



Advanced Contracts, Tendering and Public Procurement
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Lecture 46
Public-private Partnerships: Law and Policy in India – Part 03

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PPP is a Joint Venture.

- Technology, product and Equity: Incorporated and Unincorporated- Contractual based
- Consortium bids
- Shareholders Agreement
- NDA and Confidentiality
- Exclusivity
- Due Diligence
- Condition Precedent: FDI, Competition Act



The Important question to be addressed is, is a public-private partnership a joint venture? Is it a joint venture? Now, what is the joint venture? is it public and private together? The answer is absolutely yes. Is it a kind of partnership? Probably we will answer it in a little while, because here is where probably the law on organizations becomes very critical and important.

But the point is that joint ventures in India have been existing for quite some time and have seen that post the 1991 liberalization era, where the foreign direct investment was allowed to come into the country and foreign companies to do business in this country, but allowed them in a very staged manner. In some cases, the FDI was allowed just 49 percent. Later it was increased to 74 percent. In some sectors, now, there a 100 percent FDI that can actually float.

Joint ventures in India are very important because it is an important form of commercial and business ventures. Probably some of the initial joint ventures were on high technology contracts. Companies like Hero Honda, Kawasaki Bajaj all of these were kind of technology joint ventures because the technology was not in India. Hero wanted to tie up with Honda and they wanted this technology to make two wheelers.

Initially, notice that two stroke engines then we went into four stroke engines to develop that kind of technology. So, technology had to be brought to this country. And one of the best

mechanisms of getting this technology is through a joint venture or a collaborative technology partner into this country where the branding and royalty is shared with the technology partner.

In joint ventures in the product space, where companies like Mahindra trying to bring the product called Renault, with a company called Renault tied in get in a product like Logan or what is called Verito. So, this was a joint venture just for the product, it was specific to the Indian market between two automobile manufacturing companies, one is Indian the other is foreign.

Mahindra and Renault have collaborated for this product called Logan. Now, product joint ventures are also quite popular in this country. So two companies coming together of course, is based on the sales it is based on commercial launch of these products and the kind of money that they make that the royalties are shared between the joint venture partners.

Then there are equity joint ventures. This is the most important one because these are in terms of a shareholding pattern. And most of the equity joint ventures are kind of incorporated joint ventures. Now, technology and product joint ventures maybe unincorporated. Incorporated means that two companies come together and create a third entity.

So the incorporated joint ventures, when they create a third entity through a special purpose vehicle, that incorporated joint venture could be in the form of say, actually a partnership. Please note it could be a partnership under the 1932 Act. We know in India, though there are two laws of partnership. One is the unlimited a joint in several liability partnerships under the 1930 the Partnership Act, which is a British law.

Then, limited partnership law and that is why we brought what is known as the LLP Act of 2008. So incorporate it under the LLP and because the 1932 law definitely has its own problems or shares of legal risks and liability. So, joint ventures will ever go under the 1932 law. Because for simply the unlimited liability in the joint and certain liability principles, which will actually make one person extremely liable for the other person and that liability is not only limited to the capital that is contributed. The liability is also extending to his personal liability. So, no company would want that unlimited liability model. So LLP is one form of incorporation that can be done, but it is not something that is favored by joint ventures. The joint which is usually go to the private limited company model which is under

the Companies Act of 2013. They may make it public limited but not public listed though. So incorporation is one way in which joint ventures are created and private limited company model is quite a, considered to be quite an interesting model.

And notice that they bring in equity. Now equity here could be say one partner holding 49 percent of equity and the other person holding 51, just giving the 51 percent a majority kind of a stake. Now incorporated PPP models are existing in India, the Hyderabad International Airport is an interesting model of incorporated public-private partnership model.

PPP models can be completely unincorporated as well. They will be, what is called as the contractual base model as well. So the recent airports that are given to the Adanis could be the contractual based public-private partnership model. They are not necessarily to be incorporated into a third entity, that is not a necessary creation that has to be done. Giving an instance or an example of an unincorporated JV is purely run through a contract.

So that is kind of how the joint ventures in the public-private partnership mode can be, it can be purely contractual or it could be incorporated joint venture where the government is involved. Example of the same in the next slide. And what is also important is that joint ventures in tendering as well and joint ventures as consortium bids

Consortium bid is when two or more persons actually club together to fulfill the tender condition and submit a joint bid. This is called the consortium bid, it could be two or more, remember that. Now consortium bid are based on government discretion, whether they accept it or not. They can probably say no, we do not accept consortium bids, or they may say consortium of bidders can also participate in the tender notification.

This is something that the government will have to make conscious decisions about. Now, why do two or more companies submit consortium bid is for the simple reason is that the tender conditions are such that one company cannot fulfill the tender conditions and hence, they want to tie with another company which could partially fulfill those tender conditions. And hence, both of them could actually take the tender, they can actually participate in the competitive, if they selected, both of them, will actually put in their expertise to complete the project.

So that is how consortium bid becomes very important. Also, there are advantages of consortium bid, it is not about only just getting the technology or getting the expertise of two or more companies to fulfill the same, it is about sharing of the profits and risks also, because

the project is of such magnitude and scale and running in so many thousands of crores, that one company may not be wanting to expose its own risk to that kind of a project.

So tying up with other companies like sharing of that risk as well, and sharing of that kind of capital that would be required to complete the project. So consortium bids have its advantages. Of course, they have the disadvantages as well, because what happens in consortium bid is that the consortium of bidders must have an agreement between themselves and hence the tender conditions are very clear that you will notice that the joint venture agreement of the consortium bidders must be submitted before they can be selected.

So, there should be a complete understanding between these two partners, before they can submit that consortium bid as well. Because interestingly, friends, what happens is sometimes during the term of the tender or during the term of the execution of the common contract, one of the players may want to come out. Can you exit? Usually, yes, exit clauses are provided for. How can he exit? Can he sell the shares to some third party with whom the existing partner is not aligned or is comfortable with or should he sell his shares to the existing partners first?

So all of these will be relevant to bring in the liability because remember, the courts have gone on to say that in consortium bid, the principles of liability, because this is like a partnership, though not registered or though not incorporated. And hence, when it looks at what is known as implied or express kind of an agreement between two or more persons to come together. Please note it is nothing but a partnership that is created.

Now under the 1932 law, partnership, registration is optional. It is not something that you can mandate or make it very, very compulsory. And hence, anything that is not incorporated or registered, but is an agreement between two or more persons, the partnership is almost like implied, it is something that can be inferred.

And the courts have gone out to say that between the partners in a consortium bid, the joint and several liability principles will be applicable. Joint, then both of them are joint and several to the extent of their capital contribution to the extent of that rule, it is several as well, but it is unlimited joint several and unlimited liability is the principle that will be applied in the consortium bid space.

Of course, in case of joint ventures that needs some time for incorporation, because remember, there is always a gestation time between what is agreed and how to probably

execute it. Generally, in case of equity joint ventures they enter into what we call as Not Only the Joint Venture agreement, which is the basis of two partners coming together based on a joint venture agreement, if they want to actually further incorporate and take it, take the equity forward. Generally, they would enter into what is known as a shareholder's agreement.

So two or more partners who hold the shares in that kind of JV, come together and hold a shareholder's agreement. How do shareholders manage their shares in the company? Who will put in what shares? How will the shareholder's agreement be taken forward into what is called as the Articles of Association, which is the incorporating document in a private limited company?

So in Incorporated JV's first there will be a JV agreement. Second stage, there will be a shareholder's agreement. And the third stage will be the articles of association that will be registered under the private limited company model. Generally, more or less the shareholder's agreement, clauses go and get incorporated in the articles, but not necessarily so. But that is the basis of registration of the articles of association in a private limited company.

Of course, joint venture partners will also execute a nondisclosure agreement or a confidentiality clause or a confidentiality agreement. Because during the joint venture before it is incorporated, there will be so many proprietary information that is shared, there is so many confidential data that will be shared, so many economic and financial data that will have to be exchanged between the parties, to go forward. And hence confidentiality becomes critical between the partners.

And that is also, that could be part of the JV agreement, or it could be a separate agreement, even before the negotiations for JV start. So that is also something that is complied with, as well. And even in a PPP project, friends, notice that confidentiality is very, very important because government information is to be held as confidential information as top secret sometimes, especially in critical infrastructure projects, as well.

Exclusivity. Now, this is also very important because of the simple reason is that, when you are tying up with someone, you do not expect that someone to actually go and tie up with some kind of competitor. So exclusivity between the joint venture partners is something that needs to be agreed to, it needs to be executed and implemented as well. So the joint venture partners have a business of exclusivity between them.

So for example, in the McDonald's joint venture case, how exclusivity important because you do not expect the other JV partner to go and sign up with a Subway or Pizza Hut or someone else that is kind of a competitor in the food chain, or food supply business. Of course, before a joint venture can come into existence, due diligence from both the partners is very, very essential condition.

When the public or the government is trying to tie up with a private player, due diligence is compulsory, it is mandatory. What this company is, you need to know who the commuters are, you need to know what the balance sheet is, you need to know the physical and financial capacity of this company to actually come into existence and to execute this project.

So unless you do due diligence, and that is something that was very visible in the 2G case, when the Ministry of Telecommunications granted the 2G license to so many companies that actually did not have any kind of business with the telecommunication networks. So the ministry itself by giving that license even had not complied with due diligence.

This is something that has seen in government very often that once you have participated in the tender and you have become the L1 or like in the 2G case, what we call as the first come first serve policy. Everybody who applied, got the license without any due diligence that was complied with.

And interestingly, in some cases, notice that you would end up giving license to shell companies. So I think due diligence is very, very critical. I think it is mutual between the parties. The private company will offer to do due diligence or the ministry or the department or the authority that is entering into the public-private partnership says.

So due diligence is something that has to be complied with. And very importantly, let us apply due diligence in the labor sector. For example, about corporate due diligence, financial due diligence, labor due diligence. For instance, this is not a greenfield project now most PPP can be greenfield, but, public-private partnership project can be brownfield project. Brownfield projects are existing projects.

Say the Bombay and Delhi airports, they are already existing. And they were given to a PPP mode for what we call is the operation, maintenance and development. Development means new terminal can be developed but to retake our existing operation and take existing maintenance, we handed over the project to say the GMR as a JV case.

Now, notice that labor due diligence is also critical and important. For example, today, the Tata have taken over the Air India. It is completely privatization. It is not public-private participation. But there are employees with Air India, there would be employees in the airports who are already working, say for 20 years or 30 years or even maybe a couple of years. Now, the labor due diligence is important in terms of how many people are working, what is the current salary, what could be the existing salaries that will have to be increased over a period of time. Maybe in such kinds of due diligence, you will notice that there is an initial lock-in type.

Now to confer the laborers and the trade unions, you will notice that we would probably give them assurance that for the next five years, there is a lock-in that they will not be removed. Or they will be absorbed by the new public-private partnership. So that is an assurance that labor always requires. So from completely a government and labor set up to actually give to a PPP labor setup, notice that the trade unions will always have some kind of concerns and objections, already seen that in the BALCO case, where the trade unions also challenged at the privatization of BALCO and they said they were not in favor of public policy, especially when labor is adversely affected.

So, labor due diligence also will be necessary and very important. For example, what are the existing workforce, how much extra would be required, whether extra would be required or not, which are the technical sectors or areas in which labor has to be strengthened, whether they need to be re-skilled, whether they can coexist with the existing workforce. So, all of these would be also there in a labor due diligence process.

So, because public-private is a joint venture due diligence if done, appropriately with adequate care, it could actually result in a very successful implementation of the joint venture between the public and the private space. Finally, to give due diligence to finance in terms of loans or encumbrances that are existing in such a brownfield project is important.

And most importantly, finally want to conclude a due diligence on tax matters. Taxation is also very critically. Are there tax dues? Are the tax disputes? Is there tax pending claims? Are there consumer litigations? So, that is the legal due diligence that is usually done.

So, all of these are very, very critical, because that is where the transparency of the transaction will be ensured, that is where proper information can be shared with other partner, the other partner can actually take a very informed decision in terms of the joint venture that

comes into existence. So, due diligence helps the process of a better implementation of the public-private partnership space.

Of course, there are certain conditions precedent before a joint venture can be accepted. Like the foreign direct investment policy, sometimes a competition regulator, called the CCI Competition Commission of India, under the combination regulations may have to permit the joint venture to come into existence.

Now, notice that under the Competition Act, the Competition Commission may have an objection to the joint venture, if there probably two major entities coming together to actually create some kind of a monopoly, it may actually disrupt competition. And hence, under the combination regulation, the CCI may not give an approval to the same. So just to say that though contractually agrees and want to take the joint venture forward, the existing regulations on joint venture, which are not specifically law that we have.

But I think there are laws that talk about finance or money and how who can be a JV partner? How can the foreign companies do business in India? Can they do business to subsidiary model? Can they do through the finance model? All of these will have to be complied with? And yes, of course, there are some regulators who may have to get permission before the joint venture can come into proper existence as well. So if these are complied with the public-private partnership can be a very good joint venture to actually take the complete process forward.

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PPP Contracts and when the contract is made

- M/s PSA Mumbai v Board of Trustees Jawaharlal Nehru Port Trust 2018 SC



So, continuing and understanding joint ventures consortium bids in a public-private partnership contract, one of the interesting issues that did come before the Supreme Court of India in 2018, is that when does a contract come into existence in a PPP mode. Now usually, in an ordinary government contract, as soon as there is a declaration of the L1, we know that the contract comes into existence, because the contracting parties are confirmed. And the rest is the documentation process in which, say, the letter of intent is issued, the work order or the purchase order is issued, or the agreement is actually executed between the parties.

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PPP Contracts and when the contract is made

- M/s PSA Mumbai v Board of Trustees Jawaharlal Nehru Port Trust 2018 SC
- Issues: 1. When is a contract made? PPP project, after RFQ, RFP was invited on financial terms, the appellant bid which was a consortium between an Indian and Singapore company was selected. After declaration of L1, due to delay in issue of letter of award Singapore company withdrew. This was informed to the Port trust. Later letter of award was sought only in favour of the appellant. He sought permission from the Ministry of Shipping for the new proposed SPV, which was denied by the Ministry. As the contract did not go through, the bid security was encashed by the Port trust. Letter of award was withdrawn.
- The Port trust sued in arbitration under the draft consortium agreement, which was part of the tender document. [though the tender document said that the terms in the tender document would not be construed as bidding contract]
- Tender document stated that courts in Mumbai will have jurisdiction. No reference to Arbitration was mentioned.
- SC held that no concluded contract in this case as **the condition was a SPV will enter into a contract** [concession agreement] with the Port trust and all other were pre contractual documents.



Whereas in the PPP mode, what is the issue? The issue is termed as two stages of one PPP contract. The first stage of the PPP contract is to confirm the private partner. Only if the

private partner is confirmed and the private partner adheres to the preconditions of the tender, only then the concession agreement will be entered by the government with the PPP SPV that is, a special purpose vehicle.

Then what happened in the, this was about the Jawaharlal Nehru Port case. And in this case, there was a request for proposals that was floated, and consortium of bidders, it is a joint venture among the private players, this was evaluated, and two companies came together. They participate in the bid and they were selected actually.

This was an Indian company along with the Singapore company. Now this consortium was declared as L1. Now unfortunately, what happened is that the Singapore company withdrew. Of course, the Singapore company cannot be under the jurisdiction of India. So this is usually the problem of foreign companies actually entering in consortium in India. And what it leaves it, it makes the Indian company solely responsible and liable for the execution of the product.

But inevitably, because a port requires prior experience, port requires prior business purpose, entering into such consortium between the foreign companies has become the practice and norm of the day. Now, the Indian company that was left because Singapore company withdrew, they actually then said, okay, we will make another SPV. And we will continue this work. But the port trust said, as soon as you come up with a different, “we have made you L1 because you tied up with a Singapore company” Now you are tying up with somebody else. We have some preconditions of actually given clearance of that second consortium player. And hence, the Board of Trustees of the Jawaharlal Nehru Port, they sent this for approval to the Ministry of Shipping, the new consortium that was created.

Unfortunately, the Ministry of Shipping, which is the approval authority of the regulator in the space about who can do business in what sector, even including the PPP, who are the private entities, that is interestingly, noticed vis-a-vis foreign companies or security clearance also has to be given by the ministry.

Because, of course earlier a lot of these Chinese companies or Russian companies were trying to do business in India, secondary clearance from industries for any kind of JV or public projects or command Public-private Partnership projects is a must. So the ministries actually have to give their due diligence before giving such clearance.

Interestingly, the Ministry of Shipping did not clear the new consortium. And because they did not clear the new consortium, the issue was whether the contract had come into existence.

So there was issues about arbitration and whether the arbitration was entered into or was there a clause in an executed contract or not. That was another separate issue that was that in this case.

And the tender document had said that the courts in Mumbai alone will have jurisdiction and tender did not have any mention to the arbitration clause. Now, what is there in the tender will be something that will be binding, if no contract is made. If a contract is made, what is put in the contract will actually come into existence.

Now, note that the concession agreement is the contract. Selection of the private player is not the completion of the contract with the PPP. Selection of the private player is only to create the special purpose vehicle, it is only to identify with whom the public will partner and who is the private player with whom the public wants a partner. So it is not just once the private player is selected, they cannot come into conclusion that the contract has come into existence. The contract will come into existence only when the concession agreement is entered into by the government and the PPP special purpose vehicle.

That is what the court held. So the court held in this case, that there was no concluded contract with the Port Trust. And what was done was pre contractual. So selection of your private player is completely pre contractual. And hence, probably it is not binding on either of the parties to actually go ahead, they can actually withdraw. That is definitely a possibility. The Port Trust need not go with this consortium player, the Indian person, because the Ministry of Shipping has not approved the new consortium, which was a prerequisite or a precondition before the concession agreement can be entered into.

So please note even a PPP project, the contract comes into existence once a concession agreement is signed, not when the private partner is selected, be it in the L1 or in the H1 process. So that is something that has to understand how PPP contracts are different from regular contracts when declaration of L1 is the time and place when the contract comes into existence.

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Comparison of PPP

NICE

- a. Shareholding Pattern- 100 percent owned by Private Parties
- b. Type of PPP Business: Build Own and Operate the Bangalore Mysore Infrastructure Corridor (BMIC) Project, a world class integrated infrastructure development project
- c. Term of PPP: - Concession period for toll road is 40 years including 10 years of construction period
- d. How a Pvt. Partner was chosen: - An agreement for the construction of the BMIC was signed between the government and a consortium of Kalyani Group India, SAB and VHB of USA in 1995.
- e. Ownership of Land: 5688 Acres of State Government, Leased to NICE @ 10 Rupees per Acre; 168 Acres owned by the Consortium @ INR 67.75 Lakhs for Reforestation

BIAL

- a. Shareholding pattern: Private promoters hold a 74% stake (Fairfax India Holdings: 54% and Siemens Projects Ventures: 20%), while the Government (Karnataka State Industrial & Infrastructure Development Corporation Limited: 13%, Airports Authority of India: 13%) hold the remaining 26%.
- b. Type of PPP Business: Build, Own and Operate KAIAB
- c. Term: 30-year concession period
- d. How a Pvt. Partner was chosen: On June 1996, a consortium announced it was pulling out of the project due to delays in government approval. These included disputes over the location of the airport and the fate of HAL Airport. In May 1999, the Airports Authority of India (AAI) and the Karnataka State Industrial and Infrastructure Development Corporation (KSIIDC) of the State Government signed a memorandum of understanding regarding the nature of the project.
- e. Ownership of Land: State Government



Now, just to give you an example of a public-private partnership, friends, the best example is the Bangalore International Airport Limited case. Now this slide compares the NICE case that we discussed at the very beginning of this chapter. And because the NICE case, as I told you, friends, is a flopped model, it is a problematic model. We learned from the NICE case how it is important to make a PPP project. And then want to compare it with the BIAL project which is the Bangalore International Airport Limited project, which is probably one of the successful public-private partnership initiatives in this country, along with Hyderabad Airport

But Hyderabad and Bangalore were greenfield projects. So it started from the very beginning. So it is actually very important for us to understand the same. Now, first of all, if you understand the NICE versus BIAL. Please note BIAL and NICE both are private limited companies, they have been registered as private limited companies. However, you will notice that in NICE, the government or the public equity is almost nil, there is no equity of the public.

So, it cannot be at least in the special purpose vehicle sense be called as a public-private partnership project at all. Whereas in BIAL, you will notice if you see the shareholding, the current shareholding, friends, it was a shareholding that was slightly different earlier. But in 2016, GDK actually sold much of its stake to a company called Fairfax India holding, which is actually promoted by a Canadian NRI

And Fairfax is now holding around 54 percent in BIAL along with Siemens, and some of its joint ventures which is holding 20 percent. That makes 74 percent of this Bangalore International Airport Limited, which is a PPP to be held in the private space. Now, if you again, notice the planning for holding the 74 percent is critical because that gives the private player more management and ownership stake, to dominate decisions and to run the company.

Now, we know that if government holds 51 percent or more in any company, then it is called the government company. So, government has majority over here. Now, here giving 74 percent to encouraging the private payer to invest more, because there is 74 percent stake to take part in the management more, to take the liability more, Finally, they will also get profit more because they have 74 percent stake.

But how do to conclude that this is PPP or three Ps is because you will notice two governments both the central and the state government have 13, 13 percent stake in the Bangalore Airport. So, it is 26 percent public, 74 percent private and this is how the holding of PPP comes into existence in the Bangalore International Airport Limited case, which is registered as a private limited company. It has the following shareholders who have probably entered into a shareholder agreement.

Karnataka State Industry Infrastructure Development Corporation, 13 percent, Airport Authority of India, Fairfax Holdings and Seimens. So this is the shareholders pattern and shareholder's agreement we will go through this kind of a pattern. When you compare it to NICE, friends, NICE is completely private. The 100 percent equity is owned by private player, there is no public participation in that. And now you will understand, see, the point is very simple, friends.

If suppose government in Bangalore airport has 26 percent shareholding, please note the exposure to risk is also 26 percent, the profits of 26 percent is also going to go to the government. Whereas in NICE, when you notice, that this contract now of a highway, which is built around Bangalore is going to be operated and maintained by NICE, and the toll money that is going to be collected is going to the NICE company.

Now what of the toll money goes to government? Nil. Simply because they are not in the equity participation in the company that has been given this contract. So that is where the fault in design of NICE and the lessons learned could be clearly visible in the BIAL project.

Not that this cannot be a PPP model, I will just come to that in later while in the Adanis case, how that is done, because Adanis case is not that there is an equity PPP, but it is a concession agreement to which government can earn royalty directly.

So that is a different kind of model. But the original PPP model is in this case. The type of business, friends, y notice is the build, own operate method. And finally, the transfer, that is boot, which in the NICE case does not seem to be there but in BIAL case, definitely it is something that is very important. Build, own, operate and transfer.

So because it is a greenfield project, right from say the issues of land, identification of land may be designing the project, this is called the DBOT model. So design, build, own, operate and transfer that is DBOT model, but in the Bangalore case, it is build own operation. So, the land was already taken by the government. Now please note when we saw about government, you will notice that the Karnataka government, how does it invests 13 percent equity in BIAL. It does not literally, what it does it? It just acquires land and the land values taken as equity.

It may give a soft loan of 450 crores and so on and so forth. But that is usually how government equity is actually converted into these companies. So on the government land, please note, you will build the airport. You will own the airport. Own means, it is not an absolute ownership with only owning the assets built on the land. The land belongs to government; you will only own the assets built on the land.

For what purpose? It is not absolute ownership for lifetime, it is ownership during the concession period or during the lease period. And you will own it for the purpose of selling mortgage or you will charge that has to be done or maybe you need to raise some money from banks to do the expansion activities.

For all that purpose, probably the ownership can be granted, but please note it is only ownership to that extent on assets built on land that you will be granted that kind of a right. You will operate the airport which is very, very important in the PPP formula. Operation only on the civilian side, operation only in the passenger and cargo facilities, but not air traffic control, not the security operations are handed over to the BIAL company.

Now, coming to NICE case, interestingly though, say it is built own operate, the problem with NICE is, some of the land in NICE have been transferred to ownership of NICE. So,

once you have the ownership of land, friends, there is no question of, the only option if you ask me is to reacquire that land.

Some of the lands that were leased, some of the land that have been granted to NICE just to build the roads, they can always be taken back. But the ownership of land once it is transferred to a private player, the private player is not in a PPP mode. He is actually the private, completely private. No equity, land is just, he just builds the road. And that becomes private road in most sense. And that is why I said NICE happens to be probably the first case of a private road project in this country.

And then he takes the toll and the toll money of course, he keeps it to himself. Of course, if you look at the toll to the national highway projects, because it is a PPP, that is public, the Highway Authority also earns from the roads, because that is public-private. Participation is the same. But that is not the case, unfortunately. The NICE case, because there is nothing that the government earns from this project, because the government does not have equity, neither it has a contractual right in that kind of infrastructure project.

Again, the concession period. Now, what is interesting is say, some of these NICE projects, if you look at it, the concession type has not been negotiated at all. They say for toll roads; it can be 40 years. It is not necessarily 40. Sometimes, you will notice that in some of the contract, it is not mentioned at all. So NICE case has been completely kind of not a pre-planned, properly executed implemented kind of a project.

Whereas in BIAL, the continuation period of the term of this PPP is 30 years. That is a concession time. Now in the new airports, the term has been extended to 60 years, a long term giving the private player more time to actually look at. Were the private players chosen in NICE? They were not chosen at all. Whereas, the private player chosen in BIAL case, Yes, it was chosen and the state government also then signed an MOU with the chosen player, after which the concession agreement were actually was signed by the Ministry of Civil Aviation with BIAL. That is how the project was actually given shape of.

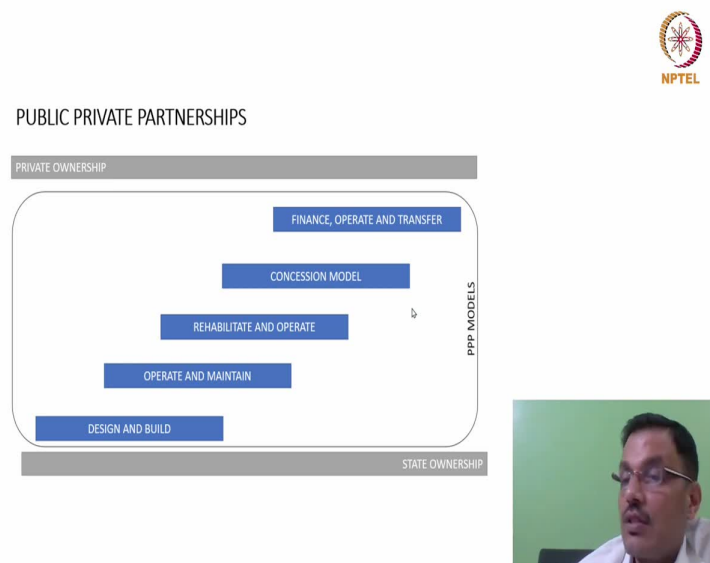
Now, some of the ownership of land in NICE, as I told you, has been transferred to NICE. Some of them have been given on lease at 10 rupees per acre, which is probably one of the most horribly negotiated clauses. And the consortium, interestingly, that is NICE has also done a resale of some of these land. Yeah, they did so. And that is why the government started feeling quite objective, because the purpose of the land that was acquired and given to

NICE was for road and now they are reselling it for something else, and hence, some of the disputes in NICE were raised because of these kinds of complications.

So, now, the road on which the land is built, friends, please note the government will have to require the same after say the 40-year period or whatever period has to be done. So, it cannot be easily transferred. Like in the BIAL case, please note the land belongs to the government, you come and build.

Now after the concession period, everything that is built on “my land is mine.” It is an automatic kind of a conclusion. And hence, the transfer could be far easier in Bangalore Airport case rather than the NICE case. So, this is precisely the lessons that one can learn from NICE and not repeat those mistakes and probably formulate the PPP project far more structured, in a far better sense to serve both public purpose as well as private interest.

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Now, to look at the public-private partnership model, friends, notice that there are different models. Design build, operate, maintain, there could be a rehabilitate and operate, maintain that is could definitely be a concession model. And finally, finance, operate and transfer model. So there are many such models that are existing for the PPP to come into existence. And one of the concession model agreements are, please note, like the current Adani airport cases where the government is not in the Adani airport, they are not an equity participant.

However, the concession agreement very clearly is based on facts that to select the concession based on the kind of revenue they will generate and pay to the government. So it is going to be H1. So the government enters into a concession it is like any other outsourcing but they get to build airport, you get to operate the airport, it is already a government airport with certain piece of land.

And based on the traffic projections, they have already gone to the government that this is the annual royalty that you will pay to the government from that particular project. To make it profitable to make it workable is your choice. Government gets an upfront profit. The government did not take part in the management and the equity or the formation of the PPP structure.

That is how the concession model operates. That is not our preferred model. Rather, notice that there is news that Airport Authority of India will actually divest its stake in the Bangalore airport, the 13 percent stake that it has, because it no longer wants to be a participant and take part in the business operation, in the day to day management, it may have to appoint one Director.

So why should we do? Finally, the government should earn, government must be able to control the activity. And to do that even without taking part in the BIAL process or in the airport Specially Purpose Vehicle, then it is a win-win situation, even for the government. And it is a better situation for the private player, because they do not have to worry about government interference into the Board and the management policies, as well.

So to think right now, in the PPP structure, what we realized is, it is important to select the concession, enter into a concession agreement. The government need not be an equity player in that PPP model. That is a free hand that you can give to the private player, and make the operations far more efficient and successful, as the case will be.

Finally, p the land on which this concession model of the Adani's is going to be built is government land. It is going to be with the Airport Authority of India, which is the regulator for airports. So when going to area to do that, to take part in the process of establishment of a private limit company, I need not be an equity holder, and create more complication.

So simpler model is the concession model. And I think that is something that new airports have actually been adopting too. However, notice that in the airport sector, some of the airports are still completely public, they are not into the PPP model like the Chennai airport,

and several other reports, which are made by the Airport Authority of India. Whereas the some of the airports are in the PPP mode, which has created SPV, some of the airports are in the concession.

So all such kinds of experimenting with the different modes of PPP, trying to evaluate which is more advantageous and which is not. And that is how most of these public-private partnership contracts are actually moving forward. And I think whatever is convenient, whichever is less cumbersome, whichever is easy to execute and operate, I think that is the kind of model that has been raised.

The government is looking at developing the infrastructure for citizen centric experiences and approaches. It wants to execute them in a faster manner, so that the citizens are benefited buying. So they are focusing on that time as the essence. Simplification as a process, and efficient execution, as a management principle.

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Are there legal conditioning issues and challenges to public-private partnership? There are some of the legal issues. And some of them, take up for our discussion, as a concluding part of the chapter on public-private partnerships. Now, choice of criteria for the public-private partnership projects. Whenever a tender is called by the government, who does it want to partner with? What are the qualifications of this private consortium or the private entity to take up this PPP project?

This is something that can obviously be taken to the court of law or a petition, and people can challenge the criteria that have been floated in the tender. So when the tender document or

the request for proposals are actually being enacted, I think it is very, very important that the criteria that are mentioned, are very objective and character and nature, they are feasible in terms of its approach and fulfillment.

While, I am sure the government is very keen to select a private player, who should be an Indian company, of course, that is an essential criterion, but notice that saying that airport sector, Indian companies when the airport sector was opened up for PPP mode, Indian companies do not have experience in managing airports.

And the Airport Authority and the Ministry of Civil Aviation could not give it to a person who did not have experience managing airports, because airports are not like highways, they are critical security infrastructure area. So someone experienced in management of the airport or building the airport was equally necessary. So what did the government do is that they said look, we need some experience with the consortium.

So let the Indian company be the lead consortium bidder. Let them tie up say Zurich Airport or any other airport company, which is already managing airports across the world. Let the consortium participate and who actually gives us the best terms and conditions is the one with whom we will actually tie up for the Bangalore or the Hyderabad airport.

Now, the courts usually do not want to intervene in tender conditions. But yes, of course, they can be called upon to test the reasonableness of the standard conditions. And hence, you will notice that, in cases like BALCO, the Supreme Court has clearly laid out that the criteria of a tender or request for proposal can be challenged if the sum to be quite arbitrary, unfair and unreasonable, and more importantly, if they are not feasible at all.

So while the concerns of the government can be definitely respected, I think the practicality of the private parties and private persons are something that are also very important for us due take note and consideration of. Now notice that in some of the tenders, the courts have said that you cannot create tender conditions so as to exclude some parties. There are certain very mischievous tender clauses which actually are not inclusive in nature, they deliberately create something to exclude competitive parties from the tender. That, is a problematic situation.

So, tender conditions must be as inclusive as possible, giving wider participation as possible to everyone concerned. And I think that is the tenders that will be least intervened by the

courts of law, thus the courts have a tendency to actually direct what in the conditions have to be laid down.

Now, the courts have very clearly said that we do not interfere in the technical parts, policy decisions of the government. If the government requires certain kinds of technicalities, the government is the best judge to do that. So the courts have also said that, however, wherever their exclusions can be brought in, the courts have already very clearly laid down what are the criteria for its implementation.

Actually, there is recently one case, this was about airport handling services. Interestingly, the Airport Authority of India for airport handling services went in for a global tie-up. And they did not give preference to MSMEs in India. So, the MSMEs actually challenged that global tender. They said for airport management services is there a need for a global tender and allow more competition from external market markets.

And when you offer global tenders to look the annual turnover that is required, definitely raise up and want more turnover of these companies as well. So, very recently, in the airport case, I think the courts did lay down that it is an exclusionary kind of a tender, it excludes MSME, it excludes local companies. We say vocal for local, we say promote more of MSME small scale industries in India, we say Make in India we say Atma Nirbhar Bharat.

So, unless you want to promote Indian companies, talking of promotion, protection of Indian companies. And notice that in a lot of government tenders, 15 percent of tenders are reserved for MSMEs to protect small scale industries. And here was a global tender that was actually excluding them and taking them away from the competition. And interestingly, in airport handling, for a lot of duration of time, these were the companies that were involved. They are small scale companies and they can actually do those business in tire 2, tire 3s kind of airports and cities.

Why call for global tender to such kinds of cities, airport handling services, because the traffic is pretty low in some of these cities. So local companies should have been given the opportunity, they should have been given priority. And the Airport Authority unfortunately did not do that. Was an AAI issue, let's put in that case.

So tender conditions have to be very carefully drafted. And I think it is a matter of public policy, and how they can be actually brought into consideration. Coming to the second most important challenge of a PPP whether PPP is a state under Article 12 of Constitution. These

projects were state till they were transferred into PPP. These were all state under Article 12, they were unable to grid jurisdiction, under Article 32 of the Constitution and Article 226 of the Constitution.

Now that to make a PPP, it is like putting it at an arm's length distance. It was public, but now, I put it into the private. So it is an arm's length distance. And being at arm's length distance, can we consider this to be or can we continue to be straight under Article 12, which means, then, a BIAL in which 74 percent is the private, will be answerable under Article 226 before High Court for violation of fundamental rights or for the violation of any legal right.

At least when it is a state, have to follow all the principles of state, procurement and state recruitment or even state policies as the case may be, which may be applicable to any government sector rather than those advantages that are there in the private sector. So that is the real broader question. And that question was answered by the court, in this case for the Flamingo Duty Free versus Bombay International High Court, MIAL, Mumbai International Airport Limited.

Flamingo Duty Free Shopping versus MIAL, it was a Bombay High Court decision that came in 2008. And there is a parallel case with the BIAL that was decided by the Karnataka High Court as well. And both these high courts very clearly said this would be considered as the instrumentalities of the state. Though the state just has 26 percent, they would still be continued to be held as the instrumentalities of state Under Article 12, and they can be held accountable under the jurisdiction of the high court, that is something that the courts have very clearly laid out.

Also, whether provisions of exclusivity given under the concession agreements can be considered as anti-competitive, because giving them exclusive jurisdiction. The courts have very clearly said that look, when you are giving an exclusive right to one person to say do something, it could be the highways, it could be the ports, it could be the airport.

It is not necessarily to be anti-competitive, it just to protect its investment, it is just to promote the project, which should have been promoted by the public, but which is now done

with the three people. So it is not considered anti-competitive, though it looks to be so, it is just trying to protect that kind of an investment or opportunity that was created.

So, that some return on investment is assured. Otherwise, if you open up the sector, and even if the government, say, after doing one PPP group with an A contractor, suddenly it does another PPP with B contractors, then to that extent it will affect the market condition, it will affect the public policy as well. And hence, these kinds of exclusivity provisions are not considered to be anti-competent.

In the DIAL case, this is the Delhi International Airport limited case, it is a brownfield project, both Bombay and Delhi were actually and notice that the employees of DIAL went to the court, they went to the Supreme Court. And they were looking at their benefits, because once it is transferred to the PPP, what benefits they can continue to have, I have already addressed this kind of a due diligence that could be required, what kind of promises are made to the unions and employees before such projects are taken over.

They will become a very critical part of the whole sector. And you will notice that the DIAL case was an important case, which has helped a transfer other airport businesses in other cities as well. And that I think has been a great way in which you can ensure the success and proper implementation of the project.

Of course, dispute resolution becomes critical. These are long term contracts dispute resolution has to be addressed in a win-win situation. It is not about pointing faults; it is not about pointing mistakes. It is not about finding breach in contracts. Even if there are some breaches, those gaps have to be filled, a long term plan has to be in place.

I think submissions are there on the table, there has to be some give and take. And the Dabhol Power Corporation case is a wonderful example of resolution of disputes. We always say arbitration is an attempt to resolve disputes. In an outer court settlement, in a formal mechanism, we call it alternate dispute resolution. The term resolution is critical and important for PPP projects to come into existence.

And in the Dabhol case, notice how that resolution plan was clearly laid down for the Maharashtra State Electricity Board to get involved both equally, and in the management

structure of Dabhol Power Corporation to make it a successful project, to make it an operationalized project. Otherwise, it would have been kind of, it could have been a monumental heritage kind of a piece with no purpose whatsoever. And I think the government did very good in bringing about a resolution plan in the Dabhol case. And I think the same goes to all PPP projects as well.

So these are some just to give an idea about the issues and challenges in the public-private projects, and where such issues can be resolved and what kind of policies have been laid down. And what interventions were called in by the court of law is something that can always take note and consideration of.

Now, to conclude this slide, two issues can always take into consideration. One is whether the PPP projects are going to be audited by the Comptroller and Auditor General of India, that is CAG. Now with 26 percent of shareholders, all the PPP projects will be audited by the CAG. From the stage of the time when the tenders were floated to the time the profits are being shared or the accounts have been submitted.

So CAG will have the right to audit and account this project. So there is no problem about the kind of control in terms of account, finance and budget that is required from this public or the from the state or from the citizen's perspective. This is one part of the advantage. At the same time, maybe from the private player, it could be disadvantages, but it is a very clear advantage in terms of control of public over private.

Secondly is PPP a state? The other challenge that did come by is whether Right to Information Act will apply to the PPP projects. The RTI Act, 2005, friends, is something that is applicable to all public authorities. And please note, look at Section 2H of the Right to Information Act which defines public authorities, it says any non-governmental organization which is substantially financed by the government is also covered under the Right to Information Act.

Now, substantial finance means what? Can it be land at the subsidized price? It could be. Can it be equity of 26 percent? It could be. So the courts and the information Commissions have very clearly gone on to hold that the PPP projects can be covered under the Right to Information Act. And they are supposed to give information under the RTI Act as well, so as to ensure transparency and accountability so a concerned citizen can also use RTI to get information about the project or the PPP project.

