Private Sector Infrastructure Facility at State Level Project

VOLUME 3: NEW DRAFT POLICIES AND LEGISLATION FOR STATES

Provided to the

State Governments of
Andhra Pradesh
Gujarat
Karnataka
Madhya Pradesh
and
Asian Development Bank

By

CPCS Transcom Limited
In association with
Oxford Policy Management
Nathan Incorporated
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Infrastructure Commercialisation Consultants

15 February 2005

Mr. Cheolsu Kim
Head, Financial and Private Sector
Asian Development Bank
Indian Resident Mission
4, San Martin Marg, Chanakyapuri
New Delhi 110 021

Dear Mr. Kim,

Reference: TA 3791-IND: Enhancing Private Sector Participation (PSP) in Infrastructure Development at State Level

It is with pleasure that I am forwarding to you the final report for the above technical assistance project. I believe that the five volumes attached can form the basis for improved private sector participation in the infrastructure sector in India.

In addition to the main volumes, we have also prepared an Executive Summary which summarises the main report recommendations. We have also structured the recommendations into seven key steps which are needed to enhance state level PSP activity. These seven steps comprise an action plan which can be applied by any State in India.

As you pointed out in the tripartite meetings, while the knowledge of how to support PSP activity seems to be fairly widely accepted, following through on that knowledge and implementing the projects is not being done. In the report we have provided a body of material which we hope can assist in that implementation.

While this report is bulky, it was written with the idea of eventually turning it into a reference book for wider dissemination to other state organisations around India. That option still remains. We believe that the concepts and the issues highlighted here, have broader application in other states as well.

In closing I would also like to thank you and your colleagues for your support and help on the project.

Yours sincerely,

CPCS Transcom Limited

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This is **Volume 3** of a five-volume set made up of the following documents:

Volume 1: Final Report, Private Sector Infrastructure Facility at State Level Project

Volume 2: Review of Existing Policies and Legislation for PSP and Privatisation in Infrastructure

Volume 3: New Draft Policies and Legislation for States

Volume 4: Concession Agreements

Volume 5: Case Studies

Introductory Note

This third volume of the present report on "Private Sector Infrastructure Facility at State Level Project" contains the various draft policies, draft laws and other texts of a legal nature which were prepared by the Consultant as part of the output of the TA programme. These texts are referred to and discussed in Chapter 3 and in Chapter 7.4 of Volume 1. Their presentation in this volume follows the order in which they were originally introduced in Volume 1, hence:

1. Review of the *Gujarat Infrastructure Development Act*, 1999 with respect to adequacy of the maximum level of State support and alternatives to the Swiss Challenge system (see Section 3.2.1 of Volume 1);
2. Proposed amendments to the *Gujarat Infrastructure Development Act*, 1999 and to the *Gujarat Infrastructure Development Draft Rules*, 2002 (see Section 3.2.1 of Volume 1);
3. Draft legislation for general infrastructure laws in Karnataka and Madhya Pradesh (see Chapter 3.2.1 of Volume 1);
4. Draft Road Policy Statement for Karnataka (see Chapter 3.2.1 (Roads) of Volume 1);
5. Proposed PSP additions to the draft Gujarat Highways Act, draft Madhya Pradesh Highway Bill, 2001 and to any future such legislation in Andhra Pradesh (see section 3.2.3 (Roads) of Volume 1);
6. Review of the Gujarat 1995 Port Policy and Gujarat 1997 BOOT Principles against the GIDA 1999 and the Draft Rules 2002 with a view to making recommendations on how to deal with any discrepancies (see section 3.2.3 (Minor Ports) of Volume 1);
7. Detailed discussion of the ports sector, both nationally as well as that the level of the Project States, along with key requirements of any policy initiatives (see section 3.2.3 (Minor Ports) of Volume 1);
8. Proposed scheme for regulating fees and tariffs in the minor ports sector (see section 3.2.3 (Minor Ports) of Volume 1);
9. Comments on of the draft Gujarat Maritime Authority Act and the draft Gujarat Ports Authority Act (see section 3.2.3 (Minor Ports) of Volume 1);
10. Draft urban mass transit policy for Andhra Pradesh (see section 3.2.3 (Urban Mass Transit) of Volume 1);
11. Draft consolidated water supply and sanitation policy for Karnataka (see section 3.2.3 (Water Supply and Sewerage) of Volume 1); and
12. Recommended model ADR clause (see Chapter 7.4 of Volume 1).

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1 Review of the *Gujarat Infrastructure Development Act,* 1999 with respect to adequacy of the maximum level of State support and alternatives to the Swiss Challenge system

- See Section 3.2.1 of Volume 1

1.1 Adequacy of maximum level of State support (section 6(b))

1.1.1 Section 6 of GIDA, 1999 in general

Government support to a private sector infrastructure project can be provided in various forms and serves primarily to facilitate its financing. The two most common forms of government support consist of:

Direct Financial Support in the form of grants, loans, capital and operating subsidies, tax holidays, provision of land, tax relief, etc.; and

Contingent Financial Support usually in the form of guarantees. Guarantees can be structured in respect of debt, foreign exchange, demand, construction cost, interest rates, etc...[1]

Subject to the caveat concerning the fifteen percent maximum subsidy discussed later in the course of this text, section 6 of the GIDA, 1999 provides for a potentially generous array of public support for private sector infrastructure projects in Gujarat. Section 6 reads as follows:

> 6. The State Government, a Government agency or a specified Government agency may provide to a person assistance in the following manner, namely:
> (a) Participation in the equity of the project not exceeding forty-nine percent of the total equity;
> (b) Subsidy not exceeding fifteen percent of the cost of the project;
> (c) Senior or subordinate loans;
> (d) Guarantee by the State Government, a Government agency or a specified Government agency in respect of liability of Government agency arising out; of a concession agreement;
> (e) Opening and operation of escrow account;
> (f) Conferment of a right to develop any land;
> (g) Incentives by the State Government in the form of exemption from payment of, or deferred payment of, any tax or fees levied by the State Government under any law; or
> (h) In any other manner as deemed fit.

While section 6 looks perhaps less comprehensive in scope than, for example, its counterpart provisions in the Andhra Pradesh's *Infrastructure Development Enabling Act, 2001*[2], which lists 5

[1] A more detailed discussion on government support for road projects, albeit most of the matters addressed therein apply equally to other infrastructure projects, can be found in "*Public-Private Options for Developing, Operating, and Maintaining Highways: A Toolkit for Policymakers*" (1999) prepared by the World Bank's Public-Private Infrastructure Advisory Facility (PPIAF): henceforth WB Highways Toolkit.
[2] Act No. 36 of 2001.

areas of possible Government support[3], it must be pointed out that those areas are narrowly defined in the legislation. On the other hand section 6 is not restrictive as evidenced by its final paragraph which provides that in addition to what is already possible under paragraphs (a) to (g) the State Government, a Government agency or a specified Government agency may provide to a person assistance: "(h) In any other manner as deemed fit".

1.1.2 Maximum subsidy under paragraph (b) of Section 6 of GIDA, 1999

Experience in other countries and in other Indian States shows that for most infrastructure projects a maximum Government subsidy of fifteen percent is just not enough to attract the participation of the private sector. Once it is accepted as a matter of policy that a maximum Government subsidy of fifteen percent is in most cases not enough to attract the private sector in investing in most infrastructure projects and that replacing that maximum percentage with another equally arbitrary percentage is not the solution, the legal aspect of the matter is relatively straightforward. It is merely a matter of redrafting paragraph (b) of section 6 of the GIDA, 1999 to eliminate the fifteen percent maximum cap and leave the amount of the subsidy to be granted, if any, unspecified.

This would not prevent the GIDB, either informally or by way of a resolution of the Board, to set beforehand certain maximums in terms of subsidy for certain types of projects above which it would not be worthwhile to proceed with the project. This is the general approach adopted in Madhya Pradesh for toll roads. This would have the advantage of tailoring the subsidy cap to take into account the type of infrastructure project involved and the changing national or international investing climate. A parallel table to the one which appears in Annex 1 (re: Limits of Project Cost) of the proposed *Gujarat Infrastructure Development Rules* could, for example, be drawn up with respect to maximum subsidies allowable by sector and modified on a regular basis. Once again this parallel table could be either an informal one or a formal one, but no more formal however than a resolution of the Board, with the approval of the Government.

Moreover, the general drafting approach in laws that provide for government infrastructure subsidies is merely to raise the possibility of such subsidies without limiting the options opened subsequently to the Government or the subsidising agency. Under the *Canada Strategic Infrastructure Fund Act*[4], for example, it is merely stated, at section 4, that:

> The Minister may enter into an agreement with an eligible recipient to provide for the payment of a contribution for an eligible project under this Act.

Nothing about the amount of that contribution is said. Under Korea's *Act on Private Participation in Infrastructure*, once again no limit is set as to the amount of the permissible subsidy, albeit under the regulations passed under the Act limits are placed as to the kind of projects eligible for subsidy or the kind of circumstances that would warrant the private sector to be subsidised[5]. Hence Article 53 of the Korean law provides as follows:

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3 Set out in Schedule V of the AP Act. Namely: (i) administrative support; (ii) asset support; (iii) foregoing revenue streams; (iv) guarantees for contingent liabilities; and (v) financial support.

4 S.C. 2002, c. 9, s. 47.

5 Article 37 (Financial Support) of the Presidential Regulations passed under Korea's *Act on Private Participation in Infrastructure*:

> (1) The State or local governments may grant any subsidy or long-term loan to the concessionaire within the scope of the budget after deliberation of the Committee, in the following cases under the provisions of Article 53 of the Act:
> 1. Where dissolution of the corporation is inevitable;
> 2. Where it is an inevitable measure to maintain the user fee at an appropriate level;
> 3. Where inducement of private capital is difficult due to a fall in the profitability of the project as a result of a considerable expenditure disbursed as compensation for the use of land;
> 4. Where the actual operational profit (referring to the amount obtained by multiplying the user fee by the demand for the concerned facility) falls considerably short of the estimated operational profit under the concession agreement, to such an extent that the operation of the facility is difficult;
> 5. Where it is difficult to actively conduct the private investment project without a long-term loan or subsidy prior to conducting projects which are low in profitability but which can considerably reduce the

Article 53 (Financial Support)
If it is necessary for the efficient implementation of construction projects of revertible facilities, the State or a local government may grant a subsidy or extend a long-term loan to the concessionaire, only where prescribed by the Presidential Decree.

Finally, under AP's *Infrastructure Development Enabling Act, 2001,* while subsidies for projects are contemplated[6] once again no maximum cap is set. Nonetheless the extent of the financial support claimed by the developer will be used as one of the selection criteria in selecting the successful bidder.

We therefore suggest replacing the following existing wording in section 6 of the GIDA, 1999:

6. The State Government, a Government agency or a specified Government agency may provide to a person assistance in the following manner, namely: (…)
(b) Subsidy not exceeding fifteen percent of the cost of the project…

by the following:

6. The State Government, a Government agency or a specified Government agency may provide to a person assistance in the following manner, namely: (…)
(b) By the grant of any necessary subsidy…

Another alternative would be to maintain the current maximum cap of fifteen percent but to allow, subject to the approval of the Council of Ministers, for a greater level of subsidy on an ad hoc basis. Hence the revised provision could read:

6. The State Government, a Government agency or a specified Government agency may provide to a person assistance in the following manner, namely: (…)
(b) Subsidy not exceeding fifteen percent of the cost of the project or, with the approval of the Council of Ministers, any other subsidy if the Council of Ministers is satisfied, on a report by the Board and such other evidence as it deems necessary, that the project is needed in the public interest…

1.2 Alternatives to the Swiss Challenge system (section 10(4))

1.2.1 General background on unsolicited proposals

In terms of handling unsolicited proposals for private infrastructure projects, Governments, or the government agencies entrusted with the task of promoting the participation of the private sector in the financing, construction, maintenance and operation of infrastructure projects, have four basic options:

(1) First, to simply adopt a law prohibiting unsolicited projects. However because unsolicited proposals can account for a significant share of infrastructure projects reaching financial closure[7] this option seems counterproductive if the goal of the Government is to encourage private sector participation in infrastructure projects. It also deprives governments of the expertise of the private

construction period or the cost of construction of other projects when conducted together with other private investment projects; and
6. Where the losses from exchange rate fluctuations occur, due to the excessive exchange rate fluctuation, in the borrowings in foreign currency for the construction funds which are raised by the concessionaire through outside capital.

[6] Schedule V, section (v).

[7] For example, it is estimated that unsolicited projects have accounted for approximately 20% and 50% of total private infrastructure projects in the Philippines and South Korea, respectively. See John Hodge, "*Unsolicited Proposals: Competitive Solutions for Infrastructure*". Viewpoint 258. World Bank, Private Sector and Infrastructure Network, Washington, D.C., 2003. Henceforth referred to as Hodges 258.

sector in conceptualising, designing, and developing projects. Moreover, within the context of the current GIDA, 1999, this option seems foreclosed since section 10(1) of the GIDA, 1999 clearly envisages the possibility of unsolicited proposals[8].

(2) The second option is for Government to negotiate a mutually satisfactory agreement with the proponent of an unsolicited proposal without any kind of subsequent competitive bidding. (As would be the case under section 10 of the GIDA, 1999, if subsections (2), (3), (4) and (5) were omitted[9].) The main incentives for a Government to embark on direct negotiations are usually based on the following reasons:

> An existing good relationship with the firm submitting the unsolicited proposal and the fear of entrusting the work to another less qualified firm in case of a competitive bidding procedure;
>
> The lack of financial resources for conducting the preliminary studies required to launch the bidding process;
>
> The project developer has intellectual property rights to the project concept or to necessary engineering technologies.
>
> The project is too small, is too remote, or involves too much political risk to attract private sector interest.
>
> Organising a public tender may not be cost efficient for the government or the bidders.
>
> The project will be developed more rapidly through negotiations, an important factor because of an emergency or widespread shortage.

Counter-arguments for *not* eschewing competitive bidding in favour of direct negotiations because of the above reasons can be found in the WB Highways Toolkit[10] and in John Hodges' "*Unsolicited Proposals: The Issues for Private Infrastructure Projects*"[11]. The main point being that:

> ….experience has shown that when a government allows unsolicited proposals, projects that attract criticism usually do so not because the project concept was developed in the private sector, but because the project was awarded to the original private proponent without adequate competition and transparency.**[12]**

Despite the above reservations, the State of Andhra Pradesh, for example, in its *Infrastructure Development Enabling Act, 2001*[13] provides at section 19(1) thereof a list of unsolicited proposals that can be dealt by direct negotiations (section 19(2), akin to section 10 of GIDA, 1999, provides for the remainder types of unsolicited proposals to be dealt under the Swiss Challenge system). Section 19(1) of the AP Act reads as follows:

> 19. I. DIRECT NEGOTIATIONS:
> (i) The Government Agency or the Local Authority may directly negotiate with a Bidder for implementing:
> (a) Category - I Projects[14] initiated by a Bidder;

8 Subject to the restriction, however, that such proposals shall not "require financial assistance in the form of a subsidy from the State Government, the Government agency or the specified Government Agency" (section 10(1)(b)(ii)).

9 In this respect we feel that the heading of section 10 of the GIDA, 1999 – namely "Selection by direct negotiation" – is somewhat misleading; more correctly it should be "Unsolicited proposals".

10 Supra, note 1.

11 Viewpoint 257. World Bank, Private Sector and Infrastructure Network, Washington, D.C., 2003. Henceforth referred to as Hodges 257.

12 Ibid.

13 Act No. 36 of 2001.

14 Under Schedule II of the AP Act, Category-I projects are projects where:
(i) no fiscal incentives in the form of contingent liabilities or financial incentives are required;

(b) the projects which involve proprietary technology, or franchise which is exclusively available with the Bidder globally;
(c) the projects where competitive bid process has earlier failed to identify a suitable Developer;
(d) the projects in prescribed social infrastructure sectors where a Non-Profit Organisation seeks to develop a project; or
e) a Linkage Infrastructure project with the concerned developer of Mega Infrastructure Project.

(3) A third option is for the Governments to buy the concept and then award the project through a competitive bidding process in which no bidder has a predefined advantage.

(4) A fourth option is to offer the original proponent a pre-defined advantage in a competitive bidding process. Under this fourth option there are essentially two main approaches: the Swiss Challenge system and the bonus system.

The *Swiss Challenge system* - adopted both in the GIDA, 1999 and in AP's *Infrastructure Development Enabling Act, 2001* – allows third parties to make better offers (challenges) for a project during a designated period. The original proponent then has the right to counter-match any superior offers.

Under the *bonus system* the government gives the original project proponent an advantage in the bidding process that takes the form of a bonus, usually about 10 percent, credited to the proponent's bid.

1.2.2 Recommendation

The direct alternative to the Swiss Challenge system is therefore the bonus system. This is the system adopted in Chile[15] and in Korea[16]. We do not feel that the bonus system is on its face preferable to the Swiss Challenge system.

Probably the best solution for Gujarat would be to amend section 10 of the GIDA, 1999 to:

(ii) the Project is viable even when land is granted at the market rates;
(iii) no exclusive rights are conferred on the Developer;
(iv) minimal inter-linkages are required.

[15] Section 2 of the *Law on Concessions of Public Works* (D.F.L. MOP 164).

[16] The relevant subsections of section 7 (Implementation Process for Unsolicited Projects Proposed by Private Sector) of the Korean *Act on Private Participation in Infrastructure* read as follows:

(6) The competent authority shall notify the proposer in writing within 60 days after the receipt of the opinion of the Director of PICKO [Private Investment Centre of Korea] on the contents of the project proposal such as whether the proposed project will be implemented as a private investment project, taking into consideration the opinion of the Director of PICKO, except in special cases. In this case, if it intends to implement the proposed project falling under any subparagraph of Article 8 as the private investment project, it shall submit the matter to deliberation by the Committee.
(7) Where the competent authority has notified the proposer of the plan to implement the project proposed under paragraph (6), it shall announce the details of the concerned proposal in the Official Gazette and in not less than three daily newspapers so that a proposal by a third party other than the original proposer shall be possible.
(8) If a third party submits a proposal which meets the conditions under paragraph (1) within the period specified in the announcement under paragraph (7), the competent authority shall review and assess the proposal of the initial proposer and that of the third party in accordance with the method in Article 13 to determine a potential concessionaire. In this case, the first proposer may be given preferential treatment of a maximum of 10% bonus points added to his total assessment when reviewing and assessing the proposal, and two or more potential concessionaire shall be designated according to the order of priority by the results of project proposal assessment, unless there exists any special reason.
(9) If there is no other proposal within the period specified in the announcement under paragraph (7), the concerned proposer shall be designated as the potential concessionaire.

a) Allow the State Government, a Government agency or a specified Government agency to consider all unsolicited proposals, including those that would require financial assistance in the form of a subsidy from the State Government, a Government agency or a specified Government agency. Hence sub-paragraph 10(1)(b)(ii) would have to be removed;

b) Modify subsection (2) to create two classes of unsolicited proposals:

The first class, which would have to be narrowly defined in section 10, would not be subject to the remainder of section 10. The concession agreement between the State Government, the Government agency or the specified Government agency and the developer would be negotiated through direct negotiations without any subsequent need to have recourse to competitive public bidding and the Swiss Challenge system. The idea here would be akin to what is being done under section 19(1) of AP's *Infrastructure Development Enabling Act, 2001*. As in the AP Act, one could eliminate from the scope of this narrow class of proposals, proposals that would require financial assistance in the form of a subsidy from the State Government, a Government agency or a specified Government agency.

The second class of unsolicited proposals would be subject to the current provisions of subsection (2) and hence be subject to competitive bidding and the Swiss Challenge system.

c) Finally, we suggest that subsection (5) of section 10 be clarified: it is unclear from the wording of the text as it is now stands whether it is the proposer of any unsolicited proposal who must be reimbursed for the cost of the preparation of the proposal and the concession agreement where a concession agreement is not signed at the end of the day or only those proposers who lose out to a third party. While Rule 16 of the proposed *Gujarat Infrastructure Development Rules* makes it clear that it is the second of these readings of subsection (5) which is the correct one, the wording of section 10(5) of the GIDA, 1999 should unambiguously stands on its own.

2 Proposed amendments to the Gujarat Infrastructure Development Act, 1999 and to the Gujarat Infrastructure Development Draft Rules, 2002

- See Section 3.2.1 of Volume 1

2.1 Gujarat Infrastructure Development Act, 1999

Treatment of Projects that fall outside the Purview of the Board - Section 2 of the *Gujarat Infrastructure Development Act*, 1999 (the "Act"), which is the definitions clause, defines "concession agreement" to mean "a contract of the nature specified in Schedule II between a developer and the State Government, a Government or a specified Government agency, relating to a project", with "project" being "a project specified in Schedule I". Schedule I contains a list of projects, described in terms of the sectors in which they may be undertaken, which may be added to by the State Government by notification in the *Official Gazette*.

Thus, unless the context otherwise requires, the reference to "concession agreement" in the Act means an agreement relating to any project specified in Schedule I thereof, irrespective of its cost. In other words, no distinction is made between an agreement, which is to be submitted to the Gujarat Infrastructure Development Board (the "Board") for its consideration, by virtue of the cost of the project concerned exceeding such amount as may be prescribed by rules framed in this regard, and that which does not require approval of the Board.

That said, the manner in which the provisions of Chapter II (Infrastructure Projects) concerning concession agreement (Section 4), procedure for concession agreement (Section 7), and selection of a person (Sections 8, 9 and 10) have been drafted suggests that such provisions are focused on concession agreements that are to be submitted to the Board for its consideration under Section 5 of the Act. Thus, for instance:

- Although Section 4(1) generally states that a person may enter into a concession agreement of the nature specified in Schedule II of the Act, Section 4(2) provides for the Board, having regard to the nature of the project, to permit combination of two or more of such agreements into one agreement.

- Section 7 prohibits the execution of any concession agreement for undertaking a project, unless the procedure specified in Section 8 and 9 or, as the case may be, Section 8 and 10 has been followed. Section 8 then stipulates that such concession agreement may be entered into with a person who is selected through competitive public bidding (Section 9) or by direct negotiation (Section 10).

  However, the procedure for competitive public bidding detailed in Section 9 only pertains to projects in which the Board is involved, as is evident from opening paragraph of Section 9(1)

  > "On the acceptance of the recommendation of the Board under sub-section (2) of section 5, the State Government, the Government agency or, as the case may be, the specified Government agency shall select a developer for the project through the competitive public bidding in the manner provided hereunder -…".

  Similarly, Section 10, which provides the procedure for selection of a person through the Swiss Challenge route in respect of unsolicited proposals, excludes the applicability of such procedure to any project, the cost of which falls below the limit prescribed under Section 5(1) and does not, therefore, require the approval of the Board. This is clear from sub-sections (1)(b)(i) and (2) of Section 10.

The Act is thus silent as regards the procedure for execution of concession agreement and selection of a person in respect of projects that are not covered by Section 5 thereof. Although the State Government is now seeking to frame rules in this regard, it might be better to incorporate express provisions in the Act to deal with projects that fall outside the purview of the Board or, at the very least, to provide that the procedure to be followed in relation to these projects shall be such as may be prescribed by rules under the Act.

Assistance by State Government, Government agency or specified Government agency - Section 6 provides for public assistance for private sector infrastructure projects in the State, including the grant, in paragraph (b), of subsidy not exceeding *fifteen per cent* of the cost of the project.

As discussed more fully in Document 1 of this Volume, it is recommended that the said paragraph in respect of subsidies be redrafted to eliminate the fifteen per cent maximum ceiling and leave the amount of subsidy to be granted, if any, unspecified, as in the case of Andhra Pradesh's *Infrastructure Development Enabling Act, 2001* (the "AP Act"). Thus, paragraph (b) of Section 6 should be amended to read as follows:

> "6. The State Government, a Government agency or a specified Government agency may provide to a person, assistance in the following manner, namely:- (…)
> (b) By the grant of any necessary subsidy…"

Such an amendment would give the Government or subsidizing agency, as the case may be, the flexibility to determine the level of subsidy necessary depending upon the type of infrastructure project involved and the national or international investing climate prevalent at the time. Notably, the amount of subsidy claimed by any developer is one of the factors specified in Section 9(3)(a) for the purpose of evaluation of proposals to undertake a project on BOOT/BOT basis through competitive public bidding.

Selection of a Person by Competitive Public Bidding – Section 9 provides the manner in which competitive public bidding shall be conducted for the purpose of selection of a developer. Sub-section 3 of Section 9 contains the financial criteria to be used in selecting the successful bidder in respect of the different nature of concession agreements specified in Schedule II of the Act. For instance, in the case of BOOT and BOT agreements, the factors listed in paragraph (a) of sub-section 3 shall be taken into consideration for the purpose of evaluation of any proposal. Such list appears to be exhaustive. Moreover, it is not clear whether the phrase "any of the following factors" used in Section 9(3)(a) should be taken to mean 'any *one*' or 'any *one or more*' of the following factors. The inclusion of the term "relevant factor" in singular in Section 9(4) in connection with the financial evaluation of proposals under sub-section (3) suggests that what is contemplated in paragraph (a) of sub-section 3 is the consideration of any *one* of the factors set out therein for the purpose of such evaluation.

It is recommended that the said provision be clarified to enable the consideration of *one* or *combination of one or more* of the factors specified therein, as also to make the list of factors contained in paragraph (a) of sub-section 3 of Section 9 an inclusive, rather than an exhaustive, one. This would have the advantage of permitting the consideration of additional factors, such as the provision of infrastructure linkages, as and when required.

In addition, it is suggested that an additional provision be included in Section 9 to provide for the treatment of a sole bid as in the case of the AP Act, and relevant rules in this regard be framed.

Selection by Direct Negotiation - As discussed more fully in Document 1 of this Volume, under Section 10 of the Act, as it currently stands, the selection of a developer in connection with any unsolicited proposal that fulfils the conditions of Section 10(1)(b)[17] shall follow the procedure of

[17] Section 10(1)(b) of the Act provides for the submission of an unsolicited proposal and proposed concession agreement to the Board, if (i) the project cost exceeds the limit prescribed under Section 5(1), and (ii) financial

competitive public bidding and the Swiss Challenge system, as set out in sub-sections (2), (3), (4), and (5) of Section 10. Thus, the Act does not contemplate dealing with unsolicited proposals through direct negotiations[18], unlike the AP Act, which provides for such negotiations in respect of certain projects, such as projects which involve proprietary technology or franchise which is exclusively available with the bidder globally, or projects where the competitive bid process has earlier failed to identify a suitable developer, or a linkage infrastructure project with the concerned developer of mega infrastructure project.

Given the advantages of a developer selection process based on direct negotiations for the implementation of such projects, it is recommended that Section 10 of the Act be amended to:

- Allow the State Government, a Government agency or a specified Government agency to consider all unsolicited proposals, including those that would require financial assistance in the form of a subsidy from the State Government, a Government agency or a specified Government agency. Hence sub-paragraph 10(1)(b)(ii) would have to be removed;

- Modify sub-section (2) to create two classes of unsolicited proposals:

  The first class, which would have to be narrowly defined in Section 10, would not be subject to the remainder of Section 10. The concession agreement between the State Government, the Government agency or the specified Government agency and the developer would be negotiated through direct negotiations without any subsequent need to have recourse to competitive public bidding and the Swiss Challenge system. The idea here would be akin to what is being done under Section 19(1) of the AP Act. As in the AP Act, one could eliminate from the scope of this narrow class of proposals, proposals that would require financial assistance in the form of a subsidy from the State Government, a Government agency or a specified Government agency.

  The second class of unsolicited proposals would be subject to the current provisions of sub-section (2) and hence to competitive public bidding and the Swiss Challenge system.

It may be noted that the *Gujarat Infrastructure Development Draft Rules, 2002* contemplate the incorporation of an additional clause in Section 10, i.e. sub-section (6), to cover unsolicited proposals in respect of projects having special characteristics[19], which would be dealt with through the direct negotiations route. The rules currently being proposed with regard to such unsolicited proposals are discussed below in section 2 of this document.

Savings – Section 39(b)(ii), which saves any concession agreement entered into under sub-clause (i), mistakenly refers to the procedure specified in "…Sections 8 and 10, or, as the case may be, Sections 9 and 10…", which should actually read as that specified in "…Sections 8 and 9, or, as the case may be, Sections 8 and 10…".

2.2 The Gujarat Infrastructure Development Draft Rules, 2002

The Government of Gujarat is in the process of framing rules under the Act. The *Gujarat Infrastructure Development Draft Rules*, 2002 (the "Rules") prepared in this regard seek to provide

assistance in the form of subsidy from the State Government, the Government agency or the specified Government agency is not required.

[18] In this respect, the heading of Section 10 – namely, "Selection by direct negotiation" – is somewhat misleading; more correctly it should be "Unsolicited proposals". In the event that such heading is changed in the manner suggested above, the references to Section 10 contained in Section 8 would have to be amended accordingly.

[19] These include the first two types of projects mentioned earlier in connection with the AP Act, but not the third one concerning linkage infrastructure projects.

for the matters specified in Section 37 of the Act[20]. Having reviewed the Rules, we propose certain amendments thereto, which focus on substantive matters alone and do not cover shortcomings in the drafting of the Rules, such as absence of standard provisions (eg. to stipulate when the rules in question shall come into force), use of ambiguous language, improper numbering of provisions, and inconsistency in terms employed, both within the Rules as well as in relation to the Act.

Rule 4 relates to projects that are to be submitted to the Board, along with the proposed concession agreement, for its consideration. In this regard, it is recommended that an additional clause be incorporated in Rule 4 to prescribe a maximum time period (of [60] days), within which the Board has to consider any proposal and proposed concession agreement submitted to it.

Rule 4.1 provides for the delegation of power to a committee specified therein to consider the proposal and proposed concession agreement relating to any project, the cost of which falls below the limits prescribed in Appendix I to the Rules.

The last paragraph under Rule 4.1, which presumably applies to both Rule 4 and Rule 4.1, stipulates that the procedure to be followed for the selection of developer shall be as laid down in Sections 8 and 9 or 10 of the Act as the case may be. However, as pointed out earlier in the discussion on proposed amendments to the Act, the procedure for competitive public bidding detailed in Section 9 and for selection of developer in respect of unsolicited proposals in Section 10 only pertains to projects covered by Rule 4, that is, where the project cost exceeds the limits set out in Appendix I mentioned above and hence approval of the Board is required. Thus, it might be better, for the avoidance of doubt, to clarify that in the case of projects covered by Rule 4.1, the procedure to be followed for the selection of developer shall be the same as that laid down in Sections 8 and 9 or 10 of the Act, as the case may be, in relation to projects that fall within the purview of the Board.

The said paragraph additionally requires that all actions taken under the delegated powers contained in Rules 4 and 4.1 be regularly notified to the executive committee of the Board. However, in contrast to Rule 4.1, Rule 4 does not provide for any delegation of powers. Therefore, it is suggested that the nature and content of the delegated powers referred to in connection with Rule 4 be specified.

Rule 6.1 refers to the publishing of an advertisement by the grantor[21], as provided in Section 9 of the Act, *upon the Board recommending the proposal*. Section 9, however, envisions that the public notice inviting persons to participate in competitive public bidding for undertaking the project shall be issued *on the acceptance of the recommendation of the Board*. It is, therefore, suggested that Rule 6.1 be modified accordingly.

Rule 7.7 sets out the responsibilities of the Pre-qualification, Bids and Awards Committee ("PBAC")[22], which include approval of evaluation criteria for pre-qualification and bid evaluation processes and finalization of most preferred bidder. The PBAC shall be constituted by the Executive Committee of the Board, which shall, for reasons to be recorded in writing, have the power to modify the constitution of such Committee considering the project specific requirements. **Rules 8.1 – 8.7** then contain provisions concerning the pre-qualification stage and specify the respective tasks to be performed by the grantor and the PBAC. In the case of the PBAC, these include approving the related terms and conditions, evaluation criteria and rating system for pre-qualification of any applicant,

[20] In addition, it is suggested that rules relating to the provision of information to the Board under Section 24 of the Act be included, which would require the submission of periodical reports to the Board on the status and progress of the project and determine the frequency of placing such reports.

[21] The Rules define the term "grantor" to mean "the State Government, Government Agency or a specified Government Agency, which has the authority to enter or has entered into a Concession Agreement with a bidder".

[22] As per Rule 7.1, the PBAC shall comprise the following: Secretary of the concerned Government Department (Chairman), Head of the Government Agency (Member), Chief Executive Officer or his representative (Member), Representative of Finance Department not below the level of Deputy Secretary (Member), Technical Expert (Member) and Representative of the Grantor (Member-Secretary).

determining whether or not any proposal submitted for pre-qualification is complete, carrying out the pre-qualification process and hearing an appeal against any decision to disqualify an applicant.

In this context, it may be pointed out that Section 9 of the Act provides for the State Government, the Government agency or, as the case may be, the specified Government agency to lay down the pre-qualification criteria, decide as to whether any person fulfils such criteria and to evaluate proposals from the technical and financial aspects. Under the Rules, however, some of these functions have been assigned to the PBAC, which is constituted by the Executive Committee of the Board. While the carrying out of such functions by the Board, and thus the PBAC, may be brought within the scope of Section 28 (i), which provides for the Board to perform such other functions as may be entrusted to it by the State Government, authorization from the State Government would be required there for. Also, it might be better to provide that any action taken by the PBAC, as contemplated in the Rules, shall be subject to the directions of the Board, if any. More generally, it is recommended that the respective functions of the grantor and the PBAC in the developer selection process be clearly demarcated to avoid any confusion or ambiguity.

Rules 9.1 – 11.6 cover the procedure to be followed for the submission of the bid (RFP document), including the time frame for completing various steps. However, no maximum period for submission of the bid has been prescribed, even though Rules 11.2 and 11.6 contain references to 'the last date of submission of the bid or RFP document'. It is suggested that the Rules be amended to include such date.

Rule 12.12 stipulates that any bidder may, by written notice to the grantor prior to the time and date set for the opening of the bids, be allowed to withdraw or modify his bid. However, any such withdrawal of bids after the bid opening date shall lead to forfeiture of the bid security and automatic rejection of the bid. In this context, the words "either before or" contained in the last sentence should be deleted, since these appear to be contrary to the intention set out in the first half of the Rule.

Rule 14.9 deals with the situation where there is only one purchaser of the RFP document or when no complying bids are received, and states that in such cases the bidding shall be declared a failure and the project shall be subject to re-bidding. However, the Act, in Section 9(5), provides for cancellation of the competitive bidding, only in the event that no proposal satisfies the technical or financial criteria. In other words, no provision has been made for the treatment of a sole bid under the Act. Thus, the first part of Rule 14.3, "..there is only one purchaser of the RFP document ..", should be deleted.

Section 9(6) of the Act permits the holding of competitive public bidding in respect of any proposal that stands cancelled under the aforesaid sub-section (5), after, if necessary, revising the same. At the same time, it is contemplated that sub-section (6) would be added to Section 10 to make provision for certain projects having special characteristics, such as projects where an earlier competitive bid has failed to elicit any response, to be dealt with through the direct negotiations route.

It is, therefore, recommended that Rule 14.9 be amended (i) to limit its scope to cases where no complying bids are received, and further (ii) to provide that in such cases either the competitive bidding process may be restarted after making necessary revisions to the proposal or direct negotiations may be undertaken with any developer.

Rule 15.1 permits the State Government, a Government agency or a specified Government agency to consider an unsolicited proposal on a negotiated basis, if the requirements of Section 10 are fulfilled, one of which provides that such proposal should not require financial assistance in the form of subsidy from the State Government, the Government agency or the specified Government agency. As discussed earlier with regard to the proposed amendments to the Act, it is recommended that such requirement contained in Section 10 (1) (b)(ii) be removed, so as to allow the State Government, a Government agency or a specified Government agency to consider all unsolicited proposals, including those that would require financial assistance, for award through competitive public bidding and the Swiss Challenge system. In such an event, the only requirement for considering an unsolicited

proposal on a negotiated basis would be that the cost off the project exceeds the limits prescribed under section 5(1).

Rule 18.1 – lists several cases, which may be considered by the State Government, a Government agency or a specified Government agency as projects having special characteristics and for which the process of selection of a developer may be conducted through direct negotiations, while taking account of any recommendations made by the Board. It is suggested that the said list be expanded to include a linkage infrastructure project mentioned earlier with reference to the AP Act.

3 Draft legislation for general infrastructure laws in Karnataka and Madhya Pradesh

- See Section 3.2.1 of Volume 1

Preface

As part of the output of this TA programme, the Consultant has prepared draft legislation for Karnataka and Madhya Pradesh aimed at encouraging PSP in most infrastructure sectors in those two States. The two proposed draft laws are, except for minor adjustments in nomenclature, identical and are based both on the Gujarat Infrastructure Development Act, 1999 (GIDA 1999) and the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (IDEA 2001).

In neither Karnataka nor Madhya Pradesh is there currently a law of general application governing PSP in the infrastructure sector which would help provide a legal better environment for private investments in infrastructure and similarly help to introduce a transparent process for project privatisation. Without such a law – and the greater certainty and stability afforded by legislation - the general (and easily-made transient) policies of Karnataka or Madhya Pradesh regarding PSP in infrastructure cannot be said to be specific enough in and of themselves to provide a clear framework for potential private investors.

The State of Gujarat was the first Indian state to adopt a general infrastructure development act, the GIDA 1999. This act served as a model for Andhra Pradesh's IDEA 2001, which is a broader and more comprehensive piece of legislation than its predecessor in Gujarat. (Some of the differences between the GIDA 1999 and the IDEA 2001 have been discussed in chapter 3.2.1 of volume 1.) The IDEA 2001 can, in turn, serve as a model for other States.

While mostly based on the IDEA 2001, in drafting the proposed legislation which follows:

- some provisions of the GIDA 1999 have been preferred over their counterparts in the IDEA 2001 in terms of language and concepts used;
- some mechanisms found in the IDEA 2001 have been simplified, such as sections 32-40 of the IDEA 2001 concerning the Conciliation Board which is the subject of only one provision (section 35) in the draft legislation; and
- all the provisions in the IDEA 2001 concerning penalties against the investor have been jettisoned, both because they create an unfavourable impression of distrust with regard to potential investors (and this in a law aimed at encouraging private investment) and because most of the concerns that are addressed in those provisions can be equally, if not better, addressed in the concessions agreement themselves.

Further, while a major revision to the current PSP policy in Karnataka has been undertaken and is in draft form, we have not been able to review that draft and thereby incorporate important specific provisions from that policy into this draft. Further, there remains in Karnataka a difference of opinion on the need for guiding legislation. One school of thought argues that the new draft policy statement will be adequate to provide guidance to investors about how best to deal with the Government of Karnataka regarding PSP initiatives. The other school of thought supported within the Department of Finance, argues that a legislative base would enhance the perception of commitment by the Government of Karnataka to PSP and thereby support increased investment.

The draft legislation should therefore be seen as a balanced assessment of the two other predecessor acts and a selection of the clauses within them which appear most useful in drafting similar legislation in other states. Since this document is meant to provide support for States beyond the Four States involved in this technical assistance project, we have provided this draft as guidance for any state interested in developing similar legislation.

THE KARNATAKA [MADHYA PRADESH]
INFRASTRUCTURE DEVELOPMENT ACT, 2004

(Karnataka [Madhya Pradesh] Act No. 00 OF 2004)

AN ACT to provide for a framework for the participation by private sector participants in the financing, construction, maintenance, operation and management of infrastructure projects in the State and for that purpose to establish the Karnataka [Madhya Pradesh] Infrastructure Development Board and to provide for the matters connected therewith.

Be it enacted by the Legislative Assembly of the State of Karnataka [Madhya Pradesh] in the fifty-fifth year of the Republic of India as follows:-

CHAPTER 1

PRELIMINARY

1. Short title, extent and application

(1) This Act may be called the Karnataka [Madhya Pradesh] infrastructure Development Act, 2004**.**

(2) It extends to the whole of the State of Karnataka [Madhya Pradesh].

(3) This Act will not apply to any infrastructure project which is undertaken by any joint venture between the State or Central Government Departments or between the State or Central Government and any statutory body or between any statutory bodies or between the State or Central Government or statutory body and any Government company or any infrastructure project which may be taken over by any private party or private sector undertaking upon privatisation or disinvestment by the State or Central Government or Government Agency or by any statutory corporation or any Government company or any infrastructure project which does not involve fresh, new, additional investment being made by a private sector participant or any infrastructure project which is expressly notified to be excluded from the provisions of this Act by the Government.

(4) It shall be deemed to have come into force on the 00th XXX, 2004.

2. Definitions

In this Act unless the context otherwise requires:-

(a) "bidder" means any entity including any bidding consortium, who has submitted a proposal to undertake an infrastructure project under public-private partnership;

(b) "bidding consortium" means if the proposal for the infrastructure project is made jointly by more than one entity, then such group of entities shall be referred to as a bidding consortium;

(c) "Board" means the Karnataka [Madhya Pradesh] infrastructure Development Board established under section 3(1) of this Act;

(d) "categories of infrastructure projects" means categories specified in Schedule 2 of this Act and such other categories as may be notified by the Government from time to time;

(e) "company" means any entity incorporated by memorandum of association under the Companies Act, 1956 (Central Act I of 1956) or incorporated under any other statute or deemed to be incorporated under the laws of India or the laws of any other country;

(f) "Conciliation Board" means the Conciliation Board established under section 33 of this Act;

(g) "construction" means any construction, reconstruction, rehabilitation, improvement, expansion, addition, alteration and related works and activities including supply of any equipment, materials, labour and services related to build or rehabilitate any infrastructure project comprising of physical structures or systems or commodities or for utilization of resources or provision of services;

(h) "Developer" means any private sector participant who has entered into a project agreement for the infrastructure project with the Government or a Government Agency or a Local Authority under this Act;

(i) "Government" means the State Government of Karnataka [Madhya Pradesh];

(j) "Government Agency" means the Government, any department of the Government or any corporation or body owned or controlled by the Government by reason of the Government holding not less then 51% of paid-up share capital in such corporation or body;

(k) "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company as defined;

(l) "Fund" means the infrastructure projects fund constituted under section 42 of this Act;

(m) "infrastructure project" means facilities and services related to any of the following fixed capital assets that are used or operated for the benefit of the public:

1. Roads (State Highways, Major District Roads, Other District Roads and Village Roads), Bridges and Bypasses;
2. Health Facilities;
3. Land reclamation infrastructure;
4. Canals and Dams;
5. Water supply, treatment and distribution infrastructure;
6. Waste management infrastructure;
7. Sewerage, drainage infrastructure;
8. Public markets;
9. Trade fairs, conventions, exhibition and cultural centres;
10. Public buildings;
11. Inland water transport infrastructure;
12. Gas and gas works;
13. Sports and recreation infrastructure, public gardens and parks;
14. Power Generation, Transmission and Distribution Systems;
15. Ports and Harbours (other than major ports and harbours);
16. Tourist-related facilities;
17. Airports and airstrips, other than national airports and airstrips;
18. Educational Facilities;
19. Agricultural Facilities; and
20. Infrastructure prescribed from time to time by the Government.

(n) "investment" means preliminary and pre-operative expenses, capital expenditure, lease on land and equipment, interest during construction, administrative expenses, all operating and maintenance expenses including expenses incurred on recovery of users' fees;

(o) "lead consortium member" means in case of a bidding consortium, that consortium member vested with the prime responsibility of developing a project, holding not less than 26% equity stake in the bidding consortium and also holding the highest equity stake amongst all other consortium

members; In the event of two or more consortium members holding the highest equal equity stake, the bidding consortium shall clearly indicate in the Bid which consortium member is to be considered the lead consortium member and the consortium member so indicated or named shall be the lead consortium member;

(p) "Lender" means any financial institution or bank or any entity providing financial assistance with or without security or giving any advances to any Developer for completing or implementing any project under this Act;

(q) "linkage infrastructure project" means from any infrastructure project any road link to the nearest State highway, national highway or rail link or water transmission link to the nearest practical water source including an existing pipeline or canal or water body or sewerage link to the nearest practical sewerage transmission line or sewerage treatment facility or such other facility;

(r) "Local Authority" means any municipal corporation or municipal council or any panchayat or any other statutory body formed, elected or appointed for local self-Government;

(s) "local laws" means laws other than central laws and applicable to the State;

(t) "member" means a member of the Board and includes the Chairman;

(u) "non-profit organisation" means any organisation formed for promoting commerce, art, science, religion, charity or any other useful object and applies its income in promoting its objects and prohibits the payment of any dividend to its members and does not allow its corpus or income to be lent or advanced or diverted or utilised or exploited by its members or office bearers or any other company in which they or any of them may be interested or connected;

(v) "notification" means a notification published in the Karnataka [Madhya Pradesh] Gazette and the word "notified" shall be construed accordingly;

(w) "person" shall include any company or association or body of individuals, whether incorporated or not;

(x) "prioritised project" means any project, which is notified by the Board as a prioritised project under this Act;

(y) "private sector participant" means any person other than Central Government or State Government or Government Agency or any joint venture between Central Government or State Government Departments or any statutory body or authority or Local Authority or any corporation or company in which Central Government or State Government or Government Agency, statutory body or authority or local body is holding not less than 51% paid-up share capital;

(z) "prescribed" means prescribed by Rules or Regulations made under this Act;

(aa) "project agreement" means a contract of the nature specified in Schedule 1 between a Developer and a Government Agency or a Local Authority relating to any infrastructure project or such other contract as may be prescribed from time to time by the Government;

(bb) "prospective Lenders" means financial institutions, banks or any other entities of such project financing track record as may be prescribed, who in principle or agreeable to provide guarantees or finance to the bidder under any of the financing documents;

(cc) "public-private partnership" means the (with or without capital investment) by a private sector participant in an infrastructure project;

(dd) "Regulations" means Regulations made under section 50 of this Act;

(ee) "responsive bid" means a bid from an eligible bidder which complies with all the requirements prescribed by the tender documents or other documents as the case may be;

(ff) "Rules" means rules made under section 51 of this Act;

(gg) "sector Regulator" means the regulatory authority for a sector or sectors as may be notified by the Government from time to time;

(hh) "sole bid" means when in competitive bidding process there is only one responsive bid received by the Government Agency or the Local Authority;

(ii) "State" means the State of Karnataka [Madhya Pradesh];

(jj) "State support" means grant by the State of any administrative support, asset-based support, foregoing revenue benefits support, undertaking contingent liabilities by providing guarantees or financial support to the Developer as enumerated in Schedule 3 of this Act;

(kk) "Swiss Challenge Approach" means when a private sector participant (Original project Proponent) submits an unsolicited or suo-motu proposal and draft contract principles for undertaking a category II project, not already initiated by the Government Agency or the Local Authority and the Government Agency or the Local Authority then invites competitive counter proposals in such manner as may be prescribed by the Government. The proposal and contract principles of the Original project Proponent would be made available to any interested applicants; however, proprietary information contained in the original proposal shall remain confidential and will not be disclosed. The applicants then will have an opportunity to better the Original project Proponent's proposal. If the Government finds one of the competing counter proposals more attractive, then the Original project Proponent will be given the opportunity to match the competing counter proposal and win the project. In case the Original project Proponent is not able to match the more attractive and competing counter proposal, the project is awarded to the private sector participant, submitting the more attractive competing counter proposal;

(ll) "unsolicited or suo-motu proposal" means a proposal in respect of a project not already initiated by a Government Agency or Local Authority and which proposal is submitted by any private sector participant to the Government Agency or Local Authority in respect of any infrastructure project in the State supported by project specifications, technical, commercial and financial viability and prima facie evidence of the financial and technical ability of such private sector participant to undertake such project with full details of composition of the private sector participant and his financial and business background; and

(mm) "users' fees" means the right or authority granted to the Developer by the Government Agency or the Local Authority to recover investment and fair return on investment and includes toll, fee, charge or benefit by any name.

CHAPTER 2
ESTABLISHMENT, CONDUCT OF BUSINESS AND EMPLOYEES OF THE BOARD

3. Establishment of the Karnataka [Madhya Pradesh] Infrastructure Development Board

(1) There is hereby established the Karnataka [Madhya Pradesh] infrastructure Development Board.

(2) The Board shall be a body corporate having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, to do all the things incidental to and necessary for the purposes of this Act and to contract and may by the said name sue and be sued.

(3) The headquarters of the Board shall be at Bangalore [Bhopal] or at such other place as may be notified.

4. Composition of the Board

(1) The Board shall consist of a chairperson, and such other members not exceeding nine (9) in the aggregate including ex-officio members.

(2) The Chief Minister of the State shall be the chairperson of the Board.

(3) The ex-officio members of the Board shall be:

(a) …..
(b) …….
(c) ……

(4) The members other than those specified in sub-section (3) shall be appointed by the Government in the manner prescribed.

5. Term of office of the members

Every member other than the ex-officio members shall hold office during the pleasure of the Government.

6. Terms and conditions of service

The term and conditions of service of the members of the Board including the honoraria and the allowances to be paid to them shall be such as may be prescribed.

7. Meetings of the Board

The Board shall meet at such times and places and observe such procedure in regard to the transaction of business at the meetings, including the quorum, of as may be provided by the Regulations.

8. Appointment of officers and staff of the Board

The Board may appoint such officers and members of staff as it may require carrying out its functions and discharging its duties under this Act in such manner as may be prescribed.

9. Constitution of committees

(1) The Board may, from time to time, constitute such committee or committees consisting of such members for performing such of its functions as may be provided by the Regulations.

(2) The Board shall invite such persons from the fields of banking, commerce, industry, environmental protection, law, technology and the like as may be nominated by the Government from time to time to assist the Board in carrying out its functions under this Act on such terms and conditions as may be prescribed.

10. Functions of the Board

The functions of the Board shall be as follows, namely:-

(a) To promote participation of private sector participants in the financing, construction, maintenance, operation and management of infrastructure projects;

(b) To advise the Government, a Government Agency or a Local Authority on matters of policy in respect of participation referred to in clause (a);

(c)To lay down priorities of infrastructure projects to be undertaken by a Government Agency or Local Authority;

(d)To consider the proposal for undertaking an infrastructure project and the proposed project agreement submitted to it and to recommend, with or without modifications, or not recommend the implementation of the proposal to the Government Agency or Local Authority;

(e)To illicit information relating to national and international financial institutions and to ensure co-operation of such institutions;

(f)To co-ordinate and monitor the infrastructure projects undertaken by the Government Agency or Local Authority;

(g) To assist in developing concepts of infrastructure projects by undertaking pre-feasibility and feasibility studies of the infrastructure projects;

(h) To undertake such infrastructure project as may be entrusted to it by the Government; and

(i) To perform such other functions as may be entrusted to it by the Government.

11. Powers of the Board

(1) Notwithstanding anything contrary in any other law for the time being in force, the Board shall have the power to grant any clearance or permission required for any infrastructure project and such clearance or permission when granted shall be final, binding and conclusive on the concerned state level statutory bodies or administrative bodies or authorities as the case may be.

(2) Notwithstanding anything contrary in any other law for the time being in force, the Board may give directions to any Government Agency, Local Authority or Developer with regard to the implementation of any infrastructure project under this Act and such Government Agency, Local Authority or Developer shall be bound to comply with such directions.

(3) The Board shall have power to call upon any Government Agency, Local Authority or Developer to furnish information, details, documents and particulars as may be required by the Board in connection with or in relation to any infrastructure project, which such Government Agency, Local Authority or Developer shall furnish them to the Board without any delay or default.

(4) The Board shall have power to inspect, visit, review and monitor any infrastructure project and its implementation, execution, operation and management through its official or officials and the persons in charge of the infrastructure project shall be bound to give full co-operation to the Board.

(5) The Board shall have all powers to enable it to carry out its functions under this Act.

12. Transparency

The Board shall ensure transparency while exercising its powers and discharging its functions.

13. Control by the Government

The Board shall exercise its powers and perform its functioning under this Act in accordance with the policy framed and guidelines laid down from time to time, by the Government and it shall be bound to comply with such directions, which may be issued, from time to time, by the Government for efficient administration and effective implementation of this Act.

14. Reports to the Government

The Board shall submit quarterly reports as regards its working and operations to the Government.

CHAPTER 3
INFRASTRUCTURE PROJECT DELIVERY PROCESS

15. Participation in infrastructure projects

Any private sector participant may participate in the financing, construction, maintenance, operation and management of an infrastructure project.

16. Projects identification

The Board, a Government Agency or a Local Authority may identify or conceptualise an infrastructure project. If the Board identifies or conceptualises an infrastructure project**,** such infrastructure project shall be referred by the Board to the appropriate Government Agency or Local Authority for its consideration and further action. If the Government Agency or Local Authority identifies or conceptualises any infrastructure project**,** then the same will be referred to the Board for its consideration, evaluation and further action as may be required.

17. Prioritisation of infrastructure projects

The Board will prioritise infrastructure projects based on demand and supply gaps, inter-linkages and any other relevant parameters and create a infrastructure project shelf.

18. Recommendation by Board

(1) A proposal prepared by a Government Agency or Local Authority for private sector participation in the in financing, construction, maintenance, operation and management of an infrastructure project, the cost of which exceeds such amount as may be prescribed, shall be submitted to the Board along with proposed project agreement relating thereto for its consideration.

(2) The Board shall consider the proposal and the proposed project agreement submitted to it under sub-section (1) and may either recommend, with or without modifications, or not recommend the implementation of the proposal to the Government Agency or Local Authority.

19. Consultant selection

The Government Agency or the Local Authority shall ensure adequate competition in the consultant selection process for any infrastructure project. They may, frame the terms of reference for consultant studies and in case of Category II infrastructure projects and present the same for approval and modification, if necessary, by the Board. Provided that in case of such selection process, adequate weight shall be given to the technical capabilities.

20. Developer selection process

The Government Agency or the Local Authority may adopt appropriate Developer selection process including any of the processes set out in sections 21, 22 and 23.

21. Direct negotiations

(1) The Government Agency or the Local Authority may directly negotiate with a bidder for implementing:

(a) Category – I infrastructure projects initiated by a bidder;

(b) the infrastructure projects which involve proprietary technology, or franchise which is exclusively available with the bidder globally;

(c) the infrastructure projects where competitive bid process has earlier failed to identify a suitable Developer;

(d) the infrastructure projects in prescribed social sectors where a non-profit organisation seeks to develop an infrastructure project; or

(e) a linkage infrastructure project with the developer of an infrastructure project;

(2) In case a Developer is selected through direct negotiations the Government Agency or the Local Authority may renegotiate the financial offer or recommend that all subsequent procurement for the infrastructure project be made through the competitive bidding procurement process, the cost of the infrastructure project be determined after such competitive bidding procurement process, and renegotiate the financial offer based on the revised cost of the infrastructure project.

22. Swiss Challenge Approach

(1) The Swiss Challenge Approach will be followed in any infrastructure project belonging to Category – II, initiated by a private sector participant who is hereinafter referred to as 'the Original Proponent', by a suo-motu proposal.

(2) The the Original Proponent must submit to the Government Agency or Local Authority:

(a) details of his technical, commercial, managerial and financial capability;

(b) technical, financial and commercial details of the proposal;

(c) principles of the project agreement.

(3) The Government Agency or the Local Authority would first evaluate the Original Proponent's technical, commercial, managerial and financial capability as may be prescribed and determine whether the Original Proponent's capabilities are adequate for undertaking the infrastructure project.

(4) The Government Agency or the Local Authority shall forward such suo-motu proposal to the Board along with its evaluation within prescribed time for the approval of the Board;

(5) The Board would then weigh the technical, commercial and financial aspects of the Original Proponent's proposal and the project agreement, along with evaluation of the infrastructure project by the Government Agency or the Local Authority and ascertain if the scale and scope of the infrastructure project is in line with the requirements of the State and whether the sharing of risks as proposed in the project agreement is in conformity with the risk-sharing framework as adopted or proposed by the Government for similar infrastructure projects if any and if the infrastructure project is in conformity with long term objective of the Government.

(6) If the Board recommends any modification in the technical, scale, scope and risk sharing aspects of the proposal or the project agreement, the Original Proponent will consider and incorporate the same and re-submit its proposal within prescribed time to the Government Agency or the Local Authority.

(7) If the Board finds merit in such suo-motu proposal the Board will then require the Government Agency or the Local Authority to invite competing counter proposals using the Swiss Challenge Approach giving adequate notice as may be prescribed. The Original Proponent will be given an opportunity to match any competing counter proposals that may be superior to the proposal of the

Original Proponent. In case the Original Proponent matches or improves on the competing counter proposal, the infrastructure project shall be awarded to the Original Proponent; otherwise the bidder making the competing counter proposal will be selected to execute the infrastructure project.

(8) In the event of the infrastructure project not being awarded to the Original Proponent and being awarded to any other bidder, the Government Agency or the Local Authority will reimburse to the Original Proponent reasonable costs incurred for preparation of the suo-motu proposal and the project agreement. The suo-motu proposal and the project agreement prepared by the Original Proponent shall be the property of the Government Agency or the Local Authority as the case may be.

(9) The reasonable costs of preparation of the suo-motu proposal and the project agreement shall be determined as per the norms prescribed by the Government, and shall be binding upon the Original Proponent.

23. Competitive bidding

(1) Competitive bidding will be adopted in all infrastructure projects initiated by the Government Agency or the Local Authority. The notice inviting participation will be adequately publicised by the Government Agency or the Local Authority as may be prescribed.

(2) The bid process will be designed to assist and ascertain, technical, financial, managerial and commercial, capabilities of the Developer.

(3) In case of a two stage process being adopted for an important infrastructure project, the Government Agency or the Local Authority may require all bidders to obtain from their prospective Lenders, financial terms, expectations regarding State support, comments on the project agreement and other infrastructure project documents (hereinafter called "Deviations").

(4) Any Deviations proposed shall be enclosed in a separate envelope and shall not be part of the envelope containing the financial or the commercial offer with regard to a infrastructure project. The procedure for determining the common set of Deviations and the effect to be given to such common set of Deviations shall be as may be prescribed.

(5) All proposals shall be opened and evaluated in a fair and transparent manner.

(6) It will be open for the Government Agency or the Local Authority to adopt one or two stage process depending upon the complexity of the infrastructure project.

(7) The Government Agency or the Local Authority will periodically inform the Board of the progress of all infrastructure projects undertaken through a two-stage bid process.

24. Approval of contract principles

In case a model contract for a sector has not been adopted or in case there are deviations proposed vis-à-vis the approved model contract for a sector, then, the Board will formulate or approve the contract principles as the case may be.

25. Selection criteria

The Government Agency or the Local Authority will first satisfy itself about the technical ability of the Developer to undertake and execute the infrastructure project and will follow:

(a) one or combination of one or more of the following criteria for Developer selection through competitive bidding in Build Own Operate and Transfer, Build Operate and Transfer and Build Own and Operate infrastructure projects:

(i) Lowest bid in terms of the present value of user fees;

(ii) Highest revenue share to the Government;

(iii) Highest up front fee;

(iv) Shortest concession period;

(v) Lowest present value of the subsidy;

(vi) Lowest capital cost and Operation & Management cost for infrastructure projects having a definite scope;

(vii) Highest equity premium; and

(viii) Quantum of State support solicited in present value.

(b) For Build Transfer, Build Lease and Transfer and Build Transfer and Lease infrastructure projects selection criteria used will be the lowest net present value of payments from the Government.

(c) Such other suitable selection criteria the Board may allow or determine.

26. Treatment of sole bid

In case of the competitive bidding process resulting into a sole bid, the Government Agency or the Local Authority shall in consultation with the Board, either:

(a) accept the sole bid;

(b) re-negotiate the financial offer; or

(c) reject the sole bid.

27. Treatment of limited response

In case the competitive bidding process does not generate sufficient response and if even a sole bid is not received, then the Government Agency or the Local Authority shall in consultation with the Board either:

(a) modify either the pre-qualification criteria and/or the risk sharing provisions and restart the bid process;

(b) may cancel the competitive bid process; or

(c) in case of (b) above, may have direct negotiation with any private sector participant.

28. Treatment of bid submitted by a consortium

(a) All proposals submitted by a bidding consortium shall enclose a memorandum of understanding, executed by all consortium members setting out the role of each of the consortium members and the proposed equity stake of each of the consortium members with regard to the infrastructure project.

(b) The lead consortium member of a pre-qualified consortium cannot be replaced except with the prior permission of the Board and which permission will be considered only in case of acquisition or merger of the lead consortium member company. Further, after a bidding consortium is selected to implement any infrastructure project, the lead consortium member shall maintain a minimum equity stake of 26% for a period of time, as specified in the sector Policy or the project agreement.

(c) Replacement of other consortium members may be permitted, provided the same is not prejudicial to the original strength of consortium as determined in course of the evaluation of original bid or proposal.

(d) Any change in the shareholding or composition of a consortium shall be subject to the approval of the Board.

29. Speculative bids

The Government Agency or the Local Authority with the approval of the Board will be entitled to treat speculative or unrealistic bids as non-responsive and reject the same. The rejection of such bid shall not necessarily lead to termination of the bid process. The Board will prescribe the criteria adjudging a bid to be speculative or unrealistic.

CHAPTER 4
BID SECURITY, RIGHT OF LENDERS AND FACILITIES TO BE PROVIDED BY THE GOVERNMENT AGENCY OR THE LOCAL AUTHORITY.

30. Bid security

(a) The bidder will be required to submit a bid security along with the proposal for undertaking the infrastructure project. The bid security amount will be determined based on the infrastructure project cost by the Government Agency or the Local Authority.

(b) The procedure for refund of bid security will be specified in the request for proposal. In any event, the bid security of unsuccessful bidder will be returned no later than thirty (30) calendar days from the date of selection of the Developer.

31. Right of lenders

The Lenders will be entitled to recover their dues from the Developer and infrastructure project receivables in the form of users' fees and in the event of default by the Developer in completing or implementing a infrastructure project, the Lenders will have the right to substitute the Developer with the consent of the Government and subject to the approval of such substituted Developer by the Government Agency or the Local Authority and by the Board**,** on the same terms and conditions as applicable to the previous Developer or with such modifications as may be specifically approved by the Board.

32. Facilities to be provided by Government Agency or Local Authority

The Government Agency or the Local Authority will provide all facilities to the Developer for obtaining statutory clearances at state level, for providing construction power and water at infrastructure project site on such terms as may be prescribed and provide Best Effort support for obtaining Central Government clearances and assistance in rehabilitation and resettlement activities if any incidental to the infrastructure project on such terms as may be prescribed.

CHAPTER 5
ARBITRATION AND CONCILIATION PROCEEDINGS

33. Arbitration

A project agreement entered into under this Act shall contain an arbitration clause providing that:-

(a) all parties to the project agreement shall submit to arbitration any dispute which may arise between them out of the provisions of the project agreement;

(b) the place of arbitration shall be India, or any other place agreed to by the parties if the Developer opposes arbitration in India; and

(c) the dispute referred to in clause (a) shall be decided in accordance with the law for the time being in force in India.

34. Commencement of arbitral proceedings

No party shall commence any arbitral proceedings in respect of any dispute which may arise between them out of the provisions of the project agreement without first initiating conciliation proceedings under this Act.

35. Establishment of a Conciliation Board

The Government shall by notification nominate a suitable person to act as a Conciliation Board, with effect from such date as may be specified, to assist the Government Agency or the Local Authority and any Developer in an independent and impartial manner to reach an amicable settlement of their disputes arising under the project agreement or under this Act.

36. Commencement of proceedings

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate briefly identifying the subject matter of the dispute. The party initiating conciliation shall file the invitation with the Conciliation Board in such form as may be prescribed.

(2) The conciliation proceedings shall commence when the other party receives the written invitation from the party initiating conciliation.

(3) If the other party does not reply or does not participate in the conciliation proceedings, then the Conciliation Board shall have power to call upon the other party to file its reply or give notice to the other party and proceed further without reply.

(4) The Conciliation Board may request each party to submit to it further written statement of their position and the facts and grounds in support thereof, supplemented by any document and other evidence as such party deems appropriate. The parties shall send a copy of such statement, documents and other evidence to the other party.

37. Conciliation Board bound by certain enactments

The provisions of section 66 of The Arbitration and Conciliation Act, 1996 shall apply to the Conciliation Board as regards the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

38. Co-operation of the parties with the Conciliation Board

(1) The parties shall co-operate with the Conciliation Board and in particular, shall comply with requests by the Conciliation Board to submit written materials, give evidence and attend meetings.

(2) Each party may on his own initiative or at the invitation of the Conciliation Board, submit to the Conciliation Board suggestions for the settlement of the dispute.

39. Settlement agreement

(1) When it appears to the Conciliation Board that there exists a possibility of a settlement, the terms and conditions of which may be acceptable to the parties, the Conciliation Board shall formulate the terms and conditions of the possible settlement and submit the same to the parties for their observations. After receiving the observations of the parties, if any, the Conciliation Board may reformulate the terms and conditions of the possible settlement.

(2) It the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the Conciliation Board may draw up or assist the parties in drawing up the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The Conciliation Board shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

40. Status and effect of settlement agreement

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 of The Arbitration
and Conciliation Act, 1996 or its amendment or re-enactment as the case may be.

41. Termination of conciliation proceedings

The conciliation proceedings shall be terminated:-

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by an order of the Conciliation Board, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the order; or

(c) by a written communication of the parties jointly addressed to the Conciliation Board to the effect that the conciliation proceedings are terminated on the date of the communication; or

(d) on the expiry of the period of three (3) months from the date of the commencement of the conciliation proceedings. If the parties to conciliation proceedings request in writing to continue conciliation, such conciliation proceedings shall stand terminated on the expiry of period of ninety (90) days from the date of such joint communication in writing to the Conciliation Board requesting Conciliation Board to continue conciliation.

CHAPTER 7
INFRASTRUCTURE PROJECTS FUND

42. Establishment of the Infrastructure Projects Fund

The Government shall establish a fund to be called the "Infrastructure Projects Fund" and shall contribute such a sum as may prescribed from time to time by the Government. The Government will make such further contributions to the Fund as it may deem appropriate from time to time.

43. Fees and charges to be credited to the Fund

The Government Agency or the Local Authority will inter alia levy fees and charges on the application for infrastructure projects and infrastructure project fee on the Developer under the project agreement as may be prescribed from time to time and which fees shall be credited to the Fund.

44. Administration of the Fund

The Fund will be administered and managed by the Board and the Board will be entitled to appoint an officer or officers for the management, control and administration of the Fund.

45. Utilisation of the Fund

The Board will utilise the Fund for achieving objects and purposes of this Act and for financing the activities of the Board for realising the objects and purposes of this Act, time to time.

46. Formulation of policies and making of Regulations for the Fund

The Board shall formulate policies and make Regulations for the financing, working, administration and management of the Fund.

47. Audit report of the Fund

The working of the Fund shall be subject to audit by the Comptroller and Auditor General and the Board shall submit a report every year as regards the working and operation of the Fund to the Government who will present the same before the Legislative Assembly of the State.

CHAPTER 8
MISCELLANEOUS

48. Members, Officers and servants to be public servants

All members and officers and servants of the Board shall, while acting or purporting to act in pursuance of the provisions of this Act of any rules or regulations made thereunder be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

49. Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the Board or any member and officer or servant of the Board for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act or any rules and regulation made thereunder.

50. Power to make regulations

The Board may by notification make Regulations, with the approval of the Government, for the proper performance of its functions under this Act.

51. Power to make Rules

(1) The Government may by notification make Rules for carrying out all or any of the purposes of this Act.

(2) Every Rule made under this Act shall be, immediately after it is made be laid before the Legislative Assembly of the State if it is in session, and if it is not in session, in the session immediately following for a total period of fourteen (14) days which may be comprised in one session or in two successive sessions, and if, before the expiration of the session in which it is so laid or the session immediately following the Legislative Assembly agrees in making any modifications in the Rule or in the annulment of the Rule, the Rule shall from the date on which the modification or the annulment is notified, have effect only in such modified form or shall stand annulled as the case may

be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the Rule.

52. Delegation of powers

The Government may, by notification, direct that any power exercisable by the Government under this Act shall be exercisable by an officer of the Government, subject to such terms as may be specified in such notification.

53. This Act to override other State Acts

If any provision contained in any State Act is repugnant to any provision contained in this Act, the provision contained in this Act shall prevail and the provision contained in any such State Act shall to the extent of its repugnance be void.

SCHEDULE 1
(Section 2 (aa))

The following types of project agreements with their variations and combinations may be arrived at by the Government Agency or the Local Authority for undertaking infrastructure projects. The types of project agreements enumerated hereinafter are indicative in nature only and the Government Agency or the Local Authority shall be entitled to evolve and arrive at such project agreement as may be found necessary or expedient for any specific infrastructure project.

(i) Build-and-Transfer (BT) – A contractual arrangement whereby the Developer undertakes the financing and construction of a given infrastructure or development facility and after its completion hands it over to the Government Agency or the Local Authority. The Government Agency or the Local Authority would reimburse the total infrastructure project investment, on the basis of an agreed schedule. This arrangement may be employed in the construction of any infrastructure or development infrastructure projects, including critical facilities, which for security or strategic reasons, must be operated directly by the Government Agency or the Local Authority.

(ii) Build-Lease-and-Transfer (BLT) – A contractual arrangement whereby a Developer undertakes to finance and construct infrastructure project and upon its completion hands it over to the Government Agency or the Local Authority concerned on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Government Agency or the Local Authority concerned.

(iii) Build-Operate-and-Transfer (BOT) – A contractual arrangement whereby the Developer undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The Developer operates the facility over a fixed term during which he is allowed to a charge facility users appropriate tolls, fees, rentals and charges not exceeding those proposed in the bid or as negotiated and incorporated in the Contract to enable the recovery of investment in the infrastructure project. The Developer transfers the facility to the Government Agency or the Local Authority concerned at the end of the fixed term that shall be specified in the project agreement. This shall include a supply-and-operate situation which is a Contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government Agency or the Local Authority so requires, operates the facility providing in the process technology transfer and training to the Government Agency or the Local Authority nominated individuals.

(iv) Build-Own-and-Operate (BOO) – A contractual arrangement whereby a Developer is authorized to finance, construct, own, operate and maintain an infrastructure or Development facility from which the Developer is allowed to recover this total investment by collecting user levies from facility users. Under his infrastructure project, the Developer owns the assets of the facility and may choose to assign its operation and maintenance to a facility operator. The Transfer of the facility to the Government Agency or the Local Authority is not envisaged in this structure; however, the Government Agency or Local Authority may terminate its obligations after specified time period.

(v) Build-Own-Operate-Transfer (BOOT) – A contractual arrangement whereby a Developer is authorised to finance, construct, maintain and operate a infrastructure project and whereby such infrastructure project is to vest in the Developer for a specified period. During the operation period, the Developer will be permitted to charge user levies specified in the project agreement, to recover the investment made in the infrastructure project. The Developer is liable to transfer the infrastructure project to the Government Agency or the Local Authority after the expiry of the specified period of operation.

(vi) Build-Transfer-and-Operate (BTO) – A contractual arrangement whereby the Government Agency or the Local Authority contracts out an infrastructure facility to a Developer to construct the facility on a turn-key basis, assuming cost overruns, delays and specified performance risks. Once the facility is commissioned satisfactorily, the Developer is given the right to operate the facility and

collect user levies under a project agreement. The title of the facilities always vests with the Government Agency or the Local Authority in this arrangement.

(vii) Contract-Add-and-Operate (CAO) – A contractual arrangement whereby the Developer adds to an existing infrastructure facility which it rents from the Government Agency or the Local Authority and operates the expanded infrastructure project and collects user levies, to recover the investment over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the Developer.

(viii) Develop-Operate-and-Transfer (DOT) – A contractual arrangement whereby favourable conditions external to a new infrastructure project which is to be built by a Developer are integrated into the BOT arrangement by giving that entity the right to develop adjoining property and thus, enjoy some of the benefits the investment creates such as higher property or rent values.

(ix) Lease Management (LM) – A contractual arrangement whereby the Government Agency or the Local Authority leases an infrastructure project owned by the Government Agency or the Local Authority to the Developer who is permitted to operate and maintain the infrastructure project for the period specified in the agreement and to charge user charges therefor.

(x) Management (M) – A contractual arrangement whereby the Government Agency or the Local Authority entrusts the operation and management of an infrastructure project to the Developer for the period specified in the agreement on payment of specified consideration. In such agreement the Government Agency or the Local Authority may charge the user charges and collect the same either itself or entrust the collection for consideration to any person who shall after collecting the user charges pay the same to the Government Agency or the Local Authority.

(xi) Rehabilitate-Operate-and-Transfer (ROT) – A contractual arrangement whereby and existing facility is handed over to the private sector to refurbish, operate (collect user levies in operation period to recover the investment) and maintain for a franchise period, at the expiry of which the facility is turned over to the Government Agency or the Local Authority. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

(xii) Rehabilitate-Own-and-Operate (ROO) – A contractual arrangement whereby an existing facility is handed over to the Operator to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.

(xiii) Service Contract Agreement (SC) – A contractual arrangement whereby the Developer undertakes to provide services to the Government Agency or the Local Authority for a specified period with respect to an infrastructure project. The Government Agency or the Local Authority shall pay him an amount according to the agreed schedule.

(xiv) Supply Operate and Transfer Agreement (SOT) – A contractual arrangement whereby the Developer supplies to the Government Agency or the Local Authority the equipment and machinery for an infrastructure project and undertakes to operate the project for a period and consideration specified in the agreement. During the operation of the infrastructure project, he shall undertake to train employees of the Government Agency or the Local Authority to operate the infrastructure project.

SCHEDULE 2
(Section 2 (d))

CATEGORIES OF PROJECTS

All infrastructure projects may be categorised based on the extent of Government support required and the exclusivity of the rights granted. The Government Agency or the Local Authority with the approval of the Board will be entitled to evolve any further category or categories of the infrastructure project having combination of categories as per the priority and other requirements of the Government Agency or the Local Authority. The Government Agency or the Local Authority with the approval of the Board may divide the infrastructure projects into the following categories:

1. CATEGORY – I PROJECTS shall be infrastructure projects where:

(i) no fiscal incentives in the form of contingent liabilities or financial incentives are required ;
(ii) the infrastructure project is viable even when land is granted at the market rates;
(iii) no exclusive rights are conferred on the Developer; and
(iv) minimal inter-linkages are required.

2. CATEGORY – II PROJECTS shall be infrastructure projects where:

(i) Government Agency will be required to provide asset support;
(ii) financial incentives in the form of contingent liabilities or direct financial support are required to be provided;
(iii) exclusive rights are conferred on the Developer; or
(iv) extensive linkages i.e. support facilities for the project such as water connection etc. are needed.

SCHEDULE 3
(Section 2(jj))

STATE SUPPORT

The Government may grant the following forms of State support to assist the Government Agency or Local Government and the Developer to implement any of the infrastructure projects covered under this Act:
(i) Administrative support;
(ii) Asset support;
(iii) Foregoing revenue streams;
(iv) Guarantees for contingent liabilities; or
(v) Financial support.

I. Administrative Support:

The Government will offer the following administrative support to all the infrastructure projects covered under this Act, namely:
(a) Provide State level statutory clearances within specified time limits after the infrastructure project is sanctioned in favour of the Developer;
(b) Automatically grant non-statutory State level clearances, if an infrastructure project meets specifications as may be prescribed;
(c) Provide best effort support for obtaining all central level clearances;
(d) Undertake all rehabilitation and resettlement activities and recover the cost from Developer;
(e) Provide construction power and water at infrastructure project site; and
(f) Acquire land necessary for the infrastructure project, if the same does not already belong to the Government.

II. Asset Based Support:

The Government will offer asset based support to all Category II infrastructure projects covered under this Act. The Category I infrastructure projects will receive asset based support only if the sector policy specifically provides for the same. The asset based support comprises:
(a) Government owned land would be provided at concessional lease charges for infrastructure projects where ownership would revert to the Government, within a maximum prescribed period of yearsfrom the date of grant of land; or
(b) The Government will commit/facilitate development of linkage infrastructure for infrastructure projects;

III. Foregoing Revenue Streams:

The Government will forego revenue streams in case of all Category II infrastructure projects. Government will forego revenue streams in case of Category I infrastructure projects only if the sector policy specifically provides for the same. Such support would be in the form of:
(a) Exemption of sales tax on all inputs required for infrastructure project construction;
(b) Exemption of stamp duty and registration fees on the first transfer of land, from the Government to the Developer and on infrastructure project agreements registered in the State;
(c) Exemption from payment of segniorage fees i.e. cess on minor minerals during construction period.

IV. Guarantees:

The Government may guarantee receivables only in the case of Category II infrastructure projects, provided they are not collected directly from users. The Government may also provide off take guarantees if it is the service distributor and is responsible for collection of user levies.

V. Financial Support:

(a) Direct financial support may be considered only in the case of Category II infrastructure projects.
(b) The Government will have the final authority to approve direct financial support.

(c) Board will ensure that appropriate infrastructure project structuring will eliminate, to the extent possible, the need for financial support.
(d) Extent of financial support will be used as one of the selection criteria whenever financial support is to be provided.

4 Draft Road Policy Statement for Karnataka

- See Section 3.2.1 (Roads) of Volume 1

This document has been prepared as part of a Technical Assistance Project provided by the Asian Development Bank to the Governments of Andhra Pradesh, Gujarat, Karnataka and Madhya Pradesh. This policy statement is meant to offer a starting point for the development of a clear policy statement at the State Government level covering this sector and providing a degree of clarity as to the intentions of the State Government. In some cases, these policy statements can be used as a foundation for the development of an Act which legally enshrines these intentions into Law. However, in many other cases, the policy statement itself can serve as the statement of intention by the State and can be sufficient as it is.

We do not pretend to understand all the nuances of the sector in the State. It is left to the professionals in the State to take this beginning and bring it to a point where it clearly and accurately reflects the policies of the Government.

4.1 Preamble

Karnataka which is the eighth largest state in the Country has a total geographical area of about 1,91,791 sq. km. accounting for over 5.8 percent of the total area of the country. Located in the South Western part of India, it shares its boundary with Goa and Maharashtra in the North, Andhra Pradesh along the East and Kerala and Tamil Nadu in the South.

An estimated 50 million people reside in 27,028 inhabited villages, 254 towns, and urban agglomerations within the State, resulting in a population density of 234 persons per sq. km. While 69 percent of the State's population is in rural areas, the share of population residing in the urban areas has been increasing steadily over the past few decades.

Due to the growth oriented policies of the Government, the real Net State Domestic Product (Net SDP) has registered an average annual growth rate of 8.1 percent. The real per capital income has increased from Rs. 1,520 in 1980-81 to Rs 2,563 in 1995-96.

At this level of economic growth, the impact on road traffic has been significant on the National Highways, there has been about 10-12 percent increase in traffic each year, while on State Highways, the annual growth of traffic has been about 12-15 percent. The traffic on village roads and other District Roads has also registered an increase of 10 to 12 percent per annum. Not only does the existing road system need widening and strengthening to match the current and future traffic demand, but new roads also need to be constructed to improve accessibility, reduce distances and decongest existing roads.

The current policies of the State Government are clearly directed toward achieving a faster pace of economic development. This is reflected in the numerous initiatives taken recently by the Government. Important among them are the following:

- A revised industrial and information technology policy aimed at attracting greater industrial investment and generation of employment;
- Decentralisation of industrial activities from the Bangalore Metropolitan Region to industrial growth centres at Hassan, Hubli-Dharwad and Raichur;
- Commissioning of the Konkan Railway and its imminent impetus to the economic development of the west coast region of Karnataka;
- Implementation of mega irrigation projects in the Krishna River basin;
- Major thrust towards augmentation of power generation and transmission;
- Major thrusts towards ports upgrading and development;

- Major thrusts toward increasing tourism and associated activity within the State;
- Improving agriculture production and marketing.

A sustained programme of road development, rehabilitation and maintenance needs to be quickly initiated not only to minimise the diseconomies and regional imbalances but also to ensure that the desired economic growth is not constrained by poor road infrastructure.

4.2 Roads in Karnataka

The State has a descending hierarchy of roads that have been categorized according to their functional importance, these being respectively, National Highways (NH), State Highways (SH), Major District Roads (MDR), Other District Roads (ODR), and Village Roads (VR).

The size of this 122,489 km network broken down by category is as follows:

- 2,357 kms of National Highway;
- 11,035 kms of State Highways;
- 28,311 kms of Major District Roads;
- 2,090 kms of Other District Roads;
- 78,696 kms of Village, Forest and Irrigation Roads.

The bulk of the traffic is carried by the NH and SH which account for 11 percent of the overall state road network.

Approximately 71 percent of SH is single lane 22 percent is intermediate lane and only 7 percent is two lanes in width. Among the MDRs, 98 percent is single lane. While all SH have hard surface, only approximately 65% of the MDR are hard surfaced. Virtually all the remaining roads are single lane in unsurfaced condition.

4.3 Strategic Targets for Road Sector Development

Targets for road sector development are the foundation for budget planning, resource allocation and regional development balance. The targets tell the story of the Governments plan for improving access to markets, housing, industry and other development. Therefore the targets need to be carefully defined and justified. Generally the targets for road development can be divided into capital (new) roads and ongoing maintenance of current roads. Maintenance should always have the first call on available funds. Without maintenance, the investment made in previous periods is lost ultimately will need to be made again. Therefore, maintenance holds primary importance in the setting of road development targets. Maintenance targets are set based on consideration of the following factors:

- Traffic levels;
- Road condition;
- Target road condition/quality standards;
- Cost for reconstruction or maintenance;
- Vehicle operating cost;
- Budget limits.

The following are strategic targets for road maintenance by road type and by financial commitment over the next 5 year period.

Table 1.1: Time bound Target for Road Maintenance in Karnataka

Road Type		2005	2006	2007	2008	2009
National Highway	Kms					
	Rp					
State Highway	Kms					
	Rp					
Major District Roads	Kms					
	Rp					
Other District Roads	Kms					
	Rp					
Village Roads	Km					
	Rp					
Total	Kms					
Total	Rp					

The following capital investment priorities are based on the planned needs of the State over the coming 15 year period. These targets have been developed by consideration of the following factors:

- Current traffic based on State Traffic Survey;
- Population growth;
- Population distribution;
- Migration of population;
- Economic growth of industry and commerce;
- Current level of service offered to rural dwellers, villages, towns and cities; and
- Budget limitations and sustainable funding.

Table 1.2: Time bound Target for Road Development in Karnataka

Road Type		2005	2010	2015	2020
National Highway	Kms				
	Rp				
State Highway	Kms				
	Rp				
Major District Roads	Kms				
	Rp				
Other District Roads	Kms				
	Rp				
Village Roads	Km				
	Rp				
Total	Kms				
Total	Rp				

4.4 Financing Road Development and Maintenance

In the past, the funds available for road development, rehabilitation, widening and maintenance in the State have been insufficient to allow for major upgrading of the network. However, over the past few years, major changes have occurred in the Indian road network and in the approach to road development and financing.

The designation of the Golden Quadrilateral and the North South and East West Corridors as National Highways with funding from the National Highway Authority of India (NHAI) has had a significant impact on the interconnection between the major urban centres in India. Together with this very intense focus on the NH system, there has been an increased awareness of the need for additional financing for the State Highways and for upgrading of MRD and other local roads. Since the early 1990's the major international financial institutions like the World Bank and the Asian Development Bank have provided significant funds for road upgrading and maintenance improvements. The Karnataka State Highway Improvement Project (KSHIP) is an example of this kind of ongoing assistance. It is anticipated that the State Government will continue to address the shortages of adequate road network through both domestic and International funding.

In addition to the normal State budget source for funding roads, further sources have recently been expanded to include:

- Assistance from the National Bank of Agriculture and Rural Development (NABARD);
- Housing and Urban Development Corporation (HUDCO).

Further to the above sources of funding a major potential source of funding exists in the provisions of the Karnataka State Highways Act –1964, which provided for assessment of a Road Betterment Levy against lands adjacent to roads which were significantly improved. The road levy will need to be balanced against the type of land use of the adjacent development. Commercial land is likely to be significantly enhanced with improved access. Agricultural land will be less impacted.

The Government will undertake a review of the provisions of the Highway Act to develop a standardised approach to potential application of the betterment levy which is fair to landowners as well as which ensures that the real benefits of improved access to adjacent land is shared between the land owners and the State Government.[23]

While these sources of assistance are welcome, the longer term sustainability of road sector improvement is achievable only when the financing for such improvement is predictable and can be budgeted with confidence. For this reason the Government of Karnataka has decided to establish a road fund.

Review of road funds around the world argues that the funding of capital works for roads should remain the responsibility of the Government through annual appropriations and allocation to Ministries. This maintains the responsibility of Government to allocate public resources according to the societal needs of the moment. This means that the most effective use of road funds is to provide resources to maintain the condition of the current network through maintenance, rehabilitation and reconstruction.

The sources of finance for a road fund are as follows:

- Fuel Levy (cess);
- License fees;
- Heavy vehicle license fees (based on vehicle weight); and
- Fines and charges for overloading.

These charges will be explored with a view of deciding how best to fund the road maintenance cost of all levels of road works in Karnataka. A projection of funding sources linked to the above budget allocations is as shown in the following table. The following percentages are for example only and will obviously vary depending on the conditions pertaining in future years and on the specific Strategic State Road Development Plan.

[23] Such undertaking is both technical and controversial. A full study by the Roads Department will be prepared and presented to Cabinet for review and approval.

Table 1.3: Sources of Funding for Road Development

Road Type		2005		2010		2015		2020	
		Maint	New	Maint	New	Maint	New	Maint	New
National Highway	International Loans	0%	20%	0%	20%	0%	20%	0%	20%
	Cess	50%	40%	50%	40%	50%	40%	50%	40%
	National Budget	50%	10%	20%	10%	20%	10%	20%	10%
	Private Sector		30%	30%	30%	30%	30%	30%	30%
State Highway	International Loans	0%	10%	0%	10%	0%	10%	0%	10%
	Road Fund		0%	80%	5%	96%%	10%	94%%	10%
	State Budget	100%		18%	65%		50%		50%
	Private Sector		10%	2%	20%	4%	30%	6%	30%
Major District Roads	International Loans		10%		10%		10%		10%
	Road Fund		0%	80%	5%	100%	10%	100%	10%
	State Budget	100%		20%	85%		80%		80%
	Private Sector								
Other District Roads	International Loans		10%		10%		10%		10%
	Road Fund		0%	80%	5%	100%	10%	100%	10%
	State Budget	100%		20%	85%		80%		80%
	Private Sector								
Village Roads	International Loans		10%		10%		10%		10%
	Road Fund		0%	80%	5%	100%	10%	100%	10%
	State Budget	100%		20%	85%		80%		80%
	Private Sector								

4.5 A Road Policy Objective for Sustainable Development

This statement of Road Transport Policy sets out the government's intended measures for removing shortcomings in the road network and its policies for securing and maximizing the economic benefits of a balanced public financed and private financed road development and maintenance strategy. The Statement is intended to encourage and guide the process of reform in the road transport sector, clarifying its implications for the day-to-day decisions faced by public officials and the private sector alike.

Though some changes have been introduced in the road sector over the past decade, significant shortcomings still remain in the system. Many of these are related to needed capital investment, but many have also to do with the efficiency of operations of existing transport enterprises, including construction and maintenance contractors and commercial road transport operators.

4.5.1 Policy Objectives

The objectives of the policies set out in this Statement are as follows:

- To provide the people of Karnataka with a high quality, well maintained, safe and efficient road transport network;
- To facilitate upgrading of road transport infrastructure by incorporating into the cost of the transport, the real cost of providing the infrastructure through tolls and other direct user charges where possible;
- To recover costs of roads through toll revenue on roads where at least one un-tolled alternative route exists (some governments may wish to relax this objective);
- To provide opportunity for the private sector to assist where viable, further construction of the road infrastructure network; and
- To protect safety and environmental standards and the interests of the socially or economically disadvantaged.

4.5.2 The Respective Roles of the Public and Private Sectors

In order to achieve the above objectives, the Government of Karnataka will support private investment in road development wherever such investment can be self sustaining and where such investment will reduce the financial burden of the road development on the Government of Karnataka. Where such investment is not feasible, such as for local or district roads or urban street networks, private sector involvement may remain viable through performance based contracts for maintenance and rehabilitation of the current road network. Further, the annuity based approach to provision of road infrastructure has been well tested at the national level and this approach offers significant advantages to forward budget planning and built in performance based incentives for construction and operations. This approach will be used in the state where and when it seems most advantageous.

To promote and encourage private sector investment in the road network in Karnataka, the Government will offer projects through open and transparent competitive bidding, according to the following steps:

- All new road construction in Karnataka will be assessed from the viewpoint of financial viability based on toll collection from users. Those roads which clearly will generate a stream of revenue sufficient to allow for adequate return to the private investor, will be offered to the private sector on a BOT/BOO/BOOT basis with no guarantee or capital support from the Government. However, other incentives such as support for permits or fulfilment of environmental or social requirements that clearly fall within the area of general community interest may be paid by the Government;
- All projects which are not fully commercially viable but which would generate sufficient revenue to cover at least operating and maintenance costs will be offered to the private sector for investment with sufficient capital or other support to make them viable for private sector operation;
- All projects which will not generate at least sufficient revenue to cover ongoing operations and maintenance cost, may be combined with other existing roads with the option of blending toll revenue from existing and new roads to achieve a level of commercial viability;
- Existing roads which are commercially viable under tolling will be offered as concessions or leases to the private sector for operation and management;
- All important projects which cannot be found to be commercially viable according to the above steps will be funded directly by the Government of Karnataka; and

- Ongoing maintenance on existing roads will continue the current practice of contracting that function where possible to the private sector.
-

Role of Government[24]

- The Government will offer the projects to the private sector through open and competitive bidding and where such bids do not evoke a response from the private sector, the Government reserves the right to enter negotiation with any qualified company to achieve a mutually agreeable balance of public and private interests;
- Further, unsolicited applications from any qualified company who wishes to either undertake new investment or alternatively lease or concession existing roads where tolling is permitted, will be allowed to develop a proposal which will be considered according to the Swiss Challenge Procedure;
- A special unit within the Transport, Roads and Buildings Department will be established with the mandate of supporting private sector investment wherever viable;
- Where necessary, Government will propose amendments to the existing acts and rules to facilitate private sector investment;
- The Government will develop all road projects through independent engineering input to the detailed design stage to enable the investors to prepare bids according to a set target. Compliance with the recommended designs will be one of the bid evaluation criteria, although variation from the recommended design so far as it can be shown not to result in a non compliant road should be allowed. Where possible, private sector engineering companies will be used to develop road plans, assess viability of roads for private sector investment, draft bidding documents, assess bids for compliance according to standard engineering criteria, evaluate annual performance of concessionaires and determine remedial action if needed;
- The Government will acquire the land needed for the road development and provide the land free and clear of encumbrances to the private sector including dealing with all issues of resettlement and rehabilitation of affected people. The cost of such resettlement and rehabilitation will remain a Government supported cost;
- The Government will obtain all major environmental clearances and approvals prior to the beginning of construction. The cost of compliance with any environmental mitigation measures will be incorporated into the project design as part of the background documents used for the bidding process. All significant compliance costs should be identified in the bid documents to allow all bidders to compete fairly;
- In the case of Rail Over/Under Bridges, Government will assist in obtaining any permission/clearance from the Indian Railway to allow the private company to build the ROB/RUB under railway supervision and finalising of GAD;
- The Government will provide legal foundation to permit the transfer of tolling rights to the private company for the road investment in question. The private investor will be allowed to collect and retain the toll revenue according to the concession agreement for the stated term of the agreement. The basis for the setting of tolls will be established in the concession agreement either individually by road or according to a State tolling standard established by the Government;

[24] In states where such process steps are separately specified in overall State Infrastructure Policy, such steps are not needed in this policy statement. Where such steps are not generally specified, then specification in the road policy will be necessary.

- The Government will ensure that adequate protection from unfair treatment is provided to the private investor through clear and legally binding dispute resolution mechanisms built into the concession agreement.
-

Role of the Private Sector

- Concession agreements with the Government will generally be for a term of 30 years but will depend on the financial viability of the project. Minimum performance standards will be set by independent engineering review and the concessionaire will guarantee that the performance standards for construction and maintenance will be met continuously through the period of the concession;
- The private company will be free to fix and revise tariffs according to the market and within the limits imposed by Government policy. Where government policy changes or where the limits set do not sufficiently compensate the private sector at a reasonable level of financial return or in cases where the Government has allowed tolls to be charged on a road where no viable alternative free route exists, the Government and the private company will jointly determine the appropriate level of tariff to ensure an adequate rate of return to the investor while maintaining a reasonable level of user charges, the private sector may charge "shadow tolls" to the Government or be otherwise compensated through a "public service obligation agreement";
- The completed project will revert to the Government at the end of the concession period at no cost and according to the conditions outlined in the concession agreement.[25]

4.5.3 Tolling Strategy and Policy

Tolling provides a direct link between the use of the infrastructure and payment for that use. As tolls increase, the user must consider the cost of the toll compared to the cost of alternative routes or modes. Any toll is apt to reduce traffic at the margin. Therefore a tolled road will on average always carry less traffic than if it were un-tolled. This means that governments may gain direct revenue but the traffic not carried may impose other economic costs which would be saved if the tolled road were used. For instance, heavy vehicles that reject paying tolls and use alternative un-tolled roads that are less able to handle the heavy load, may severely damage the un-tolled road, hence causing additional cost for maintenance to the Government. In recognizing this fact, various jurisdictions have either chosen to fund roads from consolidated revenue (tax revenue) or alternatively to use mechanisms like shadow tolls or annuity based contracts to bring the private sector into the road infrastructure sector without the negative implications of direct tolls.

The Government of ___ will undertake a review of tolling strategy and sources of finance for road development with the view of maximising the economic return to the State while at the same time providing a fair and reasonable return to the investors.

4.5.4 Creating a Safe, Environmentally Sensitive and Socially Responsible Road Network

Safety

Road safety is a serious consideration throughout India and specifically in Karnataka. Lack of safe travel can result from a number of causes, including:

- Poor road design;

[25] Example Concession Agreements for both Annuity Based and BOT based concessions are available in Volume 4 of this report series.

- Poor maintenance;
- Lack of appropriate signage; and
- Lack of enforcement of current road laws.
-

The Government of Karnataka will begin to address these issues on all fronts. Specifically, directions and guidelines will be provided based on national standards developed by the National Highway Authority of India (NHAI) for road design to ensure adequate bypassing of built up areas, adequate underpasses for animals, pedestrians and slow moving vehicles crossing busy roads, ensuring safe vertical and horizontal sight lines for vehicles travelling along the roads, and where possible physical separation of fast moving vehicles from slow moving vehicles through use of service roads.

Further, traffic management will be enhanced through more use of signage to ensure that both travellers along the road and other users of the road have information about safe speed of travel, safe crossing behaviour and indications of permission for various types of vehicles on the different sections of the road.

The trust fund noted above will be used to ensure that the current road conditions are free from serious potholes, broken pavement and other deterioration that can cause loss of control and result in unsafe travel.

The Ministry of Transport, Roads and Buildings Department will also work closely with the Karnataka State Police force and municipal police to ensure that current road laws are enforced. This will take the form of joint committees set up to deal with traffic enforcement and to sensitise the police to the need for traffic management and safe operation of motor vehicles. Experience in other countries with publicised "blitzing" of unsafe vehicles or unsafe driving behaviour will be explored with the police forces with the objective of making the travelling public aware of the need for safe travelling behaviour and adherence to traffic safety laws.

4.5.5 Environmental and Social Responsibility

Current national and state environmental legislation is clear on the rules which govern the provision of road infrastructure. The Government of Karnataka is committed to maintaining an environmentally responsible road infrastructure and where new roads are developed the Government of Karnataka will obtain necessary clearances and permits for those roads and develop any required mitigation measures into the final design for the road. Those mitigation measures will be applied equally to those road constructed directly by the Government of Karnataka or alternatively, by the private sector under concession agreement with the Government.

Social responsibility in the development of the Karnataka road network is also important. While specific guidelines for resettlement or rehabilitation of residents displaced by new road development are not always clear, the Government of Karnataka is committed to the principle of equity and fairness and where negative social impact results from the development of a new road, adequate compensation will be paid to the displaced residents following the overall guidelines issued by the State Legislature, and remedial action or mitigation measures such as bypasses or underpasses will be used where possible to limit negative social impacts of new roads.

4.6 Public Administration and Regulation

In general a regulatory function for road transport may not be needed unless it is determined that an independent body is needed to approve toll increases or to ensure compliance with safety or other provision of service or public liability issues. However, the default case for these issues should normally be the concession agreements signed between the government and the private companies. Only in cases where it is determined that the concession agreements are not able to function in this way, may it be necessary to establish an independent body.

If such a body is established, it should be a Statutory Body reporting to Parliament through the Minister of Law or Legal Affairs. The Regulator will be legally empowered to rule on issues which fall under its mandate and to have its decisions carry the same weight as a judicial decision. It may be established to carry out the following functions:

- set safety and environmental standards for the operation of the privatised infrastructure;
- adjudicate and rule on disputes over provision and quality of service;
- adjudicate on inter-company disputes over liability for damage or lost business;
- rule on entry of new companies where the new company may be in direct competition with an existing company and where such competition is precluded in the concession agreement; and
- rule on public liability of the private companies and ensure compliance with public liability statutes.

4.7 The Legal Framework for Road Transport

The government recognizes that some of the provisions existing road and highway law may be incompatible with the policies set out in this Statement. Accordingly, and in consultation with the Ministry of Legal Affairs, it intends to undertake a further review of the legal framework governing the road transport sector. The result of that review may be new provisions to cover particularly tolling policy and private sector investment policy in a revised Highway Law which can provide the legal foundation on which the various changes outlined in this statement can be founded.

To coordinate this process, and to ensure the consistent application of the policies set out herein, the Ministries of Legal Affairs and the Department of Transport, Roads & Buildings will set up, on a temporary basis, a joint Committee for Legal Reform. The main tasks of this committee will be to review (in consultation with the relevant service departments and enterprises) -all existing laws and regulations governing the road transport sector and to identify, and propose amendments to any which are ineffective in meeting the goals of this Policy Statement.

4.8 Operational Plan

The above policy statement forms the basis for a master plan for road development in the State. This plan should be followed by a full operational plan linked to the annual budget cycle to ensure that the resources outlined in this policy are in fact available as needed to support development of the State Roadway System.

5 Proposed PSP additions to the draft Gujarat Highways Act, draft Madhya Pradesh Highway Bill, 2001 and to any future such legislation in Andhra Pradesh

- See section 3.2.3 (Roads) of Volume 1

Version 1:	**Version 2:**
Composite of sections 7 and 8-A of the GOI *National Highways Act, 1956* and sections 19-A, 48-A and 58-A of the *Karnataka Highways Act, 1964*.	Based on sections 27, 28 and 30 of the *South African National Roads Agency Limited and National Roads Act*

CHAPTER III-A **TOLL HIGHWAYS**	**CHAPTER III-A** **TOLL HIGHWAYS**
1. Levying of toll by highway authority	**1. Levying of toll by highway authority**
(1) The highway authority may, by notification in the *Official Gazette*, levy tolls on all motor vehicles entering highways, or a part thereof, at such rates as it may prescribe after prior approval by the State Government, and different rates may be prescribed for different classes of vehicles and different highways. Provided that the highway authority may, if in its opinion it is necessary in the public interest to do so, by notification in the Official Gazette and subject to such restrictions and conditions as may be specified in the notification, exempt the toll payable in respect of any class of motor vehicle. (2) The toll collected under subsection 1 shall be levied and collected in such a manner as may be prescribed.	(1) Subject to the provisions of this section, the highway authority— (a) with the State Government's approval— (i) may declare any specified highway or any specified portion thereof, including any bridge or tunnel on a highway, to be a toll highway for the purposes of this Act; and (ii) may amend or withdraw any declaration so made; (b) for the driving or use of any vehicle on a toll highway, may levy and collect a toll the amount of which has been determined and made known in terms of subsection (3), which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the highway authority may determine and so make known; (c) may grant exemption from the payment of toll on a particular toll highway— (i) in respect of all vehicles of a category determined by the highway authority and specified in a notice in terms of subsection (2), or in respect of the vehicles of a category so determined and specified which are driven or used on the toll highway at a time so determined and specified;

	(ii) to all users of the road of a category determined by the highway authority and specified in such a notice, irrespective of the vehicles driven or used by them on the toll highway, or to users of the road of a category so determined and specified when driving or using any vehicles on the toll highway at a time so determined and specified; (d) may restrict the levying of toll on a particular toll highway to the hours or other times determined by the highway authority and specified in such a notice; (e) may suspend the levying of toll on a particular toll highway for any specified or unspecified period, whether in respect of all vehicles generally, or in respect of all vehicles of a category determined by the highway authority and specified in such a notice, and resume the levying of toll after the suspension; (f) may withdraw the following, namely— (i) any exemption under paragraph (*c*); (ii) any restriction under paragraph (*d*); (iii) any suspension under paragraph (*e*). (2) A declaration, amendment, withdrawal, exemption, restriction or suspension under subsection (1), will become effective only 14 days after a notice to that effect by the highway authority has been published in the *Official Gazette*. (3) The amount of toll that may be levied under subsection (1), any rebate thereon and any increase or reduction thereof— (a) is determined by the State Government on the recommendation of the highway authority; (b) may differ in respect of— (i) different toll highways; (ii) different vehicles or different categories of vehicles driven or used on a toll highway; (iii) different times at which any vehicle or any vehicle of a particular category is driven or used on a toll highway; (iv) different categories of road users, irrespective of the vehicles driven or used by them; (c) must be made known by the State Government by notice in the *Official Gazette*; (d) will be payable from a date and time determined by the State Government on the

	recommendation of the highway authority, and must be specified in that notice. However, that date may not be earlier than 14 days after the date on which that notice was published in the *Official Gazette*. (4) The State Government will not give approval for the declaration of a toll highway under subsection (1)*(a)*, unless— (a) the highway authority, in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice— (i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll highway; (ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza, and has directed them to furnish their written comments and representations to the highway authority not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose; (b) the highway authority, in writing, has given every local authority in whose area of jurisdiction that road is situated the same opportunity to so comment; (c) the highway authority, in applying for the State Government's approval for the declaration, has forwarded its proposals in that regard to the State Government together with a report on the comments and representations that have been received (if any). In that report the highway authority must indicate the extent to which any of the matters raised in those comments and representations have been accommodated in those proposals; and (d) the State Government is satisfied that the highway authority has considered those comments and representations. Where the highway authority has failed to comply with paragraph (a), (b) or (c), or if the State Government is not satisfied as required by paragraph (d), the State Government must refer the highway authority's application and proposals back to it and order its proper compliance with the relevant paragraph or (as the case may be) its proper consideration of the comments and representations, before the application and the highway authority's proposals will be considered for approval. (5) Any person liable for toll who, at a toll plaza or other place for the payment of toll determined and made known in terms of subsection (1),

	refuses or fails to pay the amount of toll that is due—
	(a) is guilty of an offence and punishable on conviction with imprisonment for a period not longer than six months or a fine, or with both the term of imprisonment and the fine; and
	(b) is liable, in addition, to pay to the highway authority a civil fine of (…) rupees. This amount may be increased in 2005 and annually thereafter in accordance with the increase in the official consumer price index for the relevant year as published in the *Official Gazette.*
2. Operation of toll highways and levying of toll by authorised persons	**2. Operation of toll highways and levying of toll by authorised persons**
[Gujarat version:]	**[Gujarat version:]**
(1) Notwithstanding section 1, and subject to the Gujarat Infrastructure Development Act, 1999 (Act No. 11 of 1999), the highway authority may enter into an agreement with any person in relation to the development, construction, operation or maintenance of the whole or any part of the highway.	(1) Notwithstanding section 1, and subject to the Gujarat Infrastructure Development Act, 1999 (Act No. 11 of 1999), the highway authority may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement, is authorised—
	(a) to operate, manage, control and maintain a highway or portion thereof which is a toll highway in terms of section 1 or to operate, manage and control a toll plaza at any toll highway; or
	(b) to finance, plan, design, construct, maintain or rehabilitate such a national road or such a portion of a highway and to operate, manage and control it as a toll highway.
[Madhya Pradesh version:]	**[Madhya Pradesh version:]**
(1) Notwithstanding section 1, and subject to the guidelines issued by the Highway Authority under subsection 3, the Highway Authority may enter into an agreement with any person in relation to the development, construction, operation or maintenance of the whole or any part of the highway.	Notwithstanding section 1, and subject to the guidelines issued by the Highway Authority under subsection 5, the Highway Authority may enter into an agreement …..
(2) Notwithstanding anything contained in section 1 the person referred to in subsection 1 is entitled to collect and retain toll at such rate, for services or benefits rendered by him as the highway authority may, by notification in the *Official Gazette*, specify having regard to the expenditure involved in the development, construction, operation or maintenance of the whole or part of such highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement.	(2) That person (in this section and in section 3 called the authorised person) will be entitled, subject to subsections (3) and (4)—
	(a) to levy and collect toll on behalf of the highway authority or for own account (as may be provided for in the agreement)—
[Madhya Pradesh version only:]	
(3) No later than 180 days after the coming into force of this Act, the Highway Authority shall prepare and submit to the State Government for approval and notification in the *Official Gazette* a set of guidelines outlining the manner in which the person referred in subsection 1 will be selected and the general content and restrictions	(i) on the toll highway specified in the agreement; (ii) during the period so specified; and (iii) in accordance with the provisions of the agreement only; and

pertaining to the agreement that can be entered into under subsection 1. These guidelines may be amended from time to time.	(b) in the circumstances mentioned in subsection (1)(b), to construct or erect, at own its cost, a toll plaza and any facilities connected therewith for the purpose of levying and collecting toll.
3. Regulation of traffic on toll road A person referred to in section 2 shall have powers to regulate and control the traffic in accordance with the provisions contained in Chapter VIII of the Motor Vehicles Act, 1988 (Central Act 59 of 1988) on the highway forming subject matter of such agreement for proper management thereof. [No equivalent provision in Version 2]	(3) Where the agreement provides for any of the matters mentioned in section 1(1)(b), (c), (d), (e) and (f)(ii), the authorised person will be subject to the duties imposed on the highway authority by that section in all respects as if the authorised person were the highway authority. (4) The amount of the toll that may be levied by an authorised person as well as any rebate on that amount or any increase or reduction thereof, will be determined in the manner provided for in section 1(3), which section will apply, reading in the changes necessary in the context, and, if applicable, the changes necessitated by virtue of the agreement between the highway authority and the authorised person. [Madhya Pradesh version only:] (5) No later than 180 days after the coming into force of this Act, the Highway Authority shall prepare and submit to the State Government for approval and notification in the *Official Gazette* a set of guidelines outlining the manner in which the authorised person will be selected and the general content and restrictions pertaining to the agreement that can be entered into under subsection 1. These guidelines may be amended from time to time.
4. Entry into highway without paying toll Whoever enters a highway without paying the toll prescribed under section 1 or notified under section 2 shall, on conviction, be punished with such fine for each offence, not exceeding (…) rupees, as shall be prescribed. **[Equivalent to section 1(5) in Version 2]**	3. The highway authority and authorised person may institute legal proceedings to recover outstanding toll moneys (1) The highway authority or the authorised person, as the case may be, may institute legal proceedings to recover toll moneys owing to it or him by any person liable for toll under this Act. (2) The highway authority's right to do so will not be reduced, limited or affected in any other way where, and only because— (a) the person concerned has been convicted and sentenced in the circumstances mentioned in paragraph (a) of section 1(5), or (b) has paid or is liable to pay the civil fine provided for in paragraph (b) of that section.

6 Review of the Gujarat 1995 Port Policy and 1997 BOOT Principles against the Gujarat Infrastructure Development Act (GIDA 1999) and the Draft Rules 2002 with a view to making recommendations on how to deal with any discrepancies

- See section 3.2.3 (Minor Ports) of Volume 1

The Consultant has reviewed the Port Policy and BOOT Principles against the GIDA 1999 and the Draft Rules 2002 with a view to making recommendations on how to deal with any discrepancies. While it is clear that in the case of any inconsistency between the Port Policy/BOOT Principles and the GIDA Act/ Draft Rules 2002, the latter will prevail, we have nevertheless categorized differences between the two into separate groups to suggest ways in which these may be resolved.

Drawing on the comparison chart provided in the Appendix to this paper, we have created the following three categories:

I Matters specified in the Port Policy/BOOT Principles but not dealt with in the GIDA 1999/Draft Rules 2002;

II Matters specified in the GIDA 1999/Draft Rules 2002 but not dealt with in the Port Policy/BOOT Principles; and

III Matters covered by both the Port Policy/ BOOT Principles and the GIDA 1999/Draft Rules 2002.

At the outset, it may be pointed out that though the provisions contained in the Port Policy/BOOT Principles in respect of matters that fall under Group I (such as provisions regarding the options available after transfer of the project) will continue to apply, most of these have been included in the model port concession agreement finalized in March 1999. Some others, that do not find mention therein, may be dealt with as under:

- The offer of additional incentives for port developers [per BOOT Annexure B (VII)(2)] and the charging of wharfage at a concessional rate of 25% of the existing rate to encourage the establishment of barge-mounted power plants [Port Policy] may all be implemented under Section 6 of the GIDA 1999, which covers the assistance that may be provided to any person by the State Government, Government agency or specified Government agency.

- The provision for structuring linkages to transport corridors as separate BOT packages in respect of which the port developer will have first preference [per BOOT Annexure B (II)(15)] may be included as one of the categories of projects that can be awarded through direct negotiations under Section 10 of the GIDA 1999, as recommended in document 2 of this volume.

- The BOOT Principles contain provisions regarding the institution of an independent port regulatory authority, which will be concerned with the working of a port and the sector as a

whole, including unfair/monopolistic behaviour relating to tariffs [per BOOT Annexure B (IV)(B)(1) and (4)]. The model concession agreement acknowledges the establishment, in future, of such an authority in accordance with the BOOT Principles and makes both parties to the agreement subject to the control of the same. In this regard, the adoption of the proposed scheme for regulating fees and tariffs in the minor ports sector (contained in document 2 of this volume) would be a first step in this direction.

As regards the matters contained in Group II (some of which are covered by the model concession agreement), these may, to the extent considered necessary, be included in any updated port policy/BOOT principles issued by the Government of Gujarat. In any event, the relevant provisions of the GIDA 1999/Draft Rules 2002 relating to such matters will be applicable, irrespective of whether or not they are incorporated in the Port Policy/BOOT Principles.

Finally, Group III includes matters that are covered by both the Port Policy/ BOOT Principles and the GIDA 1999/Draft Rules 2002. In the case of any inconsistency between them with regard to such matters, the provisions of the Port Policy/BOOT Principles will only apply if these may be reconciled with corresponding provisions of the GIDA 1999/Draft Rules 2002. For instance,

- Although Schedule II of the GIDA 1999, which covers the different types of concession agreements that may be entered into under the Act, does not provide for a BOMT agreement as specified in the Port Policy, the same may, if considered necessary, be added to the said Schedule by the State Government by notification in the *Official Gazette*.

Otherwise, the provisions contained in the GIDA 1999/Draft Rules 2002 will take precedence. Thus,

- Although the Port Policy states that, apart from the wharfage/waterfront charges, the promoters/developers will be free to charge any other service charges *with the prior approval of the Gujarat Maritime Board*, the GIDA 1999 merely provides for the developer to charge such amount as specified in the concession agreement.

- Similarly, while the BOOT Principles provide for a concession period of thirty years (commencing three years after signing of the agreement), which period may be longer if the project requires sizeable capital investment [per BOOT Annexure B (V)(1)], Section (4)(3) of the GIDA 1999 *mandates a ceiling of thirty-five years* (commencing from the date of the concession agreement) for the transfer of a project by a developer to the State Government, a Government agency or a specified Government agency.

To conclude, if the aim is merely to reconcile any discrepancies between the Port Policy/BOOT Principles and the GIDA 1999/Draft Rules 2002 and not to draft an updated/revised port policy, the only matters of concern are those that fall under Group III, i.e. matters covered by both the Port Policy/BOOT Principles and the GIDA 1999/Draft Rules 2002. Of these, few matters specified in the Port Policy/BOOT Principles have provisions that are inconsistent with those of the GIDA 1999/Draft Rules 2002. As mentioned earlier, such provisions of the Port Policy/BOOT Principles will only apply if these may be reconciled with corresponding provisions of the GIDA 1999/Draft Rules 2002.

Appendix A

Comarison between the Port Policy 1995 (and its associated BOOT Principles) and the Act, 1999 (and its associated draft Rules)

Subject Matter	Port Policy and BOOT	Act and Rules
Coordinating agency	GMB	GIDB
Agency Role	Development of 10 named green field ports under the Policy	Functions as set out in Act Ch. IV covering 20 sectors listed in Sch. I including Ports
Division of Responsibility	None Mentioned	Per Act Ch. II (5)(1) and (10)(1)(b) If project does not required subsidy and exceeds project cost limit, then GIDB, otherwise remain with agency. Under Rules 4, on project cost limit per ApplI, see also section below.
PSP Participation Framework	BOOT only	In total 12 types of cooperating structures set out in Act Sch. II.
Guiding principles of framwork	Per Annexure A of BOOT Principles promoting long term economic benefits and minimum financial liabilities to the state.	Limited reference. Per Act Ch. II 9(2) and (3). Evaluate proposals to ensure maximum benefit to state.
Inception of project, qualification , evaluation of proposals and bid management	Per Annexure B (II)(7) of BOOT. By tender with GMB involvement but process not mentioned in detail.	Per Act Ch.II5,7,8,9 anc 10 GIDB approves project. State agency manages process. Per rules 7 PBAC manages process, see also section below.
Assistance by State Gov't/Agency	Per Annexure B(II) of BOOT -State to acquire land -Additional land acquired to facilitate future expansion of port related activity. - Tax concession – lower stamp duty and registration fee - Award status of notified area - Latest traffic study and engineering pre-feasibility report -Equity stake as co-promoter (no detail of equity limit) -Initiate concomitant development of road, rail corridors and industrial parks - Royalty holiday period until total approved capital cost is set off or end of concession period, if earlier. Additional Incentives - Permission to develop marine related activities such as ship breaking and dry docks - Port based industrial complexes - Real estate.	Per Act Ch. II (6) - Invest in equity of the project not to exceed 49% - Subsidy not exceeding 15% of project cost (no detail on nature of subsidy) - Senior or subordinate loans (no detail on the nature of assistance) - State guarantee of State agency liability arising out of a concession agreement. - Opening and operation of an escrow account - Conferment of right to develop any land - Exemption or deferred payment of any State tax or fees (no detail on period) - In any manner as deemed fit
Terms of lease of land	Concurrent to term of concession agreement Rental based on acquisition costs.	None mentioned
Site Studies	Latest traffic study and site specific engineering pre-feasibility report from GMB. Costs recoverable from selected developer. Undertakings by developer to prepare detailed project report and EIA for assessment by GMB.	None mentioned
Configuration	Per BOOT Annexure B (II)(8)	None mentioned.
Clearances	Per BOOT Annexure B (II) (9)	None mentioned
Construction	Per BOOT Annexure B (II) (10)	None mentioned
Financial Stake of Developer	Per BOOT Annexure B (II) (11)	None mentioned
Stipulation on Developer's Financial Commitment	Minimum stake of 51% for a period of 5 years of commercial operation. Otherwise, Government concurrence required.	None mentioned
Linkages to Transport Corridors	Developer has first preference as separate BOT packages	None mentioned
Ownership Rights	Per BOOT Annexure B (III)	None mentioned
Operation of Ports	Per BOOT Annexure B (IV)	None mentioned
Duration of Concession Period	30 years commencing 3 years after signing of agreement. Can be greater that 30 years if project requires sizable capital investment	Per Act Ch. II (4)(3) no more than 35 years from date of agreement for transfer of project.

Transfer of Assets and considerations payable	- Immovable assets at fair market value Moveable assets may be removed by developer or transferred at fair market value. Fair value formula is determined at the time of signing of the concession agreement.	Per Act Ch. II (14) and (15) compensation as specified in the concession agreement
Options after transfer	-Offer developer roll over option -Offer the port to another Developer -Government to take over as landlord and outsource services to private sector on contract basis. -Government to act as operator.	None mentioned
Options after termination by default	None mentioned	Per Act Ch. (15)(2) allowing Government to take over and enter into a new concession agreement with a third party.
Force Majeure Issues	Per BOOT Annexure B (VII)(5)	None mentioned
Regulation	Independent Port Authority to be established	None mentioned
Combination of more than one agreement	None mentioned	Per Act Ch. II (4)(2)
Amount to be charged for providing goods and services	None mentioned	Per Act Ch. II (11)
Financial security for maintenance of project	None mentioned	Per Act Ch. II (12)
Training of Employees	None mentioned	Per Act Ch. II (13)
Amount charged by nodal agency	None mentioned	Per Act Ch. VI(32)
Arbitration	None mentioned	Per Act Ch. VI(35) and (36)

7 Detailed discussion of the ports sector, both nationally as well as that the level of the Project States, along with key requirements of any policy initiatives

- See section 3.2.3 (Minor Ports) of Volume 1

This document has been prepared as part of a Technical Assistance Project provided by the Asian Development Bank to the Governments of Andhra Pradesh, Gujarat, Karnataka and Madhya Pradesh. This policy statement is meant to offer a starting point for the development of a clear policy statement at the State Government level covering this sector and providing a degree of clarity as to the intentions of the State Government. In some cases, these policy statements can be used as a foundation for the development of an Act which legally enshrines these intentions into Law. However, in many other cases, the policy statement itself can serve as the statement of intention by the State and can be sufficient as it is.

We do not pretend to understand all the nuances of the sector in the State. It is left to the professionals in the State to take this beginning and bring it to a point where it clearly and accurately reflects the policies of the Government.

7.1 Structure of Ports in India and governing legislation

India has nearly 5560 km long coastline with 12 major ports and 181 minor ports out of which 139 are operable and only about 30 handle cargo traffic. 95 per cent of India's foreign trade by volume and about 70 per cent by value involve sea transportation. The first 25 years after independence saw a modest growth in traffic, from 20 million tonnes in 1950 to 67 million tonnes in 1975, the main commodities being crude oil and iron ore. However, following liberalization in the early 1990s, there has been a significant increase in India's maritime trade. Containerization of general cargo, which came late in India in comparison with other Asian economies, has also shown a steady increase and is currently over 10 per cent of all traffic in major ports.

Ports are placed in the Concurrent list of the Constitution and are administered under the Indian Ports Act, 1908. It lays down rules for safety of shipping and conservation of ports. It regulates matters pertaining to the administration of port dues, pilotage fees and other charges.

Ports in India are classified into major and minor ports. This classification is based on the jurisdiction of Central and State Government as defined under the Indian Ports Act, 1908. Ports owned and managed by the Central Government are classified as Major Ports, while Minor Ports are owned and managed by the State Governments. It must be noted that this arrangement is not based on the size of the port but rather only on legislative arrangements.

7.1.1 Major ports

In India, the major ports are placed under the Union list of the Indian Constitution, and are administered under the Indian Ports Act, 1908, and the Major Port Trust Act, 1963, by the Government of India. Under the Major Port Trust Act, each major port is governed by a Board of Trustees appointed by the Government of India. Their composition gives dominance to public enterprises and government departments. The powers of the trustees are limited and they are bound by directions on policy matters and orders from the Government of India.

The major functions of Port Trusts are the following:

- ❑

- To maintain, plan, supply and improve the port infrastructure including cargo handling equipments (like cranes, crafts and the flotilla of the port and plant and machinery) and physical infrastructure (wharfs, jetties, roads and bridges, buildings)
- To manage and oversee the port operations and development of port area like cargo handling operations of cargo receipt, storage and delivery, deciding berthing priorities on a day-to-day basis, monitoring cargo traffic, finalizing traffic projection, marketing port's services and facilities.
- To perform conservancy functions that would include ensuring navigational safety within port limits and approaches. This would incorporate maintenance of break waters and approach channels, dredging, removal of obstructions or wrecks, locks for impounding water to necessary, and setting up and maintaining navigational aids like buoys and beacons. More specifically, it would also include collection of bathymetric and hydrographic data, tide observations and predictions, establishing and operating port signal and control stations, protection and conservation of port land and waterfront from environmental damage and misuse and dissemination of port related information to national and international community. Under the Major Ports Act, 1963, the conservancy functions are vested with the trustees of the individual port trusts.

7.1.2 Minor Ports

At the State level, the department in charge of ports or the State Maritime Board created through a State legislation, as in case of Gujarat, is responsible for formulation of water front development policies and plans, regulating and overseeing the management of state ports, attracting private investment in the development of state ports, enforcing environmental protection standards, etc. Maritime boards have so far been constituted only in Gujarat, Maharashtra, and Tamil Nadu.

The functions of the State Maritime Boards or the state governments are broadly the same as the major ports trusts, with an additional power of tariff setting. The conservancy functions are also vested in the same authority. In terms of private sector participation, their function is to facilitate and attract private investment to promote efficiency and investment. These would include awarding concession contracts, providing fiscal incentives, right to exclusivity and assuring land acquisition. These have been dealt with later in the specific case of Gujarat and Andhra Pradesh.

7.1.3 Concerns in the sector

Until recently, port capacity was the most significant constraint in the development of the sector. The major ports handled traffic of about 250 million tonnes in 1998/99 as against an assessed capacity of about 220 million tonnes. The overall capacity utilization for all the major ports was about 115 per cent. As a result, in India, ships had to wait for berths instead of berths having to wait for ships. However, with significant improvements in efficiency as documented below, and investments, the total capacity at the major ports is currently 344 million tonnes against traffic of about 300 million tonnes (about 86% capacity utilization), thus bringing a great relief to the existing overworked ports.

Nevertheless, there are several other issues of concern that need to be addressed in the development of India's maritime sector:

Trends in the performance of Indian ports

The productivity in Indian ports is poor as compared to other ports in the region as discussed below.

Vessel turn around time - Until recently (1998/99), the average vessel around time for Indian ports varied from 3.3 days to 8.3 days. There has been substantial improvement to 2.5 days to 6.55 days in

2002/03. This however has to be compared with 15 to 35 hours in major European ports and less than a day in Singapore.

Equipment utilization - The average availability of equipment in Indian ports is around 70 per cent of the time as compared to 85-90 per cent for other Asian ports (World Bank 1995). The number of containers handled per ship hour is 10 at JNPT, which is India's most modern container terminal, as compared to 30 in Colombo and 69 in Singapore respectively. While, efficiencies have improved since 1995, productivity of Indian Ports is still below international standards.

Labour productivity - On an average, Indian ports handled around 1424 tonnes of cargo per employee in 1998/99 and 1494 tonnes per employee in 2002/03. In comparison, ports in U.K. handled around 47,000 tonnes of cargo per employee in 1997/98. The port of Rotterdam handled around 50,500 tonnes of cargo / employee during 1998/99. Manning scales at different ports for specific activities such as container handling and stuffing vary widely. For example, for transfer of containers from ships to quay, Calcutta port employs 32 persons as against 12 at Haldia, 15 at Mumbai, 21 at Chennai and 4 at JNPT. Again for container stuffing/destuffing, Calcutta and Mumbai employ 28 persons, Chennai, 7, and Haldia, 2 for unitized and 7 for non unitized cargo. Such large manning scales result in excessive transaction and staffing costs, again making Indian ports highly uncompetitive.

Factors leading to poor performance

The key reason for the poor performance of Indian ports is the lag in responding to international economic development. Even conceding that investments in ports are bulky and need to be planned to take into account long term trends, the inertia arising out of largely government ownership and operations has led to the ports not being able to adapt to a dynamic environment.

Most major ports were originally designed to handle specific categories of cargo which have declined in time while other types of cargoes gained importance. The ports have not been able to adjust to the categories of cargo which grew the most. There are thus several berths for traditional cargo, which are under-utilized, and only a few for new cargo, which are over-utilized.

In addition, absence of inter-port and intra-port competition which have been conductive to substantial productivity increases in other countries is absent in Indian due to poor inland connectivity and a policy regime that protected domestic ports against competitive pressures.

As a result, equipment utilization is very poor because equipment is obsolete and poorly maintained. Over staffing at Indian ports remains rampant and productivity indicators in respect of cargo and equipment handling continue to be poor. Port access facilities and arrangements for moving inbound and outbound cargo are inadequate and unsatisfactory. Documentary procedures relating to cargo handling such as customs clearance requirements are unduly complicated and time consuming. Electronic document processing is still to be introduced in all the ports.

The consequences of these various shortcomings for the Indian economy are severe. Few large liner ships are willing to call on Indian ports as they cannot afford to accept the long waiting times. Indian container cargo is transshipped in Colombo, Dubai or Singapore resulting in additional costs and transit times. As a result the Indian exporter is not in a position to avail of "fixed-day-of-the-week" services offered by the liner industry at a time when manufacturing and trading companies abroad are increasingly selling and buying on a "just-in-time" basis. Indian exporters are, therefore, operating on the basis of substantial buffer stocks which also makes them less competitive. It has been estimated that the annual incidence of these various factors such as demurrage charges, transshipment costs, pre-berthing delays and vessel turn around time could be as high as US $ 1.5 billion per annum. These costs have ultimately to borne by the end user, raising the costs of India's exports in international markets and the prices of imports for the Indian economy.

7.2 Policy initiatives for port restructuring in India

It is now recognized that ports are no longer mere modal interfaces between surface transport and sea transport. They are now logistics and distribution platforms in the supply chain network. International trade has now become transport intensive and time sensitive and Indian ports clearly are not yet ready for this changing environment. There is, therefore, an urgent need to restructure the port sector in order to improve efficiencies and reduce costs.

Given these considerations, the Government of India has taken several policy and legislative initiatives that have resulted in improvements in port performance as discussed above.

7.2.1 1996 Guidelines for Private sector Participation

The Government of India which administers the major ports has now realized that port restructuring is essential if Indian exporters are to be given an opportunity to enjoy the efficiencies and low costs in transportation as are available to their competitors elsewhere. The Government also recognizes that the additional port capacity to meet the projected traffic by 2006 can not be achieved unless there is massive private investment in the augmentation of port capacity.

Port restructuring was deemed necessary to avail of private investment. The adoption of landlord port concept was a step in this direction and to facilitate the process of gradual privatization of port service provision, the Government in October 1996 issued guidelines for the private sectors. Leasing out of existing assets of the port, construction and creation of additional assets, leasing of equipment for port handling and leasing of floating crafts from the private sector, pilotage, and captive facilities for port based industries are the areas where private investment and participation was provided for. In 1997, the initiative was given a further boost when guidelines were issued to enable the major ports to set up joint ventures with foreign ports, minor ports, and private companies. The Major Port Trust Act was amended to give effect to the guidelines issued in 1996 and 1997.

General tender conditions formulated were that private participation will be on the basis of open competitive bidding, with technical and price bids. After the issue of tender document, the port may arrange one or more pre-bid conferences for clarifications, if necessary. The tender document will not give any kind of guarantee for financial returns to the entrepreneur and that port property, if any, being transferred to the entrepreneur, will be kept insured at the cost of the private entrepreneur. The private entrepreneur would not be permitted to transfer asset by way of sublease, sale, sub-contract or any other method without the previous approval of the port. Environment clearance and other statutory clearance for privatization project would be obtained by the Port Trust or entrepreneur depending on the project and requirement. The Tariff Regulatory Authority may fix a ceiling tariff. If the Tariff Regulatory Authority is satisfied, suitable periodic increases in tariff may be permitted on justified grounds. In all, the drive was to facilitate the ambience for a smooth transition to corporatization of the ports.

While these guidelines are for projects in Major ports, the role that the Union Government plays in guiding the development of the sector in the states implies that several State Government initiatives are modeled on these guidelines.

7.2.2 Corporatization

As stated earlier, the major ports are governed by the Major Port Trusts Act, 1963, and the minor ports by the Indian Ports Act 1908. Both these acts were modeled after the then British practice in managing ports and carry a lot of baggage from the acts of the 19th century governing the ports in the three presidencies of Madras, Calcutta, and Bombay. The Board of Trustees who are appointed by the Government of India to administer the port represent government departments involved with port operations, labour and service providers such as stevedores, shipping agents etc. Their interest lies more in protecting their turfs and not in promoting the commercial well being of the ports. The financial and other powers of the trustees are also limited. In fact, they could incur expenditure only up to Rs 5 billion in respect of new works and replacements. The different operations in the port were

also not set up as separate profit centers. The accounting practice followed was revenue accounting and not commercial accounting.

Recognizing that port operations can not be made efficient or cost effective unless ports were encouraged to operate on commercial lines, the Government of India, as part of the 1996 policy guidelines, substantially increased the financial and other powers of the Port Trusts. The Government of India also took a decision that all new ports will be set up as companies under the Indian Companies Act and the existing Port Trusts will also be gradually corporatized and set up as companies. Accordingly, the 12th new major port, at Ennore near Madras, has been set up as a company under the Companies Act, with the conservancy functions being exercised by the Madras Port Trust. Action has also been initiated to corporatize the Jawaharlal Nehru Port Trust (JNPT) and the Haldia port, which are among the newer of the major ports.

7.2.3 Tariff Authority for Major Ports (TAMP)

As private sector was allowed entry into the major ports to provide services often in competition with the Port Trust themselves, there was a demand from the private sector for an independent regulator to set port tariffs in order to ensure that there was no unfair competition between themselves and the Port Trust. There was also a feeling that where services are provided only by one agency involvement of the private sector could result in public monopolies being converted into private monopolies. Accordingly, the 1996 guidelines provided for the establishment of the Tariff Authority for Major Ports to fix and revise port tariffs. TAMP was set up in March 1997 through an amendment of the Major Port Trust Act 1963. All powers for fixing tariffs in major port lies with TAMP, but it has no jurisdiction over minor ports or private ports.

7.2.4 Minor Ports

As far as the minor ports are concerned the state governments have had the opportunity to start almost from scratch and develop ports without being inhibited by existing institutional arrangements, labour or other vested interests. However, such initiatives are relatively recent. The Gujarat Maritime Board has allowed the private sector to develop two ports in Gujarat mainly the Gujarat Pipavav Port and the Adani port, and has further identified nine sites for port development by the private sector. The Government of Orissa has granted a concession to a private consortium to develop a green field port at Damra an Build-Own-Operate-Share-Transfer (BOOST) principle. Similar initiatives are being taken by other Maritime states to develop ports in their coast line.

Gujarat - Gujarat, situated on the western coast of India, is a principal Maritime State endowed with favorable strategic port locations. The prominence of Gujarat is by a virtue of having nearly 1600 km long coastline, which accounts for 1/3rd of the coastline of India and being the nearest maritime outlet to Middle East, Africa and Europe. In addition, significant investment in industry is taking place near the coastline in the state to take advantage of easy access to the international market. Another advantage is that Gujarat has a vast hinterland consisting of fast developing Northern and Central Indian States generating cargo. Given the above, the following objectives are identified for in Port Policy of the Government of Gujarat (1995).

- To increase Gujarat's share in foreign trade.
- To decongest existing major ports
- To cater to the needs of increasing traffic of western and northern States
- To handle 100 million tones of cargo in Gujarat Maritime waters accounting approximately for 25% India's total cargo by 2000 AD.
- To provide port facilities to promote export- oriented industries and port- based industries.
- To encourage ship building, ship repairing and establish manufacturing facilities for Cranes, Dredgers and other Floating Crafts
- To provide facilities for coastal shipping of passenger and cargo traffic between Kutch, Saurastra and South Gujarat and further extension of these services to Bombay, Goa etc.
- To fulfill future power requirements of Gujarat,
  - By establishing barge mounted power plants.

  - by providing exclusive port facilities for importing different kinds of power fuels

- To attract private sector investment in the existing minor and intermediate ports and in the new port locations.

To achieve this end, Gujarat envisages an integrated port development strategy, consisting of creation of port facilities, industrialization, and development of infrastructure facilities like roads and railways in the hinterland. It is estimated that around Rs. 10,000 crores would be required to create new port facilities along with necessary infrastructure.

Recognizing the need for private investment to increase port capacity in the state, the Port Policy of the Government of Gujarat has invited PSP in the sector. The activities for which PSP is being sought in existing ports are the following:
- Incomplete works of wharf/jetty/quay.
- Private entrepreneurs will be permitted to install modern mechanical handling equipments on the wharf/jetty/quay.
- Privatization of the construction of new wharves/jetties in selected sites.

In addition, privatization of services would be done in the following areas:
- The lighterage operations will be privatized in the selected existing minor ports and in all new ports.
- Gujarat Maritime Board will gradually withdraw from the dredging operations, and transfer all assets and activities to a joint venture company to cater to the dredging needs of all the ports of Gujarat.
- Piloting
- Tug towing service
- Other essential Utility services

In terms for Greenfield sites, GMB has identified 10 green field sites for development as direct berthing deep water ports. Four of these sites/ports will be developed by GMB along with a consortium of State Government public sectors and/or consortium of private sector companies:
- Rozi (Bedi) Agriculture port
- Positra Container and Petroleum port
- Dahej Industrial port
- Mundra General cargo port

The following ports six sites/ports have been identified by GMB for exclusive investment by the private sector:
- Simar Power port
- Mithiwirdi Steel and Automobile port
- Dholera General Cargo port
- Hazira Industrial port
- Vansi-Borsi Petroleum and Liquid Chemical port
- Maroli Industrial port

These ports will be privatized through a global tender bid. Gujarat Maritime Board will undertake to do the preliminary techno-economic feasibility report. These port locations are to be given on BOMT (Built, Operate, Maintain, and Transfer) basis. Each port project would be evaluated based on an investment analysis consisting of a capital cost, revenue receipts, revenue expenditure and capital recovery. After BOMT period, the ownership of the port and its assets will get transferred to Gujarat Maritime Board and they will examine whether to give it further on lease basis to the same promoter. Under these guidelines, the port of Mundra was among the key specialist ports that were developed by the State Government with private sector participation (Gujarat Adani Port Ltd.).

Andhra Pradesh - Andhra Pradesh has twelve minor ports and one major port (Vishakhapatnam) along its 1000 km coast. In terms of minor port traffic, Andhra Pradesh is ranked third behind Gujarat

and Maharashtra and handles 9% of the total minor port traffic. Kakinada is by far the largest minor port in AP.

Andhra Pradesh was amongst the first maritime states in 1994/95 to recognize the imperative need for increased port infrastructure. Andhra Pradesh has identified ports as 'trunk infrastructure' constituting the 'infrastructure backbone' of the State in its Vision 2020 document. The Vision 2020 envisages a total minor port capacity augmentation to 186 mmtpa by year 2020 compared to the current capacity of 9.7 mmt. This involves development of 4 Ports of 30-50 mmtpa capacity each (Kakinada, Krishnapatnam, Gangavaram, Machilipatnam), in addition to making Vishakhapatnam a Mega Port (~70 mmtpa). The investment estimated to achieve this would be about Rs. 14000-17000 crore by 2020.

The port privatization in Andhra Pradesh has been based on Build-Operate-Share-Transfer (BOST) basis. The salient features of this system:

- 30 year concession period
- Port Developer to be designated as Conservator for the Port under the Indian Ports Act, 1908
- Freedom to fix tariff and set own employee policies
- Sharing of revenue with the government (5 per cent in first five years progressing to 12 per cent in later years)
- In respect of acquired land, cost of land acquisition to be borne by Developer and adjusted against share of revenue payable to the Government
- In case of new port development activity within 30 km, assured exclusivity in terms of right of first offer and refusal and at the end of the concession, etc.

Karnataka - Karnataka with a 320 km long coastline has one major commercial port called New Mangalore Port to handle all its cargo. The intermediate Karwar port is the other coastal service provider. In the past few years, the State Government has been trying to exploit its geographical advantage (of being between more active maritime States such as Gujarat, Maharashtra, and Kerala) by developing its minor ports with private investments. In December 1996, government announced a Ports Policy. In 1997, the government also identified nine potential locations for development. It meant to turn Karwar, Belekeri, Tadri, Honavar, Bhatkal, Kundapur, Hangarkatta, Malpe, and Old Mangalore -- that have small coastal and fishing activities -- into all-weather, multi-cargo and multi-user ports of international standards. These were to create facilities for the upcoming steel units, barge mounted power plants and fuel imports for power plants in the hinterland. Related industries such as ship-building and repair and support services for cargo and passenger traffic were also targeted.

However, based on a RITES feasibility report, the number of sites was scaled down to three. In November 1997, bids were called for BOOST-based development of Karwar, old Mangalore, and Belekeri. Finally, the nodal Karnataka State Industrial Investment and Development Corporation received a single offer for Tadri early last year. The lone bidder, a consortium of Hanjin Engineering and Construction of South Korea and Mumbai-based Zoom Developers, received an in principle clearance this February for developing Tadri, 40 km south of Karwar, as a multipurpose minor port with about a dozen berths. The consortium plans to develop about 1,000 acres of land for the port in two phases. The Rs 755-crore Phase 1 will handle cargo of 7-32 mtpa including general type, iron ore, and coal. The investments are expected to grow to Rs 3,000 crore over the years.

The consortium then planned to conduct surveys for a detailed techno-economic feasibility study of the project. Besides, land availability for future expansion and industrial activities will become difficult at Karwar where the new naval base Sea Bird is coming up. A crucial missing link in Karnataka's port development plans has been the long-pending Hubli-Ankola rail line. Some 10 million tonnes of high grade iron ore from the Hospet-Bellary steel belt have to routed through Tamil Nadu and Goa ports each year for want of a rail link to the hinterland. Clamoring for rail and port facilities are major projects such as Jindal Vijayanagar, Mukand Vijaynagar and Bellary Steel.

Unfortunately, Karnataka's port plan does not seem to take off as much of its coastline falls in the sensitive Western Ghat belt, pitting several industrial plans against strident environmental concerns. Often, there are arguments for relaxing the CRZ (coastal regulatory zone) norms in favour of port development.

A Karnataka Maritime Board has been proposed on the lines of boards in Gujarat, but is yet to be enacted into law. Hence, incentives for PSP are not so clear right now.

7.3 Way forward and policy directions

The State Governments should play a more proactive role in implementing its policy so as to realize the benefits of private sector participation in port development. The Maritime Boards should only perform the role of a regulator and as a facilitator of services, as is in the case of the landlord model. Based on the review of the present Government of India Port Policy, the initiatives by the various states and the concomitant policy directions, the following policy directions are suggested:

7.3.1 Planning port sector development

The policy implications for state level port policies to address the issues and developments discussed above can be decomposed into four distinct steps:

The first would be construction of a holistic policy framework keeping in mind the issues discussed previously.

- Next would be the review of current policies and where exactly does it needs to be strengthened when juxtaposed with appropriate policy guidelines.
- The third step would be the actual integration of the existing and new policies.
- Lastly the legislative and regulatory changes required for bringing in commensurate changes in the Maritime policy paradigm of the country.

The key principle here is to reject a piecemeal approach to port development and make the sector globally competitive. Hence, port development would need to be planned in conjunction with international shipping, inland waterways, and coastal shipping to fully realize the potential of sea-borne trade for the accelerated development. Hence, each state should be encouraged to develop a detailed Master Plan involving an analysis of trade trends, cargo facilities necessary, infrastructural and logistical requirements, etc. Such a plan needs to be substantiated with quantifiable targets taking into account realistic projections about Port traffic, IWT traffic, Port capacity, IWT terminal capacity and investments required to reach these targets.

7.3.2 Interconnectivity issues

Interconnectivity is another key parameter to ensure the success of a port. This would require a sequence of activities starting from setting up an efficient transportation route linking the new minor ports with major and minor ports, rail and road, and an intricate web of inland waterways. The activities should ideally start off with an origin destination study evaluating the financial viability and the locational feasibility of the proposed minor ports. Once that has been established, then the minor ports should be identified along with their strategic positions in the entire grid. Finally for the investments, private participation should be systematically encouraged, keeping in mind the locational and operational characteristics of each venue and each project under it.

7.3.3 Financing and private participation

To ensure the financing of port projects, there needs to be much more flexibility in granting projects to private bidders in terms of the nature of the contract than is currently there in the existing guidelines in states. For instance, options like annuity and management contracts must also be explored in addition to the variants of the BOT mode that are currently in vogue. Here lessons from the National Highway Development Program are relevant. As opposed to the current approach of

project by project approval for private participation by the State Government, the implementing agency, such as the maritime board, could be given a program approval for implementing the entire master plan and hence reduce bureaucratic delays in PSP approvals.

7.3.4 Incentives for private participation

- Exclusivity and monopoly provisions are considered important by private investors. This also appears to be rational as it allows some guarantee of market size to private port developers while at the same time allowing them to exploit efficiency gains by not being encumbered by explicit revenue or market guarantee clauses. These clauses could be either restrictions or rights on port development in the neighborhood as in the case of AP, or discouraging development of captive jetties, as in the case of Gujarat.

- The other issue of import to greenfield ports is transport connectivity with the hinterland. Since this connectivity is usually by means other than maritime transport, state agencies such as the Department of Roads of the State Government or Indian Railways have an important role to play. This is where the State Government can facilitate private investment by ensuring that issues such as transport connectivity for new ports are resolved before the project is put out for bidding.

- The most significant port development cost items are such as land, breakwater, etc. Participation of the State Government in the project, whether by way of grant or equity, could be though making available land for the port and the associated breakwater, etc.

- Privatization process issues are critical to all PSP in infrastructure. In the ports sector, the concern emanates from ambiguity and complexity in the tax regime, environmental and other clearances required for port development, services of other utilities such as power and water. In this regard, the PSP process could be canalized through a dedicated PSP unit that could also provide single window clearances for PSP projects. This agency could also provide clarity to the PSP procedures, laws, and regulations to private developers.

7.3.5 Competition issues

Inter-port competition does not exist in India due to long distances between ports and poor interface of ports with the rest of the transport network. The users are constrained in the choice of ports by the availability of road and rail network. Integration of ports with the transport system is necessary to increase inter port competition. Intra port competition should also be encouraged wherever possible and new facilities should be concessioned to multiple providers. The concession agreement should also be designed that there are no restrictions in the agreement on developing competing facilities. All future investments in ports should be left to the private sector and the government must move away from additional public investment in port infrastructure.

7.3.6 Labour reforms

The enormous gap between the number of labour required given modern cargo handling technology, and actual number of workers in the port is a major deterrent for private investment in port facilities. An appropriate voluntary retirement scheme should be designed so as to reduce excess staff. Proper training should be given to the port employees to improve their performance and productivity. The performance of port employees should be judged and linked to their productivity.

7.4 Conclusions

The policy initiatives delineated so far have had a tremendous positive impact on the performance of the Indian port sector, particularly Major ports. In terms of the traditional indicators of port performance, pre-berthing delay and vessel turn around time have been reduced has been reduced, labour force has decreased resulting in increased capacity being able to meet increasing traffic volumes. Some of the major private sector projects boosting growth and development in major Indian

ports in the last five years have been container terminals at JNPT like the Nava-Sheva International Container Terminal and Liquid Cargo Berth for BPCL/IOC; container Terminal at Tuticorin by PSA/SICAL; oil Jetty by IFFCO and IOC at Kandla; container Terminal by P&O, Australia at Chennai; captive Fertilizer Berth at Paradip by Oswal Fertilizers and construction of a new port at Ennore along with equipment by TNEB at Coal Berth.

This experience needs to be replicated in minor ports as well. Several states have taken initiatives to improve port capacity and performance where after an already considerable private investment of Rs.4714 crores. However, the strategy to achieve the policy objective has not been thought through and progress so far has been halting and ad hoc. There is no concerted move to speed up the privatization of all port services. Adequate attention has not also been paid to strengthen the support infrastructure such as land and rail connections and to streamline administrative and customs procedures including MIS. The way forward is for the states is to develop an integrated approach for the commercialization and privatization of port services.

The above policy review and recommendations forms the basis for a master plan for port development in the State. This plan should be followed by a full operational plan linked to the annual budget cycle to ensure that the resources outlined in this policy are in fact available as needed to support the State port development plan.

8 Proposed scheme for regulating fees and tariffs in the minor ports sector

- See section 3.2.3 (Minor Ports) of Volume 1

8.1 General background

Even though the freedom to set their own fees and tariffs may only marginally help any of the individual minor ports in the 3 Project States to compete with:

- other minor ports within the state;
- minor ports located in other states; and
- major ports, both inside and outside the state,

it would seem counterintuitive[26] to provide, through a law or other regulatory mechanism, for uniform state port fees and tariffs if one wishes to promote, as a matter of policy, either competition in the port sector in general or more particularly PSP within a competitive port sector.

We recommend therefore that port authorities, port facility operators, marine port services providers and port services providers all be granted, in each of the 3 Project States, the freedom to set their own fees and tariffs. Freedom to set fees and tariffs should therefore be maintained in Gujarat and in AP, and re-introduced in Karnataka by way of the repeal of that State's *Ports (Landing and Shipping Fees) Act, 1961*[27]. However such freedom also entails the possibility of abuses, especially in terms of price gouging[28] and predatory pricing[29].

There are two general approaches to prevent or moderate anti-competitive behaviour in fees and tariffs-setting. The first is for the Government, or a specialised agency thereof, to prevent any harm from being done in the first place and therefore legally dictate what fees can be fixed for what services. Section 48 of the GOI *Major Port Trusts Act, 1963*[30] is a good example of this first approach:

> ***48. Scales of rates for services performed by Board or other person***
>
> (1) The Authority[31] shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorised under section 42 at or in relation to the port or port approaches-
>
> (a) transhipping of passengers or goods between vessels in the port or port approaches;
>
> (b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;
>
> (c) carriage or porterage of goods on any such place;

[26] Consider however the following precedent: "The Tariff Authority for Major Ports (TAMP) was established in 1997 as a distinct body under the umbrella of MOST to regulate port tariffs independently from the Port Trusts. TAMP has responsibility for setting the tariffs of the major ports…TAMP was created in response to protests by private partners in the port system that they could not expect fair treatment on tariff matters from the Port which is their commercial competitor." (World Bank and Public-Private Infrastructure Advisory Facility, *India: Country Framework Report for Private Participation in Infrastructure*, 1999 at p. 46.)

[27] Karnataka Act 20 of 1961, as amended by Act 8 of 1980.

[28] Using monopoly power to charge excessive fees for services.

[29] Selling services below cost to induce a rival's exit from the market, deter future entry or dissuade a rival from future competition.

[30] GOI Act No. 38 of 1963.

[31] The Tariff Authority for Major Ports (TAMP). GOI Act No. 15 of 1997, adding Chapter V-A, Sections 47A to 47H, to the *Major Port Trusts Act, 1963*.

(d) wharfage, storage or demurrage of goods on any such place;

(e) any other service in respect of vessels, passengers or goods.

(2) Different scales and conditions may be framed for different classes of goods and vessels.

The second approach is to intervene only in limited cases and upon proof by a complainant that there has been a pricing abuse. An example of this approach is section 49 and following of the *Canada Marine Act* [32]:

49. Fixing of fees

(1) A port authority may fix fees to be paid in respect of –

(a) ships, vehicles, aircraft and persons coming into or using the port;

(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port; and

(c) any service provided by the port authority, or any right or privilege conferred by it, in respect of the port. (…)

(3) The fees fixed by a port authority shall be at a level that permits it to operate on a self-sustaining financial basis and shall be fair and reasonable.

50. Discrimination among users

(1) A port authority shall not unjustly discriminate among users or classes of users of the port, give an undue or unreasonable preference to any user or class of user or subject any user or class of user to an undue or unreasonable disadvantage.

(2) It is not unjust discrimination and it is not an undue nor an unreasonable preference or disadvantage for a port authority to differentiate among users or classes of users on the basis of the volume or value of goods shipped or on any other basis that is generally commercially accepted. (…)

52. Complaints

(1) Any interested person may at any time file a complaint with the [Canadian Transportation] Agency that there is unjust discrimination in a fee fixed under subsection 49(1), and the Agency shall consider the complaint without delay and report its findings to the port authority, and the port authority shall govern itself accordingly. (…)

In section 2 of this Document, we have prepared a draft scheme which adopts a middle approach between, on the one hand, the Government fees and tariffs-setting approach of section 48 of the GOI *Major Port Trusts Act, 1963* and, and on the other hand, the minimalist remedial oversight approach of section 52 the *Canada Marine Act.* In section 3 of this Document we provide a short explanation on the most important elements of the regulatory scheme contained in section 2.

8.2 Draft provisions

PART I

1. Definitions

In this Act:

[32] S.C. 1998, c. 10.

"fee" means any harbour dues, berthage and wharfage, as well as duties, tolls, rates and other charges;

"marine services" means *inter alia* all services in respect of towage, pilotage and mooring of vessels, sounding of fairways and other navigable waters, the lifting of sunken vessels, salvage of vessels, the fighting of fires aboard vessels, and all related activities as well as the provision of facilities, vessels and equipment to perform these activities;

"marine services provider" means any person who provides a marine service;

"Minister" means the minister responsible for ports;

"person" includes a company, a corporate body or organisation;

"port" means any sea and land area along the coast of [name of the appropriate State] and any navigable river or channel leading into such a place, forming an economic entity with the purpose of accommodating seagoing vessels, having the legal status of minor port;

"port facility" means a wharf, pier, breakwater, terminal, warehouse or other building or work used in connection with navigation or shipping;

"port services" means *inter alia* port terminal services and facilities for the handling, storage and transportation of goods on land adjoining the foreshore of [name of the appropriate State] and for the handling of passengers carried by vessels, and all related activities as well as the provision of facilities and equipment to perform these activities.

"port services provider" means any person who provides a port service; and,

"tariff" means a schedule of fees and terms and conditions applicable to the services performed by a port authority, a port facility operator, a marine services provider or a port services provider.

2. Non-Application

This Act shall not apply to a person who controls or manages a port or a port facility for the exclusive use of, or who provides marine services or port services for the exclusive use of, himself or, in the case of a corporate body, for one of its subsidiaries, a parent company or any subsidiaries of the parent company.

PART II

3. Fixing of fees by a port authority or a port facility operator

(1) A port authority or a port facility operator may fix fees to be paid in respect of –

(a) ships, vehicles, aircraft and persons coming into or using the port or port facility;

(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or port facility or moved across the port or port facility; and

(c) any service provided by the port authority or the port facility operator, or any right or privilege conferred by it, in respect of the port or port facility, as the case may be.

(2) The fees fixed by a port authority or a port facility operator shall be at a level that permits it to operate on a self-sustaining financial basis and shall be fair and reasonable.

4. Fixing of fees by a marine services provider or port services provider

(1) A marine services provider may fix fees to be paid in respect of any marine services it provides.

(2) A port services provider may fix fees to be paid in respect of any port services it provides.

(3) The fees fixed by a marine services provider or a port services provider, as the case may be, shall be at a level that permits it to operate on a self-sustaining financial basis and shall be fair and reasonable.

5. How fees are be charged

(1) A port authority, port facility operator, marine services provider or port services provider shall not fix any fee, or any increase to that fee, unless the fee, or the increase, is set out in a tariff which is –

(a) publicly displayed at the port or port facility where the service is offered or made available for public inspection at the business offices of the port authority, port facility operator, marine services provider or port services provider; and,

(b) filed with the Regulator prior to its coming into effect.

(2) A port authority, port facility operator, marine services provider or port services provider shall supply a copy or excerpt of his tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

6. Prescribed information and waiver

The tariff must include any information that the Regulator may prescribe by regulation. The Regulator may also by regulation exclude any port authority, port facility operator, marine services provider or port services provider or any class of service providers from the obligation of having to file tariffs with the Regulator.

7. Tariff to be supplied on request

A port authority, port facility operator, marine services provider or port services provider shall supply to a person who so requests it a tariff with respect to those services specified by the person, and this no later than seven (7) days after the request has been made.

8. Disallowance of unreasonable fees

(1) Where, on complaint in writing to the Regulator by any person or on its own motion, the Regulator finds that a port authority, port facility operator, marine services provider or port services provider has imposed a fee that is unreasonable, the Regulator may, by order -

(a) disallow the fee;

(b) direct the port authority, port facility operator, marine services provider or port services provider to reduce the fee by such amounts and for such periods as the Regulator considers reasonable in the circumstances; or

(c) direct the port authority, port facility operator, marine services provider or port services provider, where practicable, to refund amounts specified by the Regulator, with interest calculated in the manner prescribed by the Regulator, to persons determined by the Regulator to have been overcharged by him as a result of the imposition of the fee.

(2) When exercising its powers under sub-paragraph (1) (b) of this section the Regulator shall satisfy itself that the fee so reduced remains compensatory. A fee is compensatory when it exceeds the variable costs involved in providing the service to which the fee applies.

9. Disallowance of discriminatory fees

(1) Where, on complaint in writing to the Regulator by any person or on its own motion, the Regulator finds that a port authority, port facility operator, marine services provider or port services provider has imposed a fee that unjustly discriminates among users or classes of users, gives an undue or unreasonable preference to any user or class of user or subjects any user or class of user to an undue or unreasonable disadvantage, the Regulator may, by order -

(a) disallow the fee;

(b) direct the port authority, port facility operator, marine services provider or port services provider to increase or reduce the fee by such amounts and for such periods as the Regulator considers reasonable in the circumstances; or

(c) direct the port authority, port facility operator, marine services provider or port services provider, where practicable, to refund amounts specified by the Regulator, with interest calculated in the manner prescribed by the Regulator, to persons determined by the Regulator to have been overcharged by him as a result of the imposition of the fee.

(2) It is not unjust discrimination and it is not an undue nor an unreasonable preference or disadvantage for port authority, port facility operator, marine services provider or port services provider to differentiate among users or classes of users on the basis of the volume or value of goods shipped or on any other basis that is generally commercially accepted.

(3) When, in the exercise of its powers under sub-paragraph (1) (a) of this section, the Regulator directs a port authority, port facility operator, marine services provider or port services provider to reduce a fee, it shall satisfy itself that the fee so reduced remains compensatory.

9. Disallowance of predatory fees

Where, on complaint in writing to the Regulator by any person, the Regulator finds that a port authority, port facility operator, marine services provider or port services provider has imposed a fee that is not compensatory, the Regulator may, unless the port authority, port facility operator, marine services provider or port services provider establishes to the satisfaction of the Regulator that the fee does not have the effect or tendency of lessening competition or harming a competitor and was not designed to have that effect, make an order disallowing the fee and requiring the port authority, port facility operator, marine services provider or port services provider to substitute for that fee a fee that is compensatory.

PART III

11. Ancillary powers

(1) The Regulator has all authority to perform any act or make or issue any regulation, order and decision that is necessary or proper for the exercise of its powers and duties under this Act.

(2) A regulation, rule, order or decision made or issued by the Regulator may be conditional or unconditional and may be general or restricted to a specific person, port, port facility, marine services provider or port service provider.

12. Investigation of complaints

When the Regulator is required to investigate a matter pursuant to a complaint, the Regulator shall -

(a) conduct, as expeditiously as possible, the investigation of the complaint; and

(b) within sixty days (60) after receipt of the complaint, determine the matter and issue the required order, as the case may be.

13. Financial Information

The Regulator may order any port authority, port facility operator, marine services provider or port services provider at all times to supply it with such accounts, budgets, returns, statements, documents, records, books, reports or other information as the Regulator judges necessary for the proper discharge of its duties.

14. Appointment of person to conduct investigation

The Regulator may appoint any person having the appropriate qualifications to conduct any investigation that the Regulator is authorised to conduct and report to the Regulator. On receipt of the report, the Regulator may adopt the report as a decision or order of the Regulator or otherwise deal with it as it considers advisable.

15. Powers of investigation

The Regulator, or person conducting an investigation on behalf of the Regulator, may, for the purposes of the investigation –

(a) enter and inspect any port or port facility when such appears to be necessary for the proper conduct of the investigation; and,

(b) summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that are necessary for the proper conduct of the investigation.

16. Offences

Every person who contravenes an order made by the Regulator is guilty of an offence and liable on summary conviction -

(a) in the case of an individual, to a fine not exceeding XXX Rupees, and

(b) in the case of a corporate body, to a fine not exceeding YYY Rupees,

for each day the person contravenes the order.

8.3 Explanation

The main point to make concerning the legal scheme embodied in the draft provisions which appear in section 2 of this Document, *supra*, is this:

The Regulator is given the mandate to disallow certain kind of fees: those that are unreasonable (section 8), those that are discriminatory (section 9) and those that are predatory (section 10). The enforcement of these provisions are its core mandate. Sections 8 and 9 are aimed at protecting port users, while section 10 is aimed at protecting competitors or potential competitors of a port authority, port facility operator, marine services provider or port services provider. However fees by themselves mean little unless one knows the conditions of service to which these fees attach, hence the obligation, under section 5, for the port authority, port facility operator, marine services provider or port services provider to issue a tariff.

How active will the Regulator be? This is difficult to say. Much will depend, of course, on how much port activity is going on in a given State, the willingness of aggrieved parties to seek redress, etc. It is not necessarily important either that the Regulator be inundated with complaints by port users or competitors of port authorities, port facility operators, marine services providers or port services providers; the mere fact that provisions such as sections 8, 9 and 10 exist in the first place can act, in a number of cases, as a sufficient deterrent to potential anti-competitive behaviour. This is a legitimate and useful regulatory exercise by itself.

We have referred throughout the above draft provisions to a "Regulator" without specifying who that Regulator will be for any of the 3 Project States.

We believe that in all 3 Project States no special regulatory body, such as GOI's TAMP, should be created just to enforce the proposed scheme set out above. A reasonable alternative would be for the minister responsible for ports in the State to act as *de jure* Regulator, although in practice he could delegate this role to a part-time panel of 3 or more experts, appointed by him and approved by the State Government.

In Gujarat there is the possibility, discussed in section 3.2.3 of Volume 1, for the enactment of two new acts, namely the Gujarat Ports Authority Act and the Gujarat Maritime Authority Act.

In theory the proposed new Gujarat Maritime Authority could be the designated Regulator for that State. Under section 10 (1)(f) of the proposed new Act, the Gujarat Maritime Authority : "is to exercise regulatory and licensing functions in respect of marine services and facilities." Not included are regulatory functions with respect to port services and facilities, including matters related to the fees charged for these port services. This could easily be corrected by adding to the list of functions and duties of the Authority found at section 10 the following new duties: "the administration and enforcement of Part [***] of this Act", i.e. the scheme set out above. The other difficulty, crucial in our view, is the very real conflict of interest that the Authority may encounter when acting as a marine services provider under the Act and also as a Regulator. While most of its duties in that regard will probably be delegated to others, it cannot be excluded that it will provide some of these services itself. We therefore do not feel that the Gujarat Maritime Authority, if such a body is created eventually in Gujarat, should be entrusted with the enforcement of the scheme set out in section 2 of this Document.

9 Comments on the draft Gujarat Maritime Authority Act and the draft Gujarat Ports Authority Act

- See section 3.2.3 (Minor Ports) of Volume 1

Preamble

The Gujarat Maritime Board Act, 1981 was enacted to provide for the constitution of a Maritime Board (the "Board") for minor ports in the State of Gujarat and to vest it with the administration, control and management of such ports.[33] The Board reports to the State Department of Ports and Fisheries. The following is a summary of some important provisions of the Gujarat Maritime Board Act 1981 for the purpose of comparison with the provisions of the draft legislation discussed later in this document.

Transfer of Property – Section 20 provides that, as of the appointed day, in relation to any port, all property, assets and funds and all rights to levy rates vested in the State Government for the purposes of the port shall vest in the Board.

Provision of Marine and Port Services and Facilities – Section 25 refers to the power of the Board to execute works and provide appliances, including wharves, docks, jetties, sheds, hotels, warehouses, moorings, cranes, breakwaters, dredgers, light-houses, light-ships, beacons, buoys, vessels, tugs, barges, dry docks, slipways and boat basins. Further, Section 32 provides that the Board may undertake or authorize any person to perform services such as stevedoring, landing, shipping or transshipping passengers and goods; piloting, hauling, mooring, remooring, hooking or measuring of vessels; carrying passengers within the limits of ports or port approaches, and receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. Section 35 contemplates the construction of private wharves etc. within a port subject to conditions.

Imposition of Rates – Sections 37-39 make provision for the Board to frame a scale of rates for services performed by the Board or other person, for use of property belonging to the Board and consolidated scale of rates for any combination of services or for any combination of services with any use of property of the Board. As per Section 40, such rates require the prior sanction of the State Government, which may direct the Board to cancel any of the scales in force or modify the same. Section 43 empowers the Board, in special cases, to exempt either wholly or partially any goods, vehicles or vessels from the payment of any rate or of any charge leviable in respect thereof, or to remit the whole or any portion of such rate or charge so levied.

Power of State Government to supersede, give directions to the Board – As per Section 94, the State Government may by notification in the *Official Gazette* supersede the Board for such period, not exceeding six months at a time, as may be specified in the notification, if it is of the opinion that (i) on account of a grave emergency, the Board is unable to perform its duties, or (ii) the Board has persistently made default in the performance of its duties, and as a result of such default, the financial position of the Board or administration of the ports has greatly deteriorated. In addition, Section 95 stipulates that the Board shall, in the discharge of its functions, be bound by such directions on question of policy as the State Government may give to it in writing from time to time.

Power of the Board to make regulations – Section 110 provides that the Board may make regulations with respect to all or any of the matters contain therein, whereas Section 112 empowers the State Government to direct the Board to make or amend any regulations, if the Government considers it necessary in public interest to do so. Further, Section 113 stipulates that the State

[33] Preamble, *The Gujarat Maritime Board Act, 1981* (Gujarat Act No. 30 of 1981).

Government shall make the first regulations under the Act, notwithstanding anything contained therein.

The State Government is now planning to revise the Board and to create a separate maritime regulatory agency through the enactment, respectively, of the proposed Gujarat Ports Authority Act and the Gujarat Maritime Authority Act. By splitting up the functions of the Board and vesting them in two Authorities, the Government is seeking to separate service delivery and development from regulatory functions. Apart from the establishment of the Authorities - the Gujarat Ports Authority and the Gujarat Maritime Authority - the Preamble to both the draft Acts provides for the repeal of the Gujarat Maritime Board Act, 1981. Presumably, this is an oversight, given that the repeal of the Gujarat Maritime Board Act, 1981 may be effected by one Act alone.

Our review of the draft Acts is limited to an examination of whether there exists proper separation of powers and functions between the two Authorities; whether the draft Acts allow and encourage private sector participation in marine and port services and facilities, and further, whether there are any overlaps/discrepancies between the said Acts. Our comments on some of the provisions of the proposed legislation are given in italics.

9.1 Functions and Powers of the Authorities

The Gujarat Maritime Authority Act (the "GMAA")

As per the GMAA, the Gujarat Maritime Authority (the "GMA") shall be responsible for all maritime affairs, including but not limited to nautical safety, vessel traffic management, pilot-age, aids to navigation, and for the protection of the marine environment in the minor ports of the State and the approaches thereof (Section 6).

Section 10(1) of the GMAA deals with the functions and duties of the GMA, which, subject to the provisions of the Act, include:

Administering waters within the limits of the minor ports;

Acting as Conservator for every minor port in the State;

Providing and maintaining, or causing to be provided and maintained, adequate and efficient aids to navigation within the limits of the minor ports and approaches thereto; and

Exercising regulatory and licensing functions in respect of marine services and facilities.

Section 10(6) stipulates that the GMA may provide any marine service and facilities for a maximum period of two years, in the event that it feels that a marine services provider has failed to discharge or is not discharging his contractual obligations towards the GMA. Section 10(7) contemplates an extension of such period by the State Government in special circumstances. Further, Section 18 specifies marine services that may be provided by the GMA, subject to the provisions of the Act or any other Act.

In contrast to the corresponding provision under the Gujarat Maritime Board Act, 1981, Section 13 contemplates that the GMA shall, in the exercise of its functions, be bound to give effect to any direction of the State Government only (i) on the occurrence of any public emergency, in the interests of public security, national defence or relations with the Government of any other country, or (ii) to discharge or facilitate the discharge of an obligation binding the Government by virtue of its being a member of an international organization or a party to an international agreement. Moreover, the State Government shall give any such direction after consultation with the GMA.

Section 30 contains the power of the GMA to make regulations with the approval of the State Government for, amongst other things, the safety and security of maritime traffic, vessel traffic control and management in the minor port and in the approaches thereto, and protection of the

marine environment. The regulations may cover matters such as regulating the licensing and use of pilots engaged in piloting vessels calling at the minor ports; regulating, directing and controlling the navigation of vessels and all marine activities carried on in the waters of the port and at the wharves or by using a mooring buoy or at anchor in respect of vessels, prescribing conditions for pilot-age, for towage, for supply of water and fuel to vessels and for the disposal of garbage and waste; and the regulation and licensing of organizations or individuals who provide engineering, surveying, ship handling and ship repairing services in any minor port. Section 31 provides further that the GMA shall make regulations in respect of all or any matters for which regulations are required by the Act, any other written law or any international convention. Section 87 then reiterates that the GMA may make regulations for the purposes and provisions of the Act.

Section 68 permits the GMA, subject to the provisions of the Act, to levy such rates, charges and fees for the use of its services and facilities as may be prescribed by the GMA from time to time by notification in the *Official Gazette*; to determine the fees to be paid in respect of the issue or renewal of any license or permit issued under the Act; and to remit or waive, if it thinks fit, the whole or any part of any rates, charges, dues and fees paid or payable under the Act. The Section further provides that the owner, agent or Master of any vessel, which enters, leaves, uses or plies within a minor port, shall pay the GMA such dues as it may prescribe by notification.

The Gujarat Ports Authority Act (the "GPAA")

Under the GPAA, the Gujarat Ports Authority (the "GPA") is charged with the responsibility of administering and managing all minor ports in the State (Section 5).

To this end, Section 10(1) provides for the functions and powers of the GPA to include, subject to the provisions of the Act, the following:

Promoting the use, improvement and development of the ports and their hinterlands;

Administering land *and waters* within the limits of the ports;

Providing for the construction and adequate maintenance of basic infrastructure and operational infrastructure of the ports;

Maintaining or providing for the maintenance of all other premises in the ports, except those premises which are leased out or concessioned to marine and/or port service providers;

Prohibiting, regulating and controlling the use of land within the limits of the ports and the presence of any person, ship, vehicle or goods.

Section 10(7)[34] stipulates that the GPA may provide any marine or port services and facilities itself, if (i) no marine or port service provider is willing to provide the necessary services, or (ii) the GPA is of the opinion that a marine or port services provider has failed to discharge or is not discharging his contractual obligations towards it, in which case, the GPA may only provide such services for a maximum period of two years. *There is no provision for extension of such period, unlike under the GMAA.*

Section 12 contains the circumstances under which the GPA shall be bound to give effect to any direction of the State Government and is similar to Section 13 of the GMAA.

Section 15 refers to the appointment of committees and permits the Board of Directors of the GPA to delegate all or any of its powers, functions and duties, except the powers to *make regulations*, prescribe or levy dues and rates and borrow money, to any such committee or to any member or employee of the GPA or any person.

[34] This should actually be sub-clause (6), but has mistakenly been numbered as sub-clause (7).

Sections 19 and 20, respectively, cover the provision of services by marine service providers and port services providers, while Section 21 stipulates that marine and port services providers are free to set rates and charges as they see fit, notwithstanding anything in the GMAA or in any other written law. Accordingly, the rates and charges included in any concession agreement or lease agreement, entered into by any such marine or port services provider with the GPA, shall be valid during the term of the agreement or during such other term and conditions as may be agreed. At the same time, Section 53 provides that the GPA shall take into account the public license issued by the GMA, when concluding a concession agreement with any marine services provider in a minor port, and further, that in the case of conflict the provisions and conditions of the public license shall prevail. *Reading Sections 21 and 53 together, it seems that freedom of any marine services provider to set rates and charges in the concession agreement would be circumscribed by relevant terms and conditions of the public license, if any.*

Section 41 confers on the GPA, subject to the provisions of the Act, the power to levy rates, charges and fees by notification for the use of its services and facilities; *to determine the fees to be paid in respect of the issue or renewal of any license or permit issued under the Act*, and to remit or waive, if it thinks fit, the whole or any part of any rates, charges, dues and fees paid or payable under the Act[35]. Also, the GPA may by notification levy goods dues on goods brought into or taken out of any minor port or private wharf, pier or premises.

9.2 Private Sector Participation

Both the draft Acts require the GMA or the GPA, as the case may be, to attract *local and foreign* private investors in marine *and port* services and facilities, in the discharge of its functions and duties [36]. Furthermore, each of the two Acts stipulates that the GMA or the GPA, as the case may be, shall have regard to enabling persons providing marine and port services and facilities in the State to compete effectively in the provision of the same[37].

Other relevant provisions of the draft Acts are as follows:

Section 33 of the GMAA empowers the GMA to enter into such contracts as are necessary for the discharge of its functions, and in the case of contracts for the supply of goods and material or for the execution of works, provides for the publishing of notice of intention to enter into such contracts and invitation of tenders, as far as practicable.

Section 10(2)(c) of the GPAA stipulates that the GPA shall conclude lease agreements with marine and/or ports service providers under such terms and conditions as it thinks fit, while Section 21, as discussed earlier, provides for marine and port service providers to set rates and charges as they see fit.

Section 32[38] of the GPAA empowers the State Government to exempt from any license, fees or taxes any equipment, belonging to the GPA or any marine or port service provider and being used exclusively within the limits of any port.

The provisions contained in the draft Acts concerning private sector participation (PSP) in minor ports in the State, including any implementing rules, would have to be integrated with the wider legal and regulatory framework for encouraging such PSP, as provided by the *Gujarat Infrastructure Development Act, 1999*[39] and the Rules framed there under (presently in draft form). The said Act envisions PSP in the financing, construction, maintenance and operation of infrastructure projects, including minor ports and harbours thereof, by way of concession agreements. The Gujarat Infrastructure Development Board is established for implementation of that purpose.

[35] This provision is similar to Section 68 of the GMAA.
[36] Sections 10(2)(c) and 10(2)(b), respectively, of the GMAA and GPAA. The GMAA makes reference to local and foreign investors in the said Section, while the GPAA includes port services and facilities therein.
[37] Section 10(3)(e) of the GMAA and GPAA.
[38] This should actually be Section 33, as Section 32 already exists.
[39] Gujarat Act No. 11 of 1999.

9.3 Overlaps/Discrepancies between the Draft Acts, if any

There is considerable overlap between the powers and functions of the GMA and the GPA, as highlighted below:

One of the principal functions of the GMA is to administer waters within the limits of minor ports. The principal functions of the GPA also include administration of land and waters within the limits of the ports;

Both the GMA and the GPA are required to deepen, improve or alter approaches and water areas within the limits of the minor ports, whether by themselves or by any other party;

Another common function of the GMA and the GPA is to secure that there are provided in the minor ports adequate and efficient marine services and facilities on such terms as the GMA or the GPA, as the case may be, may think expedient;

Similarly, both the GMA and the GPA have the responsibility to secure that any person by whom any marine services or facilities have to be provided in minor ports is able to provide them efficiently whilst maintaining independent financial viability;

As mentioned earlier, the GMA and the GPA may provide any marine services and facilities themselves, if they are of the opinion that a marine services provider has failed to discharge or is not discharging his contractual obligations towards the GMA or the GPA, as the case may be. The GPA may also, unlike the GMA, provide such services if no marine or port services provider is willing to provide the same. *This suggests that, compared with the GPA, the intention of the GMAA is to allow the GMA to provide marine services and facilities only in certain, very limited, circumstances.*

In addition, there is some discrepancy between the provisions of the GMAA and the GPAA with regard to the transfer and vesting of the property of the Board. Thus, while Section 25(1) of the GMAA provides for all water areas within the limits of the minor ports and the approaches thereto, possessed or administered by the Board, to be transferred to and vested in the GMA, Section 27(1) of the GPAA provides for the same, as well as all land held, possessed or administered by the Board, to be transferred to and vested in the GPA. Further, the GPAA makes provision for the transfer of all movable and immovable property held or possessed by the Board to the GPA, whereas the GMAA provides for the transfer to the GMA of all such property related to maritime safety and protection of marine environment, including all vessels, buoys, beacons, and lighthouses. Notably, the GPA is empowered, by virtue of Section 32 of the GPAA, to sell land or water area within the limits of the ports with the approval of the State Government.

Further, Section 71 of the GMAA contemplates that as from the appointed day, such property, rights and liabilities in respect of marine services under Part IV (i.e. Section 18) vested in the Board, as may be determined by the State Government, shall become the property, rights and liabilities of the GMA. Section 45 of the GPAA, on the other hand, provides for the transfer to the GPA of "…such property, rights and liabilities in respect of any function and duty under section 10 of any port, vested in the Board as may be determined by the State Government…". *Thus, it seems that the draft Acts attempt to distinguish between property, rights and liabilities in respect of marine services and those in respect of any port and to transfer each of them to the GMA and GPA, respectively. However, such a distinction may be problematic, since the GPA may, under Section 10, itself provide any marine services and facilities in certain circumstances.*

9.4 Conclusion

As set out at the beginning, the scope of review of the draft ports legislation in Gujarat has been restricted to an examination of three issues concerning separation of powers and functions between the two Authorities, encouraging private sector participation, and existence of any overlap/discrepancies between the two Acts. These issues have been discussed with reference to

relevant provisions contained in the draft Acts and our conclusions regarding the same may be summarized as follows:

Separation of Powers and Functions – The division of responsibility between the GMA and the GPA, as proposed by the draft Acts, may not achieve the objective of separation of service delivery and development from regulatory functions. As per the current position, the GMA may provide marine services and facilities listed under Section 18; however, this is subject to the provisions of the Act, including Section 10(6) and the circumstances contemplated therein. The suggestion that the GMAA seeks to limit the circumstances in which the GMA may provide marine services and facilities is reinforced by the corresponding provision in the GPAA, which additionally permits the GPA to provide such services if no service provider is willing to provide the same. Nevertheless, even though the GMA may provide marine services and facilities only in limited circumstances, the potential for conflict of interest between its service delivery and regulatory functions remains.

Further, the GMA is responsible for exercising regulatory and licensing functions in respect of only marine services and facilities. The GPAA, on the other hand, makes references to the power of the GPA to frame regulations and to issue licenses there under, though it is not clear what these regulations/licenses might be.

It is recommended that the provision of marine and port services and facilities in the circumstances specified in the draft Acts should be left to the GPA, while the GMA should look after the regulatory functions in respect of both marine and port services and facilities.

Private Sector Participation – Both the draft Acts contain provisions aimed at allowing and encouraging private sector participation, and require the GMA or the GPA, as the case may be, to enable effective competition in the provision of marine *and port* services and facilities. As mentioned earlier, such provisions, including any implementing rules, would have to be integrated within the wider framework for PSP provided by the Gujarat Infrastructure Development Act, 1999 and the Rules framed there under.

It is suggested that the GPA should be charged with the responsibility of encouraging private investment, while that of promoting effective competition in the provision of services should rest primarily with the GMA. Moreover, if the above recommendation regarding the proper division of responsibility between the GMA and the GPA is adopted, there should be no difficulty in designating the GMA as 'Regulator' for the State, provided for in the 'Proposed Scheme for Regulating Fees and Tariffs in the Minor Ports Sector' (Document 8 of this Volume).

Overlaps and Discrepancies – In the preceding discussion, some of the overlaps and discrepancies between the proposed legislation, as regards the powers and functions and the property of the GMA and the GPA, have been highlighted. It is recommended that the relevant provisions be amended and inconsistencies reconciled, before the draft Acts can serve as the basis for preparing a comprehensive port regulatory framework for the State of Gujarat as also for the other maritime project states.

10 Draft urban mass transit policy for Andhra Pradesh

- See section 3.2.3 (Urban Mass Transit) of Volume 1

This document has been prepared as part of a Technical Assistance Project provided by the Asian Development Bank to the Governments of Andhra Pradesh, Gujarat, Karnataka and Madhya Pradesh. This policy statement is meant to offer a starting point for the development of a clear policy statement at the State Government level covering this sector and providing a degree of clarity as to the intentions of the State Government. In some cases, these policy statements can be used as a foundation for the development of an Act which legally enshrines these intentions into Law. However, in many other cases, the policy statement itself can serve as the statement of intention by the State and can be sufficient as it is.

We do not pretend to understand all the nuances of the sector in the State. It is left to the professionals in the State to take this beginning and bring it to a point where it clearly and accurately reflects the policies of the Government.

10.1 Introduction

Transport plays an increasingly important role in meeting development goals for the major urban areas of the State. Rapid urbanisation and growth in private vehicles, causing congestion, pollution and accidents, has placed an increasing strain on existing urban public passenger transport (PPT) services and now threatens to inhibit continued improvement in urban productive efficiency and urban development.

In this document, the State sets out its urban mass transit (UMT) policy for *major urban areas* that addresses these concerns. In this introduction it describes the background and summarises the options for UMT. In subsequent sections, it summarises the *objectives* and *principles* which underlie its policy. It then describes its *policy.* Finally, it sets out an *action plan for implementation of policy*.

10.2 Background

Although there are several factors responsible for the prevailing road congestion, pollution and lack of road safety, the basic cause is an imbalance in the mix of passenger traffic carried by the various urban transport modes. In general, the share of PPT is declining, in part, because of the inability of the public transport operators to keep pace with the increasing demand and the deteriorating quality of service arising from continued losses and thus inadequate capital generation for increasing PPT capacity. Unless the quality and quantity of PPT services improves significantly, the increasing preference for personal vehicles will continue and the State will fail to make best use of the existing transport infrastructure.

10.3 Options for UMT

UMT comprises suburban rail, metros, light rail and buses in segregated busways (PPT comprises UMT, other buses, taxis and auto-rickshaws). The most suitable options for UMT depend on urban characteristics:

- Buses in segregated busways may provide the most appropriate basis for UMT in medium-sized and lower-income urban local bodies (ULBs) for many years.
- Light rail operating at grade may become more appropriate in medium-sized ULBs as affordability increases or environmental concerns become critical.

- Metros operating at grade, elevated or underground may become appropriate in the primary corridors of the major urban areas, with support from busways or light rail in secondary feeder corridors.

The development of UMT systems should be carried out within the context of an ULB development plan and transport strategy. The ULB development plan should define the ULB's objectives, set sectoral priorities within available resources, develop the future urban structure and define the future spatial strategy for the ULB. The transport strategy should define the role of UMT, identify the primary UMT network (comprising the rapid transit options and the feeder busways) and determine policy in respect of matters such as managing private car demand and controlling air pollution.

10.4 Objectives

Urban transport policy seeks to foster economic development, enhance the quality of the environment, enhance road safety, reduce energy consumption, and allow fair and equitable access by all. The integrated UMT policy of the State aims to provide direction to all institutions, [major] ULBs and individuals that relate to the urban transport sector to achieve the following objectives:

- To address issues relating to the planning, design, construction, operation, maintenance, management and development of all forms of UMT in an economically efficient, equitable and sustainable manner.
- To ensure provision of an adequate quantity and quality of UMT services.
- To accelerate the development of UMT infrastructure with appropriate legal, regulatory, institutional and financial measures.
- To make institutional changes necessary to consolidate publicly- owned UMT facilities in major urban areas and to improve service delivery.
- To develop the legal and regulatory framework to allow consolidation and to improve the prospects for PSP.
- To establish priorities for urban transport, from highest priority to lowest priority, as follows:
  - Mass transport.
  - Non-motorised transport such as cycle rickshaws, bicycles and pedestrians.
  - Intermediate public transport such as auto-rickshaws and taxis.
  - Personalised motor transport such as motorcycles and cars.

10.5 Principles

In seeking to meet these objectives, the State will adopt the following principles:

Participation. To involve all relevant stakeholders is planning, developing and managing UMT infrastructure.

Markets. To use economic signals and market mechanisms rather than administrative mechanisms for resource allocation [where appropriate].

Decentralisation. To manage UMT at the relevant municipal level.

Private sector participation (PSP). To allow all forms of PSP in any element of UMT.

10.6 Policy

The overall policy of the State is to ensure provision of adequate quantity and quality of UMT services in each ULB and to ensure UMT services operate on an integrated and commercially viable basis. As initial steps, the State intends:

To facilitate establishment of an Integrated Municipal Transport Provider (IMTP) responsible for development and operation of publicly owned UMT in Hyderabad. Subject to agreement of the Municipal Corporation of Hyderabad (MCH) and Indian Railways, the IMTP operations will comprise the following:

- The intra-city buses in Hyderabad currently owned by Andhra Pradesh State Road Transport Corporation (APSRTC).
- The Multi-Modal Transit Scheme.
- The Hyderabad Metro.
- The commuter rail services currently owned by Indian Railways.

To ensure control of price and quality of service through a performance agreement or concession contract or multiple concession contracts, relating to separable elements of UMT service (referred to as the performance agreement in the remainder of this document), between the Municipal Corporation of Hyderabad (MCH) and the IMTP that, as well as setting user charges and quality of service, requires that:

- The IMTP develops an integrated transport plan for Hyderabad, consistent with the MCH's transport strategy, for approval by the MCH.
- The IMTP seeks all appropriate forms of PSP in its UMT services. Such forms include but are not limited to sub-concessions, leases and operations and maintenance contracts (collectively referred to as sub-concessions in the remainder of this document).
- The MCH provides explicit subsidy equal to the gap between the full costs of an efficient operator and the revenue received from user charges (if the performance agreement does not allow the IMTP to recover its full costs under efficient operation through user charges).
- The MCH initially and later an independent Integrated Municipal Transport Authority (IMTA) monitors performance of the IMTP under the performance agreement.
- The IMTP initially and later the IMTA monitors performance of any sub-concession holder under its sub-concession.
- The dispute resolution mechanism envisaged in the Andhra Pradesh Infrastructure Development Enabling Act deals with disputes between the MCH and the IMPTP and disputes between the IMTP and any sub-concession holder until such time as the IMTA is established.

To facilitate establishment of an IMTA in Hyderabad to control price and quality of service by regulatory oversight of the performance agreement and sub-concessions once sufficient PSP has been achieved to provide an appropriate workload. Subject to agreement of the MCH and Indian Railways, the IMTA will regulate:

- All intra-city buses in Hyderabad.
- The Multi-Modal Transit Scheme.
- The Hyderabad Metro.
- The commuter rail services.
- Intermediate public transport.

10.7 Integrated transport plan

The State recognises that integration of all modes of urban transport in the major urban areas is most likely to achieve the potential of each mode. Accordingly, the policies of the State concerning integrated transport plans are:

- ❑ To promote integrated UMT services in each major ULB.

- To require each major ULB to prepare and publish a transport strategy, consistent with its urban development plan, promoting integrated multi-modal transport.
- To require each IMTP to prepare an integrated transport plan that sets out policies for the promotion of safe, efficient and economic UMT services in the relevant municipal area, making maximum use of PSP.

10.8 Transport charges

The State recognises that transport charge policy can be used as a tool to achieve its objectives and will have a major impact on the success of its overall UMT policy. Accordingly, the policies of the State concerning UMT charges are:

- To ensure that the level of charges, together with any subsidy provided by the relevant Municipal Corporation, State or Government of India or by other sources of funding, covers the full costs of efficient UMT services.
- To ensure that the structure of charges reflects the underlying costs of UMT service subject to any adjustments:
- To cross-subsidise to meet public service obligations.
- To ensure that fare relativities support overall transport policy so that bus fares are lower than suburban rail and metro fares [and taxi fares and personalised transport costs].
- To ensure that any subsidy or cross-subsidy within the UMT sector is explicit.
- To encourage through ticketing on multi-modal transport to facilitate transfer of passengers from one route or mode of PPT to another.
- To encourage pre-payment of user charges by ticketing structures with volume discounts.

10.9 Private sector participation

The State considers that PSP will help to improve service efficiency and accountability to users. Accordingly, the policies of the State concerning PSP in UMT are:

- To encourage PSP in all aspects of planning, design, construction, operation, maintenance, management and development of UMT infrastructure and services.
- To allow any appropriate mechanism for PSP in building, owning, operating, maintaining and leasing of UMT infrastructure.

10.10 Institutional policy

The State recognises that integration of all modes of urban transport in the major urban areas is most likely to achieve the potential of each mode. Accordingly, the policies of the State concerning institutions are:

- To facilitate establishment of IMTPs in major urban areas of the state commencing with Hyderabad. An IMTP will be responsible for development and operation of UMT services in the urban area.
- To restructure the APSRTC if appropriate to facilitate transfer of its intra-city bus operations for major urban areas to the relevant IMTPs.

When justified by the workload, to facilitate establishment of IMTAs in major urban areas of the state commencing with Hyderabad. An IMTA will act as a regulator responsible for setting fares, routes and quality of service for all urban public passenger transport.

10.11 Legal and regulatory framework

The State recognises that separation of policy, regulatory and implementing functions at municipal level promotes accountability and provides the best prospects for efficient development and operation of UMT. However, it also recognises that separation of policy and regulatory functions in respect of the performance agreement and separation of regulatory and implementing functions in respect of the sub-concessions by the establishment of an IMTA should be justified by the workload and should be delayed until sufficient PSP has been achieved (which is unlikely to occur before deregulation of bus services). Accordingly, the policies of the State concerning the legal and regulatory framework are:

To enact a state UMT law including matters such as:

- Definition of UMT system.
- Functions, powers and duties of policy, regulatory and implementing institutions.
- Rights regarding land acquisition and control and rights of way.
- Rules concerning economic regulation, including fare setting.
- Rules concerning quality of service regulation, including reference to standards.
- Rules for monitoring and enforcing economic and quality of service regulation, including penalties for failure to comply.
- Transfer scheme to establish IMTPs,
- Establishment of IMTAs.

To work with the Government of India to promote development of a national UMT law that amongst others:

- Provides sufficient authority for PSP in metro construction and operation.
- Authorises transfer of suburban rail assets of Indian Railways to IMTPs and regulation of their operation by IMTAs.
- Authorises licensing of appropriately qualified PPT operators and drivers and of appropriate PPT vehicles by the relevant Municipal Corporation or IMTA.
- Ensures that state UMT laws are developed on a consistent basis.

To facilitate regulatory control of the IMTP by the relevant Municipal Corporation through its performance agreement and to facilitate regulatory control of any sub-concession holder by its IMTP under its sub-concession.

In due course when justified by the workload, to facilitate establishment of IMTAs in major urban areas of the state commencing with Hyderabad. An IMTA will act as a regulator responsible for setting fares, routes and quality of service for all urban public passenger transport.

To require the relevant Municipal Corporation to control access to the sector to ensure that necessary investment will be provided and to ensure only appropriate qualified reputable firms can provide service.

To require the relevant Municipal Corporation, IMTP or IMTA as the case may be to ensure regulatory control will include:

- Economic regulation to control fares for certain customer classes [such as elderly or school children] or journeys, to ensure operation of through ticketing on multi-modal UMT schemes and to monitor application of subsidies.
- Technical regulation for setting and enforcing technical standards for both investment and operation.

- Environmental regulation for setting and enforcing environmental quality standards.
- Safety regulation for setting and enforcing driver, track and train standards.
- Customer service regulation for setting and enforcing service frequency, seating and standing capacity, timeliness, cleanliness, passenger loading, passenger information and similar quality standards.

10.12 Key policy, regulatory and implementing functions

The State intends ultimately to ensure full separation of policy, regulatory and implementing functions in major urban areas. For the avoidance of doubt, the State sets out below a brief description of the key policy, regulatory and implementing functions.

The key policy functions that will be carried out by the Municipal Corporation are:

- To prepare and publish a transport strategy consistent with its urban development plan [and resources].
- To approve and publish the integrated transport plan developed by the IMTP.
- To determine and publish any public service obligations of the IMTP.
- To determine if municipal subsidy is appropriate for any non-commercial UMT services or routes [and to provide any such subsidy].
- To specify the price and quality of service and other terms of the concession contract(s) between the Municipal Corporation and the IMTP.
- To determine and publish any other policy guidance to the IMTP or IMTA.

The regulatory functions will be carried out, initially, by the Municipal Corporation in respect of the IMTP and the IMTP in respect of any sub-concession holders and, later, by the IMTA in respect of both the IMTP and any sub-concession holders. The key regulatory functions concerning UMT services are:

- To control entry to the sector to ensure only appropriately qualified firms provide services [by issue of licences and permits].
- To control the price and quality of service through monitoring of the performance agreement or sub-concession as the case may be.
- To approve changes to routes, prices and quality of service.
- To balance appropriately the interests of passengers and service providers.
- To promote efficient service provision.
- To facilitate competition among service providers [both for the market and within the market including between different modes of UMT].
- To ensure non-discrimination amongst service providers.
- To promote the development of UMT services.
- To ensure appropriate stakeholder contributions to decision making [through means such as public consultations].
- To issue rules to support the performance of its functions.
- In the case of the IMTA only:
  - To resolve disputes between parties to the concession or sub-concession contracts.
  - To make recommendations to the Municipal Corporation on policy matters.
  - To follow published policy guidance in performance of its functions

The key implementing functions that will be carried out by the IMTP are:

- To develop and operate UMT services (including not only trains and buses but also depots and terminals and maintenance facilities) according to the performance agreement or concession or sub-concession contract.
- To develop and update periodically [and no less frequently than every two years] an integrated transport plan for the relevant urban area consistent with the transport strategy.
- To review periodically [and no less frequently than every two years] existing UMT services to determine if these services can be provided more efficiently and effectively by PSP.
- To appropriate offer UMT services for PSP by competitive tender.
- To enter into sub-concession contracts with successful PSP tenderers.
- To coordinate with other PPT providers.
- To follow published policy guidance in performance of its functions.

10.13 Action plan

To implement the policies expressed in this document the State directly, or through its institutions, will take the actions set out in the following paragraphs:

- To require the MCH to draft a performance agreement (or concession contract or multiple concession contracts relating to separable elements of UMT service) between the MCH and the IMTP [by end 2004].
- To facilitate negotiations between MCH and Indian Railways concerning transfer of suburban rail assets to the IMTP.
- To require the MCH to establish an IMTP for Hyderabad including relevant MCH assets and, if timely agreement is reached, relevant Indian Railways assets [by end 2005].
- To implement the dispute resolution mechanism envisaged in the Andhra Pradesh Infrastructure Development Enabling Act [by end 2004].
- To facilitate establishment of an IMTA in Hyderabad [once sufficient PSP has been achieved to provide an appropriate workload].
- To require each major ULB to prepare and publish a transport strategy, consistent with its urban development plan, promoting integrated multi-modal transport [by end 2005].
- To require each IMTP to prepare an integrated transport plan [within one year of its establishment].
- To require each IMTP [within one year of its establishment and no less frequently than every two years thereafter] to review existing UMT services to determine if these services can be provided more efficiently and effectively by PSP.
- To require each IMTP [within one year of its establishment] to develop a phasing plan to ensure that the level of charges, together with any subsidy provided by the relevant Municipal Corporation, State or Government of India or by other sources of funding, covers the full costs of efficient UMT services.
- To restructure the APSRTC if appropriate to facilitate transfer of its intra-city bus operations for major urban areas to the relevant IMTPs [by end 2005].
- To enact a state UMT law [by end 2005].
- To work with the Government of India to promote development of a national UMT law.
- To develop rules under the state UMT law dealing with price and quality of service [by end 2007]

- To develop a full operational plan linked to the annual budget cycle to ensure that the resources outlined in this policy are in fact available as needed to support development of UMT in the State.

11 Draft consolidated water supply and sanitation policy for Karnataka

- See section 3.2.3 (Water Supply and Sewerage) of Volume 1

Preface

We have prepared this draft consolidated water supply and sanitation policy for Karnataka at the request of the Additional Chief Secretary and Principal Secretary Infrastructure Development Department after the October 2003 Tripartite Meeting of GOK, ADB and the consultants, during which it was agreed that the water supply and sanitation should be a sector of focus for Karnataka.

As requested, the draft policy consolidates and extends three main policy documents: the GOI National Water Policy 2002, the GOK State Water Policy 2002 and the GOK Urban Drinking Water and Sanitation Policy 2003. It also draws on the implied policy underlying the Second Karnataka Rural Water Supply & Sanitation project. To allow users to recognise the source documents, we have often chosen to use wording and ordering from the source documents.

We prepared and submitted a first draft of this document in December 2003 for discussion at a workshop planned for January 2004. Although this workshop was subsequently cancelled, we incorporated comments received from various stakeholders and prepared and submitted a second draft of this document at the end of January 2004. In the absence of further substantive comments from stakeholders, we included this second draft in our draft final report. We have now incorporated comments made on our draft final report and amended the action plan to recognise the delays since preparation of the first draft. We consider that this draft policy is now ready to be taken forward and finalised by GOK officials. We have indicated the main areas in which further development is required by square brackets. In general these are areas where a level of detail is required which is outside the scope of our work.

We anticipate that GOK officials will now take ownership of the draft, modify the draft adding such further detail as they consider appropriate and publish the policy.

11.1 Introduction

1 The State is endowed with limited water resources that are stressed and becoming depleted as water demands are growing rapidly. Increases in population and urbanisation together with rapid industrialisation and rising incomes are putting water and sanitation resources under stress. Unless water and sanitation resources are properly developed and managed, the State will face an acute crisis within the next two decades. Serious destabilisation of the water and sanitation sector affecting the hydrology, economy, ecology and health of the State could result. In the context of this document, sanitation includes sewage collection, treatment and disposal and excludes refuse collection and disposal.

2 In this document, the Government of Karnataka (GOK) sets out its consolidated water supply and sanitation policy that addresses these concerns. In this introduction it describes the background and reasons to set out a consolidated policy. In subsequent sections, it summarises the objectives and principles which underlie its policy. It then describes its policy. Finally, it sets out an action plan for implementation of policy.

11.1.1 Background

3 The Government of India (GOI) established its initial "National Water Policy" in 1987 and subsequently reviewed and updated its policy in 2002. The latter policy emphasised the importance of:

(a) **Information system.** Developing appropriate information systems for water management.

(b) **Water resources planning.** Planning and implementing water resource development projects on an integrated and multi-disciplinary basis for a hydrological unit, such as a drainage basin or sub-basin

(c) **Institutional mechanism.** Re-orienting existing institutions and, wherever necessary, establishing appropriate institutions for the planning, development and management of water resources on a hydrological unit basis.

(d) **Water allocation priorities.** Prioritising water allocation in planning and operation so that drinking water takes first priority

(e) **Project planning.** Adopting an integrated, multi-disciplinary approach to improve the quality of project preparation, management and implementation.

(f) **Ground water development.** Regulating the exploitation of ground water resources to ensure sustainable recharge and to ensure social equity.

(g) **Drinking water.** Expanding provision of drinking water to cover the entire urban and rural population

(h) **Irrigation.** Integrating water-use and land-use policies and adopting a command area development approach to all irrigation projects to close the gap between developing and utilising irrigation potential.

(i) **Resettlement and rehabilitation.** Developing detailed resettlement and rehabilitation policies based on national policy.

(j) **Financial and physical sustainability.** Establishing water charges that convey the scarcity value of the resource to users and that cover annual operation and maintenance costs and a part of fixed costs.

(k) **Participatory approach to water resources management.** Involving all stakeholders in planning, design, development and management of water resource schemes, with a view to eventually transferring management of water infrastructure and facilities to user groups/local bodies.

(l) **Private sector participation.** Encouraging PSP wherever feasible.

(m) **Water quality.** Phasing improvements in water quality and monitoring the quality of surface and ground water on a regular basis.

(n) **Water zoning.** Establishing zoning for economic development based on water availability.

(o) **Conservation of water.** Fostering awareness that water is a scarce resource and promoting efficient use and conservation.

(p) **Flood control and management.** Developing and implementing plans for flood control and management in flood prone areas.

(q) **Land erosion by sea or river.** Taking cost-effective measures to minimise land erosion and preparing comprehensive land management plans to regulate coastal development.

(r) **Drought-prone area development.** Developing and implementing plans for reducing vulnerability to droughts in drought prone areas.

(s) **Monitoring of projects.** Monitoring closely project planning and execution to obviate time and cost overruns.

(t) **Water sharing/distribution among the States.** Evolving guidelines for facilitating agreements on water sharing among river basin States and reviewing and amending the Inter-State Water Disputes Act of 1956.

(u) **Performance improvement.** Beginning to shift the emphasis from creation and expansion of water infrastructure towards appropriate operation and maintenance of existing water infrastructure.

(v) **Maintenance and modernisation.** Ensuring proper provision for maintenance and modernisation.

(w) **Safety of structures.** Developing institutional arrangements at national and state levels for ensuring safety of dams and other water-related structure.

(x) **Science and technology.** Intensifying research efforts aimed at effective and economical management of water resources.

(y) **Training.** Developing and implementing a plan for standardised training for all stakeholders.

4 The GOK established its "State Water Policy" in 2002 and its "Urban Drinking Water and Sanitation Policy" in 2003. The objectives of these policies are to:

(a) Provide drinking water at the rate of 55 litres per person per day (LPPD) in rural areas, 70 LPPD in towns and 135 LPPD in city corporation areas.
(b) Create an ultimate irrigation potential of 45 lakh hectares under major, medium and minor irrigation projects.
(c) Facilitate creation of an additional irrigation potential of 16 lakh hectares by individual farmers using ground water.
(d) Improve the performance of all water resources projects.
(e) Improve the productivity of irrigated agriculture by involving users in irrigation management.
(f) Harness the hydropower potential of the State.
(g) Provide a legislative, administrative and infrastructural environment which will ensure fair, just and equitable distribution and utilisation of the water resources of the State to benefit all the people of the State.
(h) Provide all residents of urban areas of the State, piped water supply and sanitation services at or near their dwellings. The efforts of the GOK, urban local bodies (ULBs), the Karnataka Urban Water Supply and Drainage Board (KUWSDB) and the Bangalore Water Supply and Sewerage Board (BWSSB) will be:
    (i) To ensure universal coverage of water and sanitation services that people want and are willing to pay for.
    (ii) To do so in a manner that preserves the sustainability of the water resources of the State, protects and enhances the commercial and economic sustainability of the operations.
    (iii) To ensure a minimum level of service to all citizens.

11.1.2 Reasons for consolidated policy

5 The GOK has now decided to consolidate and extend these policies to form a comprehensive single statement of policy concerning the water and sanitation sector. The reasons for this are to:

(a) Assist co-ordination amongst the many institutions with roles in the sector.
(b) Facilitate private sector participation (PSP) by clearly enunciating the roles of the public and private sectors in developing and operating water and sanitation infrastructure.
(c) Address gaps in the policy framework.
(d) Define broad timetables for actions arising from this policy.

11.2 Objectives

6 The consolidated water policy of the GOK aims to provide direction to all institutions, communities and individuals that relate to the water and sanitation sector to achieve the following objectives:

(a) To address issues relating to the planning, design, construction, operation, maintenance, management and development of all forms of surface water and ground water in an economically efficient, equitable and sustainable manner.
(b) To ensure provision of quality water and sanitation services to people that want them and are willing to pay for them and to ensure provision of basic water and sanitation services to all [with targets for drinking water of 55 LPPD in rural areas, 70 LPPD in towns and 135 LPPD in city corporation areas].
(c) To accelerate the development of sustainable public and private water and sanitation infrastructure with appropriate legal, administrative and financial measures, including the establishment of secure water rights [and water pricing].
(d) To make institutional changes necessary to decentralise management of water resources and sanitation services and to improve service delivery.

(e) To develop the legal and regulatory framework to help the process of decentralisation and to improve the prospects for PSP.
(f) To develop the knowledge and capability to develop water resources and sanitation taking due account of economic efficiency, equity, social justice and environmental considerations.
(g) To prioritise water allocation to give top priority to drinking water with remaining uses prioritised broadly as follows:
  (i) Irrigation.
  (ii) Hydropower.
  (iii) Aquaculture.
  (iv) Agro industries.
  (v) Non-agricultural industries.
  (vi) Navigation and other uses.

11.3 Principles

7 In seeking to meet these objectives, the GOK will adopt the following principles:
(a) **Participation.** To involve all stakeholders is planning, developing and managing water and sanitation infrastructure.
(b) **Markets.** To use economic signals [and market mechanisms] based on enforceable water rights rather than administrative mechanisms for water resource allocation [where appropriate].
(c) **Decentralisation.** To manage water and sanitation at the lowest appropriate level while recognising that co-ordination, monitoring and control at State level will continue to be necessary [for certain activities] [for some time].
(d) **PSP.** To allow all forms of PSP in any element of water supply and sanitation.

11.4 Policy

11.4.1 River basin and sub-basin management

8 Planning and implementing water resource development projects on an integrated and multi-disciplinary basis for a hydrological unit, such as a river basin or sub-basin provides the most rational basis for development of water resources. The policies of the GOK concerning river basin or sub-basin management are as follows:
(a) Water resources planning, design, construction, operation, maintenance, management and development will be carried out under an integrated and multi-disciplinary approach for a hydrological unit considering both surface water and ground water and incorporating quantity, quality and environmental considerations. Development projects and investment proposals will be formulated and considered within the framework of a river basin or sub-basin plan so that the best possible combination of options can be obtained for alleviating poverty, increasing incomes and productivity, improving equity, and reducing vulnerability to natural and economic risks while taking due account of costs. Solutions to water allocation and planning issues will be found by using economic signals rather than administrative measures where suitable.
(b) The GOK will foster co-operation among its neighbouring states to realise integrated river basin management. It will seek to reach agreement with its neighbouring states for:
  (i) Sharing the waters of rivers which cross the State border, guided by the national perspective.
  (ii) Managing waters under normal and emergency conditions of drought, flood or water pollution.
  (iii) Exchanging relevant data.

(c) Catchment areas [of the storages supplying water to urban centres] will be protected from encroachment, environmental degradation and industrial pollution. Steps will be taken:
  (i) To ensure that waste water and effluents are treated to acceptable level standards before discharging them into natural streams.
  (ii) To treat and reuse waste water downstream of its source, where economically viable.

(d) Siltation of dams will be reduced through soil conservation and afforestation measures. Measures will be undertaken in co-ordination with the GOK Forest Department and the Directorate of Watershed Development to protect the environment and improve the quality of life by planting appropriate trees. Water Users' Associations will be allowed to plant trees in the command area handed over to them for management and to share the benefits accruing with the GOK.

(e) Periodic reassessment of the ground water potential on a scientific basis will be undertaken. The exploitation of ground water resources will be regulated so as not to exceed the recharge capabilities. Ground water recharge projects will be formulated and implemented.

(f) Efforts will be made to restore natural landscape, to develop habitat to attract inland and migratory birds and to beautify the landscape, particularly around shores and islands.

11.4.2 Planning and management of water resources

9 The GOK recognises that the process of planning and managing water resources requires a comprehensive and integrated analysis of relevant hydrological, topographical, social, political, economic and institutional factors across all water-using sectors. The policies of the GOK concerning planning and management of water resources are as follows:

(a) The GOK will:
  (i) Frame rules, procedures and guidelines for combining water use and land use planning based on water zoning.
  (ii) Frame and periodically revise the rules, procedures and guidelines on all aspects of water management.
  (iii) Make social and environmental assessments mandatory in developing all water and sanitation plans.
  (iv) Implement resettlement and rehabilitation policy, consistent with any national policy, for people adversely impacted by water and sanitation projects.

(b) The State Water Resources Board (SWRB) will prepare and update [at least annually] a Karnataka Water Management Plan (KWMP) addressing the overall resource management issues in each hydrological unit and for the whole of Karnataka and providing directions for the short-term, medium-term and long-term. The KWMP will be executed by different institutions as determined by GOK from time to time.

(c) The KWMP will be prepared in a comprehensive and integrated manner, having regard to the interests of all users. The planning methodology will ensure co-operation across all relevant sectors and wide participation in drawing up the KWMP.

(d) The participation of project affected persons, individually and collectively through Water Users' Associations, will be ensured in the planning, design, implementation and operation and maintenance of publicly funded surface water plans and projects. The lowest appropriate level of local government will be responsible for co-ordinating such participation. [In the case of publicly funded surface water plans and projects which cross the boundaries of a particular level of local government, the next highest level of local government will be responsible for co-ordinating such participation.]

(e) Unauthorised pumping/lifting/siphoning of water from main canals, branch canals and distributaries will be prevented.

(f) [The SWRB will prepare a comprehensive coastal management plan taking due account of environmental and ecological impacts and future developmental activities will be controlled accordingly.]

(g) The efficiency of utilisation of water will be improved and awareness about water as a scarce resource will be fostered. The importance of water conservation and water harvesting to the water supply and demand balance will be emphasised. Rainwater harvesting and water conservation will be encouraged. Conservation consciousness will be promoted through education, regulation incentives and disincentives.

(h) Close monitoring of planning, execution and performance of water and sanitation projects will be undertaken to identify bottlenecks and to obviate time and cost overruns.

11.4.3 Water rights and water allocation

10 The ownership of surface water vests in the GOK and the ownership of ground water vests in the landowner. The GOK will develop mechanisms for regulation, including equitable allocation, of surface water. The GOK will also develop mechanisms for regulation, including equitable allocation, of ground water to ensure that exploitation does not adversely effect any public drinking water sources and that extraction [as determined at household level] does not exceed [85%] of recharge capability [as determined at household level] without authorisation by GOK. The GOK will reserve the right to redirect the use of surface and ground water during emergency periods of droughts, floods and other natural and man-made disasters, including water pollution that threatens public health or the environment. Allocation rules will be the formal mechanisms for deciding who gets water, for what use(s), how much, at what time, for how long and under what circumstances water use may be curtailed. The policies of the GOK concerning water rights and water allocation are as follows:

(a) In planning and operation of water resources projects, drinking water will have top priority with remaining uses prioritised broadly as follows:
  (i) Irrigation.
  (ii) Hydropower.
  (iii) Aquaculture.
  (iv) Agro industries.
  (v) Non-agricultural industries.
  (vi) Navigation and other uses.

(b) The GOK will issue rules to regulate the extraction of water in identified water scarcity areas in order to sustain rechargeable ground water aquifers.

(c) The GOK will empower the SWRB to establish a system of water rights along with suitable enforcing mechanisms. Such water rights may be granted to private and community bodies to provide secure, defensible and enforceable ownership/usufructuary rights to surface water and ground water [to help attract private investment]. For the avoidance of doubt, the SWRB may allocate ground water from one ULB or Panchayat to another ULB or Panchayat that, otherwise, in the opinion of the SWRB, might have insufficient drinking water.

(d) The SWRB will establish a system of water rights along with suitable enforcing mechanisms. Water quotas for different sub-systems like distributary, sub-distributary, minors or laterals will be fixed in order to distribute water equitably and use water more efficiently.

(e) The SWRB may empower any level of local authority or any local body it deems fit to exercise the SWRB's right to allocate water during emergency periods, including during periods of severe drought. [In exercising this right, the SWRB will ensure that a higher level of local government will be responsible for water allocations which affect more than one particular level of local government.]

(f) The SWRB will ensure that drought monitoring and contingency plans are prepared for each basin or sub-basin experiencing recurrent seasonal shortages of water with due consideration of joint use of rain water, surface water and ground water and of water conservation. The contingency plans will include action to limit the use of ground water.

(g) The SWRB will ensure that disaster management strategies for drought, floods and water pollution are prepared for each basin or sub-basin.

(h) The SWRB will monitor the water regime and enforcement of the rules.

11.4.4 Public and private participation

11 Water resources and sanitation management requires involvement of the public sector, private sector, communities and individuals that benefit from the delivery of water and sanitation services. The effectiveness of public water resource and sanitation projects depends on acceptance and ownership by those affected. Accordingly, there should be a participatory approach to water resource and sanitation management following the principle that community resources should be managed by the community concerned and, unless a greater regional interest is affected, its immediate local authority. The policies of the GOK regarding the respective roles of the public and private sectors are:

(a) The GOK's investments in water and sanitation will be directed to creating public goods, addressing problems of market failure and protecting community interests.

(b) Policies and programmes of any public institution concerning water resources and sanitation will be co-ordinated with the policies and programmes of all other public and private institutions concerning water resources and sanitation to build synergy, to avoid disputes and to avoid misallocation of resources.

(c) Public water and sanitation institutions, including KUWSDB and BWSSB and their successors, will to the extent [reasonably feasible] involve the private sector in providing water and sanitation services.

(d) PSP will be encouraged in all aspects of planning, design, construction, operation, maintenance, management and development of water resource and sanitation projects. PSP will help to improve service efficiency and accountability to users. Any appropriate mechanism for PSP in building, owning, operating, leasing and transferring of water resources and sanitation facilities may be adopted:

  (i) New public water schemes [except municipal schemes] with command area over [5000ha] will be implemented by the private sector or under public private partnership.

  (ii) Existing public water schemes [except municipal schemes] with command area over [5000ha] will be gradually transferred to the private sector or to public private partnership.

(e) Given the current state of the sector, PSP will necessarily have to be gradual. Accordingly, preparatory work leading to PSP in the sector will be undertaken as a matter of urgency. Such preparatory work includes fostering a culture of commercialisation, encouraging outsourcing, building local capacity and, most importantly, identifying and expediting the necessary legislative, institutional and regulatory changes that are necessary for PSP and identifying criteria for selection of suitable opportunities for PSP. [The GOK considers that an important criterion for selection of bulk water supply and sanitation projects for PSP will be [credit worthiness of ULB] and considers that, initially, such PSP projects will be more likely to succeed if they are selected from the [most credit worthy ULBs].] [The GOK considers that important criteria for selection of retail water supply and sanitation projects for PSP will be [population served], [credit worthiness of ULB if the ULB will provide financial support], [percentage of costs covered by user charges] and [percentage of supplies that are metered] and considers that, initially, such PSP projects should be selected from those ULBs with populations exceeding [250 000].]

(f) The management of water resources will be conducted through a participatory approach. The necessary legal and institutional changes will be made. The ultimate goal will be to transfer operation, maintenance, management and collection of water charges to user groups.

11.4.5 Public investment

12 The GOK recognises that a consistent and uniformly applied analytical framework for project appraisal is essential for equitable, efficient and effective water resource and sanitation management. A full multi-objective analysis of the water and sanitation needs of an area and the formulation of options for investment and management must consider the interrelations among different sources of water, different management schemes and the interactions between needs of different users. Such

analysis must also take due account of any displacement and resettlement of people and disturbance to ecosystems occasioned by the project.

13 The policies of the GOK concerning public investment are:

(a) Water resource projects will be developed as multi-purpose projects under an integrated multi-disciplinary approach from planning to implementation and to monitoring.

(b) Planning and feasibility studies for all water and sanitation projects will follow published guidelines that will be issued and updated from time to time by GOK.

(c) All appropriate analytical procedures, including mathematical modelling, cost-benefit analysis, risk analysis and multi-criteria decision making techniques, will be used for planning and project appraisal.

(d) Public urban water and sanitation projects will include specific provision for proper maintenance of infrastructure.

(e) Public urban water and sanitation projects will include specific provision for future PSP.

(f) The interests of low-income water users and women will be protected in water and sanitation projects.

(g) Relevant public institutions will continuously update and maintain an appropriate water resource data base.

14 Concerning urban water and sanitation projects, GOK will establish a demand driven and need based structure for financing the capital and operating expenditure for different ULBs. The approach will include the following activities:

(a) A revised demand driven urban water and sanitation action plan based on the principles outlined in this section will be developed and implemented.

(b) ULBs will develop an investment plan detailing the options for utilisation of existing assets and the need for creation of new assets. The investment plan will consider both financial and social returns on investment.

(c) ULBs will estimate of the life cycle costs of the new investments and operating expenses for new and existing assets.

(d) GOK will fix upfront its capital contribution to all the schemes [as a fixed percentage of the estimated cost].

(e) ULBs will resource the difference between estimated project cost and GOK capital contribution. They will need to raise the money and service the same from tariffs and any apportionment of future ULB budgetary surpluses.

(f) GOK will set up a pool fund through contributions from financial institutions and multilateral agencies to develop bankable projects and support project development.

15 Concerning rural water and sanitation projects, GOK will establish a demand driven and need based structure for financing the capital and operating expenditure for different Panchayat Raj Institutions (PRIs).

16 The State Water Council (SWC) will develop guidelines, principles and standard documents for procuring urban water and sanitation services with PSP:

(a) In normal circumstances, contracts will be awarded on the basis of an open competitive bidding process. The ULB will form the bidding documents by developing technical specifications [in consultation with SWC] to be incorporated in the standard documents. The ULB will select the contractor, from among those that meet the minimum technical standard, using a quantifiable selection criterion.

(b) In exceptional cases, where the private operator is able to develop an "innovative proposal" that would result in significant user benefits, the ULB may consider direct negotiation with the private operator, without going through the competitive bidding process. The SWC will set out guidelines for definition of an "innovative proposal" [and will assess the feasibility of any such proposal].

(c) ULBs will enter into appropriate contractual arrangements for project implementation. The SWC will seek to develop a contractual framework that will allow equitable allocation of risks between the contracting parties, taking into account the legitimate concerns of private investors.

(d) The ULB will need to demonstrate [to the satisfaction of the SWC] that any PSP model chosen by the ULB is the most appropriate. In doing so, the ULB will need to

consider all relevant matters including financial and economic viability, quality of service and environmental impact.

17 The PRIs may use such guidelines, principles and standard documents for procuring rural water and sanitation services with PSP.

11.4.6 Water and sanitation charges

18 The GOK recognises that the increasing gap between costs of water and sanitation services and revenues received for charges for these services is unsustainable. Unless users pay a cost-reflective price for water and sanitation services there will be a tendency for misuse, wastage and misallocation of resources. Desirable practices such as water-saving agricultural and industrial technologies, water harvesting and water recycling will emerge only when users perceive the scarcity value of water

19 The policies of the GOK concerning water and sanitation charges are:

(a) Water will be considered an economic resource and priced to convey its scarcity value to all users.

(b) Waste water treatment charges, and any special charges for management of polluted water, will be based on the principle that the polluter pays.

(c) Water and sanitation charges for urban users will be revised in a phased manner:
  (i) Initially, the level of charges will cover at least the operation and maintenance charges of providing services and the structure of charges will penalise excessive consumption and wastage of water. Subsidies will be focused in areas such as pockets and communities of extreme poverty, to ensure at least a minimum "life line" supply to the poor, and investments with large scale externalities such as waste water treatment.
  (ii) In the longer term [within ten years] the level of charges will cover operations and maintenance costs, debt service plus a reasonable return on capital and the structure of charges will reflect underlying long-run marginal costs of service.

(d) Water and sanitation charges for rural users will be revised in a phased manner:
  (i) Initially, the level of water charges will cover at least the operation and maintenance charges of providing water supply services and the level of sanitation charges, together with any funding from the Gram Panchayats (GPs), will cover at least the operation and maintenance charges of providing sanitation services.
  (ii) In the longer term [within 15 years] the level of water and sanitation charges will cover operations and maintenance costs, debt service plus a reasonable return on capital and the structure of charges will reflect underlying long-run marginal costs of service.

(e) Water and sanitation charges will incorporate financial incentives for water re-use and conservation, for responsible use of ground water and for preventing over exploitation and pollution of water resources.

(f) Water and sanitation charges will be separated from charges for other urban or rural services.

(g) Within [five] years, ULBs will be required to achieve 100% metering and to adopt volumetric pricing. The costs associated with installation of a meter will be recovered as soon as possible through a surcharge on the relevant urban customer tariff. This surcharge will not exceed [20%] of the average bill of customers of the relevant urban customer tariff.

(h) Within [ten] years, GPs will be required to achieve 100% metering and to adopt volumetric pricing. The costs associated with installation of a meter will be recovered as soon as possible through a surcharge on the relevant rural tariff. This surcharge will not [20%] of the average bill of customers of the relevant rural customer tariff.

(i) All water and sanitation service providers will be required to develop and implement an action plan for increasing the level of charges and amending the structure of charges to conform to this policy.

(j) The GOK will make explicit any subsidy to the water and sanitation sector.

11.4.7 Drinking water supply and sanitation

20 Good quality reliable drinking water supply and sanitation are essential basic needs of every citizen. It has been the endeavour of successive Governments of Karnataka to satisfy this need for all its citizens. It is an on-going effort which aims at meeting the growing demand both in urban and rural areas. The overall policies of the GOK concerning drinking water and sanitation are:

(a) To facilitate availability of safe and affordable drinking water supplies through various means including rainwater harvesting and conservation.
(b) To facilitate availability of sanitation services.
(c) To preserve water bodies and natural depressions for recharge of underground aquifers and rainwater management.
(d) To require public water and sanitation institutions to provide necessary drainage and sanitation, including treatment of domestic waste water and sewage and replacement of open drains and construction of sewers in the interest of public health.
(e) To hold service providers (including ULBs, PRIs, KUWSDB and BWSSB and their successors) responsible for controlling the use of water to prevent wastage and pollution.
(f) To hold service providers responsible for checking the quality of drinking water and sanitation services.

21 In view of the different institutional structure and different sets of issues involved in the delivery of the services to urban and rural areas, it is necessary to have a separate detailed policies for urban and rural areas. However, in due course, the GOK intends to harmonise policy, regulation and implementation of urban and rural drinking water and sanitation services.

Urban

22 Increasing urbanisation has resulted in greater pressure on the existing urban water supply and sanitation systems leading to increasing demand both to augment the sources and improve distribution and to increase the coverage of underground drainage. At the same time, there is an urgent need to conserve the limited water resources of the state to ensure sufficient availability of water for various needs as well as for the future. The GOK's efforts, therefore, will focus on raising the levels of efficiency in the management of drinking water systems in urban areas so as to give satisfactory service to the citizens while at the same time discouraging over exploitation of resources and preventing wastage. The detailed policies of the GOK concerning urban drinking water and sanitation are:

(a) The GOK will continue to be responsible for:
    (i) Formulating policy.
    (ii) Ensuring provision of the bulk of the resources required for capacity creation.
    (iii) Regulating, monitoring and evaluating the efficiency of water and sanitation service provision and resource utilisation, including prescribing reporting requirements [for measures of efficiency in water and sanitation service provision and resource utilisation], procurement procedures, etc.
    (iv) Setting minimal service standards.
    (v) Encouraging the use of public private partnerships as well as private sector participation to achieve the sector goals.
    (vi) Promoting appropriate aggregation options to exploit economies of scale and scope to facilitate the economic and commercial viability of water supply systems and to ensure reasonable uniformity of water and sanitation charges.
    (vii) Instituting necessary incentives for ULBs and other service providers to implement sector reforms.
    (viii) Ensuring co-ordination and collaboration among the various agencies both at the policy and operational level through the establishment of appropriate committees and agencies.
(b) The ULBs will be responsible for urban water supply and sanitation services from water catchment to waste water treatment. The GOK, however, will have the

responsibility to monitor that ULBs provide quality services in accordance with the standards prescribed at the State level. ULBs may choose to provide the services through appropriate PSP arrangements. Given the paramount needs for financial and commercial viability of the operations and for efficiency improvements in service provision and resource utilisation, the GOK will monitor strictly policies related to minimal tariff operational autonomy of the municipal water operations etc. and will monitor strictly compliance with standards for service provision and resource utilisation.

(c) The KUWSDB will continue to be responsible for water and sanitation capacity creation and augmentation in all ULBs and operation and maintenance in selected ULBs for the present. Over the medium term, the KUWSDB will be restructured and its role redefined. In the longer term, the KUWSDB could become a publicly owned independent provider of technical assistance and management support to ULBs who do not have adequate capacity. Similarly, the appropriate role of BWSSB will be defined in the action plan for Bangalore City and surrounding areas.

(d) The GOK will issue a detailed urban drinking water and sanitation strategy and action plan to carry forward policies in this section.

Rural

23 The GOK wishes to increase rural communities' access to improved and sustainable drinking water and sanitation services and to decentralise rural water supply and sanitation service delivery to GPs and user groups. The detailed policies of the GOK concerning rural drinking water and sanitation are:

(a) The GOK will continue to be responsible for:
  (i) Formulating policy.
  (ii) Ensuring provision of the bulk of the resources required for capacity creation.
  (iii) Fixing upfront its capital contribution to all types of rural water and sanitation schemes [as a fixed percentage of the estimated cost].
  (iv) Regulating, monitoring and evaluating the efficiency of rural water and sanitation service provision and resource utilisation.
  (v) Setting minimal service standards based on GOI Ministry of Rural Development, Department of Drinking Water Supply norms.
  (vi) Promoting appropriate aggregation options to exploit economies of scale and scope to facilitate the economic and commercial viability of water supply systems and to ensure reasonable uniformity of water and sanitation charges.
  (vii) Ensuring co-ordination and collaboration among the various agencies both at the policy and operational level through the establishment of appropriate committees and agencies.

(b) The GPs will be responsible for rural water supply and sanitation services (including ground water recharge). A GP wishing to obtain water and sanitation facilities, with the support of GOK, must register with its Zilla Panchayat (ZP) declaring its willingness to fund its defined share of capital costs and to fund 100% of operation and maintenance costs. The GPs will plan, procure, construct, operate, maintain and manage rural water and sanitation projects with the technical support of the Zilla Panchayat Engineering Divisions of the GOK Rural Development and Panchayat Raj Department. The GPs will decide on the type of water and sanitation scheme and service level (in terms of LPPD) which they demand and are willing to finance (taking account of the GOK capital contribution and any other capital contributions). GPs may choose to provide the services through appropriate PSP arrangements.

(c) The ZPs will manage rural water and sanitation projects at district level and provide a channel for releasing GOK, KRWSSA and other funding to GPs. The Zilla Panchayat Engineering Divisions of the GOK Rural Development and Panchayat Raj Department will provide integrated community development, engineering and management support to GPs.

(d) The Karnataka Rural Water Supply and Sanitation Agency (KRWSSA) will plan and monitor rural water and sanitation projects at state level, including

(i) Establishing district support units to assist ZPs.
(ii) Prioritising provision of support to GPs according to transparent criteria.
(iii) Developing a rural drinking water and sanitation strategy and action plan to carry forward the policies in this section.

11.4.8 Irrigation

24 The GOK recognises the importance of water for irrigation and will continue to support appropriate development of surface water [and ground water] irrigation. But the GOK intends to focus increasingly on efficient use of water through measures such as drainage-water recycling, rotational irrigation and adopting water conserving crop technology. The policies of the GOK concerning agricultural uses of water are:

(a) Irrigation planning will take into account the irrigability classification of land, cost effective irrigation techniques and the needs of drought prone and rain shadow areas. Wherever water is scarce, the irrigation density will be such as to extend the benefits of irrigation to as large an area as possible in order to maximise production. The management of water and land resources are closely linked and hence there will be close integration of water use and land use policies. Appropriate cropping patterns will be adopted in co-ordination with the Agriculture Department. Drip and sprinkler irrigation to improve water use efficiency will be promoted.
(b) Prioritisation for incurring expenditure in respect of major and medium irrigation projects will be as follows:
  (i) Completion of on-going and committed projects
  (ii) Promoting participatory irrigation management
  (iii) Operation and maintenance
  (iv) Repairs and modernisation.
(c) In irrigation projects where reservoirs are already completed, top priority will be given to the construction of the canals and field irrigation channels in the shortest possible time to utilise the irrigation potential.
(d) Irrigation and multi purpose projects will include drinking water components.
(e) Preparatory work to develop the supporting framework to allow gradual transfer of irrigation facilities to the private sector will be initiated.

11.4.9 Hydropower

25 [To add if specific policy necessary]

11.4.10 Aquaculture

26 [To add if specific policy necessary]

11.4.11 Agro industries

27 [To add if specific policy necessary]

11.4.12 Non-agricultural industries

28 [To add if specific policy necessary]

11.4.13 Navigation and other uses

29 [To add if specific policy necessary]

11.4.14 Safety of structures

30 Consistent with national policy and any national legislation, GOK intends to establish institutional arrangements for ensuring safety of water-related structures. The policies of the GOK concerning safety of storage dams and other water-related structures are:

(a) To develop and review and update periodically guidelines on safety of water-related structures.
(b) To put in place a system of continuous surveillance of such structures.
(c) To ensure appropriate institutional arrangements are in place to implement this policy on safety.

11.4.15 Research and data management

31 As management decisions become increasingly complex and information-sensitive, the demand for supporting data, research and information management increases. The policies of the GOK concerning research and data management are:

(a) To promote integrated and co-ordinated applied research in water and sanitation.
(b) To involve the Departments of Agriculture and Horticulture, the universities of agricultural sciences, Krishi Vigyan Kendras and non-government organisations in promoting cost-effective and high value agricultural production techniques.
(c) To develop a state of the art information system containing data on surface and ground water availability and use for diverse purposes in different basins and sub-basins.

11.4.16 Stakeholder participation

32 Decisions concerning water resource and sanitation management affect the public and most sectors of the economy. Every relevant public institution, every community and each individual has an important role to play in ensuring that the water resources of Karnataka are used appropriately so that future generations can be assured of at least the same, if not better, availability of water and quality of water. It is important that stakeholders are involved in water resources and sanitation management throughout the cycle from planning and design, through implementation to operation and monitoring. The GOK will seek to mobilise and educate Water Users' Associations and other local institutions to take an active part in water resource and sanitation management. The policies of the GOK concerning stakeholder participation are:

(a) To raise awareness among citizens on decentralised user participation and involvement in decision-making, implementation and management of water resources projects.
(b) To achieve stakeholder participation in planning, developing and managing water and sanitation infrastructure at the lowest appropriate level.
(c) To create an enabling environment to ensure that women play a key role in community institutions concerned with management of water resources and sanitation.

11.4.17 Institutional policy

33 The governance and management of the state water resources and sanitation require co-ordination of existing institutions and, in some cases, reform and creation of new institutions. The GOK will restructure and strengthen where appropriate the existing institutions to ensure that its policies are implemented efficiently and effectively. In doing so, it will follow two key principles: there will be separation of policy, regulatory and implementing functions at each relevant level of government; and each institution will be fully accountable for its financial and operational performance. The GOK will also develop a transition strategy to ensure the smooth functioning of the sector during the restructuring. The policies of the GOK concerning institutions are:

(a) A State Water Resources Board will be established for multi-sectoral water planning, inter sectoral water allocation, planning of water development programmes, management decisions, and resolution of water resources issues,. The Water Resources Development Organisation will act as technical secretariat for the State Water Resources Board. The SWRB's charter will include the following:
    (i) Assist in implementing the GOK water resources policy and periodically monitoring the progress of the sector.

(ii) Establish and manage a State Water Resources Data and Information Centre.
(iii) Develop a system of water rights and suitable enforcing mechanisms.
(iv) Develop targets for efficiency improvement in water resource exploitation and utilisation and suitable monitoring mechanisms.
(v) Assist GOK with the development of rules for regulation of ground water exploitation.
(vi) Develop allocation rules for water resources.
(vii) Develop rules and procedures for water accounting.
(viii) Develop solutions to water resource management issues in each hydrological unit and for the whole of Karnataka (involving, project affected persons in the development of water resource projects).
(ix) Develop, or cause to be developed, drought monitoring and contingency plans for each basin or sub-basin experiencing recurrent seasonal shortages of water.
(x) Develop, or cause to be developed, disaster management strategies for each basin or sub-basin.
(xi) Develop and publish annually the KWMP which addresses the overall resource management issues in each hydrological unit and for the whole of Karnataka and provides directions for the short-term, medium-term and long-term concerning water resource exploitation and water resource allocation across sectors and geographic areas.
(xii) Set out and monitor, or cause to be monitored, the reporting formats for regulating the water resource regime.
(xiii) Prepare an annual report setting out the key activities of the SWRB and providing such financial statements as are required by the [Comptroller and Auditor General of India].
(xiv) Develop and maintain an appropriate combination of suitably skilled in house and contracted staff to conduct the above activities.

(b) The Water Resources Department will be restructured to suit the new approaches envisaged, increase the efficiency of plan and non-plan spending and reduce the non-plan spending. The transition strategy will ensure opportunities for the existing staff to be trained and re-deployed as needed [including to the SWRB, RSTBA and SWC].

(c) A River, Stream and Tank Bed Authority (RSTBA) will be established to remove and prevent encroachments and prevent the occurrence of man made floods and droughts. The RSTBA's charter will include the following:
(i) Assist in implementing the GOK policy concerning encroachments.
(ii) Establish and manage a database and information system detailing encroachments or other situations which could lead to man made floods and droughts on a hydrological unit basis.
(iii) Develop procedures to register encroachments or other situations which could lead to man made floods and droughts on the database.
(iv) Develop and implement procedures for timely removal of such encroachments or other situations.
(v) Prepare an annual report setting out the key activities of the RSTRA and providing such financial statements as are required by the [Comptroller and Auditor General of India].
(vi) Develop and maintain an appropriate combination of suitably skilled in house and contract staff to conduct the above activities.

(d) A State Water Council will be established with a clearly defined mandate for administration of urban water and sanitation sector policies and activities and monitoring sector development. The SWC will be separate from the policy making apparatus of the GOK. The primary objective of the SWC will be to enable provision of sufficient water of an acceptable quality to meet basic human needs and to support development of the sector. The SWC's charter will include the following:
(i) Assist in implementing the urban water and sanitation policy and periodically monitoring the progress of the sector.

(ii) Manage an urban water and sanitation sector database and information system [or agree to use the facilities of the State Water Resources Data and Information Centre].
(iii) Assist in setting out individual targets and developing charters for ULBs.
(iv) Set out and monitor the guidelines/procedures for investment decisions, including a comprehensive assessment of the technical (including source identification based on the KWMP), financial, environmental and quality aspects.
(v) Approve and recommend the investment plan and proposal of ULBs.
(vi) Propose activities of institutional strategies for capacity building of ULBs.
(vii) Advise ULBs in adopting necessary measures for improvement of service delivery.
(viii) Prescribe the financial accounting system for water services across the State, and set out procedures for periodic due diligence of the same.
(ix) Assist in resolving drinking water related issues between stakeholders (ULBs, water utilities etc.)
(x) Monitor allocation of shared water resources [if requested by SWRB].
(xi) Set out and monitor the reporting formats for measuring the efficiency of physical and commercial operations of urban water and sanitation [including requirements that the relevant reports be independently audited before submission to the SWC].
(xii) Develop procurement guidelines and procedures and assist ULBs in obtaining the services.
(xiii) Advise the GOK in tariff resetting for ULBs.
(xiv) Prepare an annual report setting out the key activities of the SWC and providing such financial statements as are required by the [Comptroller and Auditor General of India].
(xv) Develop and maintain an appropriate combination of suitably skilled in house and contract staff to conduct the above activities.

(e) The SWC will perform the functions of economic and quality of service regulator for the urban water and sanitation sector in the short to medium term, until such time as an independent or multi-utility regulator is warranted for the sector.
(f) The SWC's mandate may be extended in due course to include administration of rural water and sanitation sector policies and activities and monitoring sector development.
(g) Technical assistance will be rendered to Water Users Associations and they will be encouraged to undertake land levelling and also take up cultivation of high value crops requiring less water use for efficient use of scarce water. Minor irrigation works and sub-systems of major and medium irrigation works will be rehabilitated with participation by the users of these tanks and sub-systems and handed over to the Users Organisation for operation, maintenance and management.
(h) Appropriate public and private institutions will provide information and training to local community organisations for managing water resources efficiently.
(i) A perspective plan for training for integrated water resources development and management shall be prepared. Training will be given to all relevant government staff, farmers and other users and also PRIs by organising training courses, workshops, discussions, conferences and study tours.
(j) Eco-interpretation centres will be created to bring awareness and to educate society to protect and manage precious natural resources including water.
(k) Action will be taken to improve governance, bring transparency in administration, reduce corruption and make administration accountable.

11.4.18 Regulatory framework

34 The GOK recognises that separation of policy, regulatory and implementing functions promotes accountability and provides the best prospects for efficient development and operation of the water and sanitation sector. The policies of the GOK concerning regulation of water and sanitation are:

(a) To control access to the sector through the competitive award of concessions, leases, management contracts and similar instruments (described collectively as concessions in the remainder of this section) to ensure only appropriate qualified reputable firms can provide service.

(b) To control the price and quality of service through:
  (i) Economic regulation of both water and sanitation services.
  (ii) Technical regulation for setting and enforcing quality standards concerning coverage, flow rate, pressure and related matters.
  (iii) Environmental regulation for setting and enforcing quality standards for raw water and for waste water discharges, ideally with participation from river basin or sub-basin representatives.
  (iv) Public health regulation for setting and enforcing quality standards for drinking water.
  (v) Customer service regulation of both water and sanitation services.

(c) To create a state level regulatory institution, initially within the SWC:
  (i) [To approve award and revoke of concessions by municipalities.]
  (ii) To conduct economic regulation under the terms of the concession.
  (iii) To conduct quality of service regulation under the terms of the concession.

(d) To create regional (or potentially municipal) level regulatory institutions to conduct quality of service regulation under the terms of the concession when a critical mass of PSP has been achieved.

11.5 Action plan

35 To implement the policies expressed in this document the GOK directly, or through its institutions, will take the action set out in the following paragraphs.

1. Establish the State Water Resources Board [by 2006]. Complete a review of existing policies and formulate new policies [by 2006]. Review the existing legislative framework, draft new legislation and propose amendments to existing legislative framework within 12 months in order to achieve the objectives enumerated above.
2. Establish the State Water Resource Data and Information Centre [with the State Water Resources Board], including a comprehensive water resource database containing data on surface and ground water availability and use for diverse purposes in different basins and sub-basins [by 2006]. Develop collaborative arrangements with concerned Departments and Agencies [by 2006]. Develop protocols for data sharing and exchange [by 2007]. Establish direct access for water management units to Water Resource Data Centre's database and decision support systems like GIS and MIS [by 2007]. Make water accounting and audit mandatory [by 2007].
3. Restructure the Water Resource Department (WRD) to improve planning and management capabilities, to eliminate duplication of functions and increase efficiency of plan and non-plan expenditure. Develop a transition strategy to train and redeploy staff based on needs [by 2006], implement this strategy [by 2007] and change operating rules to ensure transparency and accountability and make the WRD responsive to user needs [by 2007].
4. Establish a River, Stream and Tank Bed Authority to remove and prevent encroachments and prevent the occurrence of man made floods and droughts [by 2007].
5. Establish the State Water Council with a clearly defined mandate for administration of urban water and sanitation sector policies and activities and monitoring sector development [by 2006]. Create, within the SWC, a state level water and sanitation regulatory institution [by 2007].
6. Establish a demonstration eco-interpretation centre to bring awareness and to educate society to protect and manage precious natural resources including water [by 2008].
7. Complete all on-going and committed water resource development projects [by 2006].
8. Complete command area development works [by 2007] consistent with the policy of decentralisation and participation.
9. Undertake and complete rehabilitation and development of all minor irrigation tanks on the basis of participation by water users, including farmers, within a period of 10 years and entrust these works and subsequent operations and maintenance to Tank Users Associations

which will themselves regulate water use, cropping pattern, levy and collection of water user charges.

10. Develop and implement projects and schemes of rainwater harvesting and recharging of ground water sources, with community participation, [with at least one demonstration project implemented in each district by 2008].
11. Assess overall water resources availability, current and future problems and conflicts and identify drought and flood risk zones in each river basin and develop drought, flood and water pollution management and contingency plans [by 2007].
12. Mobilise community and stakeholder participation through Users Organisations, empower them, provide training, technical support and create public awareness. Form and empower Water Users Co-operative Societies and Federations for participatory irrigation management [with at least one demonstration project implemented in each district by 2008].
13. Develop integrated conjunctive river basin and sub-basin management plans for intra-state rivers using a participatory approach [by 2007].
14. Develop, and agree with the relevant states, integrated conjunctive river basin and sub-basin management plans for inter-state rivers [by 2008].
15. Assemble the initial KWMP by combining the river basin and sub-basin plans for inter-state and intra-state rivers [by 2008].
16. [Develop a comprehensive coastal management plans using a participatory approach [by 2007]].
17. Develop rules, procedures and guidelines for combining water use and land use planning [by 2008].
18. Develop rules, procedures and guidelines on all aspects of water resource management [by 2008].
19. Develop resettlement and rehabilitation policy, consistent with any national policy, for people adversely impacted by water and sanitation projects [by 2006].
20. Develop guidelines for planning and feasibility studies for water and sanitation projects [by 2006].
21. Establish a system of water rights along with suitable enforcing mechanisms [by 2009].
22. Develop rules and mechanisms for regulation of ground water to ensure that exploitation does not adversely effect any public drinking water sources and that extraction does not exceed [85%] of recharge capability without authorisation by GOK [by 2009].
23. Establish rules and mechanisms for regulation of surface water, including rules and mechanisms for water allocation [by 2009].
24. Develop plans for modernisation and rehabilitation of water resources projects as well as reclamation of water logged and salt affected lands [by 2007] and commence implementation of the plans.
25. Prepare and prioritise soil conservation and afforestation plans to reduce siltation of major dams [and implement at least one demonstration project in each district by 2011].
26. Establish a system for regular monitoring of application of the rules for ground and surface water [by 2009].
27. Establish a system for regular monitoring of the urban drinking water and sanitation services quality provided by each service provider and publish the results [by 2006].
28. Establish a system for regular monitoring of the rural drinking water and sanitation services quality provided by each service provider and publish the results [by 2008].
29. Require KUWSDB and BWSSB to prepare plans for increased PSP in the water and sanitation sectors [by 2006] for approval or amendment by the GOK and subsequent implementation.
30. Require KUWSDB, BWSSB, ULBs and other service providers to prepare investment plans detailing the options for utilisation of existing water and sanitation assets and the need for creation of new assets [by 2007].
31. Develop [by 2007] a revised demand driven urban water and sanitation strategy and action plan, including plans for restructuring KUWSDB and BWSSB to align with the objectives and principles set out in this policy statement, and commence implementation.
32. Require KRWSSA [by 2008] to develop a revised demand driven rural water and sanitation strategy and action plan and commence implementation.

33. Establish a pool fund, through contributions from financial institutions and multilateral agencies, to develop bankable urban water and sanitation projects and support project development [by 2007].
34. Require the SWC to develop guidelines, principles and standard documents for procuring urban water and sanitation services with PSP [by 2007].
35. Require all water and sanitation service providers to develop an action plan for increasing the level of charges and amending the structure of charges to conform to this policy [by 2006] and to commence implementation [by 2006].
36. Require all ULBs to install water meters at supply points to achieve 100% metering [by 2011] and to adopt volumetric pricing [by 2011].
37. Require all PRIs to install water meters at supply points to achieve 100% metering [by 2016] and to adopt volumetric pricing [by 2016].
38. Establish a system for monitoring of implementation of the action plans for increasing the level of charges and amending the structure of charges [by 2006].
39. Set minimal standards for water and sanitation services [by 2006].
40. Develop a system for regulating, monitoring and evaluating the efficiency of water and sanitation service provision and resource utilisation, including prescribing reporting requirements, procurement procedures, etc [by 2006].
41. Create regional (or potentially municipal) level regulatory institutions to conduct quality of service regulation when a critical mass of PSP has been achieved.
42. Review and, if appropriate, harmonise policy, regulation and implementation of urban and rural drinking water and sanitation services [by 2015].
43. Develop [by 2009] and review and update periodically guidelines on safety of water-related structures.
44. Put in place a system for continuous surveillance of safety of water-related structures [by 2009].
45. Ensure appropriate institutional arrangements are in place to implement policy on safety of storage dams and other water-related structures [by 2009].
46. Restructure and strengthen training, research and development institutions in the water sector to meet technology requirements to support basin planning, participatory approaches and render technical assistance to users organisations [by 2007].

12 Recommended model ADR clause
- See Chapter 7.4 of Volume 1

1. Compulsory domestic[40] institutional conciliation followed by institutional arbitration (domestic or foreign)

1. Applicable Law[41]

This Agreement shall be construed and interpreted in accordance with the laws in force in the State of [….], as they may be amended from time to time, and any dispute which arises out of, or in relation to, this Agreement, or the breach, termination or invalidity thereof shall be equally so governed.

2. Conciliation[42]

(a) If a dispute arises out of or in relation to this Agreement, or the breach, termination or invalidity thereof, the parties agree to seek an amicable settlement of that dispute by conciliation under the Rules of Conciliation of the Indian Council of Arbitration in force at the date of the signing of this contract. Accordingly, the parties hereby accord their written consent to conciliate, and agree that such consent constitutes the acceptance of the invitation to conciliate in terms of Rule 3 of the said Rules.

(b) A single conciliator shall be appointed by the Indian Council of Arbitration within 30 days from the date a party has requested the Indian Council of Arbitration to effect such an appointment. The Indian Council of Arbitration will provide administrative services in accordance with its Rules of Conciliation.

3. [Domestic] Arbitration[43]

(a) If the dispute was not settled by conciliation under section 2, the dispute shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

(b) Pending the submission of and/or decision on a dispute and until the arbitral award is made, the parties shall continue to perform their respective obligations under this agreement, without prejudice to a final adjustment in accordance with such award.

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40 Since we have opted for choice of Indian law, see below, "international commercial arbitration" which is in essence domestic arbitration with a choice of law, other than Indian law, is not longer relevant.

41 Choice as to the law governing the contract – Though not strictly part of an ADR clause, the importance of stipulating in advance the law that is applicable to the contract (i.e. applicable or governing law clause) is needless to say an important matter. A dangerous situation is created when the applicable law is not stipulated in the contract; its absence may sometime lead to a new dispute arising over what law is applicable. We have opted for choice of Indian law. This is the only reasonable choice, no matter where arbitration takes place.

42 Section 2 is unnecessary in Andhra Pradesh. Conciliation is compulsory in that State under section 41 of the *Infrastructure Development Enabling Act, 2001.* For contracts in Andhra Pradesh, what is here section 3 should therefore begin thus: "If a dispute arises out of or in relation to this contract, or the breach, termination or invalidity thereof, and cannot be settled by conciliation under the provisions of the *Infrastructure Development Enabling Act, 2001,* the dispute shall be settled by arbitration *…".*

43 Choice as to the venue of arbitration - If an English company sells to an Indian company, by way of a contract signed in the United States, a ship being built in Korea by the subsidiary of a Japanese company, it is not immediately obvious, if ever, that arbitration to solve any dispute relating to that contract should take place in India. In the case of the kind of PSP infrastructure contracts we are dealing with, the obvious place (venue) where arbitration proceedings should take place is India. We have provided a foreign arbitration variant in both versions of our model ADR clause only to cover the eventuality where a foreign investor would refuse to sign a contract with any of the Project States or one of their infrastructure agencies unless disputes arising out of the contract are settled in arbitration proceedings held abroad.

(c) The party challenging howsoever an award made under subsection (a), including making an application to set aside the award pursuant to section 34 of the *Arbitration and Conciliation Act, 1996* (Central Act No. 26 of 1996), shall in addition to all of his own costs and fees reimburse on a monthly basis all the direct costs and fees incurred by the party defending the award, including all direct costs and fees associated with any appeal thereof[44].

- or -

3. [Foreign – using London, U.K. as a venue] Arbitration[45]

(a) If the dispute was not settled by conciliation under section 2, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The place of arbitration shall be London (United Kingdom)[46]. The language to be used in the arbitral proceedings shall be English.

(b) Pending the submission of and/or decision on a dispute and until the arbitral award is made, the parties shall continue to perform their respective obligations under this agreement, without prejudice to a final adjustment in accordance with such award.

(c) The party challenging howsoever an award made under subsection (a), including:

(i) making an application to set aside the award pursuant to section 68 of the Arbitration Act,1996 (U.K. 1996, c. 23), and

(ii) opposing the enforcement of the award in India pursuant to section 48 of the Arbitration and Conciliation Act, 1996 (Indian Central Act No. 26 of 1996) shall in addition to all of his own costs and fees reimburse on a monthly basis all the direct costs and fees incurred by the party defending the award, including all direct costs and fees associated with any appeal of an order or judgement denying the application to set aside the award pursuant to section 68 of the Arbitration Act, 1996.

2. Compulsory domestic institutional conciliation followed by ad hoc arbitration (domestic or foreign)

1. Applicable Law

This Agreement shall be construed and interpreted in accordance with the laws in force in the State of [….], as they may be amended from time to time, and any dispute which arises out

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44 It may be pointed out that under Section 35 of the Code of Civil Procedure, 1908, the Court has the discretion to award the costs of suits. See Section 35(1) of the Code, which provides that:

> 35. *Costs*
> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

In this regard, it was held in *Dawoodbhai Matiwalla and Anr.* v. *Shaikhali Alibhoy* A.I.R. 1953 Bom. 445, at p. 447, that "…Parties cannot agree that the costs of the suit shall be awarded in a particular manner and then insist upon the Court awarding the costs in the manner they have agreed. It would be open to the Court to take into consideration the contract arrived at between the parties, but at the same time the discretion of the Court would remain unfettered…"

Furthermore, this provision may not be enforceable, if it is construed by the Court as defeating the remedy, and therefore, struck down as being unreasonable and onerous, particularly in the case of foreign arbitration.

45 Not possible in Gujarat since Section 35(b) of the GIDA, 1999 requires that the place of arbitration be in India only.

46 Although the ICC Court is based in Paris, it has facilities all over the world, including London which is a major arbitration centre.

of, or in relation to, this Agreement, or the breach, termination or invalidity thereof shall be equally so governed.

2. Conciliation[47]

(a) If a dispute arises out of or in relation to this Agreement, or the breach, termination or invalidity thereof, the parties agree to seek an amicable settlement of that dispute by conciliation under the Rules of Conciliation of the Indian Council of Arbitration in force at the date of the signing of this contract. Accordingly, the parties hereby accord their written consent to conciliate, and agree that such consent constitutes the acceptance of the invitation to conciliate in terms of Rule 3 of the said Rules.

(b) A single conciliator shall be appointed by the Indian Council of Arbitration within 30 days from the date a party has requested the Indian Council of Arbitration to effect such an appointment. The Indian Council of Arbitration will provide administrative services in accordance with its Rules of Conciliation.

3. [Domestic] Arbitration

(a) If the dispute was not settled by conciliation under section 2, the dispute shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The arbitral tribunal shall consist of three members appointed as follows: each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon request by a party, by the Indian Council of Arbitration. The place of arbitration shall be (a city in India). The language to be used in the arbitral proceedings shall be English.

(b) Pending the submission of and/or decision on a dispute and until the arbitral award is made, the parties shall continue to perform their respective obligations under this agreement, without prejudice to a final adjustment in accordance with such award.

(c) The party challenging howsoever an award made under subsection (a), including making an application to set aside the award pursuant to section 34 of the Arbitration and Conciliation Act, 1996 (Central Act No. 26 of 1996), shall in addition to all of his own costs and fees reimburse on a monthly basis all the direct costs and fees incurred by the party defending the award, including all direct costs and fees associated with any appeal thereof.

- or -

3. [Foreign – using London, U.K. as a venue] Arbitration[48]

(a) If the dispute was not settled by conciliation under section 2, the dispute shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The arbitral tribunal shall consist of three members appointed as follows: each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party, or the two

[47] Section 2 is unnecessary in Andhra Pradesh. Conciliation is compulsory in that State under section 41 of the *Infrastructure Development Enabling Act, 2001.* For contracts in Andhra Pradesh, what is here section 3 should therefore begin thus: "If a dispute arises out of or in relation to this contract, or the breach, termination or invalidity thereof, and cannot be settled by conciliation under the provisions of the *Infrastructure Development Enabling Act, 2001,* the dispute shall be settled by arbitration *…".*

[48] Not possible in Gujarat since Section 35(b) of the GIDA, 1999 requires that the place of arbitration be in India only.

appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon request by a party, by the International Court of Arbitration of the International Chamber of Commerce. The place of arbitration shall be London (United Kingdom). The language to be used in the arbitral proceedings shall be English.

(b) Pending the submission of and/or decision on a dispute and until the arbitral award is made, the parties shall continue to perform their respective obligations under this agreement, without prejudice to a final adjustment in accordance with such award.

(c) The party challenging howsoever an award made under subsection (a), including:

(i) making an application to set aside the award pursuant to section 68 of the Arbitration Act, 1996 (U.K. 1996, c. 23), and

(ii) opposing the enforcement of the award in India pursuant to section 48 of the Arbitration and Conciliation Act, 1996 (Indian Central Act No. 26 of 1996) shall in addition to all of his own costs and fees reimburse on a monthly basis all the direct costs and fees incurred by the party defending the award, including all direct costs and fees associated with any appeal of an order or judgement denying the application to set aside the award pursuant to section 68 of the Arbitration Act, 1996.

[49] Section 2 is unnecessary in Andhra Pradesh. Conciliation is compulsory in that State under section 41 of the *Infrastructure Development Enabling Act, 2001.* For contracts in Andhra Pradesh, what is here section 3 should therefore begin thus: "If a dispute arises out of or in relation to this contract, or the breach, termination or invalidity thereof, and cannot be settled by conciliation under the provisions of the *Infrastructure Development Enabling Act, 2001,* the dispute shall be settled by arbitration *…".*

[50] Not possible in Gujarat since Section 35(b) of the GIDA, 1999 requires that the place of arbitration be in India only.

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