain time frame. In several instances, the state basically starts selling its resources with no long-term commitment. It thus generally occurs when a country is heavily indebted and requires finances to repay their debts. Put

another way, it may be a method of reducing attention on non-core aspects while increasing focus on key aspects with the funds raised.

Policy and Legal issues

Regulations that are Vague and Ambiguous

Intentionally, politicians may make their regulations vague and confused. That made it harder on businesses to follow the rules. Officials eventually demand money to ignore any violation. Businesses who bribe politicians are permitted to operate, while any who don't face severe consequences. Payoffs are notorious for making a huge fiscal consequence in addition to its being immoral. As per research literature, an ambiguous regulatory framework is comparable to a 33 percent levy on capital projects.

Delays in Approval & Execution - Regulatory Framework

Additional roadblock to infrastructural projects is indeed an insufficient set of regulations, which is exacerbated by such an inconvenient clearance method involves the governments as well as appropriate agencies. Many regulations necessitate assent from appropriate agencies in order to carry out entire project activities. That unavoidable procedure traps projects builders in a perpetual cycle of chasing permits and licenses from various agencies and departments. Usually fiscal closing of undertakings is held up by delays in approvals

Legal Issues

Every infrastructural project is a network of interconnected agreements. Therefore, it is acceptable to state that somehow the infrastructures group's process of performing agreements determines whether an initiative succeeds or fails. Another issue is how the judicial process in emerging economies is inefficient. As a result, numerous unscrupulous partners suffer no consequences if participants breach their commitments. Those entities that were being wronged don't get many judicial choices. But that is attributable to the fact that formal solutions will become intricate, time-consuming, and costly. Therefore, a construction firm's chances could well be weighted over it. This seems to be undoubtedly a significant difficulty, because no sponsor seeks to know themselves in a situation where they can be pledged to provide an undertaking under strict

timelines but unable to compel its collaborators to fulfil their obligations. Technical difficulties may wreak havoc on finances since reimbursements are rarely delayed due to quality faults or failure to meet a deadline.

Approaches To Ensure Success In Infrastructure Projects

Effective Policies and Regulation structure Evaluation

An infrastructure project's position is entirely dependent upon appropriate policies and a thorough legal regime. As an example, in either the acquisition of PPP projects, Government of India revised numerous regulatory actions and admissibility upon this awarding of concessions for infrastructure such as energy, roads, railways, and so on as its initial move. Following that, existing policies were updated, including Privatization Policies (Airports, Ports), Land Acquisition Act as well as FDI Policy, among others. Such legislation allows non state players to build, manage, and operate facilities, there is still a paucity oversight. Consequently, there have been no bridging rules applicable for contract negotiations if the catastrophe occurs or has partnership issues.

Regulations that are transparent

When working on an infrastructural project with another or many bordering government bodies representing different nations, it became vital to make a concerted effort to harmonise and simplify numerous government regulations. As a result, transparency in the regulating process is vital. In some circumstances, regulating laws of the country has included provisions to ensure a fair regulation. Mostly in energy as well as telecommunications businesses, for instance, authorities are required to maintain fairness and honesty when exercising its duties and performing their obligations.

Political Risks

Capital investments often massive, lengthy, irrevocable, and reliant on the markets. Whatever adjustments in local governmental policy with regard to such elements has a negative impact on the project's profitability. Whilst investors in infrastructures of India may react negatively to uncertainty in nations political scenario, who may be more aware of what is happening will be

less risky. Although participating in a certain initiative, international creditors (such as the ADB, World Bank and others) might have had a stronger connection mostly with respective authority than that of the non-state sectors and hence perceive risk levels as somewhat acceptable. Politics and partisan strife may have had an impact on project success, which might lead to its termination.

Both players get a deal that is fair

That would be the crucial and vital component contributing to a Infrastructure project's success. Every stakeholder involved in such megaprojects, particularly finished, would profit from the fair use doctrine procedure. Road improvements, for illustration, are a prime illustration of outsourced to non-state entities. This ASP subterranean construction had been a collaboration of governmental, business, and municipal groups, that ultimately resulted within that developer's successfully completing.

Contract conditions and terms should be improved and strengthened

This agreement's clauses ought to be improved, particularly in regards to a firm's obligation for completion of the project, design of the building, and services. Companies ought to be interested in purchasing investments coverage to find things simpler for either of them to participate in infrastructure for the public. Additional analysis and re - negotiation are needed to defend the stakeholders' interests under the concessions agreement's contract terms.

Impediments in acquiring of Land

In Indian scenario, every one of the significant infrastructure project partners have led to a heightened of consensus on allocation of risk preferences as well as risk assessment capacities of diverse participants with regarding the delays in acquiring of land. GOI was regarded by a majority of private players as the most competent body for minimizing the time spent digging in the ground. Promoters and consultants believe that GOI should bear the full burden.

Choosing the right venture capitalists

A procurement method plays important part in identifying goals, giving desired tendering conditions, examining proposals from bidding competitors, then ultimately arranging

and structuring agreement including allocating the authority to conduct the initiative to some of the most suitable capitalists and sponsorships for such development.

Redressal Mechanisms

Legality for resolving conflicts is perhaps an influential factor while implementing Infrastructure project. Once non-government entities (financiers, concessionaire and contractors) have certainty that disagreements between both the competent authorities as well as other statutory agency and

the franchiser, or even between concessionaire and other parties, can be solved quickly equitably and expeditiously, businesses are more inclined to partake in Megaprojects. Building, operating, and ultimate transfer to the state are all possible points of contention in a Private public partnership model.

A legislation for resolving disputes can be found in a variety of statutory provisions as well as country-specific laws and policies. company law, contract law, tax law, consumer protection law, competition law, insolvency law, property law, infrastructure sector laws, intellectual property law, foreign investment law, public procurement law or rules, environmental laws, acquisition or obtainment law, as well as numerous different regulations are among the legislative acts which could be used. These following are some of the most prevalent strategies to resolving disagreements.¹⁰

- ***Mediation and conciliation are two methods of resolving conflicts:*** An individual or a body designated by the litigants assists them in settling the disagreements in a fair and neutral manner. That method can result in a mutually agreed-upon conclusion of an issue, or it could ultimately fail.
- ***Negotiations:*** When contracting parties' designate facilitators. These facilitators help the parties in settling any disagreements by facilitating negotiations. They cannot offer an opinion, but instead supports the clients in evaluating the strengths of each arguments.

¹⁰ A guidebook on public-private partnership in infrastructure, United Nation Economic and Social Commission for Asia and the Pacific, January 2011, p 74.

- ***Expert analysis that is not legally enforceable:*** An impartial third party assesses its grounds of the claims of the disputing parties and offers a resolution for all of them to decide. Negotiation among the participants are normally held after the procedure is finished.
- ***Arbitration:*** A topic under conflict is sent to a panel or tribunals of arbitrator chosen by the participants in compliance with the contractual agreement's agreed-upon procedures. Settlement is conducted in conformity with the requirements then at the location mentioned in the agreement. An arbitration panel or tribunal's decision is final and legally enforceable.
- ***Neutral specialists evaluate technological problems:*** The procedure is frequently utilised resolve technical issues amongst contracting parties. Both contending party submit differences to an impartial expert they choose to analyse issues. An impartial expert's conclusion could be enforceable or non-enforceable, accordance with the contractual arrangement.
- ***Formal Judicial action:*** Disputing parties can seek resolution of respective problems through the national justice, according to the statute.
- ***Statutory Authority Decision:*** Conflicts might well be addressed to the Regulator when a formal Regulatory Agency existing with that of the competence to judge complaints among the contracted government department and the concessionaire. Any appeals towards such decision may be heard by a tribunal competent for an appeal or a higher court, as stipulated in the binding contract.

If huge investment from the overseas private player are envisaged, it's indeed critical that a resolution procedure stated in the contractual arrangement be in accordance with global practises and criteria.

Case analysis of Rapid Metro Rail Gurgaon Limited Etc. v Haryana Mass Rapid Transport Corporation Limited & Ors¹¹

In certain circumstances, based on the infrastructure project's structure, the governmental entity owns the property ultimately. A Borrowers raises financing through banking institutions to

¹¹ Civil Appeals Nos. 925-926 of 2021, Order dated March 26, 2021

construct such financially separate initiatives, with the revenue either from enterprise serving as the primary form of income to cover existing debts. This 'rights for using' is a recurring theme across various systems, and then as a result, property monetization strategies are constrained. As a result, if the concessions are withdrawn, then builder must be reimbursed by the public body by providing a sum called as the 'cancellation penalty.' To guarantee the creditworthiness of these concession contract, the 'cancellation penalty' is usually inherently connected to the creditors' 'debts.'

Within that backdrop, the ruling of the Apex Court of India in Rapid Metro Rail Gurgaon Limited Etc. v Haryana Mass Rapid Transport Corporation Limited & Ors. is pertinent as well as sets forward a trail of hope across all players. SC reiterated the lending institutions' protections to obtain this same 'debts that are due' complies to the clauses of the concession contract among the Borrower and the holder of the concession towards the development of two construction in a period of poor credit value of several capital projects as well as ambiguity of government arrangements.

Throughout the case, the SC stresses the role of interests of the public and a need to adhere to the funding sources made by the banks to execute PPP project, which are predicated on the sanctity of business contract. In the context of infrastructure project, the party has a legal obligation to provide buyers with efficient and top-notch infrastructural services. Apex Court's interrelationship regarding contractual terms and the general good is indeed a useful foundation.

Conclusion

In the earlier days, involving private firms to make public-private partnerships has produced outstanding outcomes in a variety of infrastructure areas, including telecommunications and aviation. In order to prevent any protests or unrest from the public, India must both encourage PPP and be mindful of the implications of the contracts. Several public-private partnerships falter as the private participants are not sure that the government would keep its promises. Additionally, by providing the government an equity-like share in the project, the private bidders can be sure

that even after the money has been gathered, the government will still have an interest in ensuring that development will ultimately happen.

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