BRIEF
EMPOWERING GROWTH

POLICY BRIEF

PRIVATE PARTICIPATION AT INDIAN PORTS

Resurgence through Reforms

Supported by

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BACKGROUND

Post liberalisation in the 1990s, the number of projects under public private partnerships (PPP) in India have increased exponentially, with a view to redefine performance through capacity augmentation, efficiency and productivity enhancement as well as increased competition. Subsequently, the port privatisation programme was flagged of in India in 1997, which, apart from the aforementioned dynamics, also saw the infusion of fresh funding – including foreign investments - in the ports sector. Nhava Sheva International Container Terminal (NSICT) at JNP, Maharashtra, was the first terminal that was developed on PPP basis. Table 1 provides a glimpse of the current PPP projects in the ports sector.

Table 1 : Number of PPP Projects at Ports (Excluding Captive)*

Status	Number of Projects	Total Project Cost (In INR Crore)
Pre-Construction	15	34,003
Under-Construction	45	58,140
Operation and Management	48	42,701
Terminated	14	-
Total	122	1,34,844

**as of December 2016* *Source: www.pppindia.org*

Given the present government's emphasis on port-led development, and ensuing plans for commissioning ambitious projects such as Sagarmala, inland waterways and smart port cities, attracting private investments becomes imperative. However, reported cases of terminal operators going into litigation with port authorities have increased over the years. Apart from this, failure of the current PPP model to remain flexible vis-à-vis changes in regulatory environment and international market dynamics has reduced the number of investors in the sector. Thus, there is a need for re-examination of the PPP scenario in the ports sector in India.

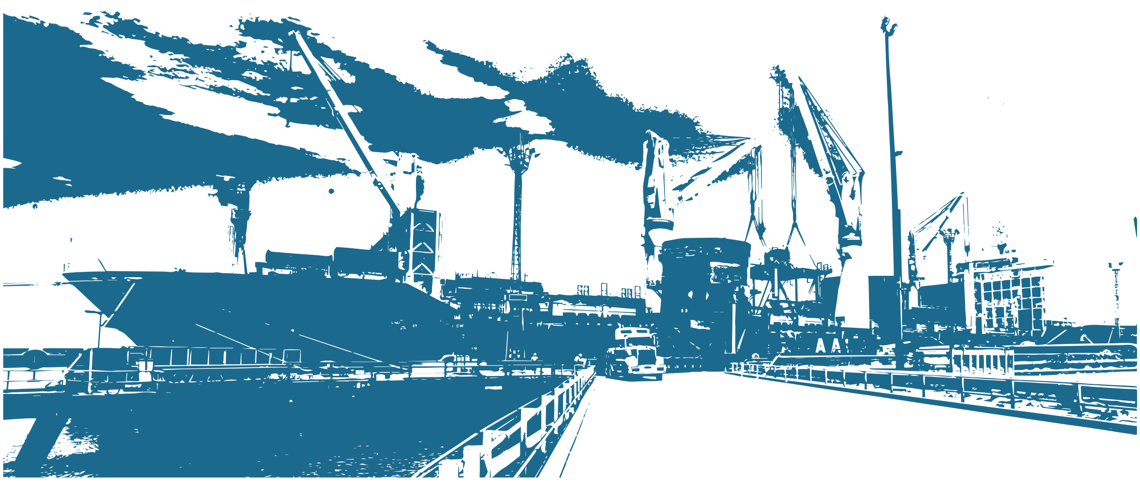
CURRENT PPP SCENARIO IN INDIA

Major and Non-Major Ports

Presently, there are 12 major ports in India (six each on the east and west coasts) - under the jurisdiction of the central government - which are governed by the Major Ports Act, 1963 and around 180 non-major ports governed by state governments under the Indian Ports Act 1908. Of the latter, only 60 are reported to be operational. The difference in approach in commissioning PPP projects at both major and minor ports has been summarised in Table 2.

Table 2: Comparative Assessment of PPP Projects at Major and Minor Ports

S. No.	Parameter	Major Port	Minor Port
1	Typical Nature of PPP	Terminal Development and Operation	Development of Green Field Ports
2	Bidding Methodology	2 Stage Bidding – RFQ and RFP	Bidding/Nomination
3	PPP Model	Revenue Share	Revenue Share/Per MT Royalty
4	Tariff Regime	Regulated by Tariff Authority for Major Ports (TAMP)	No Regulator
5	Cargo Guarantee	Minimum Guarantee Throughput (MGT) Required	MGT Not Required
6	Concession Period	30 years	40 years
7	Financial Close	180 days	270 days



Engagement Models

Various structures and models are used for facilitating PPP projects in India. These include Build-Operate-Transfer (BOT), Build-Own-Operate-Transfer (BOOT), Build-Own-Lease-Transfer (BOLT), Build-Own-Operate-Share-Transfer (BOOST), Design-Build-Finance-Operate-Transfer (DBFOT) and Operate-Maintain-Share-Transfer (OMST). The type of model used is majorly determined by the nature of the contract.

Major Actors and Documentation

- **Ministry of Shipping:** It is the apex body for the formulation of laws and regulations with respect to shipping.
- **State Maritime Board:** Each maritime state of India has its own maritime board in order to govern the non-major ports.
- **Model Concession Agreement:** The Model Concession Agreement (MCA) for the port sector came into force in January 2008. It forms the basis of a port concession document.
- **Port Authority:** It is the Concessioning Authority in a PPP agreement with a private player. It is responsible for providing immovable infrastructure such as land.
- **Private Player:** In a PPP agreement, the private player is the Concessionaire, responsible for investments and operations in providing modern facilities to the terminal/port.
- **Tariff Authority for Major Ports (TAMP):** It is a statutory body with the mandate to fix tariffs for major ports and private terminals. Section 47-50 of the Major Ports Act, 1963 determines the legality for setting up TAMP.

Prevailing Concerns

A number of concerns have been raised by the private players in terms of the current dynamics of the Model Concession Agreement. Some of them include:

- **Levying accountability on the concessioning authority:** Under the current MCA for major ports, the concessioning authority (port trust) has contractual obligations such as obtaining environmental clearances during the pre-construction period, and subsequently, dredging and providing road and rail facility at the time of constructionas well as during the operational phase of PPP. Failure to meet such obligations should entail penalties on the part of the concessioning authority. However, not a single case has been reported to date wherein the concessioning authority has been penalised due to such failures, whereas the concessionaire risks even the termination of contract in cases of non-fulfilment of conditions. Such a framework adds to the financial burden on the private players, as a three-to-five year delay – which may be due to glitches in the aforementioned areas under the purview of the concessioning authority - may even double the cost and change the entire economics of the project. Therefore, there is a need for increased monitoring of obligations of the concessioning authority to obtain desired operational results.
- **Need for flexibility in specifying minimum guaranteed cargo (MGC):** The cargo volumes handled at ports is considerably dependent on various factors including changes in international market conditions and government policies. A change in either has significant impact on trade and thereby the MGC requirements. For instance, when iron ore import was banned by the government, it had a significant impact on the bulk terminals under PPP. Similarly, when Indonesian royalty on coal increased, making it more expensive, coal imports in India was hit. Therefore, flexibility in the provision for MGC, after

factoring in such effects as has been summarised above, has been the demand for some time and needs to be deliberated upon.

- **Sharing of project risks:** The risks associated with various developments/changes in the logistics sector or in government policies are absorbed solely by the concessionaire under the prevailing structure. The need for requisite revisions in the risk sharing pattern between the government and the private investor has been continually flagged, and warrants intervention from the concerned authorities.

- **Absence of a grievance redressal mechanism:** The current MCA does not have provisions for a grievance redressal mechanism. In the absence of a platform for redressal of issues, the parties to the agreement go for litigation in order to look for plausible solutions to their disputes. On analysing a few such cases from across the country, it was observed that the process of litigation can persist for years, leading to inflated expenses and reduced terminal efficiency levels. Hence, an efficient grievance redressal mechanism needs to be a part of the MCA, to ensure cost reductions and enhanced efficiency at the PPP terminals.

RECENT GOVERNMENT INITIATIVES

Over the last few years, the government has taken a number of initiatives to attract private investments into the ports sector. These include:

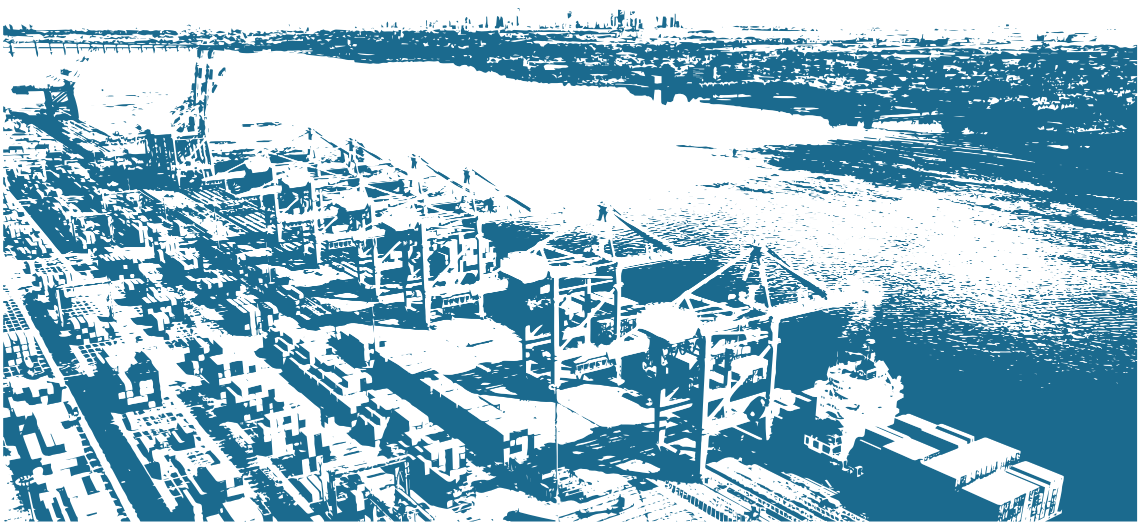
- Permitting 100 per cent Foreign Direct Investment (FDI) under the automatic route

- Allowing income tax incentives under the Income Tax Act, 1961

- Formation of joint ventures between major ports and foreign ports, non-major ports and private companies

- Standardisation of bidding documents such as Request for Qualification (RFQ), Request for Proposal (RFP) and the Concession Agreement

Some of the major recent developments include the proposed revisions by the government in the terms of the MCA and the replacement of theMajor Port Trusts Act, 1963 with the Major Port Authorities Bill, 2016.



MCA Revisions

The revision of the MCA comes in light of the recommendations by the report of the B. K.Chaturvedi Committee (2010), the report of the Working Group for Review of MCA for Ports Sector under the chairmanship of MD, IPA, the Kelkar Committee and the report 'Developing a Framework for Renegotiation of PPP Contracts' by the Department of Economic Affairs (DEA). On 22nd September 2016, the Ministry of Shipping proposed a revised MCA (Table 3)for ports with focus on:

- More equitable allocation of project risks
- Removing ambiguities in the existing provisions
- Provisions to handle unforeseen circumstances
- Attracting more private sector investments

Table 3: Salient Features of the MCA (2008) and the Proposed MCA (2016)

S. No.	Parameter	MCA, 2008	Proposed MCA, 2016
1	Equity Holding	Concessionaire shall hold 51 percent equity until three years of COD* and 26 per cent for rest of the concession period	Concessionaire shall hold 51 per cent equity until three years of COD*, and 26 percent after three years. After six years, the private party would be free to exit
2	Minimum Guarantee of Cargo	Concessionaire is to meet the minimum guarantee of cargo, failing which would lead to termination of contract	Concessionaire may commit to give minimum guaranteed revenue, updated for 60 per cent variation in WPI
3	Actual Project Cost and Total Project Cost	Actual Project Cost is the total actual capital cost incurred by the concessionaire. Any increase is subject to the approval of the concessioning authority	'Actual Project Cost' to be replaced with 'Total Project Cost', wherein it is defined either as the actual capital cost incurred after completion of the project, or is equal to the cost of the project - indexed to changes in WPI –as approved by the Project Approving Authority
4	Re-financing	No provision	Based on the Model Tripartite Agreement, wherein concessionaires with one year of operation and no cases of default with the lender can issue bonds, which are subscribed by the Debt Fund to provide refinancing to the Concessionaire
5	Definition of 'Change in Law'	Did not include changes in provision of new taxes, duties, cess etc., imposition of standards and conditions arising out of revised environmental law/labour law, or any rule/regulation stipulated by TAMP	Proposed to include: a. Tax increase and imposition of new taxes, duties b. Imposition of standards and conditions arising out of environmental law, labour law.
6	Sharing of Traffic Risk	No provision	No increase/decrease in concession period for variation of up to 20 per cent from the targeted traffic, which is defined as traffic equivalent to 70 per cent of the capacity of the project

7	Discount Rate and Revenue Share	Revenue share is payable on ceiling tariffs despite the concessionaire giving discounts to keep the charges competitive	If the discount provided by concessionaire is more than 10 per cent, the port may approve discounts on ceiling tariff for project services
8	Commercial Operation Before COD	No provision	Proposed to permit operations on project specific terms of level of operation and payment to be made to the port during this period, in order to better utilise assets
9	Complaint Redressal System	No provision	Concessionaire shall provide for lodging complaints on their website, which would be linked to theauthority website, and can be monitored on a real time basis
10	Life cycle Project Monitoring	No provision	Project monitoring arrangement to be made specific to the pre-construction, construction and post construction periods

**Commercial Operation Date*

The Major Port Authorities Bill, 2016

In another move to spur investments in the ports sector, the Union Cabinet has approved the Major Port Authorities Bill, 2016 in order to increase autonomy of the major port boards and to allow the ports to fix tariff based on the market conditions. This act replaces the Major Port Trusts Act, 1963. The salient features of this act are given in Table 4.

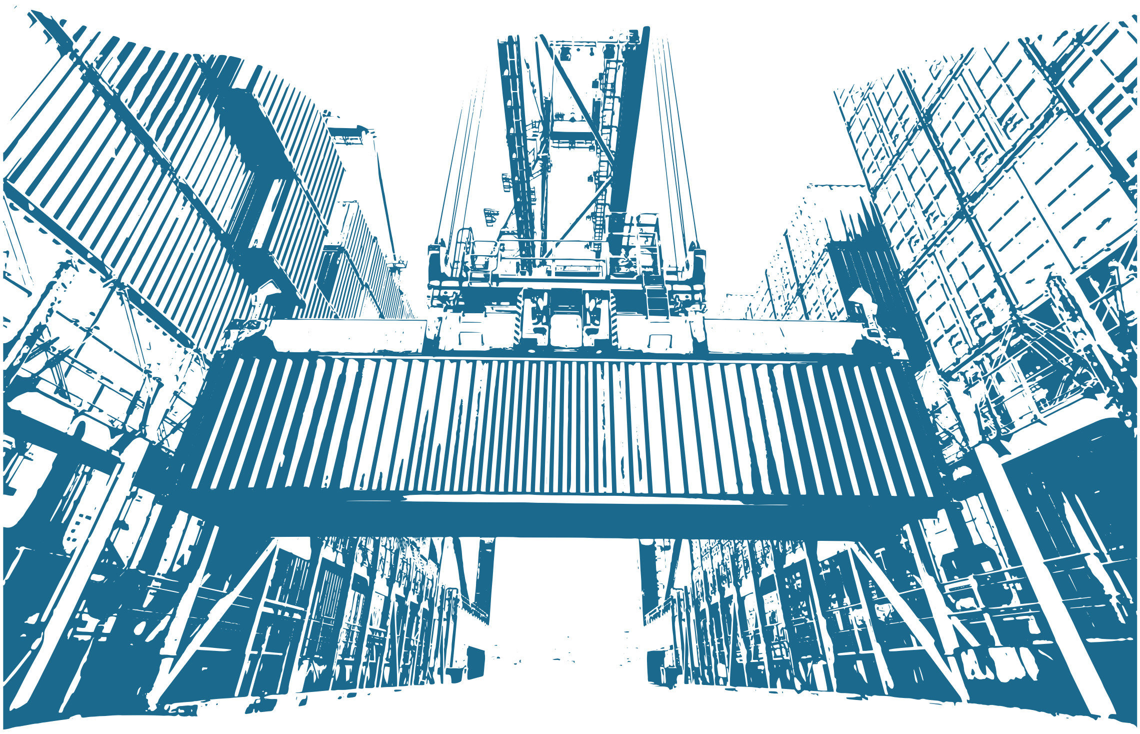


Table 4: Main Features of the Major Port Authorities Bill 2016

- The Bill is more compact in comparison to the Major Port Trusts Act, 1963 as the number of sections has been reduced to 65 from 134 by eliminating overlapping and obsolete sections.

- The new Bill has proposed a simplified composition of the Board of Port Authority which will comprise of 11 members from the present 17 to 19 Members representing various interests. A compact Board with professional independent members will strengthen decision making and strategic planning. Provision has been made for inclusion of representative of the State Government in which the Major Port is situated, Ministry of Railways, Ministry of Defence and Customs, Department of Revenue as Members in the Board apart from a Government Nominee Member and a Member representing the employees of the Major Ports Authority.

- The role of the Tariff Authority for Major Ports (TAMP) has been redefined. Port Authority has now been given powers to fix tariff which will act as a reference tariff for purposes of bidding for PPP projects. PPP operators will be free to fix tariff based on market conditions. The Board of the Port Authority has been delegated the power to fix the scale of rates for other port services and assets including land.

- An independent Review Board proposed to be created to carry out the residual functions of the erstwhile TAMP for Major Ports, to look into disputes between ports and PPP concessionaires, to review stressed PPP projects and suggest measures to revive such projects and to look into complaints regarding services rendered by the ports/private operators operating within the ports, would be constituted.

- The Boards of the Port Authority have been delegated full powers to enter into contracts, planning and development, fixing of tariff except in national interest, security and emergency arising out of inaction and default. In the present MPT Act, 1963 prior approval of the Central Government was required in 22 cases.

- Empowers the Board to make its own Master Plan in respect of the area within the port limits and to construct within port limits Pipelines, Telephones, Communication towers, electricity supply or transmission equipment. The Board is empowered to lease land for Port related use for upto 40 years and for any purpose other than the purposes specified in section 22 for upto 20 years beyond which the approval of the Central Government is required.

- Provisions of CSR & development of infrastructure by Port Authority have been introduced.

Source: Press Information Bureau, 14thDecember 2016

CONCLUDING NOTES

The Indian port sector has long been constrained by limited capacity, traditional infrastructure and poor equipment levels. These limitations encouraged the government to take definitive steps towards increased private participation in the sector through various incentives. As the government embarks on a new era of economic resurgence, expected to be considerably bolstered by port-led development, it needs to spearhead streamlined implementation of key initiatives directed towards greater private participation.

Table 5 aims at capturing the dynamics of the PPP environment today by summarising the major developments that have taken place in the recent times and the potential areas which may be ventured for realising the complete potential of public private projects at Indian ports.

Table 5: PPP Projects at Indian Ports	
Key Developments	**Future Possibilities**
• Greater focus by the central government on providing necessary fillip to PPP projects in the port sector • Key changes in the Proposed MCA, 2016 with respect to equity holding, risk sharing, MGC, grievance redressal etc. • The approval of the Major Port Authorities Bill, 2016 by the Cabinet, which will give greater autonomy to port boards, aid fixing of tariffs based on market conditions, facilitate the setting up of an independent review board for settlement of disputes, among others • Boost for foreign investments - provisions for 100 per cent FDI under the automatic route • Tax reforms • Increased focus on joint ventures between Indian and foreign ports • Standardisation of bidding documents	• The government would have to ensure that the existing PPP projects in operation get absorbed in the reform process and derive maximum benefits in the renewed ecosystem. In other words, any new development, such as the revised MCA, needs to focus on and clearly specify the amendments made in the provisions for existing PPP players • Flexibility in the regulatory environment would continue to be a key determinant of success for PPP projects in the times to come • Periodical monitoring – possibly in every 4-5 years - of PPP contracts can be a key mechanism towards ensuring infrastructural, operational and regulatory adequacies • Need for necessary flexibility in the provision for Minimum Guaranteed Cargo (MGC), based on international market conditions and government policies • Need for streamlining of risk sharing pattern between the concessioning authority and the concessionaire • Need for an effective grievance redressal mechanism as a part of the Model Concession Agreement

In conclusion, it may be said that reforms in PPP projects in the ports sector is of great significance in the context of making Indian ports more competitive and thereby strengthening India’s position in the international supply chain. This policy brief has aims at highlighting major developments towards reshaping PPP arrangements in the Indian port sector as well as facilitating greater realisation of the immense potential these projects hold in the overall growth prospects of India’s trade i.e. in fulfilling the surging domestic demand as well as providing necessary fillip to export oriented manufacturing.

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