

Rethinking Dispute Resolution in Public–Private Partnerships for Infrastructure Development in India

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Abstract

Public–Private Partnership (PPP) has been a relatively successful model for infrastructure development in India. However, investment of private capital, especially foreign investment, is far from satisfactory keeping in mind the estimated investments of the Government under the XIth and XIIth plans. Several issues have been identified which include, evolving a robust legislative framework and a well-balanced concession agreement. A major area of concern at the stage of contract management is the setting up of an efficient and credible dispute resolution mechanism which would ensure settlement of disputes in a time-bound manner. Apart from litigation, several alternative modes are being followed in India like amicable settlement, mediation, arbitration and expert adjudication. This article analyses the various practices of dispute resolution mandated in central and state legislations, policy documents and industry practices. In an attempt to suggest the most viable approach to dispute resolution in core infrastructure sectors, it will also establish the inter-relationship between private investment and dispute resolution mechanisms.

JEL Classification: O, K, Y

Keywords: Arbitration, dispute resolution, public–private partnerships

1. Introduction

With a consistent economic growth of 8 per cent per annum, India, according to many experts, is poised to grow faster than China by the end of 2012. Creation of a world class infrastructure remains one of the high priority areas for the country, if it has to move steadily in its current growth trajectory. This explains the high infrastructure investment, the union government has proposed in the XIth and XIIth plan estimates.¹ Investment of such high magnitude would not be possible without the participation of the private

sector and hence, as Dr Rangarajan, Chairman of the Economic Advisory Council to the Prime Minister puts it, ‘...increasing the investment in infrastructure through the public–private participation model’ is one of the key challenges of the Indian economy.² In addition to bridging the fiscal deficit, involvement of private sector brings along the much desired advantages of technical expertise, cost effectiveness and, efficiency in operation and management.

The Public–Private Partnership (hereinafter PPP) model, first adopted in India for delivering infrastructure projects more than a decade back, has emerged as a huge market. This is attributed to various factors like the presence of a strong domestic demand, a huge pool of natural and human resources, cost effectiveness and a strong democratic set up (Raju 2011: 105). However, Indian experience can only be regarded as relatively successful keeping in mind its need and potential for attracting private capital. Moreover, Indian PPP, dominated by domestic investors—both in terms of the number of projects and the value of investments—have been successful in attracting only a negligible number of foreign investors, even after the government has allowed 100 per cent Foreign Direct Investment (FDI)³ in most of the core infrastructure sectors.⁴ This becomes more apparent if one compares FDIs in India with that of other developing economies, like Brazil and China.⁵ Regional disparities in attracting PPP with relatively poor states having no or minimal success in attracting private investment is also a matter of concern. The government’s inability to address social and political issues in a comprehensive manner, ensuring the constitutional mandate of ‘social and economic justice’ has often created stumbling blocks in attracting more private partnerships.

A key pre-requisite for attracting private partnership is identified as laying down ‘a policy, and a legal and regulatory framework that assures fair return for investors and protects the interests of the users, especially poor and assures quality at a reasonable cost’ (GoI, The Indian Economic Survey, 2009–10, 2010a: Chap. 10, p. 266). The Government of India and various state governments have been consistently making efforts to bring clarity to policy and regulations by inter alia modifying policy documents, providing for model contract documents and mechanisms for financial structuring (ibid.). It has, of late notified standardised bidding and contractual documents for various sectors. In addition, the union government has, in 2011 come out with a draft policy and rules regarding the same. There is also some talk regarding the setting up of an entity to coordinate all efforts of PPP, apart from the existing Public–Private Partnership Approval Committee (PPPAC) and other legal and policy frameworks.

One area repeatedly emphasised by all the major policy frameworks and model contract documents is the provision for an efficient and credible dispute resolution mechanism. However, even in the latest draft rules, the government has fallen short of providing any detailed guidelines regarding dispute resolution and safeguarding it from the lengthy litigation process as far as possible. If we go by the Chaturvedi Committee Report on the faster implementation of the National Highway Development Project (NHDP), an investment to the tune of ₹10,000 crore is held up in the NHDP alone, on account of the disputes between the National Highway Authority of India (NHAI) and the contractors.⁶ Resolution of disputes being a major concern for private investment in infrastructure, this article seeks to examine the dispute resolution mechanisms available under the various state and central legislations, regulations and industry practices in an attempt to put forth suggestions for improving their efficacy. Part II of the article gives an overview of the PPP model as originated and existing in India. Part III explains the significance of a dispute resolution mechanism in PPP and goes on to a critical examination of the existing mechanisms on the touch stones of cost, time and efficacy. Part IV as the title indicates is the conclusion where the

authors on the basis of the analysis done identifies the bottlenecks and suggest certain measures for the improvement of dispute resolution vis-à-vis PPP.

2. Public-Private Partnership—The Indian Experience

2.1 PPP in India—A Brief Overview

PPP is generally understood to mean the participation of private sector in the creation or facilitation of public services. The Draft National PPP Policy, 2011 identifies two requirements for an arrangement to be called a PPP—(a) arrangement with a private sector entity; and (b) for the provision of public assets or services.⁷ Initiated as a part of ‘liberalisation–delicensing and privatisation’ regime of 1990, India has had a remarkable record of mainstreaming private capital and moulding it to suit the huge demand for infrastructure development, especially in sectors like highways, telecommunications and ports. Union as well as the state governments have taken constant efforts to encourage private investments and minimise the bottlenecks through policy initiatives and regulatory frameworks. Such efforts include standardising contractual documents as sector specific model contracts or concession agreements, setting up of institutional mechanisms like Indian Infrastructure Finance Company Ltd (IIFC), India Infrastructure Project Development Fund (IIPDF), etc., establishing a streamlined system of clearance of PPP projects developed by central agencies through setting up of PPPAC, relaxing restrictions on FDI in most infrastructure sectors and fiscal incentives including tax holidays under the Income Tax Act and various state statutes. Various state governments such as Andhra Pradesh, Assam, Bihar, Gujarat, Haryana, Jharkhand, Karnataka, Kerala, Maharashtra, Orissa, Rajasthan and West Bengal, have adopted PPP policies (Government of India, The Indian Economic Survey, 2009–10, p. 266) and many of them have put in place the necessary institutional mechanisms for the promotion of PPP.

2.2 Regional and Sectoral Disparities in Private Partnership—Key Challenges

The PPP model has not been a uniform success story all throughout. There are clear regional and sectoral disparities both in terms of the number of projects and volume of investments. While sectors like highway and port development have gained the maximum out of PPP model, possibilities in sectors such as education, health etc. largely remains under-utilised (see Table 1). As mentioned by one study

if ports and central road projects are excluded from the total, in fact relatively small value of deal flows, at only Rs 45,067 crore in basic infrastructure PPPs to-date, suggesting a significant potential upside for PPP projects across sectors where states and municipalities have primary responsibility. (Sathana Priya and Jesintha 2011)

Again there exist sharp disparities in terms of number and volume of investment through the PPP model if one analyses the state-wise distribution of PPP (see Table 2). Several factors such as economic condition of the state, law and order problems,⁸ land acquisition issues, lack of clear policy and regulatory frameworks, political ideologies,⁹ lack of advocacy, etc., have been identified as causes for unequal distribution of private investment within the country. Lack of clarity with respect to the legal and regulatory

Table 1. Sector-wise Figures

Sector	Total Number of Projects	Based on 100 Crores	Between 100 to 250 Crores	Between 251 to 500 Crores	More than 500 Crores	Value of Contacts
Airports	5	—	—	303.0	18808.0	19111.0
Education	17	424.2	365.5	460.0	600.0	1,849.7
Energy	56	337.6	934.0	3,083.0	62,890.0	67,244.6
Health Care	8	315.0	343.0	275.0	900.0	1,833.0
Ports	61	86.0	1,745.3	4,304.8	74,902.1	81,038.2
Railways	4	—	102.2	873.0	594.3	1,569.6
Roads	405	4,364.6	11,696.5	38,520.5	122,143.3	176,724.9
Tourism	50	1,132.6	1,503.5	800.0	1,050.0	4,486.1
Urban Development	152	2,812.0	3,136.9	6,688.2	16,838.0	29,475.0
Total	758	9,471.9	19,826.9	55,307.5	298,725.8	383,332.1

Source: PPP India Database (www.pppindiadatabase.com).

Table 2. State-wise Figures

State	No. of PPPs	Value of PPP
Karnataka	104	44,658.9
Andhra Pradesh	96	66,918.3
Madhya Pradesh	86	14,983.4
Rajasthan	59	15,027.3
Kerala	32	22,281.5
Uttar Pradesh	14	26,595.8
Bihar	6	2,093.8
West Bengal	30	6,617.1

Source: PPP India Database (www.pppindiadatabase.com).

framework has been identified by many, including the union and many state governments as one key issue creating apprehensions for the private investor.

2.3 Legal and Regulatory Framework

The legal framework for PPP in India ranges from the Constitution of India¹⁰ 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.

There are different modes on the basis of which PPP arrangements work in India. They may broadly be classified into three, namely¹¹

1. Public ownership and public operation where the policy decision is to retain public ownership and control over the sector; direct private financing and operation may be allowed under commercial principles by vesting ownership and management on separate legal entities controlled by the government.¹²
2. Public ownership but private operations where Operation and Management (O&M) activities may be contracted out to the private sector.
3. Private ownership and operation where the private party owns and operates the facility.

3. Dispute Resolution: Managing Cost, Time and Efficacy

As already highlighted, 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.

3.1 Disputes—When and How?

Before going in to an analysis of DRMs in detail, it would be worthwhile to mention in brief various stages involved in the adoption and development of a project under PPP in order to understand when and how a dispute can arise. Though there may be minor variations depending on the sectoral needs, various stages in a PPP project implementation, are the following¹³:

1. Identification—It is the stage where potential projects are identified through a strategic planning process and these potential projects are evaluated for their suitability for development as PPP.
2. Full feasibility—A potential PPP identified in the first phase is considered in detail and an application is made for in principle clearance to continue to the procurement phase.
3. Procurement—The procurement process takes place, an application is made for final approval, the preferred bidder is selected and the project is taken to technical close.

Contract Management and Monitoring—Here, the Sponsoring Authority manages the PPP throughout its life, including monitoring the private partner's performance against the requirements

of the Concession Agreement. Phase 4 begins at the pre-operative stage, and spans the construction stage (where relevant), the operations stage, and contract closure and asset transfer (GoI 2010b: 4).

The need for dispute resolution arises mostly in contract management stage. But possibility of a dispute arising cannot be ruled out even prior to that; say at the stage of procurement where the award of project may be challenged on grounds of arbitrariness and illegality before courts of law. This is in addition to the public policy issues relating to land acquisition and environmental clearance that government agency may have to sort out at an earlier stage. The judiciary in India has been candid in maintaining that judicial review cannot extend to policy matters which are the prerogative of the government and it is in public interest to expedite disposal of cases involving challenge to economic policies, as any delay will be counter-productive to public interest. The duty of the court, maintains the Supreme Court, is only to confine itself to the questions of illegality, irrationality and procedural impropriety.¹⁴ Hence, the courts have generally restrained themselves from interfering in matters relating to bidding and award of projects unless the arbitrariness and illegality is apparent on the face of it.¹⁵

At the stage of Contract Management, disputes essentially relates to the validity, enforceability, interpretation or non-performance of a contractual obligation, or seeking injunctive relief, compensation, specific performance, etc., may come up and thus amenable to the original jurisdiction of a civil court of competent jurisdiction. However, litigation is not preferred as a mode of dispute resolution presumably due to factors like potential delay and the need for specialised knowledge. The need for expert adjudication in issues arising out of infrastructure projects have been emphasised by the Supreme Court in *UPSEB v. Banaras Electric Light & Power Co. Ltd* (2001, 7 SCC 637).

3.2 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 recognise mutual discussion as the preferred mode of settlement of disputes. Some of the states already have in place separate dispute resolution mechanisms (see Table 3). 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.¹⁶

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.¹⁷ It can either be through

Table 3. 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 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.
Punjab Infrastructure 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.

Source: Authors' compilation based on the legislations provided therein.

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 FIDIC¹⁸ form of contract provides for an independent engineer who shall act as a balancer of interests by determining, certifying and approving the manner in which the contract is administered. It is also relevant to note at this juncture that the *Second Report of the Chaturvedi Committee on the faster implementation of NHDP* also emphasises the adoption of FIDIC model in all kinds of contracts¹⁹ where the engineer holds a key role in the adjudication of disputes at the first level.²⁰ In addition there is also the method of mediation where by the parties can get their differences sorted out through a mediator appointed by the High Court under the particular High Court mediation rules. Thus, resolution of differences at the earliest possibility through conciliation or mediation would be highly desirable in terms of saving time and cost. However, it may be noted that, success of conciliation and mediation being legally non-binding,²¹ depends on the flexibility and acceptance of the settlement by the parties.

(ii) Arbitration

Arbitration has of late become one of the most viable means of dispute settlement in disputes between a concessionaire and the contract-granting government entity. Most of the concession agreements do provide for arbitration evidently due to its relative advantages in terms of speedy disposal and technical know-how of the adjudicators. Though Section 28 of the Indian Contract Act holds any agreement in absolute restraint of legal proceedings to be void, an exception is duly incorporated to safeguard arbitration proceedings.²² It is significant to note here that the Punjab Infrastructure Development and Regulation Act, 2002 makes arbitration mandatory (see Table 3). Arbitration in India is governed by the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL model law. It provides the framework for legally binding arbitration awards with limited grounds for challenge in a time bound manner. It may also be noted that in addition to the ad hoc arbitration tribunals that the parties may by agreement constitute, preference for institutional arbitration has also become prominent in some sectors.

However, the efficacy of arbitration in resolving disputes in PPP model cannot be overemphasised. It is pointed out that arbitration at times tend to be very time consuming and add to project cost and make the environment for investment hostile. The *Nathpa Jhakri Hydro-electric Project* provides an illustration as to how arbitration contributes to project delay and escalation of costs. The project related to construction of 1,500 MW hydro-electric dam across river Sutlej. Phase one of the contract involved river diversion and some construction which was stipulated to be completed in a period of 56 months, with a bid amount of ₹439.38 crore. The project ultimately got completed after 131 months with a cost of ₹635.80 crore. Though delay was caused by a number of factors like geological conditions, change in drawings, etc., the contribution of delay in arbitration was not negligible. A large number of claims were settled by the Dispute Resolution Board (DRB), the parties did not accept its recommendations on Extension Time claims (EoT) even after spending three years. The arbitral tribunal constituted to look in to EoT in April 2005 awarded the contractor extension of time and costs on account of delay in May 2008. Finally payment was made to the contractor in November 2008 by settlement between the parties, after 10 years from the date of scheduled completion of the contract, three years being contributed by a delay in arbitration procedures.²³

The intervention of courts in arbitral procedures is yet another concern. The case involving the Dhabol Power Project, one of the biggest foreign investments in India in the 1990s, illustrates how intervention by courts defeats the advantages of arbitration and contributes to projecting the country as investor-hostile. Though India had by that time ratified the New York Convention and enacted the 1996 Act, both the central and the Maharashtra state government preferred to avoid a settlement of the dispute by international arbitration which was duly agreed to in the relevant agreements.²⁴ Even considering that there were a number of issues like lack of transparency, allegations of corruption, environmental and other human rights issues, which the government should have taken care of at the stage of award of the project, refusal to submit the dispute to arbitration by the government agencies and the concomitant intervention by the judiciary hindering the arbitration procedure have done considerable damage to India's prospects in the long run. Again, susceptibility of the award to judicial challenge will also make arbitration less attractive. It is also pointed out that, as retired judges and practicing lawyers more often constitute the panel, there is a tendency to stick to procedural aspects (Kapur, 2008: 159). This lack of flexibility has often undermined the effectiveness of arbitration as an alternative mode.

(iii) 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. The expertise of the regulator in the technical, financial and legal aspects of a particular sector along with the existence of a secretariat with extensive research data base proves to be an added advantage to the quality of dispute resolution. For instance, the Central Electricity Regulatory Commission comprises of members having qualification and experience in such diverse fields like engineering, finance, law, commerce and management.²⁵ Additionally, the Commission, in its capacity as the regulator has the functions of advising the government in major policy matters and also assuring quality standards in the industry²⁶ which naturally equip them with relevant knowledge and expertise needed for adjudication.

Moreover the enabling statutes often provide for a statutory time frame within which the adjudicatory authority has to give its decision. 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 fixing²⁷ and these specialised tribunals have more often found to be sticking to time limit.²⁸ It is also opined that setting up of the regulators at the state and central level with one appellate authority has led to a very quick settling of jurisprudence on various issues (ibid.). 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* (2011[10] SCALE 499) 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. (Supreme Court's observation in *Uttar Pradesh Power Corporation Ltd v. NTPC Ltd and others*)

4. Conclusion

The principle of profit maximisation holds the key for private investors even when they partner with public entities. Disputes mean delay and delay in turn would mean escalation of costs; and for a private investor it would mean loss of earnings from the resources which he could have utilised otherwise. Efficacy of dispute resolution mechanism thus holds significance, in attracting private investors to partner with the government. As the above discussion shows resolving disputes through amicable means like mutual discussions, conciliation, or mediation, at the earliest, holds the best solution in any PPP initiative. However, it is not so often that parties agree to merge their difference by mutual concessions and adjustments. When the parties fail to come to an agreement Arbitration is resorted which has many advantages including flexibility in procedures, binding nature of the award, the relative speed in which

matter is resolved etc. However, as discussed above the way in which arbitration is practiced in the country has made it no better than litigation. Judicial intervention, delay and procedural rigidity of the tribunal have diminished its scope as the most effective mechanism in PPPs.

Adjudication by statutory expert bodies like the Electricity Appellate Tribunal seems to be a viable model for dispute resolution in PPP. There are many advantages like expertise, efficiency in time, less interference by the judiciary, etc., which can be effectively used for structuring a dispute resolution mechanism. A harmonised system of dispute resolution with a single appellate authority at the centre would be a workable model for PPP in India in most of the sectors. Barring the jurisdiction of the civil courts and making provision for appeal only to the apex court in substantial questions of law would go a long way towards speedy disposal; while the presence of experts from diverse fields would ensure efficacy in such an arrangement. It may be hoped that the Government of India will make suitable changes in the Draft PPP rules of 2011 taking in to account the demand for a detailed framework for dispute resolution.²⁹

Notes

1. The Union Government has estimated investments worth \$320 billion in the infrastructure sector in the XIth plan. Further investment of \$1 trillion in infrastructure is estimated in the XIIth plan. See Raju (2011: 105). The Economic Survey of India 2008 had estimated that over the next five years, the investment needs in physical infrastructure will be at US\$500 billion, wherein the share of the private sector is projected at US\$150.4 billion (30.07 per cent).
2. According to Dr Rangarajan, other main challenges include inflation, raising agricultural productivity, raising social structure spending and fiscal consolidation.
3. The government of India now allows 100 per cent FDI (under the automatic route) in all infrastructure sectors including roads, power, ports and airport sectors. The percentage of FDI in other sectors allowed are as follows—74 per cent in telecom services and 100 per cent in telephone equipment; 49 per cent to 100 per cent for various services in the aviation sector. See Government of India (2011: Para. 11.143, p. 286).
4. According to one estimate, foreign investment amounts to only 7 per cent of the total PPP in terms of number of projects and merely 1 per cent in terms of the value of projects. See Government of India, The Indian Economic Survey, 2009–10 (Chap. 10).
5. For statistics on FDI, see http://www.unctad.org/en/docs/webdiaeia20111_en.pdf
6. Second Report of the Committee under the chairmanship of Shri B.K Chaturvedi available at http://planning-commission.nic.in/reports/genrep/rep_nhdp_2.pdf. Also, see Ganesh (2011).
7. The National PPP policy 2011 (available at <http://www.pppinindia.com/Defining-PPP.php>) defines Public–Private Partnership as ‘an arrangement between a government/statutory entity/government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is a well defined allocation of risk between the private sector and the public entity and the private entity receives performance linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative.’ According to the draft an entity that has a majority non-governmental ownership (51 per cent) or more is construed as a private entity. ‘Public Services’ are those services that the State is obligated to provide to its citizens or where the State has traditionally provided the services to its citizens. A ‘Public Asset’ is that asset the use of which is inextricably linked to the delivery of a Public Service, or, those assets that utilize or integrate sovereign assets to deliver Public Services.

8. Anant and Singh (2009), in their working paper, maintain that rich states and states with fewer law and order issues have been more successful in attracting private investors through the PPP model.
9. Mahalingam (2008), in his paper 'PPP Experiences in Indian states: Bottlenecks, Enablers and Key Issues' observes: 'governments or coalitions in several states such as Tamil Nadu, Kerala and West Bengal that have representations from left-wing factions are often strongly opposed to the entry of the private sector to provide essential services'.
10. The twin goals of social and economic justice, fundamental rights, directive principles of state policy, right to property, centre state relations and separation of powers becomes relevant at various stages of the working of PPP model of development. For details, see Kapur (Contracts in Public-Private Partnerships).
11. For details, see Kapur (2008).
12. For instance, Special Purpose Vehicles (SPVs) may be created which will allow private sector to participate in terms of leveraging finances (through bonds) or Specific Operation and Maintenance (O&M) activities may be contracted out.
13. As identified by the PPP tool kit of the Ministry of Finance, Government of India.
14. Questions of illegality relate to whether the decision-making authority exceeded its powers, committed an error of law, committed a breach of the principles of natural justice, acted against the principles of reasonableness and abused its powers. See *Balco Employees' Union v. Union of India and others* (2002) 2 SCC 333 and *Centre for Public Interest Litigation and Anr. v. UoI and others* (2000) 8 SCC 606.
15. *S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd and others* (2006) 11 SCC 548.
16. See Karnataka Infrastructure Policy, 2007, Orissa Public Private Partnership Policy, 2007, etc.
17. For instance, most of the concession contracts of NHAI contain provision for mediation by consultant or independent engineer at the first stage and by a Dispute Resolution/Review Board at the second stage. Only when the parties refuse to accept the recommendations of the DRB, an arbitration procedure as per the contract is commenced.
18. Federation Internationale Des Ingenieurs-Conseils is an organisation of consulting engineers. The FIDIC is well known in the construction engineering industry for its work in defining Conditions of Contract for the Construction Industry worldwide.
19. The NHAI had substantially diluted the FIDIC conditions under Conditions of Particular Applications (COPA).
20. The report, on page 12, reads 'Scope of Independent Engineer: FIDIC places great reliance on the Engineer both in terms of supervision and first level adjudication of disputes. This role of the Engineer is being internationally accepted and there is no reason not to adopt a similar role for the Engineer in India.'
21. Most of the dispute resolution mechanisms contemplated prior to the stage of arbitration have only recommendatory powers. See DRB provisions under NHAI Model Concession Agreements.
22. Exception 1 to Section 28 reads 'this section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.'
23. Case study as seen in GoI (2008: 156).
24. For a perspective of the foreign investor, see Bettauer (2010).
25. Section 77(1) of the Electricity Act, 2003.
26. See Section 79 of the Electricity Act for the functions of the Commission.
27. Section 64(3) and 111(5) of the Electricity Act. Also see Sec. 14 A (6) of the Telecom Regulatory Authority Act, 1997.
28. The appellate Tribunal for electricity is said to have decided approximately 570 cases (appeals, petitions, review petition) in 19 months, virtually all within stipulated timeframe, since its constitution in 2005. Case study as seen in Criticality of legal issues & contracts for public-private partnerships (Government of India: 156).

29. The state of Orissa has demanded the inclusion of a framework for alternative dispute resolution and arbitration in the draft PPP rules promulgated by the Government of India (*Business Standard* 2012).

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