 DOI: https://doij.org/10.10000/IJLMH.116886


# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

## [ISSN 2581-5369]

### Volume 7 | Issue 1

### 2024

# Public - Private Partnership of the Port Infrastructure in India

**Dr. Sudatta Barik**[1]


## Abstract

*Most of the international trades is seaborne. There is a need for the Indian Maritime Sector to transform into world class sector. Ports act as an economic catalyst and support small economies within the global economic system. There is a high correlation exist between the Indian economic growth and the Port sector. Ports are regarded as a critical part of infrastructure for any country. A well - developed port infrastructure allows a country to trade internationally as well as act as a transit point for international transport and trade to earn increased revenue.*

*India has 12 major and about 200 minor and intermediate ports including 69 operational non-major ports, spread along the 7517 km coastline. India is situated in an extensive coastal region but the infrastructure facility in the coastal areas is still not developed. As a comparison between Singapore and the USA, Singapore contributes 5% of its GDP through the operation of port infrastructure while in United States of America substantial amount of revenue is generated from port sector which strengthens the economic growth of the country including job creation. This paper will highlight the Public Private Partnership model in Port Infrastructure in India. Much research has been done on privatisation of ports but still the port sector in India is not developed as compared with other countries. The paper will focus on the models adapted by the Government to develop port sector through Public Private Partnership mode, how tariff is determined in the port sector and the role of regulatory authorities in developing the port sector through privatisation with case studies. The delays in privatisation of port sectors is due to regulatory clearances and lenders inefficiency.*

*Usually, privatisation of the port sector is done through various types of contractual arrangement. Contractual arrangements such as Built Operate and Transfer (BOT), Build own and Operate (BOO), Built Operate Own and Transfer (BOOT), Built Operate Lease and Transfer (BOLT) indicates the nature of privatisation. These agreements are certain parts of Major concession agreements in the Port Sector. As per the guidelines of the Central Government, private participation can only be allowed for development, operation and maintenance for major ports. The Indian Infrastructure Report, 1996 suggested that the failure to generate revenue from the Indian Port sector is low productivity like breakdown*


[1] Author is an Assistant Professor at National Law University Odisha, Cuttack, India.

*of equipment, handling facilities, maintenance, night navigation etc. which are to be taken into consideration. This paper will highlight those specific areas where the government should focus on developing the Indian maritime infrastructure to generate more revenue.*

***Keywords:*** *PPP, airport , regulatory authority, act, infrastructure.*

## I. INTRODUCTION

Inadequate funds by the Central Government or the State Government forced every State in the nation to explore innovative methods and different financial modes that allow private participation in the infrastructure projects in the form of Public-Private Partnership (PPP). Scarcity of funds lead every nation to explore innovative financial techniques and allow privatisation in different sectors. India has a planned and strategically located coastline. Infrastructure is the foundation of the society in terms of social life, economic development, and economic life and also for political development. Infrastructure facility covers any form of facility whether in the form of physical structure or commodity or service that is provided to be used by the society or the public at large and also called as Public Utility Service. Majority of the trade, exports and imports are through port sector. Since independence. India shipping sector has made a remarkable growth. A well - developed port infrastructure enable a country to develop the economic development through generating revenue and employment and also act as a transmit point for international trade and transport. Maritime sector has been gaining momentum and currency these days. Due rapid growth in the cost of transportation through road and railways and also there is innumerable delay due to traffic congestion and other factors, most of the countries and companies prefer to transport goods and services through port infrastructure. But the port sector in India is not much developed so that 70 % of the trade and communication can be done. The port infrastructure in India is still underdeveloped if we compare the same with other sub - continent and developed countries. Slowly, India is also introducing many schemes, ports to develop the port sector in India and generate revenue out of the same. Ports acts as an interface between inland modes of transport and maritime sector. The Indian Ocean served not only as a conduit for conducting trade and commerce but also serves means of communication[2] .The Port sector need to be more efficient in order to have an efficient maritime transport system. Government of India and other State Government should take initiative to utilize and develop the coastal areas for revenue generation and for other purposes like transit of goods and passengers, tourist place and other purposes. **United Nations Conference on Trade and Development (UNCTAD)** defined the role of modern Sea port as

[2] Devakumar Jacob, "India's Maritime Heritage and its Milestones" 4 IJSPR 3 (2014).

"Seaports are interfaces between several modes of transport and thus they are centres for combined transport. Furthermore, they are multi - functional markets and industrial areas where goods are not only in transit, but are also sorted, manufactured and distributed. As a matter of fact, seaports are multi - dimensional systems which must be integrated within logistic chains to fulfil their functions properly. An efficient sea port requires, besides infrastructure, superstructure and equipment, adequate connection to other transport modes, a motivated management and sufficiently qualified employees." So the definition given by UNCTAD clarifies it not only provide single service facilities but also serves multiple purposes. Port comprises of marine access infrastructure (access Channel, turning basin, navigation aids, weather defence system) , land access infrastructure (connectivity to land access) and Port infrastructure (cargo handling, ship handling, Port administration). The major reasons why India needs to involve privatisation is that it would reduce pressure on government budgets, increase higher efficiency, increase employment opportunities and many more to increase the GDP of the country.[3]

## II. Legal framework of Port sector

Port Infrastructure is divided into two categories (1) Major Ports and (2) Minor Ports (other than major ports). Both the categories comes under the distribution of powers[4] of the Union Government and the State Government. Major Ports is mentioned in Entry 27 List I of the Seventh Scheduled of the Constitution of India, 1950. The major ports are managed and controlled by the Union List. Law governing the Major ports is the Major Port Trust Act, 1963. And the second category "ports other than major ports" which in other words also considered as Minor Ports is mentioned in the Concurrent List where both the Union Government and the State Government. "Ports other than major ports" are mentioned in Entry 31 list III of the Seventh Schedule of the Constitution, 1950 and are governed and managed by Indian Port Act, 1908. India comprises of 12 major ports[5] and 200 intermediate and minor ports stretched around 7517 coast areas. Gujarat is the first state enacted a specific law for maritime infrastructure and established Maritime Board to exercise power and control of the port under the administration of the State Government. Ports other than Major ports are managed and government by the State Government rules and port policy.

The foremost expectation one has on PPP is it's a Government Contract and the pre-requisites

[3] Phuyal Mohan, " Analyzing the India way of Public Private Partnership ( PPP)" 31 CSS 159 (2022)
[4] The Constitution of India
[5] 12 Major Ports – Kandla Port trust, New Mangalore Port Trust , Port Blair Port Trust, Kolkata Port Trust, Paradip Port Trust, Visakhapatnam Port Trust , Chennai Port Trust, Tuticorin Port Trust, Cochin Port Trust, Mormugao Port Trust , Mumbai Port Trust, Jawaharlal Nehru Port Trust .

of Article 299[6] of the Indian Constitution, 1950 are mandatory.

(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

The Indian Maritime Sector plays an important role in generating revenue through international trade and transport. The Government of India showed interest through ease of doing business in the Maritime Sector by allowing private participation, allowing 100 % Foreign Direct Investment in port Sector and introducing standardised competitive bidding process, allowing joint venture between major ports and minor port between major ports and foreign ports. Government is also encouraging the development by supporting and providing viability funding gap for PPPs in port sector and providing tax exemption. Indian economy after 1990 adopted the policy of liberalization, globalization and privatisation. It was for the first time The Major Port Trust Act, 1963 was amended in the year 1997 with an intention to enable major ports to be operated, maintained and developed through private participation. PPP model for port sector can be by way of partnership, joint venture agreements, and contractual arrangements or in any others manner. Contractual arrangements can be Built Operate Transfer (BOT), Build Lease Transfer (BLT) , Build and Transfer ( BT) , Build-Own Operate-Share-Transfer (BOOST), Design-Build-Finance-Operate-Transfer (DBFOT), Rehabilitate own and operate ( ROO), Build Transfer and operate ( BTO). Through these contractual arrangements private participation is allowed in the port sector. The participants to the Port Sector comprise of Ministry of Shipping, State Maritime Board, Port Authority, Model Concession agreements, Private players and Tariff authorities for major ports (TAMP). TAMP is a statutory body which provides a mandate to fix tariffs for all major ports and private terminals. Section 47 to 50 of the Major Ports Act, 1963 provides the procedure to set up Tariff authorities for major ports in determining tariffs.

## III. Private participation in Port Sector

Long term concession agreements with equity participation by the private party or sector are one form of public private partnerships. The concept of Public Private Partnership (PPP) was first rooted in the year 1996 when the Rakesh Mohan Committee submitted its report on Indian Infrastructure. The report specifically focuses on the Port sector through PPP Mode[7]. Inadequate user charges and insufficient regulatory mechanism make the pace of infrastructure development very slow. PPP on port sector has a great impact when it comes to operation and management of the infrastructure project. The private participation also depend upon few models in which the private player can enter into and which also describes the nature of the both the parties to the contract. Models Such as the public service port Model, the tool port model , the landlord model and the private service port service. The nature and level of risk sharing will be different in the case to case basis.[8]

PPPs are generally referred to as Concession agreements but at the same time PPPs refers to contractual arrangements. India is one of the largest merchant shipping fleet among the developing countries and is ranked 17th in the world. Most of the ports sector in India has operated through PPP mode. Ports and shipping are considered as the back bone of export and import trade in India. The Central Government through the Ministry of Shipping has formulated guidelines for allowing private participation in the development, operation and maintenance of major Ports. The guidelines identifies few areas for PPP mode. Following are

1. Leasing out the existing port to the Private sector
2. Construction and creation of additional assets in the port like container terminals , specialised cargo berth, warehousing , storage , freight stations etc
3. Establishing captive power plants
4. Ship repair facilities
5. Pilotage
6. Captive facilities for port - based companies and factories[9]

Government of India provides financial support to encourage more PPP structure through Viability Gap Funding (hereinafter referred as VGF) which is a requirement to all the infrastructure sectors. The intention of the Government to support through VGF is to make the

---

[7] J G R Monteiro, "Measuring Productivity and Efficiency of Major Ports of India", 45 EPW 327 – 329 (2010)
[8] Faisal Amur Said Hamed Al Habsi & Asad Ullah, " The role of public private partnership (PPP) in achieving the optimal economic and social benefits through the Port Sector" 8 IJMSBA 59 (2022)
[9] Piyush Joshi , *Law relating to Infrastructure projects* 716 -723 ( Lexis Nexis, New Delhi, 2nd Edition 2002).

infrastructure commercially viable. Under the scheme ofVGF , the Government of India provides 20% of the total cost of the project at the time of project construction stage in the form of capital grant. As the increasing demand for port sector is growing, most of the private equity investor are coming up for investment in port sector[10]. The Government may be State Government or the Central Government who owns the Project if at any stage decides to provide additional grant out of the budget which can be up to 20 % of the total project can grant the fund to the concerned infrastructure project[11] . Through equity funding also most of the private sector enter into PPP mode. The guidelines framed by the Ministry of Shipping are only indicative in nature. Powers are been provided to the individual ports to expand the port infrastructure with prior consultation with the Central Government.

The guidelines provided by the Ministry guarantees the ports not to create monopoly through private participation or through private investment. Each port can identify the areas or specific projects for private participation for the development of the infrastructure which will result in the economic development of the country. As, government is a part of all the PPP structures. While operating the infrastructure, it should be kept in mind the user fee and other facilities are available to all consumers equally. And each port can be considered as a public utility purpose. Private participation should be selected through competitive bidding process which will fair and accurate in selecting the private entity. A feasibility report needs to be prepared before commencing the construction to verify whether the utility in port sector is required or not. Because to operate an entity, we need consumer / users to use the utility. So that at the end of the operation revenue will be generated. Generating revenue is the actual outcome of establishing infrastructure and improving the economic development of the country. The basic legal requirements should be followed while any PPP mode is adapted by sector such as port, highways, railways, hospitals, telecommunication etc. Any PPP mode is operated through an agreement or any contractual arrangements. The agreement is known as Model Concession Agreement (MCA). The model concession agreement is modified according to the requirement of the laws, rules and regulation by the Ministry of shipping. The Model Concession Agreement consists of certain core clauses and certain special clauses which is drafted according to sector specific. Core clauses include the duration of the concession agreement, rights , duties and responsibilities of the parties , indemnity clause , force majeure , insurance , dispute settlement mechanism , financial structure etc and special clauses includes the type or areas of private participation in the port sector , consent , to demarcate the various phases of port development

[10] Nirupama Kulkarni & Alok Prusty, "Private equity investment strategy in India's port sector" , 1 JPE 76 (2007)
[11] India PPP Summit 2017- Revival of PPP momentum in the transport sector Report ( FICCI , 2020)

, charges payable by private entity to the authority , tariff and other related issues . The determination of tariff is one of the important clauses in the agreement. The fee collected from the consumer has to be user friendly. And whatever fees is decided it has been within the legal framework. In the year 2018 , the Union Cabinet has approved a new Model Concession Agreement ( MCA) providing more easier exit permits to the promoters such as change in equity holding for the promoters , quick dispute redressal mechanism , reviving dormant and Stalled ports, change in revenue model .[12] Nitin Gadkari , Minister of Road , Transport and Highways said "The amendments have been proposed keeping in view the experience gained in managing PPP projects in the ports sector during the last 20 years and to obviate the problems being faced on account of certain provisions in the existing MCA. The amendments in the MCA have been finalized after extensive consultation with the stakeholders," The problems faced by port sector is low productivity, inefficient staffs, poor conditions of harbours, low connectivity to other modes of transport, poor quality equipments, political and bureaucracy interference. These things should be taken into consideration while initiating the schemes for up gradation and development of the ports in India.

One of the major issues in PPP are all the clearances in terms of environment, pollution and others are to be issued by the Government. It is the work or the Concessioning authority to provide the clearances before the construction stage. Clearances can be of many types – Land clearances/ allotment of land, environment, and pollution.[13] The Concessioning authority takes so much time to provide such clearance and the same is never penalised before the Court of Law. Time is the essence of the Contract. In the Concession agreement time frame work is specified so that the construction work will over and operation work will commence as soon as possible in order to generate revenue. Both getting clearances and completing the construction work in time framework according to the concession agreement are inter related. Once the clearances are provided, construction work will start. Due to the delay in getting clearances by the Government, the work gets stalled and the Concessionaire gets penalized. It never happened due to the failure to provide clearances by the Concessioning Authority, the Government gets penalized. Investment driven through privatisation will lead to vast job opportunities, internationally competitive infrastructure and attract more and more tourism in the port sector.

## IV. Ports under PPP mode in India

Gujarat is the first state to have a comprehensive port policy in India. The policy governs the

[12] Jyotika Sood , "Modi govt signs off on radical makeover for ports sector" , Live mint (4th January ,2018)
[13] Sairam Bhatt , *Law of business contracts in India* 59 (Sage Publication, 1st Edition, 2009)

private sector participation in the construction, development, operation and maintenance of ports other than major ports. In the year 1981, Gujarat Maritime Board Act was enacted with the establishment of Gujarat Maritime Board. The Board is vested with the power to regulate the Ports under its Jurisdiction. The Department of Port and fisheries, Government of Gujarat declared a Build, Own, and Operate, Transfer (BOOT) contractual arrangement for private sector participation in the operation, development and maintenance of the Ports. The Gujarat Maritime Board act as a co-ordinating agency in the implementation of the port policy.

### (A) Mundra Port

It is a one of the green field ports in the State of Gujarat. M/s Mundra Port & SEZ Ltd (earlier known as Gujarat Adana Port Ltd) is developing the Mundra Port. The Government of Gujarat and Adani group decided to enter into PPP mode in establishing Mundra Port as a world class commercial port through Adani Port & SEZ Ltd. Mundra Port is established in the Special Economic Zone where tax exemptions are provided to the infrastructure. Mundra Port has the capacity to become a transit point for international traffic by setting a new gateway towards the west. The port is situated in such a location which contributes around 70% of the India international trade and commerce. This port is considered one of the busiest port after JNPT.

Still, most of the land losers during the establishment of the Port were unsatisfied due to improper land acquisition procedure. There was a communication barrier for the village community to raise objections before the Government of Gujarat. Approval for Special Economic Zone was not properly taken. Evaluation framework has not followed properly.

### (B) Paradip Port

Paradip Port is one of the 12 Major ports in India. It is situated at the confluence of the Bay of Bengal and Mahanadi River. In the year 1965, Government of India took over the management of the Port from the Government of Odisha. A concession agreement was signed for the development of deep draught iron ore berth to handle 10 million tonnes per annum of iron ore for export in the year 2009 between Government of India and Paradip Port Trust. Government of India declared Paradip Port as the Eighth Major Port of India. [14] In the year 2015, Union cabinet has approved the mechanization of three berths at Paradip Port Trust for handling thermal coal on BOT (Built Operate Transfer) basis which will cost Rs 1,438 Crore. The said decision was given taking into mind that after the completion of the project the Port will be able to handle 50 million tonnes of coal/iron ore which can sustain growing demand of thermal coal

[14]First Major Port, available at : https://www.paradipport.gov.in/port_history.aspx ( Last modified on 11 Nov, 2020)

for next 3 to 4 years. In order to develop Port infrastructure through private participation, an approval is required from Public private Partnership Appraisal Committee (PPPAC). Paradip port trust has applied for approval in which PPPAC directed to rework on the technical qualification criteria and the initial bidder's applications were rejected. The initial bidders were Tata Steel, Adani Ports and Special Economic Zone Ltd and Essar Ports.[15]The Paradip Port has spent so much money around Rs 17 crores to remove the Black Rose Ship[16] from the Paradip coast and also for other maintenance purpose. But till now nothing fruitful has been done to remove the ship from the coast and the matter is forwarded to CBI for further investigation. The major ports still need more attention towards the development and privatisation in an effective manner to develop the Port infrastructure in the country.

**(C) Kakinada Deep water Port**

The Kakinada deep water port (KDWP) is a part of the Kakinada Port situated on the southern part of the east coast of India in the state of Andhra Pradesh. It is considered as the second largest port in the state after Visakhapatnam. In the year 1999, KDWP signed a concession agreement with L&T on OMST basis and BOMST basis. As compared to other port infrastructure KDWP is performing well financially and improving the profit percentage from 27% in 2007 to 41% in 2009.[17]

Recently JNPA (Jawaharlal Nehru Port Authority ) on 5th July , 2022 at Mumbai celebrated its 25 years of PPP with the private player Nhava Sheva International Container Terminal (NSICT). JNPA was the first major port which started through privatisation in the year 1997. PPPs in port sector are mainly for developing world class ports, increase foreign investments , increasing berth terminals, strengthening India international trades, etc.

## V. Initiatives taken by Government

Government has taken many initiatives to develop and improve the Port sector in India. A number of business - friendly policies have been introduced. Government has taken initiatives to enhance and upgrade the existing port infrastructure in order to promote green energy and specially to revise the skill to sustain the operation of the sector. Government has taken the following initiatives

1. SAGARMALA project is a strategic and consumers - oriented programme with an objective

[15] P Manoj , "Tata, Adani, Essar file bids to build captive berths at Paradip port" The Hindu ,Aug. 26, 2019.
[16] Meera Mohanty , "CBI to investigate the 2009 sinking of MV Black Rose" The Economic Times , Jul . 04, 2018.
[17] The World Bank and Ministry of Finance , Govt of India : Public Private Partnership In India – Compendium of case studies by Government of India (Ministry of Finance , 2010)

to set up 6 + mega ports, modernization of the ports, development of CEZ (Coastal Economic Zone), development of other transport mode like road, rail and airport linkages with these water ports.

2. E- Governance initiatives were also taken by the Government of India. E – Governance platform helps in registration of ships, processing application online, seat booking for CDS (Continuous discharge certificates) etc.
3. Government has taken initiatives to develop multi modal terminal (MMT). MMT is set up to promote inland waterways as it is cheap and environment friendly. India is the first inland waterway multi modal terminal at Varanasi
4. Government has taken initiatives to empower coastal communities through developing the skill of the coastal area peoples. Ministry has taken initiatives to establish fishing harbour projects with the Department of Animal Husbandry Dairying & Fisheries (DADF)
5. And many for initiatives were taken by the Government of India and the State Government for the green field projects and brown field for the development in infrastructure and generating revenue in the country.

One of the recent development made by Government of India relating to the Model Concession Agreement in Port sector is the formation of Society of Affordable Redressal of Disputes Port ( SAROD – PORTS) to infuse and develop trust and confidence among the private companies and 100 % exit route for equity disinvestment .

The **Major Port Authorities Act, 2021** gave focus on Public-Private Partnership Projects through the Model Concession agreement by the Board. The Act defines about PPP in Port Sector. The Board constituted under the Bill, 2020 may fix the tariff for the initial bidding process for all the Public – Private Partnership Contracts in the Port Sector. The selected concessionaire or the private party is at liberty to determine the actual tariffs taking into consideration the market conditions and other essential requirements. The Act also specifically mentions about the revenue sharing system. The revenue sharing and other condition will differ between the parties according to the concession agreement. All the decisions and rules exercised by the Board shall be subject to the policy of the Central Government. The Board has the power to review and appraise the PPP projects in India. The adjudicatory authority will settle dispute between the Port and PPP concessionaires and also supervise the operation and management of PPP projects.

Recently Government of India has come up with a draft of **Indian Port Bill , 2022** which aim to encourage consultative and scientific planning for both public and private sector participation in the maritime sector. The bill will ensure maximum utilisation of coastline through public and private participation. This bill will promote confidence among different players and increase healthy competition in the maritime sector. Through this initiative the employment opportunities will increase which will lead to Atmanirbhar Bharat.

A study conducted where the performance of the minor port and contribution towards GDP is higher in the last few years as compared to major ports. Like turn around time ( the arrival and departure of vessel in the port ) of a vessel in private ports take 10 hours wherein major port take imports ( 23 hrs ) and export (73 hrs).[18]

## VI. CONCLUSION

After a PPP is entered into, granting the private players to right to manage should be ensured by the Union Government. The regulator plays a vital role in drafting the concession agreement in terms of duration, grant, land acquisition and CSR responsibilities and considered as an important agency to regulate the conflict of interest between the concessionaire and concessioning authority. Due to the delay in the project execution process most of the investor are not interested to invest. The main stakeholder of the concession agreement is the government who selects the concessionaire for public good. The State governments should take more initiative in developing the coastal belts for different purposes like establishing fishing harbours, corporatisation of the ports, allowing private participation in maintenance of the ports etc. Government should take more interest in developing cruise services in the coastal belts in the country so that much revenue will be generated and at the same time it will attract tourist all over the world. The Indian Infrastructure Report suggested the port sector requires urgent development and modernisation. Under the Sagarmala Programme, the Government is expecting to modernise and upgrade 189 ports either by the Government or through PPP mode by the year 2035. In last 4 years Government has introduced many laws and policy to provide the private players more flexibility to invest in Port Sector. Ports are considered as the vibrant economic drivers for the economic and infrastructure development of the country. Ministry of shipping and the State Governments should take appropriate measures and initiative to make India a “BLUE ECONOMY”.

*****

[18] Swarnendu Chatterjee & Aakaansha Arya, “ An Analysis on the sectoral dynamics in the Privatisation of ports in India : The way ahead” 1 IJPIEL 72 ( 2021)