Private Sector Infrastructure Facility at State Level Project

VOLUME 2: REVIEW OF EXISTING POLICIES AND LEGISLATION FOR PSP AND PRIVATISATION IN INFRASTRUCTURE

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
The Economic Research Institute
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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 2** 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

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Appendices

Abbreviations and Acronyms

ADB	Asian Development Bank
AMRP	Ahmedabad Mehsana Road Project
BMIC	Bangalore Mysore Infrastructure Corridor
BPL	Below Poverty Line
CBO	Community-based organization
EIA	Environmental impact assessment
ESR	Environmental and Social Report
EWS	Economically Weaker Section
FI	Participating Financial Institution
FSI	Floor space index
GoAP	Government of Andhra Pradesh
GoG	Government of Gujarat
GoI	Government of India
GoK	Government of Karnataka
GoM	Government of Maharashtra
GoMP	Government of Madhya Pradesh
GRC	Grievance Redressal Committee
GSHP	Gujarat State Highway Project
I&CAD	Irrigation & Command Area Department
ICICI	ICICI Bank
IDBI	Industry Development Bank of India
IDFC	Infrastructure Development Finance Corporation
IFCI	Industrial Finance Corporation of India
IGA	Income generating allowance
IGS	Income generating scheme
IL&FS	Infrastructure Leasing and Financial Services
KSHIP	Karnataka State Highway Improvement Project
LA	Land acquisition
LAA	Land Acquisition Act, 1894
LD	Line department
LIG	Low Income Group
MEL	Minimum economic landholding
MUTP-II	Mumbai Urban Transport Project II
NEL	Nandi Engineering Ltd.
NGO	Non-governmental organization
NHAI	National Highways Administration of India
OD	Operational Directive
PAF	Project-affected family
PAP	Project-affected person
PL	Poverty line
PSIF II	Private Sector Infrastructure Facility at State Level Project II
PSP	Private sector participation
ROW	Right-of-way
R&R	Resettlement and rehabilitation
SERC	State Electricity Regulatory Commission
SC	Scheduled caste
SPV	Special purpose vehicle
ST	Scheduled tribe
STD	Sexually transmitted diseases
TA	Technical Assistance
TDR	Transfer of development rights
UKP	Upper Krishna Project
UMT	Urban mass transit

1 Introduction

This Working Paper is a review of existing policies and legislation for private sector participation (PSP) and privatisation/disinvestment in infrastructure in India with regard to national policies and State policies in the project states of Andhra Pradesh, Gujarat,
Karnataka and Madhya Pradesh. The specific infrastructure sectors covered are:

- roads;
- power;
- ports;
- airports;
- urban mass transit;
- cyber parks/information technology parks;
- special economic zones (SEZs);
- water supply and sewerage.

A summary analysis for each of these sectors will be found in the Main Text of the Working Paper itself. A more detailed description of the policies and legislative framework for each sector then will be found in the four State appendices.

In addition to a discussion of the policy and legal issues related to each of these sectors, there will also be a brief discussion of legal issues that are common to all or most of the sectors. Those issues are:

- foreign investment legislation;
- tax legislation;
- competition legislation;
- labour legislation;
- land and land acquisition legislation;
- loan security legislation;
- dispute resolution legislation.

These issues will be discussed in greater detail at a later stage in the Project if they prove important to specific projects or with regard to important institutional changes to facilitate private sector participation. In addition, other important matters, such as environmental management and protection legislation and social resettlement legislation, are being handled separately by experts in these fields and will be discussed in separate reports.

The primary purpose of this Working Paper is to identify key policy and legislative constraints to increased private sector participation in each of the Project States and, where possible, to suggest changes of a legal nature to address those constraints. The emphasis will be upon projects and sectors that may be eligible for the ADB PSIF II facility. The next stage of the Project will be the provision of assistance to the State Governments with regard to specific eligible projects and the changes required to bring financing of those projects and similar projects to reality. Case studies will be developed in a separate Working Paper to explore those matters.

This Working Paper on overall infrastructure policy and legal framework is a companion to Working Paper 2 on regulatory framework with regard to each of the above named sub-sectors. There is overlap between the two working papers but this paper will concentrate on legal changes while Working Paper 2 will concentrate on changes in institutional framework.

The Working Paper will be structured as follows. Part II will discuss general policies regarding private sector participation and privatisation, with particular emphasis upon State infrastructure authorities and one stop centres. Part III will then analyse national and state policies and legislation for each of the eight infrastructure sectors. Part IV will discuss the effect of the other relevant laws that cut

across those infrastructure sectors. Part V will give a summary and preliminary conclusions and indicate issues that need to be followed up in reviewing present policies through case studies.

It is important to note that the purpose of the Working Paper, including its State appendices, is to describe the present situation regarding policies and legislation related to infrastructure for the four Project States, to identify problems and then to make preliminary conclusions as to how best to proceed to make private sector participation more attractive for infrastructure projects in the sectors discussed. This Working Paper is meant to open up discussion and to lead to more detailed recommendations later in the Project. It is an initial review relying on information obtained in the first part of the Study through September 2003.

2 General Policies and Laws Regarding PSP and Privatisation in Infrastructure

One of the main objectives of the 1991 economic reform program in India was the attraction of more private investment into infrastructure. This Part II will describe the general policies established in the four Project States to encourage private sector participation in the infrastructure sectors, including the role of coordinating nodal agencies, and make an initial evaluation regarding their comprehensiveness and effectiveness. This general policy framework for each of the States is discussed in detail in each State Appendix. Part III of this Working Paper will then take a close look at the policies and legislative framework for private participation for each of the infrastructure sectors identified for this Project.

As a general summary, the States of Andhra Pradesh and Karnataka have adopted specific State Infrastructure Policies. The State of Gujarat has also developed such a policy as part of the Gujarat Infrastructure Agenda- Vision 2010, prepared by the Gujarat Infrastructure Development Board which is its nodal agency for infrastructure. Madhya Pradesh does not have a specific private sector participation policy generally for infrastructure but has formed the Madhya Pradesh Economic Development Board to plan and monitor project implementation for infrastructure projects with the potential for such private sector participation.

The policies for both Gujarat and Andhra Pradesh are closely tied to the functions of their nodal agencies for assisting private sector participation- the Gujarat Infrastructure Development Board (GIDB), as mentioned above, and the Andhra Pradesh Infrastructure Authority (APIA).

2.1 A. Andhra Pradesh

The general policy regarding private sector participation and privatisation in the infrastructure sector in Andhra Pradesh is laid out generally in Andhra Pradesh Vision 2020 and then specifically in the State Infrastructure Policy (G.O. Ms. No. 427 dated 18 December 2000). That Policy is then reflected in the purpose clause of the legislation establishing the APIA.

2.2 Vision 2020

Vision 2020 states the goal that Andhra Pradesh will create enough infrastructure to spur development of the growth engines to sustain future growth. The introduction of private sector participation will not only provide the people with better quality and affordable services, it will free Government resources and attention for higher priority development goals. However, before it can involve the private sector in infrastructure building, the Government will need to create the necessary conditions for that participation. These conditions include rationalizing pricing, creating a new regulatory framework, and restructuring government infrastructure agencies.

The Government will need to provide an appropriate regulatory framework to enable private sector participation by establishing autonomous bodies to determine tariffs and set quality standards for services. In addition, Government infrastructure agencies will need to operate autonomously and efficiently and, where possible, be subject to the same rules of competition as the private sector. Some of these institutions could also be progressively privatised, keeping public interest in view. The distribution and generation segments of the power sector are cases in point.

To further increase the State's attractiveness to investors, the Government will also need to simplify its procedures for approvals. It will need to undertake additional initiatives for that purpose, such as cross-ministry investment promotion boards that minimize the numbers of decision-makers and steps

involved. Also, it will need to rationalize procedures regarding land identification and land acquisition/leasing.

However, to achieve dramatic growth, the Government will have to do much more. First, it will need to cultivate a mindset of "partnership" with private investors and consult them in setting policies and procedures for the State. Second, it will need to introduce wide-reaching measures to simplify and hasten approvals by cutting down on the vast number of regulations that currently apply. It should consider the establishment of a "deregulation czar" on the Mexico model.

2.2.1 AP Infrastructure Policy (G.O.Ms. No. 427 dated 18 December 2000)

The general proposals of Andhra Pradesh Vision 2020 were followed by the specific provisions of the Andhra Pradesh Infrastructure Policy (G.O.Ms.No. 427, dated 18 December 2000). The Order establishing the Policy notes that the State has identified 31 Mega Infrastructure Projects for immediate implementation with private sector participation. The Policy applies to all infrastructure projects implemented by private-public partnership (PPP) and requiring State Government support. It determines to establish guidelines to provide a speedy and transparent selection mechanism, adequate administrative support and reduction in procedural delays, and a bankable risk sharing mechanism. It envisions the need for a special Infrastructure Development Act that would establish an Andhra Pradesh Infrastructure Authority (APIA).

The Policy specifically mentions 21 infrastructure sectors. These include the 14 such sectors mentioned in Schedule III of the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (AP IDEA 2001) (Act No. 36 of 2001), discussed below, plus minor ports and harbours, airports and heliports, information technology and telecommunications, industrial/knowledge parks and townships, tourism, education, and metro railroads and other urban transport systems. (see Section 6.)

The further details of the Andhra Pradesh general infrastructure policy are set forth in Appendix A. In effect, it served as the basis for the drafting of the AP IDEA 2001 Act. The functions set for the Task Force establishing the Policy in Section 8 are basically the same as the functions set forth for the APIA in Section 10 of the Act. Among the matters covered in the Policy and later in the Act are:

- procedures for negotiation with developers, including competitive bidding and direct negotiation (Sections 10-14);
- specific criteria for developer selection by type of project (thus BOT and similar projects or BT and similar projects) (Sections 15-16);
- type of State Support that may be provided (administrative support, asset-based support, foregoing of revenue streams (Section 19), including user levies and the possibility of further types of support on a case-by-case basis (Sections 21-23);
- mitigation of risks (Sections 24-25);
- developer indemnity and other requirements of developers to safeguard the interests of the State Government (Section 26).

One difference from the IDEA legislation is that guarantees are not specifically mentioned in the Policy as a means of State Support under Section 19.

2.2.2 Andhra Pradesh Infrastructure Development Enabling Act, 2001

As mentioned above, the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (AP IDEA 2001) (Act No. 36 of 2001) is one of two examples in our Project States of legislation establishing a statewide infrastructure authority. The other is the Gujarat Infrastructure Development Act, 1999, which establishes the Gujarat Infrastructure Development Board (GIDB)., as discussed below.

The preamble of the Act lists its principal purposes as:

- to provide for the rapid development of physical and social infrastructure in the State and to attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State;
- to provide a comprehensive legislation for reducing administrative and procedural delays, identifying generic project risks, detailing various incentives, detailing the project delivery process and setting procedures for the reconciliation of disputes;
- to provide for otherwise ancillary and incidental matters with a view to presenting bankable projects for the private sector and improving the level of infrastructure in the State of Andhra Pradesh.

The AP IDEA Act is then divided into eight chapters which cover the establishment and business of the authority, the infrastructure project delivery process, generic risk disclosure and allocation , the securitisation of the rights of lenders, the facilities to be provided by the Government, the establishment of a Conciliation Board and conciliation proceedings, and the establishment of an infrastructure fund. Section 81 of the Act provides its provisions shall override the provisions of other laws.

In addition, there are five appended Schedules. Schedule I lists the types of concession agreements permitted- BT, BLT, BOO, BOOT, BTO, CAO, DOT, ROT and ROO. Schedule II sets two categories of projects. Category I Projects are those where no fiscal incentives are required nor exclusive rights granted to the Developer. Category II Projects are projects where there is State Government asset support, where financial incentives and exclusive rights are conferred on the Developer, and where extensive linkages/support facilities for the project are required, such as water and power supply. Schedule III provides a list of sectors for which projects are covered under the Act. Schedule IV gives a list of Generic Risks which will be included as part of a Concession Agreement under the Act. Schedule V lists the kinds of State Support that may be provided, including administrative support, asset-based support, foregoing revenue streams, guarantees and financial support. As noted above, guarantees has been added from a similar list found in the Andhra Pradesh Infrastructure Policy.

A detailed, section by section, description of the Andhra Pradesh Infrastructure Development Enabling Act, 2001 is found in Appendix A. The following is a summary of important provisions for the purpose of comparison with the provisions of the Gujarat Infrastructure Development Act, 1999, and with regard to the possible requirements of a potential private investor.

- **Sectors Specifically Covered**. Section 2 of the Act states that it applies to all infrastructure projects implemented through public-private partnership in the sectors listed in Schedule III. Those sectors are roads (including bridges and bye-passes); water supply, treatment and distribution; waste management; sewerage and drainage; health; land reclamation; canals and dams; public markets; trade fair, convention, exhibition and cultural centres; public buildings; inland water transport; gas and gas works; sports and recreation infrastructure, public gardens and parks; real estate; and other sectors as notified by the Government under the Act. Ports and airports are not specifically listed, although they are included as "other sectors". It would be better to make the list more extensive so that a potential investor would know immediately that his project was included. It should also be noted that the Act does not cover privatisation or disinvestment projects unless fresh, additional investment is made by the Private Sector Participant. (see Section 1(3)).

- **Functions and Powers of APIA.** Section 10 of the Act sets forth a very broad range of functions for the Andhra Pradesh Infrastructure Authority, both with regard to approval of projects and monitoring of their execution. That Section is then supplemented by the provisions of Section 11 on specific powers of the Authority. Thus under Section 11(1), the APIA shall have the power to grant any clearance or permission required for any project that comes under the Act, save only the sanction required from the State Government itself. Such clearance or permission when granted shall be final and binding on the concerned State agencies. Section 11(2) then states that the APIA may give directions to any Government Agency or Local Authority or developer with regard to the implementation of any project under the Act or for the carrying out of its functions under the Act. That Agency or person is

bound to comply with such directions. Section 11(3) further provides that the APIA has the power to call upon any such Agency or person to furnish information as may be required by the Authority in connection with any project. Section 11(4) gives APIA the power to inspect, visit, review and monitor any Project and its implementation, execution, operation and management through the officials of the Authority. Persons in charge of a project are bound to give full cooperation to the Authority. At present, the APIA does not have the professional staff to carry out these functions adequately, especially the function of monitoring the execution of projects, but they give it what is required to serve as an effective one stop centre in the future. The clearance power is particularly important. A major goal of this Project will be to assist APIA to better define its role and to make initial recommendations as to what type of staff is required to implement that role. For example, will the Authority emphasize active development of private sector participation projects or will it emphasize the monitoring of their effective implementation.

Much of the rest of the Act concerns either the infrastructure project delivery process or provisions to be included in Concession Agreement to provide incentives to the private developer of a Category II Project (those that require Government support). The infrastructure project delivery process will be examined in detail in Working Paper 2. **Regulatory Framework**. Below is a consideration of Generic Risks and State Support as incentive elements in a Concession Agreement.

- **Generic Risks.** Section 28 and Schedule IV of the Act gives a list of generic risks that would be included in a Concession Agreement under the AP IDEA Act. They are construction period risks; operation period risks; market & revenue risks; finance risks; legal/change of law risks; and miscellaneous risks (force majeure, sequestration, government action or inaction, termination of concession or payment failure by the Government). A detailed list of the risks is found in Appendix A. However, this list of such risks is an excellent effort to be comprehensive and provide certainty to the potential investor. They will be explored with regard to specific projects in Phase II of this Project;

- **State Support.** Schedule V of the Act gives a list of the types of State Support that may be provided to a developer of a Category II Project, in order of preference. They include administrative support (best efforts on helping to obtain Central Government clearances, providing infrastructure at the site, etc.), asset-based support (lease of Government-owned land, development of linkage infrastructure), foregoing revenue streams (sales tax on inputs; exemption from stamp duty and registration fee on first transfer from Government to developer), guarantees and direct financial support. Again, this is a comprehensive list that should give the developer of a Category II Project a great amount of specifics as to the type of support that might be provided by the State of Andhra Pradesh. Administrative support may also apply to Category I projects. Asset-based support and foregoing revenue streams may apply on a sector-by-sector basis for Category I Projects. A detailed list is again found in Appendix A. The attractiveness of different types of support will be explored for specific cases as part of this Project;

In addition, there are a number of other types of assistance to help a developer, including the following:

- **Facilitation of Securitisation**. Section 29 provides that the Agency concerned or the Authority may facilitate the securitisation of project receivables and assets by the developer in favour of lenders on terms set by the Government or by the APIA to safeguard the successful implementation of the project. This is an important provision with regard to the attractiveness of such projects to developers;

- **Rights of Lenders**. The attractiveness of such projects to lenders is increased by the provisions of Section 30. Lenders are entitled to recover their money due from the developer in the form of user levies. In case of default by the developer, they may substitute another developer on the same terms and conditions or with modifications, as approved by the APIA and the Agency concerned;

- **Clearance and Other Facilities to be Provided by Government**. Section 31 states that the Government Agency or Local Authority concerned shall provide all facilities to the developer to obtain necessary State level statutory clearances, and also provide construction power and water at the project site on such terms as may be set. It shall provide Best Efforts support for obtaining Central Government clearances (see also State Support), and provide assistance in any required rehabilitation and resettlement activities. In addition, as stated above, Section 11(1) of the Act allows the APIA to grant such clearances itself, where required. These are very important clauses to provide some degree of confidence to the potential developer of an infrastructure project;

- **Conciliation Board/Conciliation Proceedings**. (Chapters V and VI- Sections 32-53 of the Act). A three member Conciliation Board, headed by a retired High Court Judge, is to try to settle all disputes under the Act before a lawsuit is permitted. These extensive dispute resolutions are important. They are tied to the modern Arbitration & Conciliation Act, 1996, thus providing some comfort for the potential foreign investor. However, many such persons will seek international arbitration as the means with which they are most comfortable to settle any such dispute regarding a contract or concession agreement;

- **Infrastructure Projects Fund**. (Chapter VII, Sections 54-60). The APIA Act also provides for an Infrastructure Projects Fund to be funded initially by the State Government, and then to receive fees and charges under the Act, including abuser charges (for violation of provisions of a concession agreement) and pollution charges. As of September 2003, the Fund was not yet operational. The APIA is seeking an amendment to the Act to permit borrowing by the Fund. The Cabinet-level committee to which the APIA reports is considering whether to provide for such a power by amending this Act or by setting up the Fund as a separate entity under its own legislation;

- **Penalties/Appeals**. Section 69 of the Act sets penalties for anyone who fails to follow orders or directions of the APIA. Each such failure is liable to a fine of not less than Rs. 50,000 up to a maximum of Rs. One Crore, or by imprisonment of from one month to three years, or both. A similar set of penalties is set for failure to follow orders or directions of the Conciliation Board. This system of penalties has not yet been used in practice. It appears that the level of fines is too low for violations regarding large projects. The level of possible imprisonment is adequate for such crimes.

2.2.3 Summary and Conclusion

The Andhra Pradesh Infrastructure Development Enabling Act, 2001 is a broad and comprehensive piece of legislation that can serve as a model for other States. It places many of the types of incentives that would be provided to a private developer of an infrastructure project in the State as provisions of the Act itself. Thus the types of generic risks to be covered in concession agreements and the types of State Support that might be provided are covered in detail in Schedules attached to the Act. In addition, a separate Schedule defines 10 types of concession agreements covered by the Act. Further, elaborate provisions are made for a Conciliation Board and for conciliation proceedings to deal with dispute resolution. An Infrastructure Fund is mentioned also, even though it is now felt that such a Fund might be a separate body and should have borrowing authority. One possible deficiency is the question of enforcement and penalties. The level of fines set seems low for violations regarding large projects.

2.3 Gujarat

2.3.1 General Policy

The general policy regarding private sector participation and privatisation in the infrastructure sector in Gujarat is laid out in Gujarat Infrastructure Agenda-Vision 2010, prepared by the Gujarat

Infrastructure Development Board (GIDB). That Agenda assesses the emerging demand-supply gap in infrastructure capacity over the period 2000-2010 and identifies projects in various sectors to cover the gap. It generates a shelf of projects for development to be undertaken by the public/private sector, and analyses the financial and investment implications for implementing those projects and the private sector investment necessary.

The Vision concentrates on power, ports and industrial parks as drivers. It relies on port-led development to attain regional growth and demand for other sectors. Roads, water supply and townships are envisioned as linkage. Though these are dependent on the drivers, they are critical to the success of the latter. The critical factors for success in infrastructure development are meeting the financial requirement and State Support. Gujarat will prioritise its financial involvement and thus must clear the way for sustainable private investment.

There is no specific general infrastructure policy regarding private sector participation in Gujarat. However, the general points made in Vision 2010 are then reinforced through the functions and powers of the GIDB under the Gujarat Infrastructure Development Act, 1999 (Act No. 11 of 1999).

Gujarat Infrastructure Development Act, 1999

The Gujarat Infrastructure Development Act, 1999 is less complex and detailed than the Andhra Pradesh Infrastructure Development Enabling Act, 2001. The purpose of the Act is to provide a framework for participation of persons other than the State Government and government agencies in the financing, construction, maintenance and operation of infrastructure projects. The GIDB is established for implementation of that purpose.

The Act is divided into six chapters (40 sections) covering the definition of infrastructure projects, the establishment and constitution of the Board, the functions of the Board, finance, accounts and audit, and miscellaneous provisions covering charges, disputes and the making of rules and regulations.
In addition, there are two schedules. Schedule I lists the types of projects that come under the Act. With regard to the areas covered by this Project, they include:

- power generation, transmission and distribution systems;
- roads, bridges and bye-passes;
- ports (other than major ports) and the harbours thereof;
- urban transportation;
- water storage, water supply and sewerage systems;
- industrial estates, including industrial parks;
- solid waste management;
- information technology related projects.

This list is more comprehensive that the list found in Schedule III of the Andhra Pradesh IDEA 2001 legislation.

Schedule II concerns the Nature of Concession Agreements under the Act. It defines BOOT, BOOM, BT, BLT, BTO, Lease Management Agreement, Management Agreement, ROT, ROM, Service Contract Agreement, SOT and Joint Venture Agreement. This list is also more comprehensive than the similar list found in Schedule I of the Andhra Pradesh Infrastructure Development Enabling Act.

Further comparison with that Andhra Pradesh Act illustrates the following points:

- **Functions**. As with the Andhra Pradesh Act, Section 28 lists a broad range of functions for the GIDB, including approval, preparation and review of projects. In addition, the Board can undertake projects on its own. Also, it can prepare pre-feasibility and feasibility studies as a consultant for other projects. The latter would seem to be a conflict of interest with the function of coordinating authority;

- **Infrastructure Project Process**. Sections 4-15 cover a number of procedures regarding such matters as competitive bidding, direct negotiation and transfer of a project that are similar to those found in the Andhra Pradesh Act;

- **Infrastructure Fund**. Section 29 permits the GIDB to establish a fund, as does the Andhra Pradesh Act. The Fund may receive payments from the State Government and any other body, and will receive amounts charged by the Board for considering proposals and proposed concession agreements. (see Section 32.) There is no mention of borrowings;

- **Terms of Concession Agreements**. Although the number of types of concession agreements listed in Schedule II is more comprehensive than that found in the Andhra Pradesh Act, the Gujarat Act does not list specifically types of generic risks or other types of assistance that would be provided, such as best efforts assistance to get clearances;

- **State Support**. Section 6 of the Gujarat Infrastructure Development Act provides for a number of types of State Support that may be provided to a project, including State Government equity participation of up to 49%; a subsidy not exceeding 15% of total project cost; senior or subordinate loans; guarantee by the State Government or a Government agency in respect of the liability of a Government agency arising out of a concession agreement; conferment of a right to develop any land; 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. The Gujarat Act is more specific than the Andhra Pradesh Act with regard to the subsidy maximum but less specific regarding types of guarantees and incentives;

- **Arbitration**. Section 35 of the Gujarat Act states that a concession agreement shall contain an arbitration clause providing that disputes shall be decided in accordance with the law of India at Ahmedabad or another named place. Unlike the Andhra Pradesh Act, there is no specific reference to the provisions of the modern Arbitration & Conciliation Act, 1996. There is also no reference to the possibility of international arbitration. Thus these provisions may not be acceptable to foreign investors.

2.3.2 Summary and Conclusion

The Gujarat Infrastructure Development Act, 1999, amending the previous 1995 law, was the first such act in India and has served as a model, particularly for the Andhra Pradesh Infrastructure Development Enabling Act, 2001. In relation to that Act, it has a more comprehensive list of projects that specifically come under the Act and of types of concession agreements. However, it is not as explicit with regard to types of generic risks covered by such concession agreements or the types of guarantees and incentives under State Support that may be provided. Its dispute resolution provisions do not refer to the modern Indian law on the subject or to the possibility of international arbitration.

The effects of these matters will be studied further under Phase II of the Project. However, unlike the Andhra Pradesh Infrastructure Authority, the Gujarat Infrastructure Development Board has a significant staff to carry out its functions and been in operation for a longer period. Thus its experience can serve as an example of the benefits and difficulties facing this type of Statewide infrastructure authority in India.

2.4 Karnataka

Karnataka has a general infrastructure policy covering private sector participation (Government Order dated 26 December 1997). However, it does not have specific legislation establishing a special agency for coordinating infrastructure projects, like the Andhra Pradesh Infrastructure Authority or the Gujarat Infrastructure Development Board. Instead there are several agencies that perform

functions to encourage and approve such private sector participation. The process may be clarified with the adoption of a new State infrastructure policy, as discussed below.

2.4.1 General Infrastructure Policy

The present general infrastructure policy of Karnataka contains a series of statements pledging the State Government to play an enabling role to promote private sector investment in the sector; to prioritise resources for key infrastructure sectors and to ensure that they are commercially viable before offering such projects for private investment. In addition, such projects generally shall be offered for open competitive bidding but with the possibility of a limited Memorandum of Understanding (MOU) where a project is offered to the Government by a private investor. The Policy also pledges to take action to ensure that there is a single window agency for all necessary clearances. The State Government will propose amendments to relevant Acts and Rules where necessary to facilitate such private sector participation. In addition, the Government may offer incentives to projects, including exemption from certain State taxes and the provision of land free of charge for project purposes.

Further, Karnataka has a public sector reform and privatisation policy dated February 2001. It should be noted that, in addition to the general infrastructure policy, the Government of Karnataka has issued a great number of separate policy statements for specific infrastructure sectors, such as power (1997 and 2001), information technology (1997), roads (1998), special economic zones (2002), and urban water and sanitation (2003). These Policy Statements will be described in detail under the specific sector in Part III below.

2.4.2 Present Project Approval Process

In principle, the State Government Cabinet is the one stop shop for it resolves differences between departments, but this is seldom necessary. Very large projects, such as the Bangalore-Mysore Infrastructure Corridor Project, are reviewed by all departments with key decisions made by the Cabinet. For other projects above Rs. 50 crores, a High Level Committee, chaired by the Chief Minister, is the final authority and acts as the one stop shop. For projects below Rs. 50 crores, a Single Window Agency is the one stop shop. It is headed by the Chief Secretary.

The Department of Industries and Commerce takes a leading role in the development of large projects involving private sector participation. In addition, the Infrastructure Development Department (IDD) acts as the nodal department for coordinating and liasing with all other relevant departments concerning all significant infrastructure projects, whether or not they are developed with private sector participation. It was established in 1996 after being separated from the Department of Industries and Commerce. Its role is to determine infrastructure needs in the various sectors, to prepare and evaluate projects profiles for selected projects that would seek private sector participation and to seek such investment. It is to act as a consultant department for infrastructure departments with special regard to developing private sector participation in large projects over Rs. 100 crore.

However, the IDD is a secretariat only. It does not have field units. Thus the Infrastructure Development Corporation (Karnataka) (iDeCK), a special purpose vehicle established in June 2000, acts as the technical arm of the Department with regard to the promotion of private sector investment in infrastructure and to facilitate the process of public-private partnership in infrastructure. The Chairman of the Board of the Corporation is the Additional Chief Secretary, IDD. Its share capital is held 49% by the Government of Karnataka, 49.5% by the national Infrastructure Development Finance Corporation (IDFC) and the remaining 1.5% by the national Housing Development Finance Corporation (HDFC). The Corporation has a paid up capital of Rs. 10 crore and additionally receives funds from the Karnataka Government for project development and project investment activities. The Corporation has taken up the task of building up a pipeline of infrastructure projects for possible private sector participation in sectors such as tourism and urban development. To date, iDeCK has provided such consulting technical assistance to the State Urban Development Department (for urban water supply and sanitation, and for the planning of the growth

of cities and towns), to the State Public Works Department (for roads and ports), and to the Directorate of Industries and Commerce (for different types of SEZs, apparel parks, agroparks). Thus iDeCK is closely related to the IDD but not legally authorized to act for it.
Further, there are several other major institutional actors with general responsibilities to assist private sector participation in the infrastructure sector in Karnataka. In effect, they may also be said to offer one-stop facilities, in addition to the above roles of the Infrastructure Development Department and iDeCK. The Karnataka State Industrial Investment and Development Corporation (KSIIDC) is a company under the State Finance Department. At present, it is mainly concerned with the development of the proposed Bangalore International Airport, but it has a broader mandate. Also, the Karnataka Industrial Areas Development Board (KIADB), reporting to the Department of Industries and Commerce, was established under the Karnataka Industrial Areas Development Act, 1966 (Karnataka Act No. 18 of 1966), as amended, to develop industrial areas and provide industrial infrastructure and amenities to such areas. As described in greater detail in Appendix C, its major role is to provide land for such areas using an expedited land acquisition procedure. (see Chapter VII- Sections 27-31). In some cases for projects under Rs. 50 crore the KIADB acts as the Single Window Agency, and its head is on the Committee that decides on private sector participation projects at all levels.

Thus the present system in Karnataka is a complex one, with a number of actors having one-stop shop responsibilities depending on the specific type of project.

2.4.3 Proposed Revised Karnataka Infrastructure Policy

The Karnataka Cabinet is presently considering a revision to the present Infrastructure Policy which would appear to make the situation clearer. Although we have not seen the new draft Policy, we understand that the new policy will have a High Level Committee, headed by the State Chief Secretary, as the final decision-maker for large-scale private sector participation projects. All such projects over Rs. 100 crore would first go to the IDD for approval, with iDeCK acting as its implementing secretariat. Thus the new Policy would give iDeCK two roles- one as the technical advisor/consultant to Government Departments in the preparation of projects and the second as the Secretariat for the vetting of private sector participation projects. If not watched carefully, this could create a major conflict of interest. It will be necessary throughout the Project to see how this new Policy is implemented in practice, as compared to the present Policy.

2.5 Madhya Pradesh

Madhya Pradesh also does not yet have a nodal agency for coordinating private sector participation in the infrastructure sector, nor does it have a general State infrastructure policy. However, the Madhya Pradesh Economic Development Board (MPEDB) has general responsibilities for both publicly funded and privately funded infrastructure projects. The Board is chaired by the Chief Minister and is comprised of some members of the Cabinet and of officers of the rank of Principal Secretary. A Project Planning and Monitoring Unit (PPMU), headed by the Chief Secretary, was set up as part of the Board to plan and monitor project implementation for select large investment projects. Infrastructure projects identified as showing potential for private involvement on a BOT or similar model with a minimum investment of Rs. 10 crore are referred to the Board.

In addition, the Madhya Pradesh Industrial and Infrastructure Development Corporation (MPIIDC), formerly the MP Industrial Development Corporation, has been given the responsibility for implementing and facilitating public-private partnership projects. It has been the responsible for several road and bridges BOT projects through its six subsidiary companies- MP Audhyogik Kendra Vilas Nigam (MPAKVN)- located at Bhopal, Indore, Gwalior, Raipur, Jabalpur and Rewa. Further, Madhya Pradesh Audhyogik Kendra Vikas Nigram (Indore) Limited is in charge of the SEZ at Indore.

There has been discussion of the establishment of a State nodal cell to coordinate the development of infrastructure projects for private sector participation or to expedite the privatisation of infrastructure facilities. An Infrastructure Privatisation Act was mentioned as a means to provide a better

environment for private investments in infrastructure and to introduce a transparent process for project privatisation. However, such an Act has not yet been drafted. To date, only road sector projects have been developed for private sector participation in Madhya Pradesh.
However, the State has enacted two recent pieces of legislation to help raise and deploy funds for infrastructure projects. They are:

- the Madhya Pradesh Adhosanrachna Vinidhan Nidhi Board Adhiniyam, 2000 (MP Act No. 6 of 2000) (the "Fund Board Act") to offer repayment guarantees for such private sector investments;
- the Madhya Pradesh Infrastructure Investment Fund Scheme Act, 2001 (MP Act No. 12 of 2001).

The Project will consider the effectiveness of this structure, particularly the role of the Madhya Pradesh Economic Development Board in assisting private sector participation in the infrastructure sector, in reviewing specific cases of possible investment in the next phase of the Project.

2.6 Summary and Conclusions Regarding State General Infrastructure Policies

The above discussion of general infrastructure policies to assist private sector participation in the four Project States has illustrated the broad range of specific policies and the broad range of implementing measures and procedures to achieve the goals sought. It is too early in this Project to make any firm conclusions about the effectiveness of the four State policies. However, the following are some initial observations, in part based on experience in other parts of the world:

1) A specific law, such as the Andhra Pradesh Infrastructure Development Enabling Act, 2001 or the Gujarat Infrastructure Development Act, 1999, which covers private sector participation in infrastructure in general terms is helpful to the potential investor in so far as it spells out a simple and well-spelled out process for that investor to follow. The more specific such a law and its implementing rules are, the better. Thus the Andhra Pradesh legislation provides a clearer roadmap than does the Gujarat legislation, but it still lacks a basic set of implementing rules;

2) A coordinating agency, such as the GIDB or the APIA, can be very helpful in promoting private sector participation if it has adequate staff and produces models for use, including model applications and procedures for application and model concession agreements. At the moment no agency in the four Project states has reached that point, even the GIDB;

3) It should be possible to lay out a simple project clearance system- a template for the potential investor. This should be a main purpose of a general coordinating infrastructure agency such as the GIDB and APIA;

4) The containing of such specifics in a law or implementing rules under a law provides greater certainty than if the specifics are contained in a policy only. However, a more specific policy is better than a general policy;

5) The containing of such specifics in a law provides greater certainty than if the specifics are contained only in a concession agreement developed on a case-by-case basis, even if that agreement is based on a model concession agreement. (The adequacy of present model concession agreements will be examined in Phase II of this Project);

6) Sector specific legal bases for private sector participation are also necessary, such as a State Highways Act, State Maritime Board Act, State Power Act, and a revised State Municipal Corporation Act to cover municipal transport and urban mass transit and perhaps water and sewerage. If not covered under the Municipal Corporation Act, then water and sewerage should have a separate Act, not necessarily linked to the establishment of a water and

sewerage board. Such laws provide detailed rules. In some cases, they can clarify the relationship between state legislation and relevant national legislation, such as the Indian Ports Act, 1908, as amended;

7) Foreign investment laws and other similar laws may affect private sector participation for a sector and conflict with the carrying out of general policies for private sector participation in infrastructure. One such area is the need for modern land acquisition procedures.

8) These initial conclusions will be examined with regard to specific projects considered for funding under Phase II of this Study.

3 Specific Infrastructure Sectors

In addition to, or in place of, general policies regarding private sector participation and privatisation in infrastructure, there are also a number of relevant policies with regard to specific infrastructure sectors. It is important to note the varying roles of the Central Government and State Governments with regard to particular infrastructure sectors. For example, airports and SEZs follow national rules. Major ports follow national rules but minor ports may also be governed by State rules. For ports and power, there are both national and State policies. Water supply and sewerage is handled at the State and local level, although there is a National Water Supply Policy. Urban mass transit is a local function based on State law but there are relevant national laws and guidelines because of the general involvement in such projects of the Government of India and of the Indian Railways. This Part III is a summary of relevant policies and legislation for each of the infrastructure sectors considered in this Project, whether national or State, as relevant. The emphasis is upon highlighting any problem areas. A general question raised by this discussion is the relationship between such specific sector policies and a general infrastructure policy. Is it necessary to have a specific sector policy to effectively attract private sector investment?

3.1 Roads

3.1.1 Overview

The roads sector has seen significant private sector participation in recent years, especially at the national level, as a means of meeting major needs and severe budgetary constraints. The National Highways Act, 1956, was amended in 1995 (new Section 8-A), to allow the Central Government to enter into agreements with private parties for the development and maintenance of national highways. Model concession agreements have been developed for large projects (over Rs. 100 crore) and for other projects (up to Rs. 100 crore). A model annuity-based concession agreement has also been finalized. At present, there are over 20 BOT projects for national highways in different stages of construction or operation.

At the State level, policies regarding such private sector investment in roads have been developed in each of the four Project States. These policies vary in their comprehensiveness and legal basis. However, minimum legislation is in place in each such State for private sector participation and for the levying of tolls to be collected by private parties for the term of the concession agreement. A description of those State policies and that State legislation follows, including some comments on results to date. A final section then considers what types of changes might create greater certainty for the potential investor regarding the roads sector

3.1.2 Roads Policies

Andhra Pradesh

In Andhra Pradesh, the policy regarding private sector participation for roads is part of the implementation of Andhra Pradesh Vision 2020 which views roads as trunk infrastructure, contributing the infrastructure backbone of the State.

The Policy Framework for Private Participation in the Roads Sector (G.O.Ms. No. 184 (R&B), dated 23 September 1997, provides that projects for private participation shall be State and district roads which are economically viable. Road widening of urban roads is also a priority. Foreign direct investments of up to 100% of equity are permitted. BOT concession periods are set at a maximum of 30 years.

The State Government will carry out all preparatory works, including land for right of way, utility installation, and resettlement and rehabilitation of affected establishments. Financial concessions

include the land required and a possible subsidy of up to 30% of project cost. As non-financial inducements, the private party may be permitted to develop wayside facilities to generate income during the BOT period for restaurants, motels, commercial and residential complexes, and for other real estate development that would improve the revenue stream of the Project. Tax concessions include a tax exemption of up to 100% of profits for the first five years and of 30% thereafter up to 10 years. In addition, subscribers to equity shares or debentures may receive deductions for their investments. Finally, disputes between the parties are to be resolved using the modern provisions of the national Arbitration & Conciliation Act, 1996.

In addition to the rules set in the State Infrastructure Policy itself, certain rules regarding private sector participation in roads projects, as for other infrastructure projects in Andhra Pradesh, are found in the Andhra Pradesh Infrastructure Development Enabling Act, 2001 discussed in Part II above and in detail in Appendix A. As previously noted, Schedule I of that Act defines different types of concession agreements. Schedule II of the Act then defines two categories of projects. Category II Projects are projects that receive State Support. Chapter IV (Sections 28-31) and Schedule IV give a list of Generic Risks which are to be included as part of a Concession Agreement under the Act. Schedule V lists the kinds of State Support that may be provided, including administrative support, asset-based support, foregoing revenue streams, guarantees and direct financial support. Chapter III (Sections 13-27) of the Act sets the rules for the infrastructure project delivery process. It covers project identification, project prioritisation, recommendations by the APIA, sanction by the Government of a project, consultant selection and developer selection. Developer selection includes both selection criteria and bidding criteria. Further, Chapter V(Sections 32-40) on the Conciliation Board and Chapter VI (Sections 41-53) on Conciliation Proceedings set rules for dispute resolution which are coordinated with the process of the Arbitration & Conciliation Act, 1996. These provisions are discussed in Part II but should be reviewed again with regard to private sector participation in each specific sector, including the roads sector.

To date, however, no State highways in Andhra Pradesh have yet been improved based on this Policy, although plans for private sector participation for five toll expressways have been completed. The ten completed and on-going BOT projects in the State are for bye-pass roads and bridges.

Gujarat

Gujarat has the oldest Road Policy of the four Project States. It dates from 1996. Annexure-B of that Policy sets forth 13 Guidelines for Private Sector Participation in Roads Projects in the State. These Guidelines and other rules regarding the nature of concession agreements, the process for bidding and negotiation, and monitoring of such projects are then put in the Gujarat Infrastructure Development Act, 1999 (Gujarat Act No. 11 of 1999), which established the Gujarat Infrastructure Development Board (GIDB).

The general State Road Policy itself notes specifically that in view of the paucity of budgetary resources for road projects, private sector participation will be sought "in a big way". Parties will be selected by open competitive bidding with evaluation of bids by a high level committee to ensure transparency. Further, the following types of incentives will be considered by the State Government for each such project to help make it commercially viable:

- acquiring land at Government cost for the right of way
- in cases where the levy of toll alone is not enough to ensure such financial viability, then the Government shall consider providing additional land to the investor for commercial development so as to increase returns;
- granting advertisement and air space rights within the right of way;
- subsidizing loss of revenue due to traffic being less than that projected;
- exemption from royalty on construction materials;
- granting permission for planting of trees and deriving revenue from them in the land width during the concession period;
- allowing construction in segments and levying of tolls on completed segments, so as to utilise the revenue from those segments to complete the remaining segments;

- Government/Government Corporation equity participation in special purpose vehicles for roads projects.

Annexure-B of the Policy then sets forth the Guidelines for Private Participation in Road Projects mentioned above. Many of these provisions are then put into the GIDB legislation, as noted. The 13 Guidelines are as follows:

- land acquisition (land will be acquired by the State Government and made available to the entrepreneur who will generally bear the land cost);
- finance (all finance for the Project shall be arranged by the entrepreneur. No guarantee will be made available to the Project);
- mode of selection (open competitive bidding of pre-qualified bidders with decision by a High Level Committee);
- project details, designs and specifications (all approved by State Government);
- return on investment and finalising of toll rates (by a Tariff Committee appointed by the State Government with representation from both Government and investor);
- settlement of disputes (suitable arbitration mechanism fixed, with a time limit for such settlement);
- additional benefits over and above toll rights (when tolls not sufficient, Government may allow the entrepreneur to develop suitable land in the vicinity of the project);
- management and maintenance of the project (entrepreneur is responsible based on terms of concession agreement);
- environmental protection (entrepreneur must meet these requirements and no mention is made of help on best efforts basis by the Government);
- legal requirement (all proposals must meet existing rules and regulations. Such rules must be followed throughout the concession period);
- ownership (facility is owned by State Government and leased to the entrepreneur for the concession period. At the end of that period, the facility is handed to the Government);
- payment of taxes and duties (responsibility of the entrepreneur. Normally no tax concession will be considered for such projects);
- period of toll (set based on traffic, amount invested, cost of toll collection, cost of maintenance, return on investment, etc. The toll may be increased or decreased periodically based on these factors and finalized by the Tariff Committee).

As was the case in Andhra Pradesh, the Gujarat Infrastructure Development Act, 1999 which provides general rules for private sector participation in infrastructure projects also must be considered as well. Schedule II of that Act carefully defines the types of concession agreements. Section 5 of the Act provides that the Gujarat Infrastructure Development Board shall review all large projects and their concession agreements. Section 6 of the Act covers possible forms of State Support for roads projects as well as for other infrastructure projects.

In addition, there are several areas where that Act adds to or contradicts the Guidelines. Thus Section 6 of the Act, mentioned above, would allow a guarantee in respect of the liability of a Government Agency arising out of a concession agreement, while the Guidelines would not. Section 4(3) of the Act sets a maximum period for a BOT project at 35 years while no maximum is set in the Guidelines. Section 35 of the Act makes more explicit that a concession agreement shall contain an arbitration clause. Disputes shall be settled based on the law of India with no mention made of the Arbitration & Conciliation Act, 1996.

Gujarat already has completed nine BOT road/bridge projects. In addition, the GIDB and the Gujarat State Road Development Corporation (GSRDC) have identified four projects to be offered to private sector parties at the Vibrant Gujarat Global Investors' Summit to be held in Ahmedabad from September 28-30, 2003. Appendix B lists those projects. However, the response to recent BOT projects has been poor in the State. GIDB feels that the lack of a clear cut policy regarding a Government subsidy, low estimates for traffic levels and questionable prospects when tolling two lane roads are major factors. The subsidy issue is one of policy that will be considered later, and as part of Phase II of this Project.

Karnataka

Karnataka issued its Policy on Road Development by Government Order dated 20 August 1998. In general, the State Government intends to widen all State highways to at least two lanes, with four lane roads and expressways along high-density traffic corridors. It also intends to strengthen all roads to carry heavier loads and to improve geometry to allow faster speeds. Thirdly, it aims to provide all weather linkages to unconnected settlements in the State.

With regard to private sector participation, the State Government has set forth specific rules regarding financing and concession agreements. With regard to financing, and consistent with Government of India policy, projects which are commercially viable will be offered to the private sector as BOO, BOT or BOOT schemes in which the Karnataka Government will participate on mutually agreed terms. Projects that are not individually commercially viable may be combined with viable projects and offered to the private sector. Concession agreements for such road projects generally will be for a period of up to 30 years (as compared to 35 years in Gujarat, for example). The private operator will have the freedom to set tariffs within the framework of existing statutes. He will have to guarantee performance standards. In addition, the Government of Karnataka generally will offer a project through competitive bidding procedures but may enter into a Memorandum of Understanding (MOU) with any qualified company in the event that competitive bidding does not elicit a response.

At present, these rules are in the process of being applied with regard to major roads. The four laning of the Bangalore-Maddur section of the Bangalore-Mysore State Highway (SH-17) is the major BOT project to date, under the management of the Karnataka Road Development Corporation Ltd. (KRDCL). Its total cost is Rs. 188 crore. The concession period for the annuity-based agreement is 10 years and three months- including three months for financial closure, 24 months for construction and then an eight-year operational period. The return will be in the form of semi-annual annuity payments based on the projected traffic volume on the road. The two-year construction period is expected to begin in September 2003. The other BOT project is the Sandur Bypass Project being prepared by the Karnataka Infrastructure Development Department(IDD) and the Karnataka Public Works Department, with the Infrastructure Development Corporation (Karnataka) (iDeCK) helping with project preparation. Thus Karnataka is just in the process of implementing its roads policy with very few parameters set in advance, either in that sector policy or in the general State Infrastructure Policy.

Madhya Pradesh

Madhya Pradesh has a 10-year road policy aimed at providing connectivity and access to provide an efficient road network to effectively meet the transportation needs of every sector of society in a cost-effective way. To meet these objectives, it is recognized that there is a shortage of Government funds available and that it is essential to attract private participation.

Madhya Pradesh was the first State in India to initiate private sector participation and investment in the construction of roads and bridges. It was the first State to carry out road maintenance under such arrangements. For this purpose, the State Government has initiated the following schemes:

- Build-Operate-Transfer (BOT);
- Maintenance-Operate-Transfer (MOT);
- Public-Private Partnership (PPP).

Viable projects will be offered to the private sector under a BOT scheme, especially projects for the widening of high-density corridors, the strengthening and maintenance of economically viable sections of highways, and the construction or reconstruction of bridges.

The implementation of the Road Policy will be monitored by the State Public Works Department through a special Implementation Cell. The State Government will set up a high level committee headed by the Chief Secretary to review the progress of that implementation.

More detailed rules are then found in the Guidelines for such private sector participation in Madhya Pradesh. Those Guidelines state that:

- there will be an advance action by the Government to acquire land, and to shift utilities such as water lines, sewer lines and electricity poles, for identified BOT projects;
- the selection of entrepreneurs will be on the basis of open and transparent competitive bidding, with equal opportunity to all.

With regard to incentives, the Guidelines indicate that an appropriate combination will be considered to ensure the commercial viability of a given road project. Such incentives may include:

- support by the State Government for preparatory works, such as the feasibility study, land for right of way and roadside facilities, relocation of utility services, cutting of trees, removal of encroaching structures, the resettlement and rehabilitation of persons affected, and environmental clearances (the project may be asked to pay back the costs of these works);
- in cases where the levy of the toll alone is not enough to ensure financial viability for the road project, the Government may consider leasing additional land to the investor for commercial or real estate development for highway related facilities, such as restaurants, hotels, parking areas, warehouses and commercial and residential complexes, as identified in the bidding documents. The investor shall keep the revenue from such facilities for the concession period;
- the entrepreneur will be permitted to collect revenue from the displaying of advertisements within or without the right of way for the concession period;
- permission may be granted for the planting of trees on the road width with that revenue going to the entrepreneur during the concession period;
- allowing of construction in segments and the levying of tolls on such completed segments so as to utilise that toll revenue to complete the remaining segments.

Finally, the Guidelines indicate that advance action shall be taken to ensure that the agency responsible for the contract for road maintenance shall be fixed before the expiration of the concession period of the BOT operator.

It should be noted that these Guidelines are essentially the same as those for Gujarat discussed above.

In addition, the Madhya Pradesh Public Works Department is preparing a detailed scheme for the development of a State Road Maintenance Fund that would pool toll revenue and road taxes, as well as have the revenue from an additional cess on fuel and taxes on vehicles. The objective of the Fund is to award contracts to large professionally managed companies who can provide an example to other road builders. It would also leverage its resources as equity participation to provide BOT operators with additional capital to be pooled with their own resources to bid for a pre-determined concession period. Thus a partnership with the private sector would both increase the available pool of funds and also enhance maintenance/construction activities by the application of modern techniques. The progress on such a fund will be reviewed by this Project.

As in the other Project States, the main projects under BOT to date in Madhya Pradesh have been bridges and bye-pass roads. Also, maintenance projects have been carried out on the Bhopal-Dewas State Highway and the Indore-Ujjain Road.

Summary Regarding Road Policies

Although each of the four Project states has issued a specific State road policy, it is too early to know whether those policies are effective as few BOT projects are being carried out. However, it does

appear that the States with specific laws setting rules for concession agreements for infrastructure projects, thus Andhra Pradesh and Gujarat, provide a more effective roadmap for potential investors in this area.

3.1.3 Legislative Framework For The Roads Sector

As noted above, in some cases the policies for private sector participation in the roads sector are specifically tied to acts and regulations, not just issued by Government Order. In general, roads are a State function, based on item 13 of List II- the State List- of the Constitution. (Article 246, Seventh Schedule). Item 13 states that States shall be responsible for communications, that is to say, roads, bridges, ferries and other means of communication not specifically listed as the responsibility of the national Government under List I- the Union List. However, item 23 of that Union List specifically gives the Central Government authority over highways declared by law made by the national Parliament to be national highways.

National Roads Legislation

The relevant national legislation declaring such national highways is the National Highways Act, 1956 (Act No. 48 of 1956), as amended, with its attendant National Highways Rules, 1957, and other rules related to fees for use of such highways and bridges on such highways. Section 2 of the Act concerns the method of declaration of such highways. An initial list of national highways is found in the Schedule to the Act and other roads may be declared as national highways by the Central Government by notification in the Official Gazette. Section 3 of the Act provides a streamlined procedure for land acquisition for national highway purposes to replace that of the national Land Acquisition Act, 1894, as amended. (see further discussion of land acquisition in Part IV). Section 4 provides that such national highways vest in the national Government/Union. Section 5 states that generally the responsibility for the development and maintenance of national highways is with the Central Government but that it may be delegated to a State Government or to an authority under either the Central Government or a State Government. In addition, Section 6 provides that the Central Government has the power to issue directions to the Government of any State regarding the carrying out of provisions regarding national highways.

Sections 7 and 8-A of the National Highways Act give rules related to private participation. Section 7 concerns the setting of tolls and other fees for the use of national highways and of bridges and tunnels on such highways. The Central Government may set such rates by notification in the Official Gazette. This Section is the legal basis for tolls on national highways, whether collected by the Government itself or by private parties under a concession agreement.

Section 8-A, added by Amending Act No. 26 of 1995, then gives the Central Government the power to enter into agreements with private parties for the development and maintenance of national highways. Subsection (2) of the Section specifically provides that such a private party may collect and retain fees set for services rendered by him as specified by the Central Government. Such fees are to be related to expenditures involved in the building, maintenance, management and operation of the whole or a part of such a national highway, interest on the capital invested, a reasonable return on that investment, the volume of traffic and the period of such agreement. Subsection (3) of the Section further gives such a private party the power to regulate and control traffic on that national highway as required for its proper management in accordance with the provisions of Chapter VIII of the Motor Vehicles Act, 1988 (Act No. 59 of 1988).

Section 8-B of the Act, also added by Amending Act No. 26 of 1995, provides penalties for persons who commit an act which renders, or he knows is likely to render, injury to a national highway so as to make it impassable or less safe to travel. Such a violator shall be punished with imprisonment for up to five years, or with a fine (unspecified maximum), or by both.

Section 9 of the National Highways Act gives the Central Government the power to make rules for its implementation, by notification in the Official Gazette. Among the subjects for which such rules may be made are the rates at which fees (including tolls) may be levied. Finally, Section 10 of the Act

states that such rules, as well as other notifications and agreements issued or entered into under the Act shall be laid before both Houses of Parliament as soon as they are issued.

Thus the National Highways Act provides a specific legal basis for both private sector participation in the construction and maintenance of national highways, and for the collection of tolls to pay for such projects under a concession agreement.

The basic National Highways Act is then implemented by several specific rules related to private sector participation. The National Highways (Collection of Fees by Any Person for the Use of Section of National Highways/Permanent Bridge/Temporary Bridge on National Highway) Rules, 1997 implements Section 8-A of the Act. Rule 3 concerns the rate of toll and the variables to be considered. It also states that the Government shall continue to collect the toll, as notified from time to time, after the end of the concession period when the road is turned back to it. Rules 4-6 then contain details regarding the mode of fee collection, who is in charge of fee collection and the verification of the collection.

The National Highways (Rate of Fee) Rules, 1997 implement Section 7 of the National Highways Act. Rule 3 states that the rate of such fees shall be set by the Central Government by notification in the Official Gazette. Such fee shall be set with regard to the expenditures involved in the building, maintenance and management operations of the section of the highway or bridge, and the volume of traffic and vehicle operating costs thereon. The wording here for what types of expenditures shall be considered in setting a fee is not exactly the same as that found in Section 8-A with regard to tolls under concession agreements. The Section 8-A wording is more specific and should be repeated here. Rule 3 then sets maximum fees at June 1997 levels. That rate may be increased annually, based on annual wholesale price increase and rounded off to the nearest Rupee.

The Control of National Highways (Land and Traffic) Act, 2002 (Act No. 13 of 2003) then sets rules for the control of land within national highways and their rights of way, of traffic moving on such highways and for removal of unauthorised occupation on such highways through the establishment of highway administrations for a State highway or individual highway. (Sections 3 and 4).

In addition, the National Highways Authority of India (NHAI) Act, 1988 (Act No. 68 of 1988), as amended, establishes that Authority as an independent body attached to the Ministry of Road Transport and Highways (MORTH) to carry out the development, management and maintenance of national highways. Under Section 16(2)(h) of that Act, added by Amending Act No. 16 of 1977, the Authority may entrust the carrying out of any of its functions to any person on terms and conditions as may be prescribed. Section 34(2)(dd), as added by the same Amending Act, then gives the Central Government the power to set rules for such terms and conditions by notification in the Official Gazette. Thus the powers and functions of NHAI may now be delegated to private parties for the carrying out of road development through concession agreements and other contracts.

Finally, the Central Road Fund Act, 2000 (Act No. 54 of 2000) gives statutory status to the existing Central Road Fund established in 1988 as a sustained financial arrangement for the development of State and local roads, as well as national highways. The Fund is financed through a cess leviable on petrol and high-speed diesel oil. Section 10 of the Act indicates that 50% of the cess on high speed diesel oil shall be for the development of rural roads, while the remaining 50% of that cess and all of the cess collected on petrol shall be spent 57.5% on national highway development and maintenance; 12.5% on roads under or over railways; and the remaining 30% on the development and maintenance of roads other than national highways (but 3% of that shall be kept by the Central Government as reserve for allocation to states for road schemes of inter-State and economic importance approved by the Central Government).
Thus the present legislation regarding national highways, as amended in recent years, provides an adequate legal basis for private sector participation through concession agreements and for the levying of tolls. The model concession agreements used for large and small projects and the model annuity-based concession agreement will be reviewed in detail in Phase II of this Project as part of Working Paper 2. **Regulatory Framework**.

State Roads Legislation

State legislation regarding private sector participation in the roads sector varies greatly in comprehensiveness among the four Project States. Karnataka is the only state with a State Highway Act, but each of the other states has at least a minimum legal basis for such participation and for the collecting of tolls by private parties. However, none of those statutes provide a precise road map for such participation.

Karnataka

The Karnataka Highways Act, 1964 (Karnataka Act No. 44 of 1964), as amended, along with the Karnataka Highway Rules, 1965, was enacted for the original purpose of modernizing highway legislation in the State to provide not only rules for construction and development of highways under State control but also to provide a legal basis for the levy of betterment charges to help pay for such highways and their improvements. It also seeks to restrict ribbon development along highways and to prevent encroachment on highways. The Act was amended in 1983 and 2000 to permit the levying of tolls on bridges and roads. (Chapter VI-A, Section 48-A of the Act, as added by Amending Act No. 15 of 1983 and later by Act No. 22 of 2000). In addition, Chapter II-A, Section 19-A, was added by Amending Act No. 35 of 1998 to allow the State Government to enter into an agreement with any person in relation to the construction, development and maintenance of the whole or a part of a highway. This gives specific legal standing to concession agreements for highway construction or rehabilitation. That provision is parallel to Section 8-A added to the National Highways Act, 1956, by Amending Act No. 26 of 1995, as discussed above.

This Highways Act and Rules can serve as a model for other States. They are comprehensive in nature. The only problem area in the legislation itself may be the size of penalties set for infractions. (see discussion in Appendix C.) However, the Act does not contain the types of specific provisions regarding concession agreements, incentives and State Support for private sector participation found in the Gujarat and Andhra Pradesh Acts establishing general infrastructure authorities. Those provisions give a clearer picture to the potential investor of the rules regarding his investment.

Andhra Pradesh

Andhra Pradesh does not yet have a specific State highway act, although the enactment of such an act has been considered. Roads are generally the responsibility of the State Roads and Buildings Department whose functions are specified in the Andhra Pradesh Public Works Department Code. (see 8th edition, 2003: Hyderabad).

In addition, some roads in the Hyderabad Metropolitan Area are designed and developed by the Hyderabad Urban Development Authority (HUDA) under its general development functions under the Andhra Pradesh Urban Areas (Development) Act, 1975 (Act No. 1 of 1975), as amended. Section 5 of that Act gives each Urban Development Authority in the State broad powers to do what is necessary to promote and secure development of all or any of the areas comprising the development area concerned, based on an approved urban development plan.

The nature of concession agreements and the process for selection of a private party are set out in the Andhra Pradesh Infrastructure Development Enabling Act, 2001, discussed in detail in Part II above. In addition, the State Motor Vehicles Act has been amended to enable the private sector to levy tolls and regulate traffic on toll roads.

Gujarat

Gujarat also does not yet have a separate State Highway Act. The Gujarat Infrastructure Development Act, 1999, establishing the GIDB provides the legal basis for private sector participation in roads as well as in other infrastructure sectors. The legal base for the levying of tolls is through the Gujarat Act No. 9 of 1994, which amended Section 20 of the Bombay Motor Vehicles Act, 1958

(Bombay Act LXV of 1958). That Amendment permits the levying of such tolls for either new construction or improvements of roads or bridges by the party responsible for such construction or improvements, after approval by the Government. That Law does not have a strong enforcement mechanism for enforcing payment of tolls by road users. In practice, there also have been problems due to delays by the State Government in issuing toll notification due to pressures for local users and their representatives.

Madhya Pradesh

Madhya Pradesh does not yet have a separate State Highway Act. but the Madhya Pradesh Highway Bill 2001 was approved by the State Cabinet and sent to the Government of India for concurrence. That Bill was prepared based on guidelines for a Model Highway Act issued by the Government of India. Its salient features are:

- declaration of a State Highway Authority and its powers;
- fixing of highway boundaries, building lines and control lines, and the imposition of certain restrictions and regulations for the use of land within those lines;
- regulation or diversion of right of access to a highway;
- compulsory acquisition of land and payment of compensation for such acquisition;
- provisions for prevention and removal of unauthorised occupations and encroachments on a highway;
- provisions to facilitate private partnership in highway projects;
- levying of betterment charges based on the increase of value of land due to construction of the highway;
- provisions to secure the safety of traffic and the prevention of damage to highways, including prohibition of the use of heavy vehicles on certain highways;
- details of penalties for violation of various provisions of the Act, and provision for appeals of such penalties to a competent Court;
- powers and duties of Police and village officials in respect of highways;
- provisions for eviction of persons wrongfully occupying any land which is part of a highway or which occupation contravenes any provision of the Act.

The enactment of such legislation, which is parallel to the Karnataka State Highways Act, would give Madhya Pradesh a modern general legal framework for the regulation and development of the roads sector. However, the specific provisions regarding private sector participation may need to be more precise, as mentioned above.

With regard to the levying of tolls, the Indian Tolls (M.P.)Act, 1932, has been amended to specifically permit the levying of tolls for new construction on roads and bridges, as well as for their improvement. It is assumed that this provision would then be included in the State Highway Act as finally enacted.

Finally, the Madhya Pradesh Adhosanrachana Vinidhan Nidhi Board Adhiniyam, 2000, established a fund for infrastructure projects. With the enactment of a State Highway Act and the establishment of the State Road Maintenance Fund, Madhya Pradesh would have in place the key elements of modern State road legislation. However, for private sector participation it would still be important to have the types of exact provisions found in the Andhra Pradesh and Gujarat infrastructure authority legislation, and in National Highway Rules.

State Legislation- Summary and Conclusions

Thus State legislation with regard to private sector participation in the roads sector is not comprehensive in character in any of the Project States. Karnataka has a general State Highways Act which permits such participation and the levying of tolls but it has not been implemented with detailed rules regarding the types of participation permitted, the incentives that may be offered, and the types of State Support that may be provided. Detailed provisions regarding concession agreements are not found in such rules.

Andhra Pradesh and Gujarat have specific statutes establishing independent infrastructure authorities. Those statutes contain a great deal of detail about the types of private sector participation permitted, the nature and content of concession agreements and the types of possible State Support. However, those statutes are not road acts which set the ownership and control of roads in general terms, beyond the terms of concession agreements. Madhya Pradesh does not yet have either a Road Act or an independent infrastructure authority act, although the MP Highway Bill 2001 is being considered at the Central level. However, it does have a fund for infrastructure projects. Such a fund is also being considered in Andhra Pradesh either under the amended provisions of the AP IDEA Act or as a separate piece of legislation.

What is required for comprehensiveness are a road act, rules regarding types of private sector participation- types of incentives, State Support- either established under a road act or a separate infrastructure authority act, and a financing mechanism or fund for either infrastructure generally or roads in particular (parallel to the Central Road Fund). Then the potential private investor will have a road map of his rights and responsibilities in such a road project.

3.2 Power

3.2.1 Overview

Power is the infrastructure sector which has seen the most policy initiatives regarding private sector participation and the establishment of a modern regulatory framework. The recently enacted Electricity Act, 2003 (Act No. 36 of 2003), effective on 10 June 2003, provides a comprehensive legal basis for reform at both the State and national level. This Act now governs although State power reform acts enacted in the last several years are not yet completely in conformity with it. The main emphasis on the corporatisation of distribution bodies and upon establishing a system of Central Government and State regulatory bodies can serve as a model for such actions in other infrastructure sectors.

3.2.2 National Power Policies

The Electricity Act, 2003 provides a more clear-cut and streamlined process for policy formulation in the power sector than the ad hoc measures enacted previously. This should assist in providing a roadmap for existing and potential private sector participants in this sector, as well as showing the way to necessary future policy initiatives. However, in the meantime, earlier policies will remain in force until implementing regulations and rules under the new Act are developed. Thus we will first outline the important policy formulations under the earlier regime and then detail the framework under the new Act.

Policy Framework Prior To Electricity Act, 2003

Automatic Approval of Foreign Direct Investment. Projects for electric generation, transmission and distribution were permitted foreign equity participation up to 100% on the automatic approval route, provided the project cost did not exceed Rs. 1500 crore. The categories which would qualify for such automatic approval are: hydroelectric power plants; coal/lignite-based thermal power plants, and oil/gas thermal power plants. (see "New Initiatives in the Power Sector- A Brief", in **India's Electricity Sector Widening Scope for Private Participation**" (Investment Promotion Cell, Ministry of Power, Government of India: New Delhi, 6th edition, 2000, p. 19)).

Competitive Bidding. Initially projects were awarded generally on the basis of negotiations between the State Electricity Board (SEB) concerned and a single developer- thus the Memorandum of Understanding (MOU) route. With a view to increase transparency as well as to maximize the benefits from private sector participation, the method of awarding projects through the method of competitive bidding was made mandatory by the Central Government based on the issue of Guidelines in this regard in February 1995. To complement that, an amendment to the tariff

notification for competitively bid thermal projects was issued in May 1997 defining the manner in which a tariff would be determined for such projects. There are, however, certain well-defined exceptions to the international competitive bidding route. The categories which are exempt from that route include:

- expansions to existing facilities;
- joint venture projects between an SEB or Public Sector Undertaking (PSU) where the SEB/PSU holds more than 51% of the shares in the Joint Venture Company;
- generating stations of Independent Power Producers (IPPs) exclusively for the captive use of an industry or group of industries;
- power projects based on heavy bottom residue set up by existing refineries.

Permission to Indian Public Financial Institutions to increase their exposure to private sector power units. When the power sector was opened up to private sector participation in 1991, the Central Government fixed a cap of 40% of the project cost as the maximum exposure that Indian Public Financial Institutions could take on any given power sector project. This cap was subsequently removed. The change was based on a shift in Government thinking to the view that a higher domestic debt component for projects that are developed on indigenously sourced plant and equipment would be more desirable.

A further provision was also made to allow the Foreign Term Loan to be replaced by a Rupee Term Loan as long as the hard currency cost does not change and the new financial arrangements are acceptable to the concerned SEB/State Government, the project developers and the lenders. (see **Reliance Review of Energy Markets** 296 (Reliance Industries Limited: Mumbai, 2002). However, the project developers were still required to approach the Central Electricity Authority for formal approval. That Central Statutory Body was constituted under Section 3 of the Electricity (Supply) Act, 1948, and was the key authority charged with policy formulation under the earlier legislative framework. It also conducted techno-economic appraisals of project reports in respect of setting up generating stations in the country and granted clearances for such projects.

Mega Power Projects Policy. In November 1995, the Government felt that there was a need to encourage the setting up of large sized power plants with private sector participation to derive the benefits of economies of scale. Moreover, one of the important conditions for individual State Governments to obtain these mega power projects would be that they would have to initiate and complete a full-fledged reform process, including the establishment of State Regulatory Commissions with full power to fix tariffs as envisaged in the Central Act. Thus the Mega Power Policy was also aimed at incentivising the State Governments in hastening the reform process in the power sector in their State.

In order to qualify as a mega power project, a project was required to have a capacity of 1000 MWs or more and supply power to more than one State. For projects which satisfied the above criteria, the Policy provided certain significant economic and legal incentives. The Standing Independent Group (SIG), which had been constituted by the Government of India in November 1997 to establish parameters for negotiation of large power generation projects, was designed as the apex body to oversee the implementation of mega private power projects.

A project which obtained Mega Power status was slated to enjoy the following benefits:

- The Power Trading Corporation would negotiate PPA contracts on behalf of the Mega Power IPPs with the users/SEBs and thus prevent the need for such IPPs to negotiate with multiple entities;
- The importing of capital equipment would be free of customs duty for these projects;
- The special incentives given to domestic bidders under such a project included a price preference of 15% for projects under the public sector, and also deemed export benefits as per the EXIM policy to domestic bidders for both public sector and private sector projects;

- The income tax holiday regime was to be continued, with the provision that the tax holiday period of 10 years could be claimed by the promoter in any block of 10 years within the first 15 years;
- The State Governments were also requested to exempt supplies made to mega power plants from sales tax and other local levies.

Liquid Fuel Policy For Power Generation. When the Government of India launched the private power policy in October 1991, private sector participation had been limited in the use of fuel, inasmuch as liquid fuel was not permitted to be used. However, the growth of projects in this area led the Government to the realisation that such non-liquid fuel-based power plants would have a relatively longer gestation period and would come on stream only after three to five years. Therefore, the Central Government, based on representations made to it in this regard by the States, decided to allow the setting up of liquid based power plants based on liquid fuels such as Naphtha, Heavy Petroleum Stock (HPS), Low Sulphur Heavy Stock (LSHS), Heavy Furnace Oil (HFO), Furnace Oil (FO) and natural gas, wherever available as primary fuel. No plants were permitted to be set up using Diesel as a fuel. Under that policy, around 12,000 MW of capacity addition was planned based on liquid fuels. From January 2001, however, the use of HSD, Distillate Oil No. 2 and Light Diesel Oil (LDO) has also been allowed as primary fuel for power generation.

Accelerated Power Development & Reforms Programme (APDRP). The fact that distribution sector reforms were urgently needed and that the Transmission and Distribution Losses were at the root of the financial crisis faced by the SEBs was well-recognized by the Central Government. To tackle this problem, the Accelerated Power Development & Reforms Programme (APDRP) was introduced in February 2001 with the sole objective of initiating a financial turnaround in the performance of the State-owned power sector. The improvement in the financial health of the SEBs under this scheme would enable the distribution sector to be privatised. But since this policy does not directly further private sector participation, it is not discussed further here.

Thus there were a number of important policies that exist under the framework of the earlier electricity legislation. The important policy formulations that are expected to be evolved under the Electricity Act, 2003 are explained below.

Policy Framework Envisaged Under the Electricity Act, 2003

Sections 3, 4, 5 and 65 of the Electricity Act, 2003 contain important provisions with regard to policy formulation in the power sector. However, most initiatives in the area of private sector participation in the sector are likely to come from two of the policies envisaged under the Act (see Section 3):

- The National Electricity Policy, which is to be framed by the Government of India in consultation with the State Governments. There is no definite recurring period within which this policy is required to be updated.
- The National Electricity Plan, which is to be framed by the Central Electricity Authority in consultation with the Government of India once in five years.

The more complete discussion of the Policy and Plan is found in the discussion of the Act under the Legislative Framework section below.

3.2.3 State Power Policies

Andhra Pradesh

The push for reform in law and policy in the power sector in Andhra Pradesh as in other states came due to the deterioration in the financial health of the State Electricity Board (APSEB). In the State, the enactment of the Reform Act (The Andhra Pradesh Electricity Reform Act, 1998) establishing the Regulator preceded the unbundling and corporatisation of the SEBs.

A High Level Committee of experts, headed by Mr. Hiten Bhaya, was constituted by the Government of Andhra Pradesh to suggest measures to encourage private sector participation in the power sector, including any structural changes. (see V.S. Samprath, (PS to Government of AP), "Power", p. 8 (undated paper)). Utilising the recommendations of the Committee Report as well as the issues outlined in the Common Minimum National Action Plan, the AP Government decided to come out with a comprehensive policy statement on reforming the power sector. Accordingly, the Government issued a policy statement on Policy Sector Reforms in February 1997.

Pursuant to the issuance of the Policy, the AP Reform Act passed in 1998. In 1999, the AP Electricity Regulatory Commission was set up. By 2000, the unbundling and corporatisation of the APSEB was completed, leading to the formation of Distribution Companies.

The Government of Andhra Pradesh Strategy Paper on Power, the most recent policy statement of the State Government hopes that the targets set by the AP Vision 2020 Plan by further advancing the reform process. These targets include reduction of energy losses by 10%, total elimination of commercial losses, reaching a per capita consumption level of over 2000 KWH, and achieving an 8.2% compound annual growth rate (CAGR) of sales for the period of 2001 to 2007. The Transmission and Distribution losses are expected to be reduced to 20% during this period, with a net capacity addition of about 5,000 MW and Transmission/Distribution investment of Rs. 15,000 crore during the period 2001-2007.

As according to the Strategy Paper, the Distribution Companies, which are presently wholly-owned subsidiaries of APTRANSCO, will be converted into Joint Ventures with Private Sector Participation. In all of these Companies, the Joint Venture (JV) partner will be allowed to hold the majority shares and thus have management control. The selection of the JV partner will be through international competitive bidding and the selection process will be fair and transparent. However, these matters are still on the drawing board. Further action will be possible only after a concrete view is taken on some important issues, such as the strategy to be followed, the extent of disinvestments, synchronisation of the privatisation of the Distribution Companies and other such matters.

Gujarat

The Government of Gujarat announced its Power Policy in December 1995 to facilitate private sector participation in the generation, transmission and distribution of power supply. A major thrust of the Policy is to promote a transparent and competitive environment to provide a level playing field for State sector and private sector enterprises.

The Policy envisages an enhanced role for the private sector in the following areas:

- Capacity addition by independent power producers (IPPs) selected through an open competitive bidding process;
- Renovation and modernisation of existing power plants, which would facilitate the introduction of more efficient management practices leading to greater availability of power. Such private sector participation could be in the form of Lease, Rehabilitate, Operate and Transfer (LROT), joint asset management with the Gujarat Electricity Board (GEB), or sale of existing plants to the private sector or to any joint sector venture;
- Captive generation of power by private industries; the captive units could sell their surplus power to GEB, at its option, on mutually agreed terms;
- Power generation through non-conventional sources of energy, with regard to which the State would devise suitable incentive schemes to encourage private sector participation;
- Setting up of transmission lines and equipment for or on behalf of GEB, which would be responsible for maintaining the State Power Grid. The selection of the private sector companies would be through a transparent bid and GEB would pay such companies a rental for using their transmission lines;
- Distribution of electricity on a territorial basis by distributing companies, selected through an open competitive bidding process. GEB would participate in the equity of such distributing companies in terms of its existing assets.

Other important reform elements highlighted by the Policy pertain to:

- the restructuring of GEB, both financially and organisationally, to improve its financial position;
- tariff rationalisation, to increase the operational efficiency of GEB and encourage private investments in the sector; and
- formulation of an appropriate fuel-mix policy to harness the potential offered by the geographical location of the State for setting up port-based power plants using imported coal or liquid fuel, like LNG, naphtha and natural gas.

The Power Policy, though issued in 1995, continues to form the basis for the State power policy. However, it has been supplemented over the years by a combination of Centre-led and State-led initiatives. The policy initiatives at the Central level have been discussed above in the section on National Power Policies. Among the State-led initiatives are the Captive Power Policy, 1998 issued by the Government of Gujarat for the supply of surplus electrical power from captive power plants (CPPs) to group companies and the GEB. In addition, the Gujarat Infrastructure Agenda- Vision 2010, which provides an assessment of the requirements of the State across the major infrastructure sectors for the decade 2000-2010, identifies projects in various sectors to meet these requirements, and also identifies reform initiatives to facilitate the same.

Some of the power sector reforms carried out in the State thus far are as follows:

- The Gujarat Electricity Regulatory Commission (GERC) was constituted in 1998 and is fully functional;
- The Government of Gujarat has signed a Tripartite Agreement, Memorandum of Understanding and Memorandum of Agreement with the Central Government to implement the power reforms in a phased manner;
- The State Government has announced the corporatisation of GEB through reorganisation of the Board into six subsidiaries- one handling generation, one handling transmission and four handling distribution. In this context, the State Government has issued a Gujarat Power Industry (Restructuring and Regulation) Ordinance and proposes to transfer the assets of the GEB to the new companies by formulating a transfer scheme under that Ordinance;
- The State has enacted electricity reform legislation, including the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 for reorganisation and rationalization of the electricity industry of the State, and the Indian Electricity (Gujarat Amendment) Act, 2003 regarding theft of electricity in the State.

Karnataka

Karnataka initiated the reform process of unbundling and corporatising its State Electricity Board as far back as 1970 when a separate corporation- the Karnataka Power Corporation Limited (KPCL) was set up for the generation of power. However, the reform process was not taken forward from this point and the sector had to wait for changes introduced in the 1997 Reform Policy announced by the State Government.

Pursuant to that Policy Statement, by March 2000 the unbundling of the KSEB was completed by the setting up of the Visvesvaraya Vidyut Nigam Ltd. and the Karnataka Power Transmission Corporation Ltd. (KPTCL) for taking over the generation activities, and the transmission and distribution activities, respectively. The Karnataka Electricity Regulatory Commission was also set up during this period. All of the above activities were undertaken under the aegis of the Karnataka Electricity Reform Act 1999. Other important milestones in the policy formulation process included the signing of a Tripartite Agreement, Memorandum of Understanding and Memorandum of Agreement with the Government of India in 2000, and the approval of the Financial Restructuring Plan of the Power Sector in the State and the Balance Sheet restructuring plan of the Karnataka Electricity Board in March 2001. In addition, as with other states, an act has been passed regarding the theft of electricity.

However, the focus of the policy process has now shifted to the privatisation of power distribution. A report was prepared by M/s Cameron McKenna Consortium of the United Kingdom acting as Financial and Distribution Privatisation Consultants in October 2001. The Government of Karnataka has decided to adopt the "Distribution Margin and Risk Allocation Approach (DM Approach)" for privatising the electricity distribution businesses and come out with a detailed paper in this regard. Already it has formed four distribution companies based on geographic areas- thus BESCOM for Bangalore. Implementing the policy of privatising those distribution companies will be the key challenge for the State of Karnataka in the short term in the power sector.

Madhya Pradesh

Following the bifurcation of the State of Madhya Pradesh in November 2000, the situation of the power sector in the new State worsened due to several reasons:

- the State Electricity Board of the new State (MPSEB) having to assume approximately 79% of the total long-term debt of the erstwhile Board (MPEB);
- the location of many high profile industrial consumers in the new State of Chhattisgarh while 94% of the agricultural consumers remain in the new State; and
- allocation of 32% of the generation capacity goes to Chhattisgarh leaving the new State of Madhya Pradesh with a more serious power shortage.

The urgent need for power sector reforms has been recognized in the Economic Development Policy issued by the Government of Madhya Pradesh in 2001. The thrust of the Power Policy incorporated therein is to connect the various categories of customers to reliable, superior quality power at reasonable rates. With regard to private sector participation, the Policy declares that the State will encourage participation of the private sector under BOO, BOT, BOOT and similar arrangements and will provide all requisite support for the successful completion of private power initiatives.

Subsequently, the Government of Madhya Pradesh has announced a new Captive Power Policy as of January 2003. That Policy includes provisions concerning the purchase of surplus power from CPPs, withdrawal of conditions imposed on CPPs of being a consumer and drawing 50% minimum consumption, and exemptions from obtaining permission of up to 100 KVA.

The most recent pronouncement by the State Government concerning private sector participation in the power sector is to be found in the "White Paper on the Status of Power Sector in Madhya Pradesh" (June 2003). The Plan covers the short-term (18 to 24 months) and the long term (2 to 7 years). The overall purpose of this action plan is to make the State self-sufficient in the power sector by the year 2007.

The State has received assistance from several institutions, including the ADB, DFID and CIDA, for carrying out necessary reforms, such as financial restructuring of the MPSEB; metering, billing, collection and institutional capacity building in the MPSEB; providing support to the State Regulatory Commission (MPERC); tariff filing; and strengthening transmission and distribution systems.
In this regard, the State has made progress on several fronts, including:

- MPERC was established in August 1998 and is fully operational;
- The Government of Madhya Pradesh as signed the Tripartite Agreement, Memorandum of Understanding and Memorandum of Agreement with the Central Government to implement the power reforms in a phased manner;
- The State Government has initiated the reorganisation of the MPSEB through incorporation of five companies- one handling generation; one handling transmission and three handling distribution. The preparation of the scheme for transfer of personnel to the new companies is being undertaken by the Adam Smith Institute under technical assistance from the ADB;
- The State has enacted electricity reform legislation, including the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000, for restructuring of the MPSEB, limiting the role of the State Government, increasing the scope and powers of the MPERC, rationalisation of tariff and

other related matters; and the Madhya Pradesh Urja Adhiniyam, 2001, for controlling the theft of electricity in the State.

Summary Regard State Power Policies

Thus each of the four Project States has developed appropriate policies to implement the power sector reforms, although these policies still need to be implemented particularly with regard to the privatisation of the distribution companies. Regulatory bodies have been established at the State level but do not yet have the necessary implementing rules.

3.2.4 Legislative Framework For The Power Sector

Electricity is one of the subjects enumerated in the Concurrent List (thus Entry 38 of List III) under the Seventh Schedule to the Constitution. This means that both the national Parliament and the State legislatures have been empowered to legislate concurrently on the subject. Indeed, the Parliament and the State legislatures of each of the four Project States have enacted electricity reform laws, as discussed below.

National Power Legislation

As noted previously, the relevant national legislation is The Electricity Act 2003 (TEA), passed by Parliament with effect from 10 June 2003, after having been debated and deliberated for over two years. The Act replaces three existing Central Acts, i.e. The Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. Other Central Acts related to the power sector are the Energy Conservation Act, 2001, which provides for the efficient use of energy and its conservation, and the Union Duties of Excise (Electricity) Distribution Act, 1980, which provides for the payment out of the Consolidated Fund of India of a certain proportion of proceeds of Union duties of excise on electricity to the States and for distribution thereof among the States.

The Preamble lists the main objectives of TEA as follows:

- Consolidate the laws relating to generation, transmission, distribution, trading and use of electricity;
- Take measures conducive to the development of the electricity industry;
- Promote competition in the industry;
- Protect the interests of consumers and the supply of electricity to all areas;
- Rationalize electricity tariffs;
- Ensure transparent policies regarding subsidies;
- Promote efficient and environmentally benign policies; and
- Constitute the Central Electricity Authority and the Central and State Regulatory Commissions, and establish an Appellate Tribunal.

TEA is divided into eighteen chapters (185 sections) which cover, among other things, provisions concerning generating companies (including captive generation), licensing of transmission, distribution and trading of electricity, principles and procedure to be followed for tariff determination, constitution of the Central Electricity Authority, the Regulatory Commissions and the Appellate Tribunal and the functions and powers thereof, the reorganisation of State Electricity Boards, arbitration and appeals in relation to disputes under the Act, and offences and penalties for contravention of the provisions of the Act.

The following discussion highlights important provisions of TEA with regard to private sector participation in the power sector, and also serves the purpose of comparison with the respective electricity reform acts of the Project States. It also makes initial comments on the effectiveness of each such provision.

- **National Electricity Policy and Plan**. Section 3 of the Act requires the Central Government to prepare, from time to time, the National Electricity Policy and tariff policy, in consultation with the State Governments and the Central Electricity Authority. Further, the Central Electricity Authority shall prepare the National Electricity Plan, in accordance with the National Electricity Policy, and notify such plan once in every five years. (**NOTE**: It is worthwhile to note that no provision has been made for the Central Government to consult with Central and State Regulatory Commissions in the preparation of the said policies, although one of the functions of the Central Regulatory Commission is to advise the Central Government on the formulation of the National Electricity Policy and the tariff policy.)

- **Generation of Electricity**. Section 7 of TEA permits any generating company to establish, operate and maintain a generating station without obtaining a licence. As per Section 8, hydro projects, however, would need clearance from the Central Electricity Authority. Section 9 freely permits captive generation and entitles every person who has constructed a captive generating plant (that is "a power plant set up by any person to generate electricity primarily for his own use …."), and maintains and operates such plant, to open access for the purpose of carrying electricity for his own use, subject to the availability of an adequate transmission facility. Section 10(2) further provides that a generating company may supply electricity to any licensee in accordance with the provisions of the Act as well as to any customer, subject to the regulations framed by the State Electricity Regulatory Commission (SERC) concerned, in respect of open access to distribution. (**NOTE:** It is not clear whether a power plant set up through a special purpose vehicle (SPV), i.e. an incorporated body, for the use of the shareholders of such SPV, would fall under the definition of a captive generating plant under TEA. This assumes added significance when we consider that in order to shield a power project from any unrelated liability, banks and financial institutions would generally prefer to finance a project undertaken by any new SPV incorporated for that purpose.

- **Licence for Transmission, Distribution and Trading Activities**. Section 12 of the Act stipulates that a licence is required for transmission, distribution and undertaking trading in electricity, while Section 14 provides for the grant of such licence by an Appropriate Commission (thus the Central Regulatory Commission, a State Regulatory Commission or the Joint Commission) to any person. The sixth Proviso to the Section contemplates the grant of licences to two or more persons for distribution of electricity within the same area. The ninth Proviso states that a distribution licensee shall not require a licence to undertake trading in electricity. Section 15 sets out the procedure for grant of licence. Section 16 stipulates that the Appropriate Commission may specify any general or specific conditions applicable to any licensee or class of licensees. Section 17 imposes certain restrictions on licensees. Section 18 empowers the Appropriate Commission to make amendments to the terms and conditions of a licence, if the public interest so permits, and prescribes the procedure to be followed for the same. Section 19 deals with the revocation of a licence by the Appropriate Commission, while Sections 20 to 22 stipulate the provisions that shall apply to the undertaking of any licensee whose licence is revoked. Section 24 deals with the suspension of a distribution licence and the sale of utility of the licensee concerned, in the event that such licence is subsequently revoked.
- **Transmission of Electricity**. Sections 26 to 33 of the Act provide for the constitution and functions of the National Load Despatch Centre, Regional Load Despatch Centres and State Load Despatch Centres, and for the compliance with their directions by any licensee, generating company or any other person. Sections 38 and 39 state that the Transmission Utility at the Central and State level shall be a Government company (or the State Electricity Board in case of the State Transmission Utility) with responsibility for the planned and coordinated development of the transmission network. The Provisos to these Sections, however, stipulate that the Government concerned may transfer, through a transfer scheme, any property, rights and liabilities connected with such Transmission Utility to any company or companies incorporated under the Companies Act, 1956, to function as the transmission licensee.

Section 38 of the Act prohibits the Central Transmission Utility from engaging in the generation or trading of electricity, while Section 39 bars the State Transmission Utility from power trading. (**NOTE**: This is a positive step in that it would result in existing PPAs being transferred either to distribution companies or entities created specifically for trading in power, which would immensely increase the depth of the market and enhance trading volumes.)

The said Sections, as well as Section 40 which covers duties of transmission licensees, stipulate non-discriminatory open access to the Transmission Utility/transmission system for use by any licensee or generating company on the payment of transmission charges or by any consumer, as and when the State Commission provides such open access, on the payment of transmission charges and a surcharge thereon. Such surcharge shall be utilised for the meeting of the current level of cross-subsidy and shall be leviable until cross-subsidies subsist. However, both the surcharge and the cross-subsidy are to be progressively reduced and eliminated. The said Sections exempt any captive power producer carrying electricity for his own use from the payment of such surcharge. (**NOTE**: While the Act provides for the progressive reduction and elimination of both the surcharge and cross-subsidies in the manner as may be specified by the Appropriate Commission, no mechanism or time frame has been specified for the same. Further, the provision for payment of surcharge may ease the pressure on the regulators to eliminate cross-subsidies. Additionally, it is imperative for the regulators to ensure that the surcharge merely covers the current level of cross-subsidy and does not become a pretext for passing on operating inefficiencies to consumers.

Section 41 provides for the maintenance of separate accounts for each other business undertaking of a transmission licensee and prohibits any transmission licensee from entering into any contract or otherwise engaging in electricity trading. (**NOTE**: In this regard, it would have been better if the Section had included a specific prohibition against common ownership of transmission and trading entities, since the absence of such a restriction may lead to the bundling of transmission and trading activities in the hands of private players with an adverse effect on the operation of non-discriminatory access to transmission lines.)

- **Distribution of Electricity**. Section 42 of TEA stipulates that a distribution licensee shall develop and maintain his own distribution system.

The said Section provides for open access in distribution to be introduced in phases, with the surcharge for the current level of cross-subsidy being gradually phased out along with the cross-subsidies themselves. As in the case of transmission, any captive power producer carrying electricity for his own use shall be exempted from the payment of such surcharge. The Section further exempts a local authority, engaged in distribution of electricity before the appointed date, from the mandatory requirement for distribution licensees to allow customers in their area to opt for power supply from other sources, as and when the State Commission implements open access. State Commissions are to frame regulations within one year regarding phasing of open access. (**NOTE:** The Cabinet has recently approved amendments to TEA pertaining to the introduction of open access in distribution which would permit the State Commissions to introduce open access within five years.)

Section 43 lays down the obligation of every distribution licensee to supply electricity on request, while Sections 44 to 48 specify further provisions in relation to such duty to supply. Section 50 requires the formulation of an Electricity Supply Code by the State Commission to provide for, among other things, the recovery of electricity charges, disconnection of supply of electricity for non-payment thereof, and tampering. Section 51 provides for the maintenance of separate accounts for each other business undertaking of a distribution licensee. However, this rule does not apply to any local authority engaged in the distribution of electricity before the commencement of the Act.

(**NOTE:** The exemptions granted to local authorities under Sections 42 and 51 have been the subject of criticism. Brihanmumbai Electricity Supply and Transport Undertaking (BEST

Undertaking) in Mumbai has been cited as an example of a local authority whose nine-lakh consumers have been denied the right to choose their source of power supply, and which may continue to subsidise its bus transport operations through revenues earned in the power distribution business, by virtue of it being exempt from maintaining separate accounts for each of its businesses.)

- **Compulsory Metering and Other Provisions with Respect to Supply**. Section 55 stipulates the compulsory installation of meters within a period of two years from the appointed date. The second Proviso to the Section, however, permits the State Commission to extend by notification such period for any class or classes of persons or for any area. (**NOTE**: In this regard, it is important to ensure that regulators do not make use of such Proviso to exempt compliance by certain sections of the community applying political pressure.)

  Section 56 authorises any licensee or generating company to disconnect the supply of electricity to any person in the event of default of payment due to such licensee or generating company. Section 57 states that the Appropriate Commission may specify standards of performance for a licensee or class of licensees and further provides for the payment of compensation by such licensee, if he fails to meet the standards specified. Section 60 permits the Appropriate Commission to issue directions to a licensee or generating company to prevent the hindrance of competition in the electricity industry.

- **Tariff Determination**. Section 61 stipulates that the Appropriate Commission shall specify the terms and conditions for the determination of tariff in accordance with certain principles, including the conduct of generation, transmission, distribution and supply of electricity along commercial lines; encouraging of competition, efficiency and economical use of resources; covering of cost of supply of electricity; and progressive reduction and elimination of cross-subsidies.

  Section 62 provides for tariff determination by the Appropriate Commission for the supply of electricity by a generating company to a distribution licensee; transmission of electricity; wheeling of electricity and retail supply of electricity. Section 63 permits the determination of tariff through a transparent process of bidding. Section 65 requires the State Government to pay in advance any subsidy granted to any consumer or class of consumers in the tariff determined by the State Commission under Section 62. (**NOTE**: The setting up of tariffs under the Act has been left to the discretion of the Central and State Regulatory Commissions. It remains to be seen whether, and to what extent, the stakeholders in the electricity industry will be involved in setting such tariffs.)

- **Regulatory Commissions**. Section 76 refers to the constitution of a Central Electricity Regulatory Commission (CERC). Sections 77 to 81 then set out the requisite qualifications for Members of the CERC, constitution of the Selection Committee to recommend Members of the CERC and the Appellate Tribunal, functions of the CERC, establishment of a Central Advisory Committee, and the objectives thereof. (**NOTE:** It may be noted that the Selection Committee mentioned above comprises mainly bureaucrats. It would have been better to have some representation from the judiciary on the Selection Committee, as is the case with regard to the selection committees for members of SERCs.)

  Section 82 mandates the establishment of SERCs by State Governments within six months from the appointed date. Section 83 contemplates the setting up of a Joint Commission by agreement of two or more State Governments, or by the Central Government and one or more State Governments. Sections 84 to 88 incorporate provisions similar to Sections 77 to 81 above for the State level commissions.

  Section 89 stipulates that a Member of a Commission shall hold office for a period of five years, and shall not be eligible for reappointment. The Section further prohibits any person who ceases to be a Member from accepting any commercial employment, as defined therein,

for a period of two years, and of representing any person before the CERC or any SERC. Section 90 details the grounds on which the Government concerned may remove any Member- in certain cases only upon an inquiry by the Appellate Tribunal. Section 94 stipulates that the Appropriate Commission shall, for purposes of any inquiry under this Act, have the powers of a civil court in respect of matters specified therein. Section 96 grants the Appropriate Commission the power to authorise entry, search and seizure of any books, accounts or documents.

Section 98 provides that the Central Government may, after due appropriation made by Parliament in this behalf, make to the CERC grants and loans of such sums of money as considered necessary by that Government. Section 99 envisages the creation of a CERC Fund to which any grants and loans from the Central Government, all fees received by the CERC, and all sums received from such other sources as may be decided by the Central Government shall be credited. Further, that Section provides that the Central Government may, in consultation with the Comptroller and the Auditor General of India, prescribe the manner of applying the Fund for meeting the expenses of the CERC in the discharge of its functions. Sections 102 and 103 contain similar provisions with regard to SERCs.

Section 107 provides that in discharge of its functions, the CERC shall be guided by directions given by the Central Government in matters of policy involving public interest. Further, it provides that the decision of the Government shall be final on whether any such direction relates to a matter of policy involving public interest. Section 108 then prescribes the same for the SERCs.

- **Appellate Tribunal**. Section 110 covers the establishment of an Appellate Tribunal to hear appeals against the orders of the adjudicating officer or the Appropriate Commission. Section 112 provides that the Appellate Tribunal shall consist of a Chairperson and three other members. Under Section 113, the Chairperson shall be, or have been, a Judge of the Supreme Court or the Chief Justice of a High Court. As per Section 114, the term of office of the Members of the Appellate Tribunal, including the Chairperson, shall be for a period of three years, though such members may be reappointed for a second term of three years. Section 117 states the Chairperson or other member of the Appellate Tribunal may only be removed by an order of the Central Government on the ground of proved misbehaviour or incapacity, after an inquiry made by a Judge of the Supreme Court.

  Section 120 specifies the procedure and powers of the Appellate Tribunal. The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, as amended. It shall have the powers of a civil court while trying a suit in respect of the matters covered by the Act. It shall be able to execute any order made by it under the Act as a civil court decree. Section 121 then states that the Chairperson of the Appellate Tribunal shall exercises general power of superintendence and control over the Appropriate Commission. Section 125 then provides for an appeal against any order or decision of the Appellate Tribunal to the Supreme Court.

- **Reorganisation of Board**. Section 131 contemplates the transfer to the State Government of any property, interest in property, rights and liabilities belonging to the State Electricity Board ("Board"), on such terms as may be agreed between the State Government and the Board. Any such property shall then be re-vested by the State Government in a Government company or in a company or companies in accordance with the transfer scheme published by the State Government, along with the property and rights of the State Government as stipulated in the said scheme. The Section further envisages the transfer of the aforesaid property, rights and liabilities to a subsequent transferee, in accordance with a transfer scheme drawn up for that purpose. Section 132 details the manner in which the proceeds of sale or transfer of the Board to any person which are not owned or controlled by the Appropriate Government are to be utilised. Section 133 contains provisions relating to the transfer of personnel of the Board which, as in the case of the transfer under Section 131, may be provisioned for a stipulated period. Section 134 then states that, except for the

provisions made in the Act, such personnel shall only be entitled transfer to compensation or damages as provided in the transfer scheme.

- **Other Provisions**. The Act contains more stringent provisions with regard to the theft of electricity and contemplates the setting up of Special Courts for the speedy trial of offences. Section 158 stipulates that the provisions of the Arbitration and Conciliation Act, 1996 shall be applicable to matters under the Act. Section 172 provides that the Board shall be deemed to be the State Transmission Utility and a licensee under the Act for a maximum period of one year from the appointed date, with the proviso that such period may be extended by mutual agreement between the Central Government and the State Government.

  Section 176 covers the power of the Central Government to make rules, while Sections 177 and 178, respectively, refer to the power of the Central Electricity Authority and the CERC to make regulations. Section 179 requires every such rule and regulation to be laid before Parliament, which may modify or annul the same. The corresponding provisions for the State level are contained in Sections 180 to 182, with the difference that the State Legislature is not entitled to require modifications or annulment of rules and regulations made by the State Government and SERC, respectively. Section 185, which covers repeal and saving, stipulates that the provisions of the enactments specified in the Schedule, not inconsistent with the Act, shall apply to the States in which such enactments are applicable. The Section further empowers the Central Government to amend the Schedule by notification, as and when considered necessary[1].

National Legislation- Summary and Conclusion

The above detailed summary of The Electricity Act, 2003 provides the background for the discussion of state legislation below. It must be noted that the national Act prevails over the State Acts, as any State Acts for matters on the Concurrent List must also be approved by the Central Government. The sections on electricity distribution, compulsory metering and tariff determination are of special concern for potential private investors. The structure of regulatory commissions is a model for other infrastructure sectors if regulation in this manner is decided on.

State Power Legislation

As mentioned above, all four Project States have enacted power reform legislation although some of that legislation is not now consistent with the provisions of The Electricity Act, 2003, especially matters regarding the licensing of power trading and provisions regarding captive power and compulsory metering.

Andhra Pradesh

The Andhra Pradesh Electricity Reform Act (APERC Act) was enacted in 1998. The Act is divided into 14 parts which cover:

- the establishment of the AP Regulatory Commission;
- the enumeration of the powers and functions of the Commission;
- provisions relating to the licensing of transmission and supply;
- reorganisation of the electricity industry;
- tariffs and financing of licensees;
- constitution of the advisory committee and consultation with consumers;
- arbitration mechanisms for resolving disputes under the Act;
- offences and penalties for contravention of the provisions of the Act.

A detailed summary of the Act is found in Appendix A. Andhra Pradesh at the end of this Working Paper. As noted earlier, this Act was introduced to provide the legal basis on which the policy

[1] The Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 has been included in such Schedule by notification no. 23/30/2003-R&R, dated September 5, 2003 issued by the Ministry of Power, Government of India.

formulations of the Government of Andhra Pradesh with regard to the power sector could find expression. It thus was primarily aimed at providing an enabling environment for the unbundling and corporatisation of the State Electricity Board, as well as the setting up of the State Electricity Regulatory Commission. As with the other Project States, Andhra Pradesh has signed a Tripartite Agreement, as well as a Memorandum of Understanding and a Memorandum of Agreement for carrying out the new policy initiatives.

Gujarat

The Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 (GEIA) was enacted to provide for the reorganisation and rationalization of the electricity industry and for establishing an Electricity Regulatory Commission in the State. The GEIA came into force on May 16, 2003, shortly before the enactment of the national TEA.

A detailed, section by section, description of the GEIA is found in Appendix B. Although the GEIA largely conforms to the provisions of TEA, there exist certain divergences between the two Acts. The following discussion focuses on several of these divergences that may be of particular interest to potential private investors in the power sector:

- **Power Trading**. The GEIA does not acknowledge "trading" as a distinct activity of the electricity industry, and consequently, does not provide for its licensing. Nevertheless, power trading constitutes a licensed activity of the electricity industry in the State by virtue of Section 12 of TEA;

- **Licence for Supply of Electricity**. In addition to transmission and distribution licences, the GEIA provides for a licence to supply electricity in a specified area of supply or in bulk to any other licensee. (Section 20 (1) (c) and (d), respectively). It also envisages the grant to a generating company of a licence to distribute or supply electricity in a specified area of distribution or supply, subject to certain conditions set in Section 19(4). In contrast thereto, TEA does not contain any requirement for the licensing of electricity supply. Further, Section 10(2) of the TEA provides that a generating company may supply electricity to any licensee in accordance with TEA and the rules and regulations made thereunder and may, subject to the regulations made under Section 42(2) relating to open access, supply electricity to any consumer;

- **Licence to Transmit Electricity**. The Proviso to Section 20 of the GEIA provides that the State Regulatory Commission (GERC) shall entertain an application for a licence to transmit electricity only if the approval of the State Transmission Utility has been obtained. This rule is more stringent than the corresponding provision in TEA (Section 15), which merely states that any person intending to act as a transmission licensee shall forward a copy of the application to the State Transmission Utility for its recommendation, which in any event shall not be binding on a SERC;

- **Reduction and Elimination of Cross-Subsidy**. While TEA does not specify any time frame or mechanism for the progressive reduction and elimination of cross-subsidies, Section 32(5)(a) of the GEIA stipulates that any existing cross-subsidy should be progressively reduced to the extent that within a period of five years from the commencement of the Act, the tariff to every class of consumer shall reflect a minimum of 67% of the licensee's average cost of supply of electricity to that class;

- **Provision of Subsidy by State Government**. Section 32(2) of the GEIA provides for payment by the State Government of an amount to compensate the person affected by the grant of subsidy to any category or class of consumers in the tariffs determined by the GERC, as a condition for the licensee or any other person concerned to implement the subsidy provided by the State Government. TEA, in Section 65, requires such payment to be made by the State Government in advance and further provides that, in case the payment is not made in accordance with the provisions of the said Section, the direction of the State

Government with regard to the grant of subsidy shall not be operative and the tariff fixed by the SERC shall be applicable;

- **Reorganisation of the Gujarat Electricity Board**. Compared with the provisions concerning the reorganisation of the State Electricity Board under TEA, the GEIA incorporates an additional requirement in Section 28(5) in that it stipulates prior approval of the State Legislature for any transfer (as contemplated in the said Section) to any company, body corporate, person or authority other than that owned or controlled by the State Government;

- **Compulsory Metering**. Section 19(3) of the GEIA mandates that no licensee shall supply electricity to any consumer, on or after the date of commencement of the GEIA, unless a meter has been installed. The relevant provision of TEA (Section 55), however, stipulates a period of two years from the appointed date for compliance with the requirement for compulsory metering. That period, as noted earlier, may be extended by the State Commission for any class or classes of persons or for any area;

- **Regulatory Commission**. Any person who ceases to be a member of the GERC is barred by Section 11(c) of the GEIA from being appointed, directly or indirectly, in the service of the State Government or any company or body corporate owned or controlled by the State Government. However, this bar has been removed by Section 89 of TEA.

  Section 63 of the GEIA provides that the GERC shall comply with any directions given by the State Government on matters of policy and of public interest, though the Proviso to the Section prohibits the State Government from giving any directions to the GERC in respect of fixation of tariff. The corresponding provision in Section 108 of TEA differs to the extent that it provides for the SERC to be guided in the discharge of its functions (without any exceptions) by directions given by the Central Government in matters of policy involving public interest;

- **Dispute Settlement**. Section 49 of the GEIA stipulates that, notwithstanding anything contained in the Arbitration and Conciliation Act, 1996, any dispute between licensees shall be referred to the GERC. The Commission may either proceed to act as arbitrator or nominate any arbitrator to settle such dispute. Further, it empowers the GERC to confirm and enforce, set aside or modify, or remit for reconsideration, an award made by any arbitrator appointed by the GERC under the Section. Sections 50 declares that an appeal against any decision or order of the GERC may be filed before the High Court, on question of law arising out of such decision or order. As per Section 51, subject to an appeal under Section 50, every order passed under the GEIA or the rules and regulations made thereunder by the GERC shall be final and shall not be called into question in any civil court.

  The aforesaid provisions concerning dispute settlement differ from the provisions in TEA which limit the adjudicatory function of the SERCs to disputes between licensees and generating companies (Section 86(f)); provide for the establishment of an Appellate Tribunal to hear appeals against the orders of the adjudicating officer or the Appropriate Commission (Section 110); and declares the provisions of the Arbitration and Conciliation Act, 1996 to be applicable to matters under the Act (Section 158).

In addition, The Indian Electricity (Gujarat Amendment) Act, 2003 has been passed. It amends relevant provisions of The Indian Electricity Act, 1910 (now repealed by The Electricity Act, 2003) regarding theft of electricity in the State of Gujarat. The Amendment Act incorporates more stringent punishment for power theft, including three years of rigorous imprisonment and a fine of up to Rs. 2 lakhs.

Karnataka

The Karnataka Electricity Reform Act (KER Act), 1999 (Karnataka Act No. 25 of 1999) which was passed a year after the enactment of the APERC Act was almost a verbatim reproduction of the latter.

The KER Act also sought to achieve the same objectives as the APERC Act in terms of setting up an independent regulatory body for the power sector and unbundling and corporatisation of the State Electricity Board. A more detailed description of the Act is found in Appendix C- the Karnataka Appendix- attached at the end of this Working Paper.

In addition, Karnataka has passed several additional pieces of legislation. The Electricity (Karnataka Amendment) Act, 2000 (Karnataka Act No. 35 of 2000) is an anti-theft of electricity law setting strong penalties. The Karnataka Electricity Board (Recovery of Dues) and Other Law (Amendment) Act, 2001 (Karnataka Act No. 27 of 2001) relates to recovery of charges for electricity and other matters.

Madhya Pradesh

The Electricity Reform Act of the State of Madhya Pradesh, namely The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000, came into force on 20 February 2001. Its objective, among other things, was the establishment of the State Electricity Regulatory Commission, the restructuring of the electricity industry, providing quality of service, and tariff and other charges, taking account of the interests of consumers and utilities, and taking measures conducive to the development and management of the electricity industry in the State in an efficient, economic and competitive manner. A detailed description of The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 ("the Reform Act") is provided in Appendix D. A review of the provisions of the Reform Act reveals that they are similar to the provisions of the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 (GEIA), which seems to have been based on the MP Act. Accordingly, the divergences between the GEIA and the Central Electricity Act identified above, to a large extent, hold equally true for the Reform Act.

That said, there exist certain differences between the Reform Act and the GEIA, some of which are summarized below:

- Section 8(3) of the Reform Act stipulates that the expenses of the State Regulatory Commission (MPERC) shall be charged upon the consolidated funds of the State, whereas Sections 16 and 17(g) of the GEIA additionally provide for the GERC to levy fees and charges and utilise the same towards meeting its expenses;

- As in the case of Section 63 of the GEIA, Section 12 of the Reform Act empowers the State Government to issue policy directives. However, the latter provision affords greater protection against the exercise of undue influence by the State Government in so far as it mandates that such policy directives shall not adversely affect or interfere with the functions and powers of the MPERC, and further that the State Government shall consult with the MPERC and duly take into account its recommendations in relation to any proposed policy directive or legislation concerning the electricity industry. Section 13 then stipulates that any dispute between the MPERC and the State Government in this regard shall be referred to the CERC, whose decision on the matter shall be final and binding;

- The Reform Act does not provide for the compulsory installation of meters, in contrast to Section 19(3) of the GEIA which provides for compulsory metering from the date of commencement of the GEIA. Nevertheless, meters would have to be installed within the State within a period of two years from the appointed date by virtue of Section 55 of TEA;

- The provisions concerning the reorganisation of the State Electricity Board under the Reform Act do not, unlike the corresponding provisions in the GEIA, require prior approval of the State Legislature for transfer of functions, duties, powers and obligations and any undertakings of the Board or portion thereof to any company, body corporate, person or authority other than that owned or controlled by the State Government;

- Under the Reform Act, there is no mention of prior approval of the State Transmission Utility for the grant of licence by the MPERC for transmitting electricity, as is contemplated in the Proviso to Section 20 of the GEIA; and

- The GEIA provides that any existing cross-subsidy should be progressively reduced to the extent that within a period of five years from the commencement of the Act, the tariff to every class of consumer shall reflect a minimum of 67% of the licensee's average cost of supply of electricity to that class. However, the Reform Act, in Section 26(5), stipulates a minimum of 75% but makes an exception in the case of financially weak consumers who are to be provided a limited quantum of electricity at a reduced tariff for the meeting of basic needs.

In addition, The Madhya Pradesh Urja Adhiniyam, 2000 has been passed with effect from 17 April 2001, to provide for the prohibition of unauthorised use of electrical energy, assessment of cases of such unauthorised use and the mode of recovery of the assessed amount along with any other charges.

Power Legislation- Summary and Conclusions

States have been active in enacting legislation in the power sector regarding regulatory commissions, the corporatisation of distribution companies and regarding theft that can serve as a model for other sectors, especially water and sewerage. Challenges still remain on both the national and State level to provide implementing regulations regarding such matters as tariff determination, introduction and implementation of open access, reduction and elimination of surcharges and cross-subsidies and the prevention of anti-competitive behaviour, such as the common ownership of transmission and trading activities. With regard to private sector participation, the main focus will be upon the possible privatisation of the distribution companies.

3.3 Ports

3.3.1 Overview

Ports are an important infrastructure sector for three of the four Project States. The exception is Madhya Pradesh which is landlocked. Private sector participation in the ports sector has been a major emphasis at the national level following the issuance of the Guidelines on Private Sector Participation in Ports on 26 October 1996. Ports are a concurrent function of government- with major ports under the Central Government and other ports under the State Government, and the three project states with ports have all established their own such port policies.

We will first examine the national port private participation guidelines for major ports, then the state port guidelines, and finally the legislative framework in the ports. Finally, this Section will suggest some changes to assist further private sector participation in the sector.

3.3.2 National Port Policies

National Guidelines on Private Sector Participation in Ports

The Guidelines to be Followed by Major Port Trusts for Private Sector Participation in the Major Ports, issued by what is now the Ministry of Shipping on 26 October 1996, as amended, set rules for private sector participation in major ports that have influenced state port policies with regard to other ports. In addition, the Guidelines permit a major port to form a joint venture to assist a minor port.

Under the Guidelines, **areas identified for privatisation** include the leasing of existing assets of a port as well as the construction of new assets. Such new assets may be the construction and operation of container terminals, the construction and operation of cargo berths and storage facilities, setting up of captive power plants, dry docking and ship repair facilities, and cranage/handling equipment. It might also include leasing of equipment for port handling and leasing of floating crafts from the private sector, pilotage and captive facilities for port-based industries.

As regards the **regulatory framework**, while the Port Trust would continue its role under the Major Port Trusts Act, 1963 (see below), tariffs would be fixed and revised by an independent Tariff Regulatory Authority. The Tariff Authority for Major Ports (TAMP) was then set up in 1997. The tariffs would be ceilings and less could be charged. Eventually, rules would be set by regulations under the relevant provisions of the Major Port Trusts Act.

As to **leasing out** of existing port assets to the private sector, such leasing would have to demonstrate that the result would be additional investment in and the upgrading of existing facilities as well as increased port traffic at greater profitability or productivity or service quality. The period of the lease will be on a case-by-case basis but with a maximum of 30 years. At the end of that period, the property would have to be returned to the Trust in good condition. Bids will be invited for such leases in two stages. Only financial bids of bidders qualified technically will be opened.

With regard to **construction/creation of additional assets**, the period of licence, including the construction period will be a maximum of 30 years, and the new assets must be constructed or created consistent with the Port Master Plan. Open tenders will be invited on a BOT basis. At the end of the BOT period, all assets revert back to the port free of costs. Bids will be in two stages as above. Bidders will be asked to indicate in their financial bid:

- an upfront fee for the licence;
- royalty per tonne of cargo to be handled;
- the minimum cargo which they will be willing to guarantee;
- the lease rent per unit area of land/waterfront;
- any other financial parameter to be specified, depending on the facility to be constructed.

The comparative financial evaluation of offers received from technically qualifying bidders will be based on the concept of maximum realization to the party on a net present value basis. The royalty for purpose of analysis will be based on the minimum traffic which the entrepreneur guaranteed. For **cargo handling**, the lease period will pay attention to the useful life of the equipment.

General tender conditions include open competitive bidding and the two cover/two stage system of technical and price bids. The tender document will not give the entrepreneur any kind of guarantee for financial returns. Port property transferred to the entrepreneur will be kept insured at his cost. He will have to keep the assets in good condition and may not transfer them to another party without the previous approval of the Port. Environmental clearance and other statutory clearances for privatisation projects would be obtained by the Port Trust or entrepreneur depending on the type of project and its requirements.

Foreign investors with the necessary clearances and registered or planning to register as company under the Companies Act, 1956 are qualified to bid. Labour conditions and the labour necessary to be kept for the new project shall be identified by the Port.

Guidelines for Private Sector Participation in Ports Through Joint Ventures and Foreign Collaborations

Besides the general port privatisation guidelines, there are additional Guidelines for Private Sector Participation in Ports Through Joint Ventures and Foreign Collaborations. These latter Guidelines expand the basic guidelines to permit the formation of Joint Ventures between Major Ports and Foreign Ports, between Major Ports and Minor Ports, and between Major Ports and companies.

A Joint Venture between a Major Port Trust and a minor port relates to improvements to existing minor ports for coordinated development of the ports and in a situation where there are constraints on the economic expansion of the Major Port. The feasibility study will be done by the Major Port but the minor port will bear up to 50% of the cost and provide assistance. The Major Port will retain at least a controlling stake in the implementing Joint Venture Company. With regard to private participation, that Company may include a private company or consortium of companies as equity partners. If such a private party is involved, then the collaboration between the two ports is limited

to 30 years. Otherwise, it can exist in perpetuity. The Major Port will be responsible for necessary statutory clearances. The Joint Venture must be approved by the Central Government.

For a Joint Venture between a Major Port Trust and a Company or consortium of companies, the private company concerned must be selected through BOT guidelines under the general Guidelines of Private Sector Participation. The period will be for up to 30 years with the approval of the Central Government. The extent of participation of the Major Port Trust will be on a case-by-case basis.

Generally, the definition of Port Facility for private sector participation may include supporting infrastructure, such as roads, railway and civic and urban facilities, which are required for the efficiency of the Port. Where the scheme does not take off, then it can be abandoned by either party and the pre-operative expenses will be borne equally by the parties. These latter Guidelines amend the 1996 Guidelines to state that at the end of the BOT period all assets will revert back to the Port not free of cost but in accordance with the agreement between the parties.

3.3.3 State Port Policies

State port policies reflect some of the above national policies for port private sector participation as well as other general policies for private sector participation as found generally for all infrastructure sectors.

Andhra Pradesh

Andhra Pradesh Vision 2020 identifies ports, along with roads, as trunk infrastructure constituting the infrastructure backbone of the State. It was one of the first maritime states in India in 1994/1995 to recognize the need for increased port infrastructure and the central role required by the private sector to meet that need.

Port privatisation in the State is based on the Build-Operate-Share-Transfer (BOST) approach. The main features of the BOST policy are as follows:

- a 30 year concession period, with the possibility of extension for two more periods of 10 years each;
- an in operation period of five years;
- a concession agreement on either the BOST or Build-Operate-Maintain-Share and Transfer (BOMST) basis;
- the port private developer to be designated as Conservator for the Port under the Indian Ports Act, 1908;
- freedom of the developer to fix the tariff;
- freedom of the developer to set his own employee policies;
- sharing of revenue with the State Government (5% in the first five years progressing to 12% in later years);
- Government land to be leased. Where land needs to be acquired for that purpose by the Government, then the initial cost of such acquisition is borne by the developer and adjusted against the share of revenue payable to the Government;
- In the case of new port activity within 30 km., the developer is assured exclusivity in terms of having a right of first offer and refusal for that work;
- At the end of the concession period, immovable assets are to be transferred to the Government free of cost. Movable assets will revert on the payment of the consideration specified in the Concession Agreement.

Privatisation mandates will be granted based on a competitive bidding process. Tendering will be to pre-qualified bidders based on their technical and financial competence with their bids assessed for technical and commercial sufficiency. The final award will be made based on an assessment of project viability and the financial offer made to the Government by way of:

- minimum guaranteed revenue share (in Rupees per annum) (50% weighting);

- percentage of revenue share offered per annum (30% weighting);
- maximum investment proposed in Phase I of the Project (20% weighting).

As of September 2003, four ports have been privatised in Andhra Pradesh- Kakinada, the LNG Terminal, Krishnapatnam and Vodarevu. The goal is to develop other minor ports with private sector participation. In addition, the concession agreement for the greenfield Gangavaram Port was signed by the parties on August 7, 2003, along with the signing at the same time of the shareholders' agreement and State Support agreement. That State Support Agreement follows the provisions of the AP Infrastructure Development Enabling Act, 2001 in providing for a 100% exemption from stamp duty and registration charges on the first transfer of land, mortgage deeds and financial agreements. It also exempts inputs required for project construction from sales taxes.

The Gangavaram Port concession agreement will be examined in detail as part of Phase II of the Project as regards the success of the above Policy and provisions necessary to attract private investors in the ports sector.

Gujarat

Gujarat is also a major maritime state with a coastline of 1600 km., one-third of the total coastline of India. Its 40 minor ports handle over 80% of the traffic handled by all such ports in the country. Its major port of Kandla is the country's largest port.

The State Government of Gujarat, through the Gujarat Maritime Board (GMB), issued a comprehensive and integrated Port Policy in 1995. Its purpose was to integrate the development of ports with industrial development, power generation and infrastructure development. The Policy had seven objectives (see details in Appendix B). One of those objectives was to attract private sector investment in the existing minor and intermediate ports and in new port locations.

Detailed rules for furthering that objective of encouraging private sector investment were then set out in Government of Gujarat Resolution No. WKS-1097-G-213-GH, dated 29 July 1997, **Build-Own-Operate-Transfer (BOOT) Principles Under Port Policy-1995**. These Principles were developed to support the Policy's vision of the development of ten greenfield ports- six of them fully private and the other four as joint venture ports. The Principles will serve as a framework for involvement of the private sector in the construction and operation of these new ports. The guiding BOOT principles are as follows:

- timeliness of infrastructure creation;
- efficiency of operations and operational autonomy to the private sector (encouragement of competition and efficiency);
- synchronisation with hinterland development;
- maintenance of a Government role only in appropriate areas (security, defence, environmental concerns and to protect economic development) through establishment of a suitable regulatory framework;
- recourse to Government kept to a minimum with the responsibility of financing the port with the developer. However, the Government will keep ownership of the land.

The above five principles are then spelled out in more detail in the Annexure to the Resolution for the following categories:

- Build Stage of the BOOT Package;
- Ownership Rights of Different Parties;
- Operation of the Port;
- Commercial Issues (tariff flexibility; royalty payments, royalty concessions, regulation by an independent Port Regulatory Authority);
- Transfer of Assets.

The details of this Annexure are set forth in Appendix B to this Working Paper. Among the important provisions are:

- Land acquisition is the responsibility of the State Government;
- The concession period shall be 30 years based on a lease, but port assets may be mortgaged to a lender under that agreement;
- State Government tax concessions include lowered stamp duty and registration fee;
- The Developer or consortium has a financial commitment to keep at least 51% of the shares in the company carrying out the venture for a minimum of five years of operation;
- The State Government will also participate as an equity partner, and will facilitate the concomitant development of roads, rail corridors and industrial parks. It will also encourage the developer to add port capacity;
- The Developer shall have as complete an operational autonomy as possible. He shall have complete flexibility to set and collect all tariffs.

This Gujarat policy is the most comprehensive port policy of the three maritime Project States. It provides a great number of incentives for a private investor. Based on the above BOOT principles, the GMB has developed a model port concession agreement. That agreement will be examined in detail as part of Phase II of this Project.

The Gujarat Maritime Board is now facilitating the development of six privatised greenfield ports- Simar Power Port, Mithiwirdi Steel and Automobile Port, Dholera General Cargo Port, Hazira Industrial Port, Vansi-Borsi Petroleum & Liquid Chemical Port, and Maroli Industrial Port. Investment in the sector in the State has been US$1.5 billion since the announcement of the port privatisation policy in 1995. At present, a long term Port Development Gujarat Programme (PODEG) is being carried out by a joint Indian-Dutch venture. Its report is expected in December 2003 and will make recommendations to support the structural development of the State port sector through organisational restructuring, technical assistance, knowledge transfer and human resource development. The Project is making recommendations regarding the restructuring of the GMB and for an independent port regulatory authority. These recommendations will be examined also in Phase II of this Project.

Karnataka

The ports policy for Karnataka is set forth in a Government Order dated 12 February 1997. Under that Policy, the State Government intends to develop three minor ports in strategic locations so that port facilities can be accessed more readily from all districts. It also intends to coordinate port development with associated industrial estate development and infrastructure development, particularly the proposed rail link between Karwar and Hubli.

As regards private sector participation, the Government intends to attract such investment for the development of existing minor and intermediate ports as well as for Greenfield locations. Private sector participation in existing ports can include:

- construction of new wharves, jetties and terminals;
- installation of mechanical cargo handling equipment;
- construction and operation of captive jetties in selected locations;
- operation of services such as cranes, tug towing, warehousing and essential utilities.

In addition, the following terms apply to such private sector participation:

- the Government will acquire and allot lands and may offer incentives to enhance the economic viability of projects on a case-by-case basis;
- the private party would be licensed;
- development and operation of the port would be through the BOOST mechanism. The BOOST agreement and license would be for a specified period of up to 30 years;

- relevant Government of Karnataka assets would be leased to the private sector in return for a fee.

The primary port project in Karnataka to use the private sector is the Karwar Container Port. The Government of Karnataka has entered into a Memorandum of Understanding with Vickram Associates to develop the port on a BOOST basis over a period of 20 years. It will build container facilities and rehabilitate other facilities. It will pay the State Government a share of the profits after a certain container traffic threshold is reached. At the moment, proceeding is waiting for dredging by the State Government. It should also be noted that Karnataka is the only Project State with a law establishing that the Government sets tariffs for ports. This is not left to a private developer.

Madhya Pradesh

Madhya Pradesh is a landlocked state. Thus it has no ports, and no need for a port policy or specific ports legislation.

3.3.4 Legislative Framework For The Ports Sector

Ports are a mixed responsibility under the Indian Constitution. Ports declared by law to be major ports are governed under Central legislation, the Major Port Trusts Act, 1963 (Act No. 38 of 1963), as amended. (see item 27 of the Union List, Article 246, Seventh Schedule of the Constitution). Central legislation also governs rules regarding maritime shipping and navigation on tidal waters (item 25 on the Union List), lighthouses (item 26 on the Union List) and port quarantine (item 28 on the Union List). Port matters also can be handled by uniform international rules set by maritime conventions of which the Government of India is a signatory. In addition, the Tariff Authority for Major Ports (TAMP) was established in 1997 to set tariffs for those national ports and to act as an economic regulator. (Act No. 15 of 1997, adding Chapter V-A, Sections 47A to 47H, to the Major Port Trusts Act, 1963.)

Ports other than major ports are the concurrent responsibility of both the Central Government and the State Government, based on item 31 of the Concurrent List under the Seventh Schedule of the Constitution. The Indian Ports Act, 1908, as amended, grants powers to State Governments with regard to all ports not designated as major ports. Those powers include the power to make port rules in all areas except questions of public health, to appoint port officials except health officers, to set rules for the safety of shipping and the conservation of ports, to set port dues and charges, and to group ports.

State Port Legislation

Gujarat

Gujarat has been at the forefront in establishing State law for ports, as permitted by the Constitution. It established the Gujarat Maritime Board (GMB) under the Gujarat Maritime Board Act, 1981 (Act XXX of 1981) to carry out the functions specified to State Governments under the Indian Ports Act, 1908. It reports to the State Department of Ports & Fisheries. The Port Policy described above, as well as the 1997 BOOT Principles, was prepared by the Board, which is responsible for their implementation.

The Board has created two commercial companies to help in that execution in partnership with the Gujarat Industrial Investment Corporation. They are:

- the Gujarat Port Infrastructure Development Corporation Ltd (GPIDCL), as an investing arm of the GMB for routing equity into the new joint sector ports;
- Alcock & Ashdown Ltd., for ship breaking, shipbuilding, ship repairing and dry-docking.

The State Government is now planning to separate service delivery and development from regulatory functions. Thus it would create two new institutions. A Gujarat Port Authority would act as the

concessioning body with private parties and administer, maintain and develop port infrastructure assets. A separate Maritime Regulatory Commission, along the lines of the State Electricity Regulatory Commissions, would enforce navigational standards and environmental protection standards, monitor concession agreements, act as a dispute resolution agency, and encourage competition in the sector. The PODEG consultants mentioned above have prepared two draft laws- one for a revised Gujarat Maritime Board and the other to create a new Gujarat Maritime Authority. Thus Gujarat would remain foremost of the Project States with regard to an appropriate legislative framework for port development and regulation. These draft Acts will be reviewed as part of Phase II of this Project.

Karnataka

The only other Project State with specific legislation related to port matters is Karnataka. Its legislation concerns only the setting of tariffs- the Karnataka Ports (Landing and Shipping Fees) Act, 1961, as amended- based on the authority given to the State Governments under Section 6 of the Indian Ports Act, 1908, as amended. That authority is carried out by the Director of Ports and Inland Water Transport of the State Public Works Secretariat but reporting to a separate Minister of Ports and Inland Waters.

Andhra Pradesh

Andhra Pradesh has not passed any State legislation in the ports sector but acts under notified orders to carry out its powers under the Indian Ports Act, 1908. In that State and in the other States, for projects such as the Gangavaram Port, most matters including tariffs are set in the Concession Agreement itself. That Agreement will be examined in detail as part of Phase II of the Project with regard to the effectiveness of regulation by contract in such situations.

State Legislation- Summary and Conclusion

Gujarat is the only Project State to set up a State regulatory and management system in the port sector based on legislation to implement the Indian Ports Act, 1908. The proposed Acts to revise the powers of the GMB and to create a maritime regulatory authority are model efforts that may have application to the other states. They should take advantage of the opportunity to establish their own ports legislation and set their own rules under that legislation, especially with regard to private sector participation. There are presently no such rules in those states beyond the fact that such participation is not excluded by either the Indian Ports Act, 1908 or the Major Port Trusts Act, 1963. Those pieces of national legislation should also be amended in that regard. Such a precise legal basis should be precisely stated and be laid out in greater detail so as to provide clear guidelines for the potential private investor in the ports sector.

3.4 Airports

3.4.1 Overview

Airports are a national government subject in India. (see items 29 and 30 of the Union List, Article 246, Seventh Schedule of the Constitution). Item 29 covers airways, aircraft, air navigation and airports. Item 30 covers carriage of passengers and goods by air.

The Ministry of Civil Aviation formulates national policies for airports, including rules regarding airport facilities, air traffic services and passenger and goods travel by air. The Office of the Directorate General of Civil Aviation is the main regulatory body responsible for the regulation of air transport services to, from and within India and for the enforcement of civil aviation regulations, air safety and airworthiness.

In the past several years, the national Government has issued several major policy documents regarding private sector participation for airports- the Draft Civil Aviation Policy (April 2000) and the

Policy on Airport Infrastructure. In addition, the draft Civil Aviation Act, 2000 would establish an independent Civil Aviation Authority under the Ministry to replace the Directorate General of Civil Aviation. There is also a Domestic Air Transport Policy that covers foreign equity participation in air transport services.

3.4.2 National Airport Policies Regarding Private Sector Participation

Draft Civil Aviation Policy

The basic objective of the Draft Civil Aviation Policy (April 2000) is to create and continue the facilitation of a competitive and service-oriented civil aviation environment in which private participation is encouraged and opportunities are created for investors to realize adequate returns on their investment. Also, among the objectives is the existence of a well-defined regulatory framework catering to changing needs and circumstances that assures all players and stakeholders of a level playing field.

With regard to airport infrastructure private sector participation, the Policy states that the private sector will be free to undertake both the construction and operation of new airports, including cargo complexes, express cargo terminals, cargo satellite cities and cargo handling facilities, and the upgrading and operation of existing airports and such facilities. Foreign equity participation in such projects will be permitted up to 74% for automatic approval and 100% with the special permission of the Government. Such private sector participation may include participation by a State Government and urban local bodies, as well as by private companies, individuals and joint ventures. It may be based on the Build-Own-Operate (BOO) concept or another pattern of ownership and management that fits the circumstances. Such projects will be carried out on a long-term lease basis.

In addition, the section on private sector participation of the Policy advocates not only private sector investment in the construction, upgrading and operation of new and existing airports, but also private sector investment in non-aeronautical activities (shopping complexes, golf courses, entertainment parks) near airports in order to increase revenue, improve the viability of airports and promote tourism. However, such activities shall not be carried out at the expense of aeronautical functions and must be consistent with security requirements.
With regard to regulatory framework, the Policy calls for the constitution of a statutory autonomous Civil Aviation Authority (CAA) to ensure aviation safety, security and the effective regulation of air transport in the country to serve as a watchdog and facilitator, to prescribe and enforce minimum standards for all agencies, to settle disputes with regard to abuse of monopoly and to ensure a level playing field for all agencies. Its functions will be:

- to set the standards for the various agencies and personnel of the civil aviation sector;
- to issue licenses to those agencies and personnel;
- to regulate tariffs;
- to ensure that these agencies and personnel carry out set standards;
- to take appropriate preventive and corrective action against agencies and personnel for violations of set standards;
- to ensure that there are no unfair trade practices and market dominance through encourage of entry and fostering of competition in accordance with the Government Competition Policy;
- to publish periodic reports on the present status and trends in international and domestic civil aviation.

The section of the Policy entitled private sector participation also calls for a competitive regulatory framework with minimal controls to be created to encourage the entry and operation of private airlines/airports. Finally, the Policy states that private sector participation will also be welcomed up to 100% foreign equity in aviation support services, such as airplane maintenance.

The Draft Civil Aviation Policy, 2000 would largely be implemented through the Draft Civil Aviation Act, 2000 whose main purpose is to set up the Civil Aviation Authority mentioned above.

Policy On Airport Infrastructure

The Policy on Airport Infrastructure is subordinate to the general Civil Aviation Policy. Its section on financing of airport infrastructure recognizes the need for the infusion of private investment, including foreign investment, in the sector as part of the worldwide movement from monopoly state ownership of airports to corporatisation. A strategy is required that permits utmost latitude in the patterns of ownership and management of airports, whether by State Governments, urban local bodies, private companies and individuals, or by joint ventures among such parties.

The Policy notes that the Aircraft Rules, 1937 already permit private ownership of non-Government airports. It also states that the options for management of airports should be kept open- whether BOT, BOLT, BOO, Lease-Develop-Operate (LDO), Joint Venture, Management Contract or Wrap-Around. It repeats the Civil Aviation Policy standard of 74% foreign ownership with automatic approval and 100% such ownership with special approval. Turnkey projects with international or bilateral cooperation should be permitted for large projects, as long as the normal licensing procedure for airports by the present Directorate General of Civil Aviation or later by a new Civil Aviation Authority continue.

With regard to private sector participation, the Policy calls for an Airport Restructuring Committee in the Ministry of Civil Aviation to identify existing airports where private sector involvement is desired. There would be prepared a shelf of projects for greenfield airports. The pre-feasibility reports for such projects would be made available to private investors.

The Airports Authority of India (AAI) would create profit centres for all individual airports and hive them off as individual companies on a case-by-case basis so as to enter into commercial arrangements or joint ventures with private parties. For existing airports, private participation would not require Government approval. For greenfield projects, the Central Government, AAI, State Government, private company or group of individuals would act as promoters and send the project to the State Government concerned with regard to land, water and power, construction of access roads, and similar matters. The proposal would then go to the Central Government, which would set up an independent Airport Approval Commission to make a technical and financial evaluation.
Fiscal incentives that would be available would include:

- 100% deduction in profits for income tax purposes for the first five years;
- 30% deduction in profits for the same purpose for the next five years;
- full deduction to run for a continuous ten of twenty fiscal years at the choice of the developer;
- 40% of profit from infrastructure also to be deductible for financial institutions providing long-term finance for infrastructure projects.

Those incentives would be available not only to new companies investing in airport infrastructure but also to the AAI and existing agencies investing in the upgrading of existing airport infrastructure.
The Ministry of Civil Aviation would try to facilitate speedy clearance of projects from different Ministries and to liaise with State Governments to ensure the provision of essential services and basic facilities.

Further, to maximize revenues, each airport would have a master plan for development of commercial initiatives and facilities as part of an overall airport master plan approved by management. Except for user development fees, there would be total freedom for airport operators to raise revenue through non-aeronautical charges and without Government control.

The Policy also proposes a reclassification of airports, as follows:

- **International hubs**. This category will cover airports currently classified as "international airports" and those eminently qualified to be upgraded as such. At present, this category covers Delhi, Mumbai, Chennai, Kolkata and Thiruvananthapuram. The airports at Bangalore, Hyderabad, Ahmedabad, Amritsar and Guwahati can be added to that list when their facilities

are upgraded. The first three of those airports are in our Project States, and plans are advanced for new airports at Bangalore and Hyderabad, as discussed below. It is intended that these airports will have world-class standards, including convenient connections for international and domestic passengers, and airport-related infrastructure like hotels, shopping areas, conferencing and entertainment facilities, and aircraft-maintenance bases.

- **Regional hubs**. This category will cover regional airports acting as operational bases for regional airlines that have all the facilities currently postulated for model airports, including the capability to handle limited international traffic. It is intended that State Governments be closely associated as co-promoters of regional airlines.

- **Other Operational Airports**. This category will be developed where cost-effective on a case-by-case basis. Airports serving State capitals will be given priority.

With regard to greenfield airports, they will normally not be allowed to be taken up by either the public or private sector without prior Government approval. This is due to the large number of existing airports that are not viable. A greenfield airport may be permitted where an existing airport is unable to meet the projected requirements of traffic or where a new focal point of traffic emerges with sufficient viability. In that case, it may be a replacement for an existing airport or carry out a simultaneous operation. No greenfield airport will normally be allowed within 150 kms of an existing airport. Where it is so allowed as a second airport in the same city or vicinity, then the parameters for distribution of traffic between the two airports will be clearly spelled out. The Government may decide if an approved greenfield airport shall be public or private or a joint venture. Where such an airport is set up on social considerations and is not economically viable, then there shall be a suitable grant in aid to the AAI to cover both initial capital cost and recurring annual losses.

3.4.3 State Airport Policies

As civil aviation is a national matter, it is the above central government policies that govern. There are no specific State airport policies. However, some mention is made in general State policy documents of requirements in the sector and of priority airport projects for that State.

Andhra Pradesh

Andhra Pradesh Vision 2020 identified development of airport infrastructure as critical for the overall development of the State economy. There is an increasing focus of improving the logistics and distribution network in the State. The State is planning to create a logistics and distribution hub that connects Visakhapatnam, Vijayawada and Kakinda. Most importantly, the Greenfield Hyderabad International Airport will be developed as a major part of a strategy to position the State as a convenient hub and central location with easy accessibility to the Arab world as well as to all of Southern India and Southeast Asia.

Gujarat

Airports in Gujarat fall under the Ministry of Industry and Mines. The Gujarat Infrastructure Development Board (GIDB), in its role to coordinate infrastructure development particularly with regard to private sector participation, has engaged aviation consultants to prepare a master plan for the development of aviation infrastructure in the State. That Plan would include an examination of possible ownership structure within the framework of the amendments to the Airports Authority of India Act discussed below, and for plan implementation with emphasis on private sector participation in the development and future operation of airports in Gujarat.

Airports are not specifically listed under Schedule I of the Gujarat Infrastructure Development Act, 1999 as one of the types of projects that must be considered by the GIDB, but, of course, are so considered under the provision permitting other sectors to be so considered by the Board after notification by the State Government.

Karnataka

Airports in Karnataka are looked after by the Infrastructure Development Department. There is no State policy on airports beyond the support being given to the new Bangalore International Airport Project (BIAP). It will be constructed as a BOO project as a public-private consortium under the national Civil Aviation Policy, with 74% of the shares held by private parties, including Siemens, Larsen&Toubro and Unique Zurich Airport. The remaining 26% is held by the State Government of Karnataka and the Airports Authority of India, each with 13%, as public parties. In addition, the Government of Karnataka is providing land on a long-term lease basis and investing RS. 300-400 crore in the project.

In addition, Karnataka officials have indicated that the small airport sector should be considered as a perceived need under the PSI II Facility.

Madhya Pradesh

The State of Madhya Pradesh does not have a specific policy regarding airports or airport infrastructure. The subject is not mentioned in the State Tenth Five Year Plan (2002-2007). However, there is a proposal to create a separate Aviation Department to replace the current jurisdiction of the State Public Works Department in the area. In addition, there has been discussion of upgrading the Indore Airport from a Domestic Model Airport to an International Airport. As noted above, that airport is not one of the ones listed in the national Policy on Airport Infrastructure for such change, as are Bangalore, Hyderabad and Ahmedabad. But the State Government has indicated that it will petition for such a change in status for Indore due to the creation of the SEZ there.

3.4.4 Legislative Framework For The Airports Sector

Civil aviation is a Central Government subject in India. (see items 29 and 30 of the Union List, Article 246, Seventh Schedule of the Constitution.) Item 29 covers airways, aircraft, air navigation and airports. Item 30 covers carriage of passengers and goods by air.

The Aircraft Act, 1934, with its attendant Aircraft Rules 1937, sets the basic rules for civil aviation. It should be noted that those Aircraft Rules permit airports other than Government airports to be owned by citizens of India or companies or corporations registered and having their principal place of business in India. Some airports are already owned by State Governments, private companies and individuals.

Regarding the operation of airports, the Airports Authority of India Act, 1994 (Act No. 55 of 1994) established that Authority by combining existing authorities as a financially independent agency under the Ministry of Aviation. Its purpose is to construct, operate and maintain all civilian airports, international and domestic, as well as 28 civil enclaves at defence airports. As originally enacted, that Act did not allow for private sector participation in any of the airports under the control of the Authority. However, the Airports Authority of India (Amendment) Act, 2003 has made revisions that allow the Authority to assist in the establishment of private airports (new Section 12(3)(ad)) and to lease the premises of an airport to a private party. (new Section 12A). Thus the Authority now may assist a private party to establish a greenfield airport, as in the new Hyderabad and Bangalore airports, or may lease an existing airport to a private party for renovation and improvement.

Finally, the draft Civil Aviation Act, 2000 would provide a legal basis for the draft Civil Aviation Policy described in detail above. Its main purpose is the establishment of a Civil Aviation Authority (CAA) as an independent regulatory authority under the Ministry of Civil Aviation, which would replace the regulatory role of the Directorate General of Civil Aviation. (see Chapter II, Sections 3-19). It would also establish an appellate authority to provide speedy and effective resolution of disputes among stakeholders in matters such as tariff rates, allotment of slots, working of air traffic controllers, and allocation of space in airports. An independent Airport Regulatory Board would also be established

consisting of key stakeholders, including representatives of the Ministry of Civil Aviation, the Directorate General of Civil Aviation, airport operators and airline operators.

The recent changes to the Airports Authority of India Act and the proposed Civil Aviation Act would create a legislative framework that should be sufficient to encourage private investors in the sector.

3.5 Urban Mass Transit

3.5.1 Overview

Except for Madhya Pradesh, each of the four project states has a proposed or being constructed urban mass transit/metro system for its capital city, thus for Hyderabad, Ahmedabad and Bangalore. Madhya Pradesh is considering the privatisation of some of its bus service. Karnataka is also considering the possible privatisation of a scheme of articulated buses in Bangalore. At present, it is not clear if private investors will find these potential investments attractive. Each is discussed below under State Policy.

3.5.2 State Urban Mass Transit Policy

None of the four project states has a specific state urban mass transit policy but each strongly supports the projects mentioned below.

Andhra Pradesh

The State of Andhra Pradesh strongly supports the Municipal Corporation of Hyderabad (MCH) in its development of an urban mass transit/metro system. Phase 1 of that system using mainly old tracks has been completed and began operation in August 2003. It is a 50%-50% joint venture to share costs between Indian Railways, some of whose tracks are used, and the State Government. The second and more ambitious Phase II is presently being designed by an international consortium of consultants. The First Phase was completed entirely with public monies. The Second Phase will seek private sector participation but it is not yet clear what will be recommended with regard to such possible participation. This will be explored further as this Project progresses.

The Andhra Pradesh State Road Transport Corporation, which is responsible for bus transport has no present plans for privatisation of any part of the bus system.

Gujarat

The Government of Gujarat and the Ahmedabad Urban Development Authority (AUDA) are presently supporting the development of a multi-modal (rail and road) integrated transportation system for Ahmedabad in an area that includes the Ahmedabad Municipal Corporation, areas under the AUDA, and the corridor between Ahmedabad and Gandhinagar. The feasibility study is being done by an international consulting consortium consisting of Louis Berger International (USA). Lahmeyer International (Germany), MTR Corporation (Hong Kong), and ICICI and Dalal Consultants. Its interim report has been submitted to the GIDB. The project will be offered to the private sector for implementation at the Vibrant Gujarat Global Investors' Summit to be held in Ahmedabad from September 28-30, 2003. As a result, a Memorandum of Understanding was signed with the Delhi Metropolitan Rail Corporation (DMRC), see description below, to carry out detailed planning. In addition, the GIDB is developing plans for the establishment of such systems in Baroda and Surat.

As in Andhra Pradesh, the Gujarat State Road Transport Corporation has no present plans for privatisation of the bus system.

Karnataka

At present, the Bangalore Metro is being planned by the Bangalore Mass Rapid Transit Ltd. (BMRTL) (a corporation wholly owned by the State of Karnataka) in consultation with the Delhi Metropolitan Rail Corporation (DMRC). The DMRC is 50% owned by the Government of New Delhi and 50% owned by the Government of India.

The DMRC has constructed and now operates a small section of the metro presently being constructed in New Delhi. It has been asked to provide a light rail scheme for Bangalore. Its alternative scheme calls for a portion of the track to run underground in the central business district with the additional cost hoped to be offset by higher traffic volumes. A detailed report is now being prepared by BMRTL, after initial approval by the Government of Karnataka. After Government of India approval, a new special purpose vehicle- Bangalore Metro Ltd.- would be formed with equal equity from the Government of India and the Government of Karnataka for implementation, following the Delhi model. There do not appear now to be any plans for private sector participation in the project.

With regard to bus privatisation, the Bangalore Metropolitan Transport Corporation (BMTC) (a wholly-owned corporation of the Government of Karnataka) is promoting a scheme of articulated buses with dedicated lanes for Bangalore. This Metro Bus Project has already been approved by the Bangalore Municipal Corporation and by the City Police. It is a possible candidate for funding under the PSI II Facility but it is unclear if the terms are attractive to the Corporation.

Also, the Karnataka State Budget (2003) laid out several major policy changes to encourage private participation in the road transport sector. They are:

- abolition of the Karnataka Contract Carriages (Acquisition) Act, 1976 so as to permit carriage permits to private operators. Previously, the only such service was the All India Tourist Buses which had to operate in a minimum of three states;
- introduction of city and town services (Stage Carriage Permits) for private operators within a radius of 20 kms. from all towns (district headquarters) except for Bangalore City.

In addition, the Karnataka State Road Transport Corporation (KSRTC), including the BMTC, is using private buses on its public routes under what is called a public-private partnership. The private bus owners of about 2000 such buses are paid based on the number of kilometres operated per day. KSTRC pays the wages of the conductors and the motor vehicle tax. The private person supplies the driver and receives fixed costs per kilometre from KSRTC. For BMTC in Bangalore, about 20% of buses operate on this basis.

Madhya Pradesh

As noted, Madhya Pradesh has no current proposal for an urban mass transit system. However, a major effort is underway to privatise the bus system through the unbundling of the Madhya Pradesh State Road Transport Corporation (MPSRTC) into five road transport enterprises- one holding company and four subsidiaries organised on a regional basis. This would be similar to the present arrangement in Karnataka. The long-term intent is either to divest the subsidiaries to private operators or to invite such operators to participate as part of the ownership of such subsidiaries. That reorganization would require the consent of the Government of India under Section 17A of the Road Transport Corporation Act, 1950, as amended. The Government of Madhya Pradesh has taken the decision to proceed with the incorporation of the subsidiaries as joint stock companies and passed a resolution this year to that effect.

3.5.3 Legislative Framework For The Urban Mass Transit Sector

Municipal urban mass transit/tramways is a State matter based on item 13 of the State List in the Constitution. (Article 246, Seventh Schedule). However, generally the States have then granted that authority to municipalities under the relevant State Municipal Corporation Acts.

In some cases, that grant is specific. Thus Section 115(34) of the Hyderabad Municipal Corporations Act, 1955 (Act II of 1956), as amended, provides that "the construction, purchase, organization, maintenance, extension and management of tramways, trackless trams and mechanically propelled transport facilities for the conveyance of the public" is one of the matters that a municipal corporation may provide for at its discretion under the Act. (This law applies to the Municipal Corporation of Hyderabad and to Secunderabad, as well as to the Visakhapatnam and Vijayawada Municipal Corporations under related municipal corporations acts that incorporate provisions from the Hyderabad Municipal Corporations Act in their act.)

In other cases, the grant is through the general power of delegation by the State under such Acts. Thus there is no such specific provision in the Karnataka Municipal Corporations Act, 1976 (Karnataka Act No. 14 of 1977, as amended but such delegation for Bangalore has occurred based on the general authority of the State Government for delegation of functions under Section 58(30) of the Act. However, there is a draft Karnataka Tramways Act, 2000 that would set up a Karnataka Tramways Authority to govern metro concessions, facilitate competition and efficiency and monitor the quality of service. A similar situation regarding lack of specific legislative base occurs for Ahmedabad under the Bombay Provincial Municipal Corporation (Gujarat Amendment) Act, 1999, which also applies to Surat, and the Gujarat Municipalities Act, 1963, which applies to the other municipalities in the State.

Because of the role of the national government in most metro projects, there is relevant national legislation. The Metro Railways (Construction of Works) Act, 1978 (Act No. 33 of 1978), as amended, was enacted for the Kolkata metro project and applies only to the metropolitan cities of Delhi, Bombay (Mumbai), Madras (Chennai) and Kolkata. (see Section 1(3) and definition of "metropolitan city" in Section 2(k)). While Section 18 of the Act appears to allow it to apply to more than just the construction phase of a metro project in practice this does not appear to be the case. Thus for the present Delhi metro project, special legislation- the Delhi Metro Railway (Operation and Maintenance) Act, 2002 (Act No. 60 of 2002) was enacted on 17 December 2002 to provide not only for the construction of the Delhi metro railway but also for the establishment and functions of a metro railway administration that would be responsible for its operation and maintenance. Section 104 of the Delhi Act states that it is additional to and does not replace the Metro Railways (Construction of Works) Act, 1978. Similar legislation to that for Delhi would be required wherever the Government of India is involved in the metro scheme, as in Hyderabad and as proposed for Bangalore and for Ahmedabad. In addition, the old Indian Tramways Act, 1886 (Act No. 11 of 1886), as amended applies to such projects, at least in Gujarat and Madhya Pradesh.

It should also be noted that the Indian Railways Act, 1989 (Act No. 24 of 1989) governs wherever Indian Railways tracks are used, as in Phase 1 of the Hyderabad Metro. Section 43 of the Metro Railways (Construction of Works) Act, 1978 states specifically that the provisions of that Act are additional to and not in derogation of the Indian Railways Act unless it is specifically stated otherwise. In addition, the definition of "railway" under Section 2(31) of that Act is drafted so as to create problems for metro projects that are not completely in a metropolitan area, as is the case for the Ahmedabad Project. That definition excludes only tramways completely within a municipal boundary from the definition of railways. Thus a metro that crosses such boundaries would apparently be considered as a railway. This anomaly should be removed from that Act.

With regard to privatisation of bus transport, the relevant legislation is the Road Transport Act, 1950 (Act No. 64 of 1950), as amended. As noted for Madhya Pradesh above, the Government of India was required to consent to the corporatisation and possible later privatisation of a State Road Transport Corporation. (see Section 17A). In addition, the national Motor Vehicles Act, 1988 (Act No. 59 of 1988) sets rules for all vehicles, including public vehicles, and is implemented by both central and state rules, such as the Karnataka Motor Vehicle Rules, 1989 that set routes. Further, as mentioned above for Karnataka, there is often State legislation, such as the Karnataka Contract Carriages (Acquisition) Act, 1976 which had to be repealed in order of carriage permits to be given to private operators.

This system of legislation for public transport would have to be reviewed for each State if a privatisation program for buses is considered for funding under this Project.

3.6 Cyberparks/Information Technology (IT) Parks

3.6.1 Overview

Two of the four Project States- Andhra Pradesh and Karnataka- are at the forefront with regard to information technology commercialisation in India and in the world. They have also been prominent in the formulation of State information technology policies and in the establishment of software and hardware industrial parks to accommodate the needs of computer ventures. Several of the projects requested for consideration for funding under the PSI II Facility fit that description, particularly the proposed hardware park to be located in Karnataka near the new Bangalore International Airport. The other two Project States also have some form of IT policy. Those Policies are summarized below.

3.6.2 State IT Policies

Andhra Pradesh

AP FIRST Information Technology Policy- 2000, adopted by the Andhra Pradesh Government in July 2000, is based upon the vision found in Andhra Pradesh Vision 2020 that "Andhra Pradesh will leverage Information Technology to attain a position of leadership and excellence in the information age and to transform itself into a knowledge society."

The Policy has three main objectives of fostering economic development, fostering human development and improving the quality of life of the citizens, and providing good governance. Good governance includes the government-citizen interface, the Government-business interface and intra-Governmental processes, including one stop shopping for all transactions.

In addition, there are eight strategies to help meet those objectives. They are:

- Putting the enablers in place (creation of a high-powered policymaking body that forms a think tank and can take quick decisions);
- Building infrastructure (Hi-Tech City; Cyber City, a modern International Airport; International Convention Centre; acquiring bandwidth, satellite communications; quick action on right of way);
- Creating the right social environment (building public awareness);
- Leveraging public sector initiative (through transparency of procedures adopted for selection of private parties; developing a suitable scheme for creation of revenue linked to transactions with regard to BOO and BOOT schemes before presenting them for open bidding; and awarding such contracts to pre-qualified bidders on a fast track basis);
- Strategic alliances and partnerships (with global leaders in state of the art technology and in education (such as Indian School of Business);
- Collaboration with other countries (such as the MOU signed with Singapore in 1997);
- International consultancies (to design large systems to eliminate redundancies);
- Thrust areas (thus IT-enabled education, e-Governance and IT-enabled services). A major goal is SMART government (Simple, Moral, Accountable, Responsive and Transparent).

Under "Putting the enablers in Place", there is established a series of Apex policymaking bodies, a Technology Think Tank and the Right Regulatory Regime. These recommendations for the IT sector should be reviewed as a possible model for a similar policymaking structure for private sector participation in infrastructure in general.

The policymaking bodies would be as follows:

- **AP FIRST**- the apex body with the responsibility for the design of suitable IT policies, strategies and plans and for reviewing their implementation. It is chaired by the Chief Minister and consists of the Ministers for Finance and for Revenue besides experts in the Indian IT industry. It meets on a fixed date every alternate month;
- **Information Technology Promotion Committee (ITPC)**. This Committee, headed by the Chief Secretary and consisting of Senior Secretaries of the Government, is responsible for the evaluation of major IT projects and for implementing the IT policy and reviewing its progress;
- **Departmental Committees on Information Technology (C-IT)**. These Department-level committees, headed by the respective ministers, are responsible for drawing up a suitable IT plan for the department and for its implementation and review.

In addition, the Government has constituted a Consultative Committee on the IT Industry (G.O.M. No. 3 of the Information Technology and Communications (IT&C) Department dated 25 May 2000). It is headed by the Secretary, IT&C and is to create a forum for coordination between the various relevant agencies under the Central and State Governments and the IT industry. It is to meet every two months.

With regard to the right regulatory regime, efforts will be made to put in place a regulatory regime that regulates the least. Areas identified for reform include:

- licensing and registration of a business;
- declaration and filing requirements under the Income Tax Act, Customs & Central Excise Act, AP General Sales Tax Act, 1957, as amended, and the Foreign Exchange Regulation Act (FERA);
- compliance requirements under the Water and Air Pollution Acts; the Factories Act; the Employment Exchange (Notification of Vacancies) Act; Payment of Wages Act; Minimum Wages Act; Contract Labour (Regulation & Abolition) Act; Workmen's Compensation Act, AP Shops and Establishments Act, and Employees' State Insurance Act;
- facilitating a regulatory regime conductive to the formation of capital under the Securities & Exchange Board of India (SEBI) Act and the Reserve Bank of India (RBI) Act.

With regard to leveraging private sector initiative, it is stated that it is necessary for the Government to spell out the areas in which such investments are invited and to spell out the ground rules for private initiatives. With regard to ground rules, the Government will be guided by the following principles:

- transparency of procedures adopted for selection of private parties;
- designing a suitable scheme for creation of a stream of revenue linked to the transactions, in relation to implementation of e-Governance projects on a BOO or BOOT basis, before throwing a project to the process of open bidding;
- setting an institutional mechanism for empanelling players in the IT sector who intend to work on Government IT projects, and awarding projects based on pre-determined eligibility criteria on a fast track basis. Players might be internet companies, website developers and hosts, system integrators, facility managers, ISPs, system designers and developers, and IT training institutes;

The State Centre for Good Governance would play a major role in the above matters.

Finally, there would be an IT Investment Promotion & Incentives Policy. Under that Policy, AP has set rules that understand the first principles of doing business with business. The Government has subsidized land so that it is free. It has reviewed all major Acts and rules that regulate the IT industry and either done away with the red tape entirely or resorted to a self-certification process. It is concerned to establish first class infrastructure, both physical infrastructure and for e-commerce.

With regard to the promotion of venture capital, the Policy implements a Venture Capital Committee of the SEBI to serve as a single window for venture capital requirements, a tax pass through benefit

to avoid double taxation, irrespective of the form of venture capital firm; the creation of limited liability partnerships; employee stock options; permitting banks to invest in venture capital firms; providing flexible options for entry and exit; and simplifying pricing norms of Rbi**.** It further would help develop managers for such firms, and create incubators for start-up facilitation and providing mentoring and the benefits of networking with venture capital firms. It would encourage and facilitate the establishment of one or more venture capital funds.

The present incentive package includes the following:

- a power subsidy involving a 25% rebate;
- an investment subsidy which works out to $400 per job created and 26 IT companies have benefited;
- a 50% rebate on stamp duties on the sale or transfer of land, and 14 companies have benefited;
- exemption from zoning regulations, and 26 companies have benefited;
- exemption from the Factories Act and the Minimum Wage Act;
- Government provision of ready-to-use facilities at subsidised rates;
- Special provision for IT mega projects involving investments of over $10 million.

Results To Date

At present, the Hi-Tec City in Hyderabad has the Cyber Tower of 550,000 square feet of built up space, the Cyber Gateway of 860,000 square feet of built up space, and the Cyber Pearl consisting of 500,000 square feet of built up space being built with Ascendas of Singapore, as well as independent plots.

There is also the Information Technology Park, consisting of Vanenburg, Millenium Centre, Cyber Park, Whitehouse, and My Home IT.

Several major multinational players have IT investments in the State, including Microsoft. Educational institutions involved in IT have expanded rapidly, including the Indian School of Business which is linked to the Wharton and Kellogg Business Schools in the United States.

The Government provides broadband connectivity through major optical fibre and satellite earth station facilities. Over 70% of the State is covered with fibre optic cable, with additional projects in the pipeline. The AP Government gives free right of way to investors to lay such cable without any conditions. In addition, it encourages related services for IT parks, including good airline/communication connections, development of tourism and hotels, and good schools and health services for the population.

Overall, AP IT economic activities have grown at a rate of 80% per year since 2000. During that same period, employment in IT related activities has grown from 12,000 to 64,000.

Besides the provision of additional fibre optic coverage, current projects include:

- Cyberabad- a strategic knowledge based corridor consisting of 5200 acres for knowledge-based industries, a centre of learning and a financial district;
- An electronic hardware park of 5000 acres to be located near the proposed international airport.

However, assistance under the ADB PSI II Facility has not been required for any of those projects. Yet a review of AP's successful experience could provide lessons for other states in India.

Gujarat

Gujarat has an Information Technology policy and an Information Technology (IT) Industry Incentive Scheme (1999-2004).

The Information Technology policy has as its objectives:

- overall IT growth in the State;
- to create enormous new employment opportunities in the State;
- to train and develop skilled manpower in IT;
- to facilitate information outlets at the doorstep of the common man;
- to make the Government –Citizen interface more effective, efficient and transparent.

With regard to private sector participation, it is expected that private investment will be important both from the point of view of attracting new resources and ensuring sufficient competition so that the customer benefits. The private sector would participate in the creation of the information corridor, in setting up information kiosks and in the provision for creating database oriented services. Public-private partnerships would be encouraged in setting up high tech cities, IT training and educational institutions and in other related economic development projects.

As to incentives, IT products, services and software produced in the State would be given special sales tax treatment, as well as a subsidy on fixed capital investment. A State Venture Capital Fund would be established. Further, the IT Industry Incentive Scheme for the five-year period 1999-2004 would establish the following incentives for Eligible New Information Technology Units:

- capital incentive subsidy- an eligible new information technology unit would be entitled to a capital subsidy of the lesser of Rs. 25 lakhs or 50% of eligible total capital investment (investment made in land; new building; machinery; assets acquired and brought up to use within 12 months from commencement of production; but not working capital, capitalised interest; second-hand equipment or pre-operative expenses);
- special incentives (for projects with a large capital base that will generate large employment opportunities)- for eligible total capital investment of Rs. 50-100 crore there would be a subsidy of Rs. 25 lakhs; for Rs. 100-200 crore, there would be a subsidy of Rs. 50 lakhs; for projects above Rs. 200 crore, there would be a subsidy of Rs. 100 lakhs;
- turnover incentive (because IT investment is high in manpower and low in capital)- 5% of the eligible turnover in the first year and a maximum of Rs. 50 lakhs per annum in subsequent operating years;
- power cut exemption;
- connectivity incentive (subsidy of 50% for rental of data line for three years or for the operating period of the scheme);
- no requirement of NOC from Gujarat Pollution Control Board.

Results To Date

Gujarat has been actively developing the Infocity Project at Gandhinagar on an area of 150 acres near the Ahmedabad Airport. Gujarat Informatics Ltd. (GIL) was established as the nodal agency for IT development in the State by the State Government. Its objective is to promote IT and accelerate the process of e-Governance in the State. GIL has entered into a partnership with Creative IT Inc., a U.S. real estate developer, to promote the Gandhinagar Infocity. The project is being implemented by way of BOT concession agreements for parcels of land within the 150-acre area.

Karnataka

Karnataka's first Information Technology Policy dates from 1997. After that, the Millenium IT Policy or Mahithi was prepared in 2000. This was followed by the Millenium Biotech Policy (2001), and by the Millenium BPO (Business Process Outsourcing) Policy also issued in 2001.

The objectives of the Millenium IT Policy are:

- to utilize the power of Information Technology in the overall goal of the Government of Karnataka in eradicating poverty and empowering women;

- to effectively reduce unemployment by absorbing the major share of educated youth into the IT industry;
- to promote the usage of Kannada in Information Technology;
- to use e-governance as a tool and deliver a government that is more pro-active and responsive to its citizens;
- to unleash the Karnataka Incubation engine;
- to encourage business with non-English speaking countries;
- to maintain the pre-eminent position of both Bangalore and Karnataka in the field of Information Technology.

The Millenium IT Policy or Mahithi proposed many incentives for potential private investors, some of which are now being withdrawn and others of which are being downplayed. For example, the Mahithi gave a 50% exemption from stamp duty (thus only 7% was paid vs. 14% for most businesses). That exemption was eliminated on 1 April 2003 as part of the tax reform package. The tax reform sets a new stamp duty of 7% for all businesses. Thus the companies concerned no longer have a differential rate, but they still pay only 7%. However, the following incentives remain:

- **Capital Goods Entry Tax**- Information Technology industries will be exempt from payment of entry tax on computer hardware, computer peripherals and other capital goods including captive power generation sets, during the implementation stage which can be extended up to five years from the date of commencement of implementation;

- **Pollution**- The Karnataka State Pollution Control Board has simplified the procedure for seeking clearances under the Water (Prevention and Control of Pollution) Act, 1974, as amended, and the Air (Prevention and Control of Pollution Act, 1981, as amended, for the software companies that use captive DG sets;
- **Power-** Software companies will be treated as industrial (not commercial). Thus the electricity tariff applicable to industrial customers will be levied on them. They will also be given priority in sanction and servicing of power and would be exempt from power cuts without any time limit;
- **Zoning-** IT companies that use up to 5 KVA will be permitted to be established without any locational restrictions- thus in residential, industrial or commercial areas;
- **Urban Development**- Floor Area Ratio (FAR) requirements are relaxed for all IT projects set outside the limits of municipal corporations. This incentive will be available to projects notified by the State Directorate of Information Technology and Biotechnology that have set up excellent infrastructure, water, uninterrupted power, dedicated connectivity, etc. A maximum relaxation of up to 50% of the existing FAR would be available;
- **Concessions/Incentives For Creating Employment**- All new IT companies which create employment of more than 250 in Bangalore and 100 in other areas during the first year are eligible for rebate either on the stamp duty or rebate on the cost of land. A rebate of 15% on cost of land will be applicable to those companies that get land from State agencies, like the Karnataka Industrial Areas Development Board (KIADB) or Karnataka State Small Industries Development Corporation (KSSIDC). For other companies, a rebate of 15% on stamp duty is applicable. This rebate on stamp duty is also applicable to the existing IT companies expanding or modernizing as well as creating additional employment;
- **Labour Rules**- The State is committed to simplify all the enactments of Labour Law for the IT sector. The State proposes to exempt IT companies from furnishing returns and the maintaining of certain registers. A specific notification will be issued by the Labour Department. In addition, the Labour Department has also initiated procedures to exempt the IT companies from the purview of the Industrial Employment (Standing Orders) Act, 1946. The Policy further states that consideration will be given to allowing flexi-timing in IT industries and other changes.

Results To Date

The High Tech industry in Bangalore has a long history going back to the 1950s, beginning with Hindustani Aeronautics Ltd. (HAL), the Indian Space Research Organisation, and the India Institute of

Sciences. In the early 1980s, the Electronic City was established, which is now in the third of four phases. The initial concentration on hardware has moved to software. Originally, there were only 10-13 such companies but there are now 1200 companies worth about Rs. 16,000 crore ($2.5 billion). The International Technology Park, a software park of 1.5 million square feet is now being carried out by a Singapore-Tata Consortium. The Government of Karnataka has given the required land so that it has an equity share in the project.

There are now three additional proposals, as follows:

- **Biotechnology Park**- 150 acres, of which 75 acres are already owned. It would be located near Electronic City;

- **Hardware Park-** This is a priority project of the Chief Minister that has now been taken up by the Confederation of Indian Industry (CII). It was included in the list of projects for the PSI II Facility submitted by the State. The Government is now financing a feasibility study concerning possible sites and which initial companies might serve as an anchor. That Study is being carried out by Feedback S-Strategic, a Delhi firm whose report is due in late 2003. Five locations have been identified. All are near the new airport and one is on the IT Corridor discussed below. It is expected that the Hardware Park would be an SEZ and receive the benefits associated with that status. (see Section G of the Working Paper below).

- **IT Corridor**- The third proposal is to convert the eastern and northern part of Bangalore into an IT Corridor. There are 13,000 hectares available, of which 8000 hectares would be developed/constructed. Good infrastructure would be provided, along with educational, commercial and residential facilities.

It should be noted that the hardware park and other similar proposals were developed under the aegis of the Bangalore Agenda Task Force (BADF), established in 1999. It includes membership from the State Government, the private sector and NGOs to promote development in Bangalore in a systematic manner. Most of the separate task forces are headed by private parties. However, the Task Force concerned with Hardware and the Hardware Park is headed by the State Minister for Information Technology. The Vice Chairman is the head of a company that makes palm computers. The specific subject Task Forces meet every three to six months and set guidelines for their specific area.

Madhya Pradesh

Madhya Pradesh has both an Information Technology Policy and a draft Science and Technology Policy, the latter dated 23 May 2003. Under these policies, the MP State Economic Development Corporation (MPSEDC) will assist in attracting investments in information technology to the State, along with the MP Agency for the Promotion of Information Technology (MPA-IT). In addition, the MP State Industrial Development Corporation (MPSIDC), in its general role to assist industrial development, as discussed in Part II above, will play an important role, including the development of information technology parks. The State Government is facilitating the setting up of "Hi Tech Habitats" to promote IT industry in the State.

Summary of Madhya Pradesh Information Technology Policy

Introduction

The introduction to the Madhya Pradesh IT Policy document states that every citizen has a right:

- To information pertaining to his own welfare needs and opportunities for individual and social development;
- To understand the processes of governance;
- To know the rationale for decision-making affecting citizen welfare and the welfare of communities; and

- To quick and effective delivery of citizen services.

The State also believes that the use of technologies would enable information to bring about human development.

The policy states that the strengths of the State are its telecom infrastructure and geographical location. The State also has a number of institutions in telecommunications, electronics and management, with a large number of alumni. The State also has a number of public and private institutions in the training sector, which makes for a cheap component of human resources.
The document states that other advantages of the State are political stability, high quality social infrastructure and quality of life, tranquil public order, and a progressive and forward-looking policy environment.

The Government of Madhya Pradesh, as its State Policy on Information Technology, has accepted the recommendations of the State Task Force on Information Technology, headed by Professor Yash Pal.

Vision and Goals

The vision statement for the State's IT Policy is the creation of a "Seamless Society with Global Opportunities". The Policy envisages that access to information and knowledge will be symmetric among all seekers and users.

The goals include contributing 5% to 10% of the IT output of the country by the year 2008; to make Madhya Pradesh a lead IT State in India by the year 2003 by providing cost effective infrastructure; and transparent and responsive governance; providing information access to all citizens at an affordable cost; and achieving IT literacy in all High Schools and Colleges by the year 2003, and in all schools by the year 2008; aiming for an average of one internet connection per 100 population by 2003; the goal of computer penetration in the Government, its organizations (including Panchayat Raj institutions and other local self-government institutions which is kept to one per ten employees by the year 2003 will be raised to one per five employees by the year 2005 and finally to one per two employees by the year 2008. There are other goals also including for targeted software exports, share of IT in the State domestic product, employment opportunities and private sector investment.

Policy Initiatives

- world standard on its own or in collaboration with one or more institutions and/or industry;
- Further, the policy initiative is to promote the use of Hindi in relation to IT;
- The IT policy is to be given a prominent place in the State's industrial policy;
- The State Government is to move the Government of India to permit International Private Operators to create an international gateway hub at both Bhopal and Indore;
- The Policy also provides for sub-block level connectivity to the villages/village panchayats, establishment of Information Kiosks, for the State Electricity Board (MPEB) to actively examine whether it can leverage the right of way of its vast supply network by partnering with suitable private national or international communications companies with capital and technology in return for right of way for connectivity. Indore, Raipur, Gwalior and Bhopal would be developed as IT "cities". Special focus would be given to venture capital availability by inviting Financial Institutions to be an integral part of the State's IT vision. MPSIDC and MPFC would formulate a special package for providing financial assistance to the IT industry. Also included is the establishment of hardware technology parks for manufacturing units and the use of existing schemes of self-employment generation, such as the IRDP, TRYSEM, PMRY, etc., to provide assistance to youth for setting up Information Kiosks to provide e-mail, internet and other value-added The nodal agency for industrial growth is the registered society promoted by the Government- the Madhya Pradesh Agency for Promotion of Information Technology (MAP-IT). The policy document gives the composition of this body;
- The objectives of MAP-IT include to propel the growth of information technology (IT) in Madhya Pradesh; to coordinate with all the Government Departments/agencies for sectoral and cross-sectoral promotion and use of IT in Government; to coordinate and network with

investors, industry, trade organizations and public and private financial institutions to promote growth in the IT sector; to generate awareness among citizens; to coordinate manpower needs and human resource development efforts for these objectives; to coordinate and develop all support infrastructure including telecom infrastructure in the State; marketing the State as an attractive IT destination for investment; and, finally, to identify and develop opportunities for furthering innovative research of services;

- In terms of clearances, the State Government will facilitate a single window clearance system and a universal overriding permission that gives the right to an enterprise to carry on activities without barriers of any kind. IT industries requiring electric power up to 15 KVA may be established without any location restrictions. Necessary amendments to the Pollution Control Act rules governing this matter.

Promotion of Information Technology in the Government

- The Policy provides a number of initiatives to promote IT in Government. These include that the annual plan of each department/sector in Government will have a detailed sub-plan for IT. In addition, there will be a distinct budgetary head of account for IT-related activities introduced in the annual budget for succeeding fiscal years, and that the financial resources for computer penetration for Gram Panchayats will be met out of grants-in-aid for basic services. An action plan will be prepared to ensure that all offices of District Government, including those at the sub-district level, are computerized and networked by the year 2003, and that e-mail facility will be extended to all employees at zero additional personnel costs, except for the costs of training and re-tooling of serving employees. All hardware supplies are to be contracted with a compulsory clause on familiarization of employees in the operations. Further, there is a proposal to tie up with banks for hire purchase schemes for employees as well as to provide interest-subsidies for purchase of computers for the personal use of employees. Other goals are that every department shall establish a LAN by the year 2003, and that the systems/databases provided by NIC in the State will be upscaled and/or augmented and made online seamlessly.
- In addition to the above, detailed plans will be prepared in respect of the Agricultural Market Information System, the Treasury Accounting Information System, the Commercial Taxes Information System, databases under the DISNIC-PLAN, the Village Information System and Gram Sampark Abhiyan, and the Transport Management System.

Promoting IT in the Social Sector

- Initiatives in this area include encouraging NGOs to establish Janpad (block) level centers and "samadhan kendras" for providing hardware/software or other support services; starting an awareness campaign for providing the benefits of computers and communication resources at the village Panchayat and sub-block or cluster levels to be utilized for rural development activities; agricultural and horticultural extension for farmers; career guidance for youth; technology guidance for rural enterprises, and micro-level planning;
- All existing websites relating to both Government and non-Government agencies of Madhya Pradesh would be linked on a reciprocal basis;
- The present public grievances redressal system of the State Government will be upgraded to facilitate access to citizens through any of the kiosks, Samadhan Kendras, public facilitation centers or Government offices;
- The district Sainik Welfare Boards will list ex-service personnel with a background in communications and computers. The services of retired IT-qualified defence personnel will be utilized at the school level for creating IT awareness in the villages/districts;
- The Policy also provides for the creation of an Intranet among institutions in each social sub-sector;
- As per the Policy, UGC is sponsoring the INFLIBNET, which seeks to network all 176 universities in the country. Madhya Pradesh will take advantage of the INFLIBNET by promoting and developing LANs for every university in the State through the working out of a detailed strategy;

- The Policy also provides for the creation of a Citizen Database, introducing a unique social security ID number for those availing themselves of various benefits, such as social assistance and social security pensions.

Development of Manpower for IT

- The policy initiatives in the area of development of manpower for IT include training for Government employees by the upgrading of existing facilities and the initiation of tie ups with private institutes; the bringing about of computer penetration in all the high schools within three years; the giving out of floor space in Government buildings which are not utilized during non-office hours to private educational institutions for IT training purposes in return for a proportionate number of free nominations of Government employees for IT training and the familiarization of PRI functionaries with the benefits of IT;
- On the education side, initiatives include upgrading of courses of study in the ITIs and polytechnics; the setting up of at least one of the IIITs suggested by the National Task Force in Madhya Pradesh fully funded by the Centre; and, in addition, promotion of private investment for setting up institutions of excellence in IT on a par with IIITs by land grants, and the setting up of a Virtual University as an enhancement of the Open University model. It also includes the development and inclusion of course material of an elementary nature at the primary school level and, finally, creating computer awareness among the masses.

Results To Date

In addition to the Hi Tech Habitats, the MPSEDC has set up a small software technology park at Indore. In addition, the MPSIDC is in the advanced stages of planning for setting up a new IT park also at Indore. MPSEDC and the MP Housing Board are jointly conceptualising an IT park in Bhopal. Further, the Madhya Pradesh State Government is exploring the creation of a separate body to carry out the operations and maintenance of the parks. This would ensure one-stop clearances, speedy approvals and smooth and swift start-ups.

Legislative Framework for Cyber Parks/ Information Technology (IT) Parks Sector

There is no specific IT legislation in any of the four States, nor is any required. Incentives have been given for the sector as part of more general tax and foreign investment legislation, as will be explored further in the next phase of this Project.

3.7 Special Economic Zones (SEZs)

3.7.1 Overview

The concept of Special Economic Zones (SEZs) was introduced in the Export-Import Policy (Exim Policy) of 2000-01, as part of an effort by the Government to unleash second generation reforms. SEZs are defined as specifically delineated duty free enclaves, to be deemed foreign territory for the purposes of trade operations, duties and tariffs. Essentially, this means that goods and services going into the SEZ area from a Domestic Tariff Area (DTA) shall be treated as exports and goods coming from the SEZ area into DTA shall be treated as if these are being imported. These SEZs were meant to be on the pattern of those existing in China and were to be given full operational flexibility and provide for the unrestricted movement of goods to and from the Zones, to create an internationally competitive and hassle free environment for exports and attract foreign investment in India.

The Exim Policy is issued on both a five-yearly and yearly basis by authority given under Section 5 of the Foreign Trade (Development and Regulation) Act, 2003. Currently in force are the Exim Policy of 2002- 2007 and the Exim Policy of 2003-2004. Chapter VII of both Policies deal with SEZs and do not differ greatly in terms of their provisions for SEZs.

The Exim Policy, 2002-2007 provides for setting up of SEZs in the public, private, joint sector or by State Governments, including the conversion of some of the existing Export Processing Zones into SEZs by the Central Government through issue of a notification. Accordingly, the Central Government has converted Export Processing Zones located at Kandla, Surat, Cochin, Santa Cruz, Falta, Madras, Visakhapatnam and Noida into Special Economic Zones. In addition, approval has been given for setting up of 21 SEZs in various parts of the country in the private/joint sectors or by the state.

3.7.2 National SEZ Policy

The Exim Policy 2002-2007 places emphasis on increasing exports and the establishment of SEZs is the long-gestation measure in keeping with this. The guidelines for SEZ developers are given in Appendix 14-II-N of the Handbook of Procedures, pursuant to which both the Central Government and the State Government have a role to play in establishing an SEZ.

The Central Government has, in the exercise of it power under Section 80 IA of the Income Tax Act, 1961, read with sub rule (2) of rule 18 C of the Income Tax Rules, 1962, formulated a scheme to develop, operate and maintain SEZs. As per this, an application for developing an SEZ must be submitted to the Chief Secretary of the concerned state where the SEZ is to be located. Thereafter, the State Government shall forward it along with its commitment to the Department of Commerce, Government of India. The Government may grant in-principle approval to proposals for setting up of SEZs. The in-principle permission shall be valid for a period of one year. The validity period may be extended by the Department of Commerce on a case-to-case basis. On acceptance of the proposal by the Board of Approvals, the Department of Commerce will issue a Letter of Permission to the applicant. The approval shall be valid for a period of three years within which time effective steps must be taken by the developer to implement the project.

The said guidelines include conditions that any proposal for establishing an SEZ must meet. Thus, for instance, the minimum size of an SEZ, with certain exceptions, shall not be less than 1000 hectares and at least 25% of the area of the SEZ shall be used for developing industrial area for setting up of units approved under the SEZ Scheme.

Units may be set up in SEZs for the manufacture of goods, rendering of services and for the generation/distribution of power. All activities of the SEZ units shall, unless otherwise specified, be on a self-certification basis. In order to ensure that the SEZs lead to an improvement in India's competitiveness and export potential, the Government has laid down certain nominal qualifying conditions for units within an SEZ[2].

- Every unit within an SEZ is required to make a minimum investment of Rs. 5 million (around USD 100,000) towards plant and machinery.
- Units within SEZs are required to be positive net foreign exchange earners. Net Foreign Exchange Earning (NFE) shall be calculated cumulatively for a period of five years from the commencement of production according to a given formula. However, no minimum net foreign exchange earning or export performance requirement has been laid down.
- Trading units within SEZs are required to ensure a turnover of at least USD 1 million within five years from the commencement of operation.

To encourage development and supply of specialised components, the Policy allows manufacturers and service providers who contribute to exports indirectly, through supply to export-based units, to locate their units within the SEZ area. Further, individual non-exporters can also enjoy SEZ benefits provided their entire production is channelised towards the manufacture of items that will be exported and is consumed within the SEZs.

Further, the Policy permits the setting up of Overseas Banking Units ("OBU") in the SEZs. OBUs are exempted from CRR and SLR norms laid down by the Reserve Bank of India (RBI), which allows units and developers to raise cheaper capital from the international market. SEZ units are also exempted

[2] For more details see http://www.sezindia.com/overview.htm

from External Commercial Borrowing (ECB) restrictions as laid down by the RBI. In addition, units within the SEZs have been allowed to pay for all their transactions, including payments for inter-unit transactions and suppliers, in dollars, except for domestic expenses like salaries.

Some of the salient features of this Policy, particularly with regard to tax and economic benefits and administration of SEZs are set out below:

Tax and Economic Benefits for SEZs

- SEZ units may export goods and services including agro-products, partly processed jewellery, sub-assemblies and components.
- Except for prohibited items of imports in the ITC (HS), SEZ units may import/procure from the DTA without payment of duty all types of goods and services, including capital goods, whether new or second hand, required by them for their activities or in connection with them.
- SEZ units may import/procure from DTA, without payment of duty, all types of goods for creating a central facility for use by software development units in the SEZ.
- SEZ units may lease capital goods from domestic or foreign leasing companies.
- SEZ units may sell goods, including by-products, and services in DTA in accordance with the import policy in force, on payment of applicable duty.
- SEZ units may transfer manufactured goods, including partly processed/semi-finished goods and services from one SEZ unit to another SEZ/EOU/ EHTP/STP unit. There are other provisions in relation to inter-unit transfers as well.
- SEZ units may also export goods manufactured/software developed by them through a merchant exporter/ status holder recognized under the Exim Policy or any other EOU/SEZ/ EHTP/STP unit.
- SEZ gem and jewellery units may export to hold exhibitions abroad, display/sell in permitted shops set up abroad or in the show rooms of their distributors/agents or set up show rooms/retail outlets at the International Airports. There are other special provisions with regard to gem and jewellery SEZ units.
- In certain circumstances, SEZ units are allowed to sub-contract a part of their production or production process through units in the DTA or through other SEZ/EOU/ EHTP/ STPs, with the permission of Customs authorities. Subcontracting of part of the production process may also be permitted abroad with the approval of the Board of Approval.
- Various entitlements shall be available to the developer of the SEZ, such as those provided for in the Income Tax Act for the development, operation and maintenance of the SEZ and exemption from the payment of duty on the import/ procurement of goods.
- SEZ units will be eligible for several entitlements with respect to, inter alia, corporate tax, retention of exports proceeds, exemption from central levies on procurement of raw materials and export of finished productions, and infusion of foreign equity of up to100% for all but a few manufacturing activities.
- Sales from Domestic Tariff Area (DTA) to SEZs are to be treated as exports. This would now entitle domestic suppliers to various benefits, including benefit of DEPB for supplies to the SEZ or unit within the SEZ.

Administration of SEZs

- SEZs shall be under the administrative control of the Development Commissioner.
- Applications for setting up units within an SEZ may be approved by the Development Commissioner or the Board of Approval, as the case may be. The 2003-04 Exim Policy also envisions the grant of approval by a Units Approval Committee in certain cases.
- The approved SEZ unit shall be required to execute legal undertaking with the Development Commissioner concerned and in the event of failure to achieve positive foreign exchange earning such unit shall be liable to penal action.
- SEZ units shall maintain proper accounts and shall make available to the Development Commissioner/Customs requisite information in the format prescribed.
- A Committee comprising of Development Commissioner and Customs shall monitor the performance of SEZ units. The Development Commissioner shall head the Committee.

- SEZ unit may be debonded with the approval of the Development Commissioner, subject to payment of applicable customs and excise duties on the imported and indigenous capital goods, raw materials etc. and finished goods in stock.

3.7.3 State SEZ Policies

Andhra Pradesh

In light of the Union Government's Policy, the Government of Andhra Pradesh has also introduced a policy framework for Special Economic Zones (SEZs) in Andhra Pradesh. The salient features of the Policy are that Special Economic Zone(s) development will primarily be led by Private Sector investors and Developers, the Government will facilitate creation of linkage and social infrastructure including telecom facilities, inter modal transport linkages (road, rail and air connectivity), the Development Commissioner: shall be deemed to be appropriate Development Authority for the notified area of SEZ, a single window clearance mechanism shall be set up, there will be simplified registration and certification procedures and various exemptions from state taxes and levies are granted.

In addition to this, SEZs don't require EIA, the APIIC is the nodal agency for the state of Andhra Pradesh for AP Special Economic Zones being developed at Atchutapuram and for other future SEZ developments in the State and SEZs are granted exemptions from electricity duty and tax.

The State Government has delegated powers of the Labour Commissioner to the DC and the Development Commissioner will be notified as the appropriate authority to represent the Andhra Pradesh Pollution Control Board (APPCB), with regard to clearances for all SEZ Units.

Compared to the policy documents of other states, AP's policy document is more detailed and provides an Annexure with proposed amendments to labour laws.

Gujarat

The Gujarat SEZ Policy, too, bases itself on the SEZ Policy of the Union Government. Such Policy will apply to all SEZs in the State i.e. the Kandla SEZ, Surat SEZ and the proposed SEZs at Positra, Mundra and Dahej and at any other locations where SEZs may come up in Gujarat.

A detailed summary of the Policy is given in Appendix B. Given below is a brief description of the salient features of the Policy:

- The management of SEZs will be under the designated Development Commissioner, who will grant all the permissions, including environmental clearances, as a Single Point Clearance;
- The SEZ authority will ensure continuous and quality power to SEZ units, the SEZ units will be granted a ten year exemption from payment of electricity duty;
- The SEZ developer will be granted approval for development of water supply and distribution system;
- The powers of the Labour Commissioner, Government of Gujarat, shall be delegated to the Development Commissioner in respect of SEZs;
- There are various exemptions available from state taxes and levies, such as stamp duty, registration fees, sales tax, purchase tax, and VAT;
- The State Government is required to take all suitable steps within the SEZs for the maintenance of law and order;
- A Committee has been constituted under the Policy to resolve various issues pertaining to the promotion, development and functioning of SEZs in the State.

Karnataka

In light of the Union Government's Policy, the Government of Karnataka also came up with a policy in relation to Special Economic Zones. The salient features of Karnataka's policy are that the Karnataka

Industrial Area Development Board, (KIADB) will be the State Agency for implementation of SEZs either independently or in association with the private sector partners.

An exclusive Development Commissioner for each SEZ will look after all matters pertaining to SEZs in the state. The powers of the Labour commissioner are delegated to the DC.

The Policy has provisions for adequate water supply and continuous power supply. Developers of SEZs and industrial units and other establishments within the SEZs will be exempted from all State and local taxes and levies. The State Government shall constitute a Committee for the review and development of Special Economic Zones.

Madhya Pradesh

In light of the Central Government's Policy and in the context of guidelines laid down by it, the Government of Madhya Pradesh has come up with an SEZ Policy in 2000.[3] This Policy incorporates the Exim Policy definition of an SEZ and is declared to be the governing policy on issues concerned with SEZs. The Policy annexes a summary of various labour laws that have been simplified for the SEZs. A detailed description of the State SEZ Policy may be found in Appendix D.

The salient features of the Policy are that the Development Commissioner (DC) will be deemed as the competent authority for the Industrial Development Area for the notified SEZ and will be delegated appropriate powers under the single agency clearance system to grant clearances/approvals pertaining to various departments.. The powers of the Labour Commissioner are also delegated to the DC. The State Government shall make available land required for the Zone through the acquisition of private land under the Land Acquisition Act, and the procedure for obtaining various environmental clearances is simplified.

All SEZ units and SEZ developers are exempted from payment of certain taxes and have been given various privileges with regard to power as well.

There are various other provisions for the management of the SEZ such as declaring it an industrial township, appointment of a Monitoring Committee, making arrangements for maintenance of law and order and so on. With regard to the financing the development of the SEZ, the Policy states that the SEZ project is to be implemented with private sector participation, with a nodal developer for the project being selected through open bidding process, and the State contributing equity in the form of land. As in the case of Andhra Pradesh, the Madhya Pradesh State Industrial Development Corporation has been identified as the nodal agency for the development of SEZs in the State.

Summary Regarding SEZ Policies

The policy framework for SEZs has been in place for a while, and though the initial response to the scheme was encouraging, not all the SEZs have taken off. There are currently 14 operational SEZs.[4] It is not clear how successful SEZs have been, because not all SEZs have been started from scratch. Some of them were Export Promotion Zones (EPZs), which have been converted into SEZs. These are among the more successful SEZs at Kandla, Santa Cruz, Noida, Falta and Kochi. Therefore, the success of these zones may not be attributable wholly to the SEZ scheme. Essentially, the goals of SEZs and EPZs are meant to be different. The goal of an SEZ extends far beyond export-promotion activities, to serve as an instrument of regional industrialization and development. While EPZs are industrial estates, SEZs are virtually industrial townships that provide supportive infrastructure such as housing, roads, ports and telecommunications. It is too early yet to judge the performance of those SEZs, which have been started from scratch, such as the one at Indore in Madhya Pradesh.

[3] Available at http://www.sezindore.com/policy_mp2.htm.
[4] These are listed at http://www.sezindia.nic.in/important_addresses.asp#app.

Legislative Framework for SEZ Sector

No separate central legislation has yet been enacted in relation to SEZs, though a draft bill on the subject has been formulated. At the state level, however, two of the four project states already have an SEZ Act, while a third is in the process of finalising a law on SEZs. These state laws have been enacted in line with the provisions of the Exim-Policy and the guidelines laid down by the Central Government as discussed hereinabove.

National SEZ Legislation

At the national level, there is a Draft Special Economic Zones Bill, which is under consideration. The provisions of this Bill are not yet final, but it might be pertinent to assess them as reflective of the legislative trends at the Central level, which aim at reducing delays and smoothening the processes for establishing and operating SEZs. In addition to this Bill, there are some other central notifications/ rules/ regulations/ legislation that deal with SEZs.

Draft Special Economic Zones Bill, 2002

Preamble

The Bill seeks to provide for the establishment, development, operation, maintenance, management and administration of SEZs.
Definitions

The Bill provides definitions to certain important terms in Section 2. It defines "infrastructure facilities" to mean the development of world class infrastructure for export of goods and includes:

- Industrial, commercial and social infrastructure;
- Carrying out functions such as processing, assembling, repairs, remaking, re- conditioning, re-engineering;
- Airports,
- Roads, bridges, ports,
- Transport system,
- Generation and distribution of power,
- Residential, industrial and commercial complexes, telecom,
- Hospitals, hotels, and educational institutions,
- Leisure and entertainment Units,
- Water supply and sanitation and sewerage systems, and
- Any other facility of similar nature as may be notified by the Central Government.

It also defines a "developer" as "a person or body of persons, company, firm and such other private or government undertaking, who develops, builds, designs, organizes, promotes, finances, operates, maintains or manages a part or whole of the infrastructure and other facilities in the Zone and is so notified by the Central or the State Government, as the case may be".

Establishment of an SEZ

Chapter II (Sections 3 to 6) of the Bill contains provisions concerning the establishment of an SEZ. Section 3 allows that the Central Government, on the recommendation of the Board of Approval, to establish by notification specially delineated areas in any State or in more than one State as an SEZ. The Central Government may also make rules to specify the requirements for the establishment of the SEZ. Section 4 provides for a number of activities to be carried out in the SEZ such as processing, assembling, repairs, remaking, re-conditioning, re-engineering and such other activities for export of goods from the SEZ, as the Central Government may deem fit. The Central Government will also have the powers to prescribe the procedure for setting up of Units in the SEZ. Section 5 accords a special status to the SEZ by regarding it, in so far as levy of Central taxes and duties are concerned, as being outside the custom territory of India. Section 6 defines "export" and "import" of goods to mean,

respectively, taking out of or bringing into India any goods by land, sea or air and includes any goods delivered into, or from, any SEZ or inter-Unit transfer of goods amongst Special Economic Zone Units.

Board of Approval

Chapter III (Sections 7 to 10) covers the Board of Approval (the "Board"), constituted for the purpose of advising the Government on the establishment of Special Economic Zones and on such other matters as may be prescribed. Section 7 refers to the composition, procedure and meetings of the Board. Section 9 requires that every proposal for the establishment of an SEZ shall be submitted to the Board for approval in the prescribed manner, and further that the Board shall obtain the feasibility report on such aspects as may be prescribed from the concerned State Government.

As per Section 10 the Board shall have the duty to promote and ensure orderly development of the SEZs and its powers and functions shall include the following:

- To recommend to the Government, on the receipt of feasibility report from the concerned State Government, approval or rejection of the proposals for the establishment of any delineated area as an SEZ;
- To approve foreign collaboration and foreign direct investment including investments from Non-Residential Indians for the development, operation and maintenance of an SEZ or any Unit thereof;
- To recommend to the Government modification or cancellation of an approval given under section 9;
- To promote investments in the SEZ for the purpose of export, employment generation and promotion of industries;
- To decide on matters regarding nature of activities that may be permitted or allowed in the SEZ;
- To issue guidelines on development, operation and maintenance of a SEZ;
- To review periodically the performance of the SEZ and recommend to the Government on matters relating to policy.
- To consider, subject to the provisions of the Industries (Development and Regulations) Act, 1951 applications made in the prescribed manner for grant of industrial license where such license is compulsory.
- To make recommendations to the Government on fiscal and other concessions that may be given to the industries to be promoted in the SEZ for quickening the pace of development.
- To recommend the closure of the SEZ, which, in its opinion, is not being run in accordance with the Bill and rules made thereunder or for any other reasons.

Special Economic Zone Development Board

Chapter IV (Sections 11 to 14) deals with the establishment and the powers and functions of the Special Economic Zone Development Board (the "Zonal Board"). Section 11 provides that the Board shall establish the Zonal Board to exercise the powers conferred on, and the functions assigned to it under the Bill and the rules made thereunder. It also gives the composition of such Zonal Board. Section 12 states that it will be the duty of the Zonal Board to secure the development of the SEZ, in accordance with the guidelines issued by the Board of Approval. The Section further provides that the Zonal Board shall perform the following functions:

- Approve goods and services required for development, operation and maintenance of Zone or any Units thereof;
- Monitor duty free import and domestic procurement of goods and its utilization by the developer for the development, operation and maintenance of the Zone;
- Oversee the management and functioning of the Zone;
- Resolve disputes of commercial nature between the agencies providing services and consumers, within territorial jurisdiction of the Zonal Board;
- Coordinate with other departments and other agencies for smooth implementation of the projects;

- Grant necessary local and State level clearances, approvals, licenses or registrations, as the case may be, for setting up of a Unit within the SEZ;
- Any other function that may be notified by the Central Government.

Sections 13 and 14 deal with the officers and staff and meetings of the Zonal Board.

Unit Approval Committtee

Chapter V (Sections 15 to 17) deals with the Unit Approval Committee to be set up for each SEZ. Section 15 covers the constitution of the Committee. Section 16 provides that the Committee shall have the powers and perform the functions as follows:

- Consider applications for setting up of Units in the SEZ and grant or refuse approval as per the Rules made under this Act;
- Approve Foreign/NRI investment up to 100% in the SEZ;
- Monitor the performance of the Units and take action against the Units wherever necessary as prescribed under the rules;
- Cancel the approval given to the Units in case of violation of the conditions of the approval;
- Supervise and monitor permission, clearances, licenses granted to the Units and take appropriate action in accordance with law;
- Call for information required to monitor the performance of the Unit under the permission, clearances, licenses granted to it;
- Lay down detailed procedure for obtaining the clearance, license or permission for approval under clause (a);
- To perform any other functions delegated by the Central Government or its agencies as provided for in section 17

Section 17 states that the Unit Approval Committee shall grant all approval and clearances for the establishment and operation of Units in the SEZ. To this end, the Central Government and its agencies shall delegate, by rules framed under this Act, their powers to the Unit Approval Committee under the relevant laws. Thus, the Section essentially provides for single window clearance.

Exemptions from Central Taxes, Duties and Cess

Chapter VI (Sections 18-23) deals with exemptions for SEZs. Section 18 provides that, subject to conditions specified in the rules made in this behalf, any goods exported out of or imported in an SEZ shall be exempt from payment of any Central tax, duty or cess under any law for the time being in force.

The Central Government may make rules to enumerate the cases in which goods to be utilized inside an SEZ may be admitted to the Zone from the DTA, free of any Central taxes, duties or cess and lay down the requirements which have to be fulfilled. The Section further states that any goods admitted to an SEZ from the DTA shall be eligible for drawback as if such goods are export goods for the purposes of this Act.

This Chapter also contains ancillary provisions with regard to closure of SEZs, transfer of ownership of goods, removal of goods and so on.

Amendment of Other Legislation

Chapter VII (Sections 24-27) amends certain other legislation, so as not to be applicable to SEZs. The legislation being amended are the Indian Stamp Act, 1899, the Insurance Act, 1938, the Banking Regulation Act, 1949 and the Sick Industrial (Special Provisions) Act, 1985.

Miscellaneous Provisions

Chapter IX (Sections 28-35) of the Bill covers miscellaneous provisions, which inter alia provide for the Act to override other laws, protection of actions taken in good faith, the contravention of the provisions of the Act to be an offence, power of the Central Government to pass orders to remove difficulties and the power of the Central Government, Board and Zonal Board to frame rules, regulations and bye- laws, respectively. The repeal and savings clause, which is to be incorporated in Section 35 of the Bill, is still to be examined and will be determined after the provisions of the Bill are finalized.

Other Legislative Provisions

- **Chapter X-A of the Customs Act, 1962** deals with SEZs, which inter alia provides that:
  - As per section 76 A, the Central Government may, by notification in the Official Gazette, specify special economic zones comprising specially delineated areas where any goods admitted will be regarded, in so far as duties of customs are concerned, as being outside the customs territory of India.
  - As per section 76 E, any goods admitted into SEZ will be exempt from duties of customs, except export duties or export cess, if any. Therefore, there will not be any requirement of exemption notification to allow duty free import of goods or procurement of goods from DTA by units in SEZ or by the developer of SEZ, as the exemption is allowed in the Act itself.
  - SEZs will be considered as foreign territory for purposes of duties and taxes. In other words, supplies from DTA units to SEZ units will be considered as exports by the DTA units and supplies to DTA units from SEZ units will be considered as imports by the DTA units.

- **Special Economic Zones Rules**[5] have been framed in relation to Chapter XA of the Customs Act. These Rules deal with several matters including the movement, admission, and temporary removal of goods and abatement of duties of customs in certain cases. The salient features of the said Rules are as follows:
  - The SEZ should have clearly demarcated processing and non-processing areas. Units will be allowed to be set up in the processing area of SEZ only and that too for the purpose of carrying out authorized operations;
  - Goods shall be allowed entry into the SEZ only for the purpose of carrying out "authorized operations" in the zone, which includes development, operation and maintenance of SEZ or provision of public utility service in the zone by the developer;
  - The SEZ unit or Developer shall execute a multipurpose bond (Form-I for the unit and Form–II for the developer) along with surety or security to the satisfaction of the Commissioner of Customs in respect of certain activities relating to the SEZ such as movement of goods between port of import or export and the SEZ and admission, manufacturing and other permitted activities in the SEZ unit;
  - The SEZ units shall be allowed to remove certain goods temporarily out of the zone without payment of duty for the purpose of repair, display, export promotion, testing etc.;
  - Manufactured goods or capital goods may be transferred from a SEZ unit to EOU/ STP/ EHTP/ other SEZ unit in the same special economic zone or in other zone without payment of duty;
  - The unit /developer shall be required to maintain accounts for import, domestic procurement, consumption, utilization of goods, inflow of all foreign exchange by way of exports and other receipts and out flow of all foreign exchange etc. The unit engaged in both trading and manufacturing activities shall be required to maintain records of accounts, separately, for trading and manufacturing operations. All units shall be required to submit quarterly returns to the jurisdictional Assistant Commissioner or Deputy Commissioner of Customs;

[5]Special Economic Zones Rules, 2003, issued by Notification No. 52/2003-Customs dated 22 July 2003.

- Goods admitted into the SEZ unit shall be utilized or exported or disposed of in terms of the provisions of these Rules within a period of five years from the date of admission, failing which the unit shall be liable to pay duty and interest;
- The Commissioner of Customs having jurisdiction over the zone shall monitor the performance of the SEZ unit and the developer in the interest of safeguarding the duty;
- In the event of closure of an SEZ, the developer shall be required to either export or pay duty on goods imported or procured from the DTA within a period of six months from such closure. In case of the SEZ unit, the unit shall be required to either export or pay duty on un-utilized goods/ manufactured goods within a period of three months from such closure. However, depreciation would be allowed on used machinery or used capital goods, as the case may be.

- The **Regulations**[6] in relation to Chapter XA of the Customs Act broadly deal with all procedural aspects concerning SEZ units, including setting up of a unit within the SEZ, import of goods by the SEZ unit, import of goods through personal carriage by gems and jewellery unit, import through data communication or telecommunication link, procurement from warehouse, re-import or replacement or re-export of goods, procurement of goods by SEZ unit or developer from DTA, procurement of goods from export oriented undertaking or software technology park unit or electronic hardware park unit, export of goods by SEZ unit. Supplies to and from SEZ units are now to be governed by the provisions of the Customs Act, 1962, and not by the provisions of the Central Excise Act, 1944. In view of this, some excise notifications issued earlier in 2003 have been rescinded.[7]

Notifications/Circulars

- There is a customs notification[8] and subsequent amendments for duty free import of goods for SEZ units. This notification exempts all goods other than those prohibited under the Exim Policy. Further, another customs notification[9] deals with duty draw back for supply of goods from DTA to SEZ.
- SEZs have been declared Inland Container Depots (ICDs) or Container Freight Stations (CFSs), as applicable, and given benefits.[10]
- Excise Notifications granting various benefits such as exemptions to specified goods under certain headings[11], duty free procurement of goods from DTAs for SEZ units[12], procedure for registration with Central Excise[13], exemption from registration with Central Excise by SEZ units in case no domestic sales are envisaged[14] and so on.
- Central Sales Tax (CST) Amendment[15] exempting SEZ units from CST in inter- state purchases. The Central Sales Tax (Registration and Turnover) Rules, 1957, have been amended to provide for SEZs.[16]
- Notification with regard to company affairs, prescribing higher limits of managerial remuneration.[17]
- Circular prescribing refinance scheme for financing farmers in Agri Export Zones (AEZs) under Contract Farming.[18]
- Measures for export credit, generally and with regard to processors/ exporters/ AEZs[19].

[6] Special Economic Zones (Customs Procedures) Regulations, 2003, issued by Notification No. 53/2003-Customs, dated 22 July 2003.
[7] Notification Nos. 115/ 2003, dated 22 July 2003 and 59/ 2003, also dated 22 July 2003.
[8] Not. No. 137/ 2000, dated 19 October 2000.
[9] Not. No. 19/ 2003, dated 3 March 2003.
[10] Notification F.No.305/38/2001-FTT, dated 3 January 2003.
[11] Not. No. 6/ 97- C.E.
[12] Not. No. 52/ 2000, amended by subsequent notifications.
[13] Not. No. 35/ 2001, amended by subsequent notifications.
[14] Not. No. 36/ 2001, amended by subsequent notifications.
[15] The amendment has been made by the Finance Act 2002.
[16] Notification dated 23 May 2003, available at http://www.sezindia.nic.in/cst_not1.asp.
[17] Not. No:- G.S.R. 565(E), 14 August 2002.
[18] Circular No. DPD. FS. 164/ 2002- 03.
[19] IECD No. 15/ 04.02.02/ 2001-2002, dated 31 January 2002, with subsequent amendment and IECD No. 16/ 04.02.02/ 2002- 03.

- Provision of FDI up to 100% through the automatic route for all manufacturing activities in SEZs, except with regard to arms, ammunition, explosives, allied items of defence equipment, defence aircraft, warships, atomic substances, narcotics and psychotropic substances and hazardous chemicals, distillation and brewing of alcoholic drinks, cigarettes/ cigars and manufactured tobacco substitutes.[20]
- FDI up to 100% is allowed for some activities in the telecom sector, albeit not through the automatic route.[21]
- Under the Health Policy, there are proposals under consideration in relation to allowing import of drugs and cosmetics by SEZ units through all ports.
- As regards environment, SEZ units are required to obtain no-objection certificates from the State Pollution Control Board. Environmental Impact Assessment is required for 30 industries, primarily related to chemicals, pesticides, bulk drugs, raw skins and hides and so on. [22]
- Various liberal measures by the Reserve Bank of India, such as:
  - Exemption from interest rate surcharge on import finance;[23]
  - Release of foreign exchange to DTA units for buying goods from EOU, EPZs, SEZs;[24]
  - To bring export proceeds in 360 days, certification of SOFTEX Form and re- export of goods/ export of goods for repair etc. without GR waiver.[25]
  - Facility of retaining 100% foreign exchange in Exchange Earners' Foreign Currency (EEFC) Accounts;[26]
  - Facility of overseas investment by SEZ units from EEFC Account through Automatic Route;[27]
  - Write-off of unrealized export bills;[28]
  - Permission to residents to take/ export goods for exhibition and sale outside India without the prior approval of the Reserve Bank of India;[29]
  - Authorized dealers being allowed to reduce 10% in the invoice value of export bills;[30]
  - General Insurance Policy by insurers outside India. Authorized dealers are free to allow remittances towards premium for general insurance policies taken by units located in SEZs from insurers outside India, provided the premium is paid by the units out of their foreign exchange balances;[31]
  - Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India)(Third Amendment) Regulations, 2002;[32]
  - Certain facilities are given to units in SEZs, with regard to export of goods and services;[33]
  - Permission to set up OBUs in SEZs. There are various guidelines available with regard to this.[34]
  - SEZs may, without prior approval of the Reserve Bank, enter into a contract in a commodity exchange or market outside India to hedge the price risk in the commodity on export / import, subject to the condition that such contract is entered into on a "stand-alone" basis;[35]
  - Certain facilities with regard to external commercial borrowings by SEZ units;[36]
  - Opening, holding and maintaining foreign currency account in India by units in SEZs;[37]

[20] Press Note No. 9 (2000 Series).
[21] Press Note No. 9 (2000 Series).
[22] EIA Notification No: 60(E), and subsequent amendments.
[23] Circular dated 16 October 2000.
[24] AD.MA Circular No. 4 dated 31 March 2000 and RBI clarification dated 16 January 2002.
[25] Notification No. 36/2001 dated 27 February 2001 and Circular 9 dated 25.10.2001.
[26] Notification No. 37/2001 dated 27 February 2001.
[27] Notification No. 49/2002 dated 19 January 2002.
[28] Circular dated 9 February 2002.
[29] Circular No. 30/ 2002, dated 26 March 2002.
[30] Circular 38, dated 12 April 2002.
[31] Circular No. 47, dated 17 May 2002.
[32] Notification No. FEMA.63/2002-RB, dated 21 June 2002.
[33] A.P. (DIR Series) Circular No.10, dated 14 August 2002.
[34] Available at http://sezindia.nic.in/rbi19.asp.
[35] Notification No:-66/2002-RB, dated 27 July 2002 and Circular No:-44, dated 12 November 2002.
[36] F.No. 4(2)/2002-ECB, dated 15 September 2002.
[37] RBI Circular A.P. (DIR SERIES) Circular No. 28, dated 3 October 2002.

- Facility to make payments in foreign exchange by SEZ units for supply of goods to a unit within an SEZ.[38]
- Exchange Earners' Foreign Currency (EEFC) Account Scheme.[39]
- Assured Spare Parts Supply Agreements.[40]
- Remittance of Foreign Exchange for Miscellaneous Purposes.[41]
- Fixed Deposit out of EEFC Account by an SEZ Unit.[42]
- Import of goods - Establishments of standby Letters of Credit - Subscription to ISP 98.[43]
- Export of Goods and Services -Facilities to Units in SEZs[44]
- Supply of goods by SEZs to units in DTA against payment in foreign exchange.[45]

- There are service tax benefits available such as exemption for taxable services provided by a service provider to an SEZ or to a unit located in an SEZ[46] and general benefits as well.[47]
- A proposal under consideration is that there is to be delegation of power under the Insecticides Act, 1968 to the concerned Development Commissioner to approve setting up of units in SEZs for export of Insecticides and Pesticides.
- Further, SEZ units are proposed to be exempted from Produce Cess Act, 1966 and Agriculture Produce Cess Act, 1940.
- As regards benefits under the Income Tax Act, SEZ units are entitled for 100% Income Tax Exemption on export proceeds for 5 years and for 50% exemption for 2 years thereafter from the date of commencement of production under section 10-A of the Income-Tax Act. Supply of goods from DTA to SEZ will also be eligible for IT exemption under Section 80HHC. Under Section 10A, Explanation 2(i)(b), the CBDT has specified the information technology enabled goods or services that will be subject to that section.[48] Also, recently, Form No. 56FF has been prescribed, which is to furnish details of Special Economic Zone Reinvestment Allowance Reserve Account.[49]
- Various cess-related exemptions are also given to SEZs. These include exemption from cess on export of agricultural and processed food[50], exemption from cess under Marine Products Exports Development Authority Act[51], exemption from cess under Spices Cess Act, 1986[52], exemption from cess under Coffee Act, 1942[53], exemption from cess under Rubber Act, 1947[54], exemption from cess on export of tobacco under Tobacco Cess Act, 1975[55], and exemption from cess under Tea Act, 1953.[56]
- With regard to textiles, SEZ units engaged in export of Cotton Waste and import of Cotton are not required to register with the office of Textile Commissioner. Various other proposals for exemptions are also under consideration.[57]

[38] Notification No. FEMA 77 /2002-RB, dated 25 November 2002.
[39] A.P. (DIR Series) Circular No. 62, dated 17.12.2002.
[40] Circular No. 9, dated August 13, 2002.
[41] Circular No. 54, dated November 25, 2002.
[42] D.O. EC.CO.PCD.No.117/15.02.75/2002-03.
[43] Circular No. 84, dated 3 March 2003.
[44] A.P.(DIR Series) Circular No.91, dated 1 April 2003.
[45] (Circular No.105), dated 16 June 2003.
[46] Circular No. 55/4/2003, dated 24 April 2003.
[47] Notification No. 17/2002-Service Tax, dated 21 November 2002.
[48] Notification: No. SO 890(E), dated 26 September 2000.
[49] Notification no S.O.972(E), dated 26 August 2003.
[50] No.F.11/16/86-EPZ(Agri.I0), dated 17 January 2001.
[51] F.NO.11/5/2001-EP(MP), dated 30 June 2001.
[52] F.No. 9/2/2001-EP(Agri.V), dated 23 August 2001.
[53] Coffee Control, dated 5 November 2001.
[54] Rubber Control, dated 7 December 2001.
[55] No.F.3/4/2001-EPZ(Agri.IV), dated 3 May 2002.
[56] F.No. T-29012/1/2000-Plant(A), dated 17 April 2003.
[57] Available at http://sezindia.nic.in/textile.asp.

State SEZ Legislation

Andhra Pradesh

Andhra Pradesh does not have legislation in relation to Special Economic Zones. It does however have instruments of delegated legislation under various state tax statutes, granting exemptions to SEZs from various state level taxes and levies. These include, *inter alia*, exemptions from levy of sales tax on the inputs supplied to the units located in the Special Economic Zone, from levy of tax on entertainments, delegation of powers of the Commissioner of Labour to the Development Commissioner and 50% exemption from payment of stamp duty and registration fee.

Gujarat

The text of the Gujarat Special Economic Zone (SEZ) Act, 2003, is not available. The texts of notifications/ circulars are also not available.

Karnataka

Karnataka is also a state that is in the process of finalizing a law on SEZs. The Bill has been passed but not notified, so as to come into force as a law. For the time being, the Bill shall be evaluated, since the final version of the law is not known. The Bill was passed on 8 August 2003. It has provisions dealing with the declaration and establishment of an SEZ, the setting up of an SEZ Development Board and a Unit Approvals Committee. The powers and functions of each of these administrative units are specified.

It elaborates the single window clearance procedure to be established, with powers in respect of the same being given to the Units Approval Committee. There are provisions for the selection and appointment of the Developer and the functions of the Developer are specified.

There are also provisions for the acquisition of land, the power of the Governor to declare any SEZ as an Industrial Township Area, exemption from state taxes, levy and cess including purchase tax, specified sales (lease tax) in respect of lease of goods, stamp duty, registration fee, sales tax, turn over tax and any other tax, cess, duty or levies, levied by the State Government and provisions in respect of generation of electricity, development of a minor port, roads, bridges and transportation and tourism.

There is a provision also that this Act shall override all other laws; unlike the MP legislation in respect of the Indore SEZ, it does not restrict itself to overriding state legislations.

Madhya Pradesh

Madhya Pradesh has enacted legislation in respect of the Indore SEZ, namely, the Indore Special Economic Zone (Special Provisions) Act, 2003, in line with terms of the State SEZ Policy. In addition to legislation in relation to the Indore SEZ, the Madhya Pradesh Labour Laws (Amendment) Bill, 2003 proposes to amend various labour laws to give benefits to SEZs by restricting or excluding the operation of certain provisions of these laws in respect of SEZs. .A detailed, section-by-section, description of the Indore SEZ Act is given in Appendix D. This includes provisions concerning the powers and functions of the Development Commissioner and his appointment as the Chief Conciliator for the purposes of this Act in respect of the Zone, and the powers and functions of the Developer, such as the power to fix rates and levy charges. The Act also stipulates that the Zone may to be notified as an Industrial Township.

In addition to this, the Act provides for exemption from payment of any tax, duty, fees, cess or any other levies under any State law for any goods exported out of or imported into the Zone, inter-Unit transactions of goods within the Zone, goods from the Zone sent for value addition to the Domestic Tariff Area and returned to the Zone thereafter and services that provide value addition to a product

within the Zone. All transactions and transfers of immovable property or documents related thereto within the Zone shall be exempt from stamp duty.

The State Government has also made certain other benefits available to SEZs through notifications/ rules.

State Legislation- Summary and Conclusions

Most states have already drafted and passed legislation in relation to SEZs or are in the process of doing so. Andhra Pradesh is the exception, but Andhra Pradesh has a very detailed policy document. However, the Madhya Pradesh legislation is limited only to the Indore SEZ. There is no legislation in respect of other future SEZs to be established, if any.

- The Madhya Pradesh Policy document is also detailed inasmuch as it includes an Annexure detailing amendments to be made to various labour laws in the State. This policy initiative has now been translated into legislation, with the passing of a law to amend various labour laws in the state.

3.8 Water Supply and Sewerage

3.8.1 Overview

Water supply, sewerage and solid waste management are subjects which are to be local responsibilities under the 74th Amendment to the Constitution of 1992. To date, it is the State Government that is most important in the areas of water supply and sewerage. Privatisation of water has been attempted in several instances in India but it has been difficult to set tariffs that meet costs and to avoid wastage, despite a legal framework that permits such policies whether the water supply is under public or private management. Of the four Project States, all have general policies in this sector but only Karnataka has a specific water policy and that was issued only in 2003. In addition, there is a National Water Supply policy that is general in nature. It should be noted that the four southern States of Andhra Pradesh, Karnataka, Kerala and Tamil Nadu have agreements for the sharing of river water, regardless of its use.

Private sector participation in the water and sanitation sector has been attempted in India several times in the past few years, with particular reference to the State of Tamil Nadu. The Tiruppur Area Development Programme Water Supply and Sewerage Project was the first water project in India to be executed through a project-specific public limited company for water and sewerage, with equity participation from the major beneficiaries, the State Government and the Central Government and financial institutions. That company- the New Tiruppur Area Development Corporation Limited (NTADCL)- was established with equity participation from the Tamil Nadu Corporation for Industrial Infrastructure Development Ltd. (TACID) (thus the State Government) which developed the integrated area project, IL&FS (as the financial institution, TEA (the Tiruppur Exporters' Association) and the Government of India. NTADCL acted as the BOT operator and entered a concession agreement with the Government of Tamil Nadu. It would implement, operate and maintain the project in return for the right to revenue streams from industrial users and bulk water supply to the municipality. It then in turn contracted its obligations to construct and maintain the new systems to a BOT operator from the private sector. He supplied water to the municipal corporation and other users. In addition, the Tamil Nadu Water and Sanitation Pooled Fund, set up with assistance from the USAID (Fire) Project, will provide funding to other such projects in the State through State Government grants and user contributions in relation to the IBRD-assisted Tamil Nadu Urban Development Fund. Further, Tamil Nadu enacted model local government legislation in 1996, the Unified Local Bodies Act, but it has not been carried out in practice. Thus the State has been at the forefront of innovation in the field. Concerning other innovations, it should be noted that the State of Maharashtra has a proposed Water and Waste Water Regulatory Commission (MWRC) that would be the first in India. In addition, Gujarat has just introduced a draft regulatory structure for the water sector which is now being reviewed.

With regard to the four Project States, Andhra Pradesh and Karnataka are receiving funding from the World Bank for the establishment and implementation of urban infrastructure finance corporations to serve as intermediaries to carry out water and other urban projects. The Karnataka Urban Infrastructure Development Finance Corporation (KUIDFC) is already operating effectively and is discussed below.

These innovations and potential changes will be kept in mind when considering appropriate measures to assist private sector participation in the water and sanitation sector in the Project States in Phase II of this Project.

3.8.2 State Water Supply and Sanitation Policies

Andhra Pradesh

Andhra Pradesh does not have a specific State policy with regard to water supply and sanitation. However, as part of achieving the goal of "Health for All", the State Government is committed to providing drinking water to every habitation in the State to overcome its present deficiency in per capita water supply. (see Appendix A.). Such provision of drinking water supply is a primary consideration of the present Tenth Five Year Plan (2002-2007). The deficiency in water supply is being dealt with through water supply improvement schemes in municipalities and towns the programs of water harvesting and the Neeru Meeru Programme for villages. The latter concentrates on the provision of percolator tanks, channels, sunken ponds and similar works involving local self-help groups and water user associations.

In urban areas, the responsibility for providing water supply and sanitation is with the respective local bodies, with the exception of the twin cities of Hyderabad and Secunderabad where the responsibility lies with the Hyderabad Metropolitan Water Supply and Sewerage Board (HMWSSB). To improve water supply availability, the State Government is interested in promoting private sector participation to improve the overall efficiency of the water supply system. There are water improvement schemes for municipal towns and for the twin cities of Hyderabad and Secunderabad to both augment the water supply from source and to achieve water and distribution efficiencies.

Concerning sewerage, there has been a rural sanitation programme in the State since 1983 to provide good sanitation facilities. Andhra Pradesh 2020 gives a programme to provide 31.77 lakh families with individual sanitary latrines. A subsidy of Rs. 2000 per toilet has been proposed. With regard to urban sewerage, the HMWSSB is presently considering a centrally funded project for abatement of pollution which has now reached the stage of calls for proposals. The project calls for the construction and operation and maintenance of sewage treatment plants that would provide primary and secondary treatment for 590 Ml/day by the completion date of 2005. At present, of 400 Ml/day of sewage in Hyderabad, about 270 Ml/day is untreated, 113 Ml/day receives primary treatment, 20 Ml/day receives secondary treatment and none of the sewage receives tertiary treatment.

With regard to private sector participation in water and sewerage, the present program of the HMWSSB includes:

- contracts for all construction works, including small works by call for tender from a list of registered contractors;
- purchase of water by mobile tankers;
- management contracts for the operation of sewage treatment plants for either one year or three years.

There have been several unsuccessful efforts in this area, including the Krishna Bulk Water Supply Project (1995). That project was to be the BOT provision of bulk water supply from the Krishna River along with a program of leakage reduction. It was not well designed and the Government could not meet the funding gap between the bulk water supply cost (Rs. 43/m3) and the average user charge (about Rs.8/m3). In addition, a concession or management contract has been proposed for

Hyderabad for water supply. However, this plan was shelved when HMWSSB employees gave notice to strike.

At present, the Visakhapatnam Industrial Water Supply Project Phase II has its feasibility study but has not yet reached financial closure. Draft Loan Agreements, Shareholders' Agreements, Bulk Water Purchase Agreements and Concession Agreements have been prepared. The Project Special Purpose Vehicle-the Visakhapatnam Industrial Water Supply Company (VIWSC) is 51% privately owned (Larsen & Toubro HL- 28.7% and PSL- 22.3%) and 49% publicly owned (33% Government of Andhra Pradesh and 16% Visakhapatnam Municipal Corporation). It makes use of an existing canal from the Yeleru Reservoir to be further augmented by the Godavari River to provide water to the Municipal Corporation, the existing steel plant and the proposed Pharmacity SEZ. Pipelaying is to begin in September 2003 with completion scheduled for May 2004.

Solid waste management in all areas of the State is under the relevant urban local body with monitoring of the implementation of national environmental rules by the Andhra Pradesh Pollution Control Board. The national Ministry of Environment and Forests has issued the Municipal Solid Waste (Management and Handling) Rules, 2000, based on a Supreme Court decision. The Rules require all urban local bodies to do the following:

- organise house to house collection of garbage;
- separate collection of waste from slum areas;
- separate collection of waste from slaughterhouses, fruit and vegetable markets;
- separate collection of bio-medical waste from hospitals;
- separate collection of demolition waste/debris;
- introduce containerised collection;
- provide a mechanism for municipal solid waste collection;
- establish sanitary land fill sites;
- establish composting plants/processing plants.

For compliance, the setting up of suitable processing and waste facilities by all cities and towns is required by 31 December 2003. Additional financial resources are being sought to meet that goal. The Andhra Pradesh Pollution Control Board is insisting that all municipal bodies in the State should adhere to the above rules and deadlines.

The Municipal Corporation of Hyderabad already contracts out for solid waste collection and disposal under a decentralized model to provide greater efficiency and to reduce municipal costs on a six-month basis. The lowest bid wins the work for the next six-month period. The contract requires operators to pay a minimum wage to workers, to collect a certain quantity of refuse and to bid a fixed price for that work.

Gujarat

The State of Gujarat also has no specified water supply and sanitation policy. However, it does suffer from an uneven distribution of water resources in the State that has led to an over-exploitation of ground water in the water-deficient North Gujarat, Sarasota and Kutch. The shortfall in some urban areas is critical. Thus efforts are being made to ensure a supply/demand balance through the addition of new sources, artificial recharge and recycling of water. This requires an integrated policy framework for the development of irrigation, hydropower and water for utilities.

In the case of bulk water supply, there is an emphasis on the use of special purpose vehicles and private sector financing while retaining government control and ownership.

In the case of municipal and urban water, there is an emphasis on BOT arrangements for developing supply sources, for increased corporatisation and commercialisation, and for increased operating and commercial efficiencies. In the shorter term, management contracts and leases are to be pursued. Movement will be toward concession agreements in the longer term. For industrial water, BOT arrangements will also be pursued. Service delivery agencies are to be corporatised and given a

higher degree of commercial and operating autonomy. There is to be the gradual introduction of privatisation of urban and industrial water. An independent water regulatory framework to facilitate the entry of private sector operators is being considered.

The major attention in Gujarat has been the reduction of water losses in the transmission and distribution system, and the augmentation of water resources, especially in water-deficient areas. There is no private sector participation project in this area. However, the Gujarat State Drinking Water Infrastructure Corporation Ltd. (GSDWIDL) has identified some possible private participation projects as part of the construction of the bulk water supply Sardar Sarovar scheme.

With regard to private sector participation in the distribution of water, the Gujarat Infrastructure Development Board is recommending demonstration projects designed to commercialise water and improve operational efficiency in certain targeted areas. Ahmedabad has already been the recipient of an extensive water and sewerage project which pioneered the use of municipal bonds without a State guarantee. It is now proposed to carry out a demonstration project in West Ahmedabad with a population of 80,000 which would be ring-fenced to increase the use of metering in an area of the city in which water tax revenues already appear to be more than operating cost. The management would be by a special purpose vehicle. A similar experiment in a ring-fenced area would be carried out for the entire city of Surat. Both projects will be put to tender on the basis of a technical/management contract for a period of three to five years. Private water operators will be contracted to manage the network during the demonstration period. The management contract would provide for benchmark improvements in technical standards and commercial outputs.

Finally, the GIDB has just presented a proposed regulatory structure for water to the State Government. This proposal may be reviewed as part of Phase II of this Project.

Karnataka

Karnataka is the only Project State with a specific policy regarding urban drinking water and sanitation which encourages private sector participation and the setting of tariffs that permit full cost recovery. In addition, the Bangalore Water Supply and Sewerage Board has been recognized internationally for its metering and collection policies, although cross-subsidisation has not been completely eliminated.

The Urban Drinking Water and Sanitation Policy was issued by Government Order on 3 May 2003. The key features of the Policy are:

- to provide piped water supply and sanitation at or near their residences to all urban residents who are willing to pay and a minimum level of service to all other urban residents;
- to confirm as a longer-term objective, the establishment of a tariff that allows full cost recovery (that is, a tariff that covers operation and maintenance costs, debt service cost, and a reasonable rate of return on capital employed);
- to confirm that the Government of Karnataka will be responsible for formulating policy, setting minimum tariffs, setting minimum service standards, monitoring service provision by the urban local bodies, and ensuring provision of the resources necessary to meet those goals;
- to confirm that urban local bodies will be responsible for water supply and sewerage services from water catchment through to waste water treatment;
- to confirm that the Karnataka Urban Water Supply & Drainage Board (KUWSDB) will continue to be responsible for construction of water and sewerage facilities in all urban local bodies, and for operation and maintenance in selected urban local bodies. It is intended that KUWSDB be restructured in the medium term to meet those responsibilities;
- to note that a sector strategy and action plan will be developed as a follow-up to the Policy Statement.

Within this framework, the State Government intends that the Bangalore Water Supply & Sewerage Board (BWSSB) will become an asset owner and regulator in the Bangalore Metropolitan Area, with all

of the investment, operation and maintenance activities conducted by the private sector under management contract. Those contracts would include drinking water quality standards, technical standards for size and type of pipe and related matters, and monitoring under separate contract by technical consultants.

This process of private contracting in Bangalore will be carried out in two stages. In the first phase pilot project, 5 of the 56 water service areas will be selected consisting of about 40,000 connections. Thames Water has been contracted for water leakage reduction and for operation and maintenance for three years, through competitive bidding. The intention is to bring leakage levels to best world levels- about 15% of present levels- within three years. The funding is from the Japanese JBIC through BWSSB- Rs. 480 million. After three years, the intention is to retender the operation and maintenance management contract to include water and sewerage for a longer period (say 10 years). The performance will be monitored by another consortium engaged for technical oversight under a separate contract. This consortium comprises Pacific Consultants, Mott McDonald and Tata. Then in the second stage scheduled to begin in June 2004, such operation and management contracts of water and sewerage would be tendered for the remaining 51 service areas in the city.

Bangalore also has a number of other private sector participation initiatives in the sector, including:

- five sewage treatment plants (all) are owned by BWSSB but the operation and management is under management contract to five separate contractors;
- two water treatment plants are under private sector management using best available technology. These plants are the Yelahanka Tertiary Water Treatment Plant and Vrishabhavathi Valley Tertiary Water Treatment Plant. Initially, construction contracts were awarded by the ICB. It subsequently awarded operation and maintenance contracts;
- leakage repairs are carried out by private contractors selected by annual competitive tender in each of the divisions of the City (North, South, East, West and Central);
- water pumping is to be outsourced. Bangalore is about 100 km. from and 500 km. above its main water source- the Cauvery River. This negotiation is currently in process with a preferred bidder.

For other urban local bodies in the State of Karnataka, there are no major private sector water supply projects. However, the World Bank- assisted Urban Water Supply and Sanitation Sector Improvement Project does have a pilot scheme for private sector participation by management contracts in the cities of Hubli-Dharwad, Gulbarga and Belgaum. A request for Expressions of Interest is expected to be issued shortly by the KUIDFC. In addition, it is understood that the World Bank intends to introduce a study to examine the modalities for private sector participation in water supply and sewerage disposal which is now at the conception stage.

With regard to **solid waste management**, the Karnataka Urban Development Department (KUDD) is considering private sector participation in the area to meet the national requirements discussed in the section on Andhra Pradesh above that state that all States must have managed landfill sites by the end of 2003. iDeCK (Karnataka) has prepared a solid waste project for Bangalore for consideration under the PSI II Facility. The private sector would management the process from collection through to disposal. Disposal might be by composting, energy production (waste to energy units) or through managed landfill sites.

At present, the process is contracted out in most cases but there is just dumping. However, Bangalore and Mysore have composting plants- a public/private venture in Bangalore and a private venture in Mysore.

Madhya Pradesh

The Government of Madhya Pradesh does not have a specific water policy but it is in the process of devolving operating and maintenance functions in the water sector to local bodies as part of the implementation of the 74th Amendment to the Constitution regarding the transfer of functions to the local level. In rural areas, there will be a three-tier structure consisting of water user associations

(WUAs), Distributing Committees and Project Committees, based on the MP Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam Act, 1999. That Act also delineates the areas of responsibility of water user associations and how such an association is established and constituted. Local urban bodies/municipalities are empowered to take on operation and maintenance of water systems in their area of jurisdiction based on the Madhya Pradesh Municipal Corporations Act. In addition, the "Policy Trust for Economic Development Report, 2001" expressly states that water supply and sanitation are infrastructure activities suitable for private sector participation both in terms of investment and in terms of management contracts.

The new water system established under the 1999 Law does not specifically call for private sector participation. The loan presently being negotiated with the ADB for urban water supply projects does not include such participation. Also, there is consideration of a Public Regulatory Commission as a single regulator for utilities including water but the work on that proposed regulatory framework has not yet begun.

3.8.3 Legislative Framework For Water Supply And Sewerage Sector

As mentioned above, water supply, sewerage and solid waste management are local responsibilities under the 74th Amendment to the Constitution, added in 1992. The Twelfth Schedule under amended Article 243-W, added by Section 4 of that Amendment, lists "water supply for domestic, industrial and commercial purposes" (item 5) and "public health, sanitation conservancy and solid waste management" (item 6) as powers, authorities and responsibilities of municipalities where they are so established by a law enacted by the concerned State Legislature.
Even before the passage of the 74th Amendment, the States had generally enacted legislation that gave authority over water and sewerage to municipal corporations under the relevant Municipal Corporation Act. Later, special water and sewerage boards were established at the State level to carry out those functions, while solid waste management remained with the municipal corporations. The system for each of the Project States is set forth below.

In addition, each State has a State Pollution Control Board established under the Water (Prevention and Control of Pollution) Act, 1974 (Act No. 6 of 1974), as amended. (see Section 4). Those Boards were also later given similar authority for air pollution under Section 4 of the Air (Prevention and Control of Pollution) Act, 1981 (Act No. 14 of 1981), as amended. The Boards are empowered to set standards for water purity and for treatment of sewage or trade effluent, and to inspect that those standards are met. They also are to plan and carry out a comprehensive programme for the prevention, control or abatement of pollution of streams and wells, and to advise the State Government on any matter concerning the prevention, control or abatement of water pollution. (see Section 17 of the Act.) They shall further advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well. In practice, these rules seem to be enforced but there is a problem that the real penalty is closing down an industry. The lesser system of fines is not strong.

Andhra Pradesh

For Andhra Pradesh, there was legislation related which set responsibilities for water and sanitation with urban local bodies and municipalities prior to the above Constitutional Amendment, based on several municipal corporation statutes. The Andhra Pradesh Municipal Corporations Act, 1994 (Act No. 25 of 1994) (and its predecessor legislation) applies to the whole State except for the local areas covered by the Hyderabad Municipal Corporation, the Visakhapatnam Municipal Corporation and the Vijawada Municipal Corporation.

The Hyderabad Municipal Corporation is regulated by the Hyderabad Municipal Corporations Act, 1955 (Act No. II of 1956), as amended. Chapter X (Sections 341-372) of that Act concerns water supply. Chapter XIV (Sections 480-572) of the Act contains provisions on sanitation.

The provisions of the Hyderabad Municipal Corporations Act are then generally followed by the Visakhapatnam Municipal Corporation Act, 1979 (Act No. 19 of 1979) and by the Vijayawada

Municipal Corporation Act, 1981 (Act No. 23 of 1981). Section 7 of each such subsequent act states that all provisions of the Hyderabad Municipal Corporations Act apply with regard also to those latter municipal corporations, unless specifically provided otherwise.

However, the Hyderabad Metropolitan Water Supply and Sewerage Act, 1989 (Act No. 15 of 1989, as amended by Act No. 4 of 1997) specifically replaces the above provisions with regard to Hyderabad and its twin city Secunderabad. That Act applies to the entire Hyderabad Metropolitan Area and establishes the Hyderabad Water Supply and Sewerage Board. Solid waste management is not mentioned in the Act and thus remains the responsibility of the Municipal Corporation of Hyderabad.
The provisions of the Hyderabad Metropolitan Water Supply and Sewerage Act are summarized in detail in Appendix A. It gives the State Government powers that allow private participation in the water sector. The Board has sufficient powers to set water and sewage rates so as to guarantee a sufficient return. (see Section 9 for water charges and Section 55 for sewerage cess.) Metering is required by Section 36 of the Act. The Board has sufficient powers to set penalties for unauthorised use, waste and other offences, although it might be better if the Act permitted an automatic increase in such penalties related to price of living increase/wholesale price index, as is done for road tolls under the National Highways (Rate of Fees) Rules, 1997, Rule 3.

Similar provisions regarding metering and the setting of water and sewerage tariffs are found in the relevant sections of the Andhra Pradesh Municipal Corporations Act, which applies to other municipalities in the State. (see Sections 200 and 201). In all cases, municipalities and towns have the power to carry out operations and maintenance in the water sector.

Gujarat

In Gujarat also, powers regarding water and sanitation were granted to municipalities and urban local bodies prior to the enactment of the 1992 Constitutional Amendment. The municipal corporations of Ahmedabad and Surat are governed by the Bombay Provincial (Gujarat Amendment) Municipal Corporation Act, 1999. All other municipal corporations are governed by the Gujarat Municipalities Act, 1963. These acts permit private sector participation in the water and sewerage sector.

As in Andhra Pradesh, there is a Gujarat Water Supply and Sewerage Board (GWSSB), established under the Gujarat Water Supply and Sewerage Board Act. That Board provides water extraction, water treatment, bulk supply and water transmission services. Municipalities generally purchase bulk water from the Board or other bulk water sources while retaining control of retail distribution. The GWSSB has established the Gujarat Water Infrastructure Ltd. (GWIL) as a water development company.

The State Irrigation Department supplies water for agriculture at a nominal charge. The Department of Narmada/Water Resource and Supply is responsible for the Sardar Sarovar Dam which is expected eventually to supply bulk water to the seven municipal corporations and 142 municipalities.
Finally, with regard to private sector participation, the Gujarat Infrastructure Development Board (GIDB) facilitates BOOT projects in the water sector, as it does in other sectors. Water storage, water supply and sewerage systems and also solid waste management are specifically named in Schedule I of the Gujarat Infrastructure Development Act, 1999 as types of projects that come under the Act for potential private sector participation.

Karnataka

Karnataka also had legislation granting authority regarding water supply and sanitation to municipalities and urban local bodies prior to the 74th Amendment to the Constitution. The Karnataka Municipal Corporations Act, 1976 (Karnataka Act No. 14 of 1977), as amended, under Section 58 made it obligatory for a municipal corporation to carry out those functions. However, Section 186 of the Act then provides that the provisions of Chapter XIII. Water Supply and Sewerage (Sections 187-244) of the original Act shall not apply to any city where separate water supply and sewerage arrangements have been made.

Thus the Bangalore Water Supply and Sewerage Board (BWSSB) was established for the Bangalore Metropolitan Area by Bangalore Water Supply and Sewerage Act, 1964, as amended). The Karnataka Urban Water Supply and Drainage Board (KUWSDB) was then given responsibilities for the other urban local bodies in the State. (Karnataka Urban Water Supply and Drainage Board Act, 1973 (Karnataka Act No. 25 of 1974), as amended. In practice, the KUWSDB is primarily concerned with constructing water supply and drainage facilities, and then transferring them to the concerned local urban body. In most cases, operation and maintenance is undertaken by that body. However, only about 25% of the urban local bodies have mains sewerage, including sewerage treatment plants. The remainder have septic tanks or no treatment of sewage at all.

There are also other agencies involved in the water and sewerage sector in Karnataka. The Karnataka Urban Development Department has the power to regulate in the area, particularly with regard to the setting of tariffs. As noted generally above, the Karnataka State Pollution Control Board (KSPCB) is responsible for the implementation of both water pollution and air pollution rules in the State.

Finally, the Karnataka Urban Infrastructure Development and Finance Corporation (KUIDFC) was established in 1993 as a100% State Government-owned corporation under the Companies Act, 1956 to assist urban bodies in the State in the planning and finance of urban infrastructure as well as providing technical assistance for the implementation of such development. It mobilizes funds from the State Government, financial institutions like HUDCO and international agencies such as the World Bank and the ADB. Presently it is responsible for two ADB-assisted projects- the Karnataka Urban Infrastructure Development Project and the Karnataka Urban Development and Coastal Environmental Management Project- described in detail in Appendix C. It is also the nodal agency for the Central Government-sponsored Bangalore Mega City Project and the World Bank-assisted Karnataka Water and Urban Management Project.

KUIDFC does not have permanent staff of its own but hires necessary personnel under contract or by deputation from other agencies. The actual work is done by the concerned line agencies. It is a finance company whose primary purpose is to fund projects. At present, it primarily acts as an agency to route funds collected from external agencies rather than lending money on its own account. However, its future plans are to act as a full-fledged State level financial institution, which is a facilitator and coordinator concentrating on the development of an urban infrastructure financial market for the State.

Madhya Pradesh

Madhya Pradesh is the only one of the four Project States without such a Water Supply and Sewerage Board Act. It is also the only Project State with a separate Water Act to implement the 74th Amendment and move control of water to the local level- the MP Sinchai Prabandhan Me Krishkan Ki Bhagidari Adhiniyam, 1999 (Act No. 23 of 1999), and its attendant rules. That Act covers farmers' participation in the management of the irrigation system and does not cover urban water. The definition of "water user" under the Act is broad and includes all kinds of uses of such irrigation water. The Act is under the management of the MP Water Resources Department which is generally responsible for the construction of new water supply schemes. When completed, these schemes are then transferred to local bodies.

For urban drinking water and sewerage, the legal base is the Madhya Pradesh Municipal Corporations Act. The responsible authority is the Housing, Environment and Urban Administration Department (HEUAD). The Public Health and Engineering Department (PHED), formerly responsible also for urban water, is now responsible only for rural water but does still provide technical support to HEUAD for utility water in urban areas.

In addition, the MP Peya Jal Parirakshan Adhiniyam, 1986 (Act No. 3 of 1987) gives the District Collector concerned the power to declare water scarcity areas in case of emergency in order to maintain or increase the supply of water to the public or to secure its equitable distribution or secure water to meet the need of the public. (Section 3). In such designated areas, the Collector must then give permission for the taking of water from a water source for any purpose, and may refuse the

taking of water to preserve supply for domestic purposes. (Section 4). The Collector may set conditions for the taking of such water, including the rates to be paid by different classes of users, with preference to domestic users. Thus a possible private sector participant would not be ensured that he would receive water in case of emergency.

Summary and Conclusions

Legislation in the water sector in the four Project States is not comprehensive, and represents the views of how operations and control should be carried out at different periods in the past- from municipal corporations laws to water supply and sewerage boards. None of the States has a comprehensive water and sewerage law that covers all aspects for all parts of the State, with clearly defined roles with regard to construction, operations and maintenance, including the role for the private sector. Such a piece of legislation would advance the likelihood to private sector participation, although the problems of costs and charges, and of efficient management and leakage, make such participation in the near future unlikely beyond operation and management contracts. The possible role of such contracts will be explored during Phase II of this Project.

4 Effect of Other Relevant Laws

Part IV of this Working Paper will provide a brief discussion of legal issues that are common to all or most of the infrastructure sectors. These issues may be explored in greater detail at a later stage in the Project as they become important for specific projects or with regard to important institutional and other changes to facilitate private sector participation. These issues are:

- foreign investment legislation;
- tax legislation;
- competition legislation;
- labour legislation;
- land and land acquisition legislation;
- loan security legislation; and
- dispute resolution legislation.

4.1 Foreign Investment Legislation

Foreign direct investment (FDI) has been viewed as an integral part of a successful outward-oriented growth strategy and could play a substantial role in the development of infrastructure in India. India does not have specific legislation to regulate FDI. Under the Industries (Development and Regulation) Act, 1951, the Government of India has been notifying its Industrial Policy Statements from time to time. Over the years, the Policy Statements have been focused on the distinction between public sector enterprises which come under the Central Government (Schedule I Industries), industries for which compulsory licensing is required (Schedule II Industries), and small scale/ancillary industries (Schedule III Industries). The Industrial Policy reforms started in 1991 introduced significant changes in the industrial policy through pruning the list of industries reserved under Schedule I and Schedule II.

The nodal agency for the approving of FDI in India is the Foreign Investment Promotion Board (FIPB), currently working under the Ministry of Finance. The Foreign Investment Implementation Authority (FIIA) facilitates realization of approved FDI and provides a "pro-active" one stop services to foreign investors by helping them obtain the necessary approvals and acting as a single point interference between the investor and the Government and Governmental authorities.
Foreign investment in India is also subject to regulation through the various provisions of the Foreign Exchange Management Act (FEMA), 1999. At present, the entire FDI policy and procedures, as notified by the Government from time to time, are duly incorporated under FEMA regulations. The Reserve Bank of India has been specifically empowered under Section 6(3) of FEMA to make regulations to prohibit, restrict or regulate foreign exchange transactions concerning, among others:

- transfer and issue of foreign securities by residents, non-residents and others borrowing in foreign exchange;
- borrowing and lending between residents and non-residents;
- deposits between residents and non-residents;
- export-import and holding of currency; and
- transfer of immovable property outside India by residents giving guarantee in respect of debt due to a non-resident or by a non-resident.

FEMA also covers issues related to foreign exchange management, such as disinvestments of original investment, foreign technology collaboration agreements, repatriation of profits, and acquisition and disposal of immovable property by foreigners.

Foreign investment in India can be made in an Indian Company through the automatic route or the Government approval route. Under the automatic route, no specific approval is required either from the Reserve Bank of India (RBI) or the Foreign Investment Promotion Board (FIPB), as is required

under the Government approval route. The automatic route requires only that the RBI be notified of the investment.

Foreign companies can conduct business in India through:

- liaison/representative offices;
- project offices;
- wholly owned subsidiaries with 100% equity; and
- joint ventures.

At present, FDI can be in the form of new investment or investment in an existing Indian company. Although any of the above modes of equity could be considered for the purpose of executing infrastructure projects, the establishment of a project office is the most widely used entry route for such projects.

Foreign companies planning to execute specific projects in India can set up temporary project/site offices for that purpose. Specific approval from the RBI is required for setting up project offices even for executing private sector projects. Accordingly, approvals accorded for setting up project offices are specific to the particular project to be executed and last only until the completion of the project.
In India, investment including capital appreciation, profits and returns are freely repatriable, except where the approval is subject to specific conditions. Those conditions include a lock-in period on the original investment, dividend cap, and foreign exchange neutrality, according to the notified sectoral neutrality and subject to the payment of applicable taxes. Where specific government approvals are specifically required, then they are accorded on the recommendation of the FIPB.

In respect of companies in the infrastructure/service sector, where there is a prescribed cap for foreign investment, then only the direct investment will be considered for the prescribed cap and foreign investment in such investing company will not be set off against the cap provided that the foreign direct investment does not exceed 49% and the management of the investing company is with Indian owners. The automatic route is not available.

In the power sector, up to 100% FDI is allowed in respect of projects relating to electricity generation, transmission and distribution, other than nuclear/atomic plants. There is no limit on the project cost and quantum of FDI.

For roads, highways, ports and harbours, Foreign Direct Investment up to 100% under the automatic route is permitted in projects for construction and maintenance of roads, highways, vehicular bridges, toll roads, vehicular tunnels, ports and harbours.

In the airport sector, FDI is allowed up to 100% but anything between 75% and 100% must be approved by the FIPB.

For urban mass transit, foreign direct investment of up to 100% is permitted by the automatic route for such a system in all metropolitan areas, including associated real estate management.
In respect of the telecomm sector, private participation in all basic and value-added services is now permitted, with varying levels of FDI.

As noted in the discussion of ports in Part III, the Central Government has issued guidelines for private sector participation in ports through joint ventures and foreign collaboration. These Guidelines have been expanded and modified to permit the formation of Joint Ventures between Major Ports and Foreign Ports, and between Major Ports and Minor Ports, and between Major Ports and Companies. For the implementation of the Guidelines, there are to be amendments of the Indian Ports Act, 1908 for minor ports and the Major Ports Trust Act, 1963 for major ports.

Apart from the sectoral caps listed above, multi-national enterprises (MNEs) and Overseas Corporate Bodies (OCBs) also face differential treatment in the matter of regulatory approvals. Certain illustrative examples are provided below:

- the foreign investor has to obtain FIPB approval in regard to specific proposals in which the foreign collaborator has a previous venture in India;
- the foreign investor has to obtain FIPB approval in regard to proposals relating to the acquisition of existing shares in an Indian company or the takeover of such a company;
- mergers/amalgamation of companies require the approval of both the FIPB and the RBI; and
- investment and returns are not repatriable in certain cases and are subject to conditions such as lock in period on original investment, dividend cap, and foreign exchange.

The Foreign Investment Implementation Authority (FIIA) was established to assist foreign direct investors with respect to post-approval operational problems. It is empowered to enable it to fix the time for investment related approvals both at the State and Central levels. In regard to Central level approvals, FIIA may bring persistent delays to the attention of the Cabinet Committee on Foreign Investment so that it can issue appropriate directions to the administrative ministries if they fail to respond conclusively within the prescribed time limit.

The Report of the Steering Group on Foreign Direct Investment of the Planning Commission of India recommended that the existing exit barriers for foreign investors, such as regulatory approvals required for the sale of shares by one foreigner to another foreigner and the sale of shares from a non-resident to a resident, be removed. (see http://planningcommission.nic.in/ReportonFDI). The Report also suggested that any entry barrier to FDI in any sector must be explicitly justified given the argument that restrictions on equity participation could be detrimental for attracting FDI.

4.2 Tax Legislation

In India, the tax system is considered not just as a source of revenue but also as an instrument for bringing about far-reaching economic reforms. Article 265 of the Constitution of India requires that no tax shall be levied or collected except by authority of law. Taxes can be broadly divided into direct taxes and indirect taxes.

4.2.1 Direct Taxes

The major direct taxes in India are:

- the Income Tax;
- the Wealth Tax; and
- the Gift Tax.

While tax rates have been reduced in the last several years, the statutory corporate tax rate in India for foreign companies is currently 35.875%. This rate is relatively high in relation to the corporate tax rates in other Asian countries, thus 15% in Hong Kong, 26% in Singapore, and 28% in Malaysia. The Indian Income Tax Act, 1961, as amended, provides for taxing income by way of dividends, royalty and technical service in the case of foreign companies. (Section 115A). The annual budget for the Year 2003/2004 has exempted shareholders from tax on dividend. However, a dividend distribution tax of 12.5% (plus surcharge) on domestic companies distributing dividends has been announced. There will also be a withholding tax at the rate of 21% (including surcharge) on royalties and fees for technical services.

Since dividends are not taxed at the hands of the shareholder, there will not be any withholding tax on the dividends distributed to the shareholders/foreign companies. Yet under Section 90(2) of the Income Tax Act, in cases where the central government has entered into an agreement with any other country in the nature of a double taxation avoidance treaty, the provisions of the Income Tax Act or the tax treaty (between the Government of India and the country of domicile of the non-resident), whichever is more beneficial to the taxpayer, would apply. India has signed double taxation agreements with 78 countries, including the United States, the United Kingdom, Singapore and France.(see details at http:// www.incometaxindia.gov.in/International.asp).

The Income Tax Act also provides incentives in the nature of full or partial tax exemptions, accelerated depreciation, and tax holidays. Units set up in a Special Economic Zone (SEZ) and cyber units set up under the Software Technology Park of India (STPI) or the Electronic Hardware Technology Park (EHTP) Scheme are eligible for such benefits. The exemption is available for ten consecutive assessment years beginning with the assessment year relevant to the year in which the undertaking begins to manufacture/produce. The tax benefit under Section 10A for the assessment year 2003/2004 has been limited to 90% of the profits and gains from exports. Moreover, no benefit under Section 10A is available to a unit in assessment year 2010/2011 and subsequent years. Such tax incentives apply to domestic and foreign owned companies alike, irrespective of the proportion of foreign equity holding. However, the Central Government levies a minimum alternate tax (MAT) of 7.5% on company book profits.

In general, income tax incentives have been used as instruments for promoting specific economic activities. Under Section 10 (23G) of the Income Tax Act, there is an exemption for infrastructure funding for income from dividends, and interest on long-term capital gains of such funds.

In addition, for companies, there is such an exemption for investments in the form of shares or long-term finance in any enterprises set up to develop, maintain and operate an infrastructure facility. Subscription to equity shares or debentures issued by a public company formed or registered in India and wholly and exclusively for the purpose of developing, maintaining and operating an infrastructure facility will be eligible for deductions under Section 88 of the Income Tax Act, which permits a deduction equal to 20% of the amount subscribed from the amount of tax payable by the subscriber. Furthermore, income from deposits with or investments in any bonds issued by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for urban infrastructure shall not be included in the total income of the assessee. Section 11(5)(ixa) of the Income Tax Act defines "urban infrastructure" as a project for providing potable water supply, sanitation and sewerage, drainage, solid waste management, roads, bridges and flyovers for urban transport.

As an incentive to financial institutions to provide finance for infrastructure projects, a deduction of up to 40% of their income derived from the financing of such investments is allowed, provided that the amount is kept in a special reserve.

4.2.2 Indirect Taxes

In India, indirect taxes are levied by both the Central Government and the State Governments. The major categories of indirect tax include:

- customs duty;
- Central excise duty; and
- Sales tax.

It is estimated that indirect taxes account for 60% of the total gross taxes collected. This includes many excise duties, as well as service tax at the Central level and various forms of sales tax at the State level.

For **customs duties**, the Customs Tariff Act, 1975, as amended, governs the tariff rate on imports and exports of products in India. Tariffs are product-specific and are levied in accordance with the product classification provided in the Indian Tariff Classification (Harmonised System). The Finance Bill, 2003, reduces the peak customs duty to 25% and has also reduced the applicable customs duty on raw materials and semi-finished goods with a view to encouraging export of finished goods.
A significant step with regard to private sector participation in the infrastructure sector is the introduction of a "Project Import Scheme" under the Customs Tariff Act whereby capital goods imported for the setting up of a "Project" are assessed as a whole and a flat rate of duty is imposed in respect of such goods instead of each individual article being separately classified and assessed for the purposes of payment of the appropriate customs duty.

With regard to **Central excise duty**, the Year 2003/2004 Annual Budget introduced a three-tier excise duty structure of 8%, 16% and 24%. The trend of the previous budgets indicates that India is moving gradually towards replacing excise duties with a full-fledged value-added tax (VAT) on manufactured goods. Accordingly, both the number and level of rates have been reduced during the last ten years so that the current central excise rate (the CENVAT) is now 16%, with a credit/offset for taxes paid for inputs. Although the convergence of tax rates and the accompanying curtailment of exemptions have been reduced, the tax administration still continues to be complex and the distortions in the application of taxes are still high.

In an attempt to broaden the indirect tax base further, a tax on services was introduced in 1994 (see Chapter V of the Finance Act, 1994, as amended.) Following proposals in the Annual Budget 2003/2004, the rate of tax was increased from 5% to 8%. Also, ten additional services have been included in the coverage of the service tax in 2003. Of these, the new additions which might be relevant in the context of Private Sector Participation in Infrastructure in India are:

- Technical and Testing analysis and certification;
- Maintenance and repair services;
- Commissioning and installation services;
- Business promotion; and
- Minor ports.

By notification dated 20th June 2003 (Notification No.7/2003) the Central Government has appointed 1st July 2003 as the date from which service tax will be levied on the above services.

Further, the Annual Budget 2003/2004 reduced the rate of **central sales tax (CST)** from 4% to 2%. The CST is proposed to be eliminated over time. Since the CST is a tax on transportation of goods from State to State which involves cost and delay, the proposal to reduce or eliminate it can be seen as an incentive for inter-State business.

State sales taxes in India range from 2% to 20%, although most are between 7% and 16%. Different states offer different incentives to attract investment in the form of exemptions, waivers, deferrals and refunds. Some of these incentives have been discussed in Part III above with regard to sectors such as information technology parks and ports. They will be examined in further detail as part of the project analysis in Phase II of this Project. In respect of VAT, this was to be implemented at the State level on June 1, 2003 but has been rescheduled due to opposition from retailers.

Other important State taxes include:

- excise duty on specific products;
- turnover tax;
- purchase tax;
- registration fee;
- stamp duties;
- motor vehicles tax;
- passengers and goods tax;
- profession tax;
- entertainment duty; and
- octroi (where still in force).

As relevant, such taxes will be explored further with regard to specific projects in the four Project States.

4.3 Competition Legislation

The Competition Act reflects the increased emphasis on promoting competition by prohibiting trade practices, which cause appreciable adverse effect on competition within markets in the country. It can have an important impact on the openness of such markets to outside participation, especially

foreign investment. The Act is intended to replace the Monopolies and Restrictive Trade Practices Act, 1969 (Act No. 54 of 1969) that was considered to have become obsolete with regard to the need to shift focus from curbing monopolies to promotion competition.

The Act is based on the recommendations of the High Level Committee, headed by Mr. S.V.S. Raghavan. The Committee was constituted on 25 October 1999 to propose a modern Competition Law. The Committee submitted its report on 22 May 2000.

Parts of the Competition Act are yet to come into force. Some portions thereof have been notified but many substantive provisions are yet to be notified. The Competition Commission of India (CCI) has not yet been formed and the MRTP Act is still in force. Certain sections of the Competition Act came into force on 31 March 2003[58] and certain others on 19 June 2003[59]. The Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003 have also been released.[60] However Section 66 of the Act, which repeals the MRTP Act and dissolves the MRTP Commission has not yet come into force.

4.3.1 Prerequisites for a Successful Competition Law

The S.V.S Raghavan Committee laid down a number of prerequisites for any competition legislation to function effectively. These prerequisites include:

- The Industries (Development and Regulation) Act, 1951, may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and national heritage protection considerations, etc.There should be no reservation for the small-scale sector of products, which are on open general licence (OGL) for imports. There should be a progressive reduction and ultimate elimination of reservation of products for the small-scale industrial and handloom sectors. Cheaper credit in the form of bank credit rate linked to the inflation rate should be extended to these sectors to enable them to become and be competitive. The threshold limit for the small-scale industrial and small-scale service sectors needs to be increased.

- The economic reforms of liberalization, deregulation and privatisation need to be further progressed and should be so designed that they strengthen the competition policy and vice versa.

All trade policies should be open, non-discriminatory and rule-bound. They should fall within the contours of the competition principles. All physical and fiscal controls on the movement of goods throughout the country should be abolished.

Government should divest its shares and assets in State monopolies and public enterprises and privatize them in all sectors other than those subserving defense and security needs and sovereign functions.

All State monopolies and public enterprises will be under the surveillance of competition policy to prevent monopolistic, restrictive and unfair trade practices on their part. Any form of discrimination in favour of the public sector and Government commercial enterprises except where they relate to security concerns must be removed. However, care should be taken not to create private monopolies out of public monopolies.

The Industrial Disputes Act, 1947, and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.
Structures like BIFR need to be eliminated. Preferably, the Sick Industries Act should be repealed. The Sick Industries Act is in the process of being repealed.

[58] Notification No. SO340(E), dated 31 March 2003, issued by the Department of Company Affairs.
[59] Notification No. SO715(E), dated 19 June 2003, issued by the Department of Company Affairs.
[60] Notification No. GSR303(E), dated 4 April 2003, issued by the Department of Company Affairs.

The Urban Land Ceiling Act should be repealed.
All provisions of the Competition Act must apply to all industrial and professional enterprises including those in the public as well as private sector.

4.3.2 The Competition Commission of India

The Competition Commission of India (CCI), a quasi-judicial body, is sought to be established (see Section 7 of the Act).

Section 18 of the Act states that the Commission shall eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure that freedom of trade is carried out by all participants in the markets of India. To carry out that purpose, it may enter into an agreement with any agency of any foreign country, as long as that agreed has the prior approval of the Central Government. The Commission is also to undertake competition advocacy so as to create public awareness of competition issues and to impart training with regard to such issues (see Section 49). The Commission replaces the Monopolies and Restrictive Trade Practices Commission under the former Act, except with regard to unfair trade practices cases, which will now be under the jurisdiction of the Consumer Protection Act, 1986 (see Section 66).

The CCI will have a Principal Bench and Additional Benches and will also have one or more Merger Benches (Section 22). It will look into violations of the Act based either on its own knowledge or based on complaints received and references made by the Central Government, the State Governments or statutory authorities (see Section 19). The Commission may pass orders for granting interim relief or other appropriate relief and compensation or an order imposing penalties (see Sections 26 to 39). Appeal from such orders shall lie to the Supreme Court (Section 40). The Central Government will also have powers to issue directions on policy matters (Section 55), as well as the power to supersede the Commission if it is considered necessary based on the situation (Section 56). In addition, Chapter V (Section 41) of the Act provides that the Director General of the Commission, appointed by the Central Government under Section 16, may carry out investigations for the Commission if so directed by it. Chapter VI (Sections 42-48) of the Competition Act confers power on the CCI to levy penalties for violations of its orders, for failure to comply with its directions, for the making of false statements or omissions to furnish material information or other such matters. With regard to violating enterprises, the CCI may levy a penalty of not more than 10% of its average turnover for the last three financial years. It can also order the division of dominant enterprises. It also has the power to order demerger/ breakup with regard to mergers and amalgamations that adversely affect competition.

Further, the Act provides for the creation of a Competition Fund (Section 51). The Fund will receive grants from the Central Government and application fees. All expenses of the CCI will be paid out of the Fund. As with similar such funds, it will be audited by the Comptroller and the Auditor General of India. Its annual accounts, as so audited, will be laid before both Houses of Parliament, as will its annual report (see Sections 50-53).

4.3.3 Anti-Competitive Behaviour

With regard to the definition of anti-competitive behaviour, Chapter II (Sections 3 to 6) of the Act defines the arrangements prohibited under the Act, thus anti-competitive agreements (Section 3), abuse of dominant position (Section 4), and combination (Section 5). Section 6 generally prohibits the entering into a combination. The definitions of these prohibited arrangements are quite specific. An anti-competitive agreement is one that causes or is likely to cause an appreciable adverse effect on competition in India.

Section 19 of the Act then lays out the principles and variables to be considered in determining whether there is an appreciable adverse effect on competition and whether an enterprise enjoys a dominant position in an industry. That same Section also sets forth the factors for determining the "relevant market", including the "relevant geographic market" and the "relevant product market".

With regard to determining if there is an "appreciable adverse effect on competition", Section 19(3) states that the Commission have due regard to any or all of the following factors:

- Creation of barriers to new entrants in the market;
- Driving existing competitors out of the market;
- Foreclosure of competition by hindering entry into the market;
- Accrual of benefits to consumers;
- Improvements in production or distribution of goods or provision of services; and
- Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Section 19(4) then lists the following relevant factors for determining if an enterprise enjoys a dominant position:

- Market share of the enterprise;
- Size and resources of the enterprise;
- Size and importance of the competitors;
- Economic power of the enterprise, including commercial advantages over competitors;
- Vertical integration of the enterprises or sale or service network of such enterprises;
- Dependence of consumers on the enterprise;
- Monopoly or dominant position, whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking, or otherwise;
- Entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- Countervailing buying power;
- Market structure and size of market;
- Social obligations and social costs;
- Relative advantage, by way of the contribution to economic development, of the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition; and
- Other factors which the Commission may consider relevant.

The above two sets of factors are found in most modern legislation of this type and indicate the move away from the emphasis on monopoly found in the previous legislation, the Monopolies and Restrictive Trade Practices Act, 1969. The Competition Act doesn't consider size per se as evil. It is the abuse of market dominance, which really has been considered to be objectionable.
With regard to relevant market, Section 19(6) states that the factors to be considered with regard to the "relevant geographic market" are:

- Regulatory trade barriers;
- Local specification requirements;
- National procurement policies (thus of transparency and competitive bidding);
- Adequate distribution policies;
- Transport costs;
- Language;
- Consumer preferences; and
- Need for secure or regular supplies or rapid after-sales services.

With regard to "relevant product market", Section 19(7) lists the important factors as:

- Physical characteristics or end-use of goods;
- Price of goods or service;
- Consumer preferences;
- Exclusion of in-house production;
- Existence of specialized producers; and
- Classification of industrial products.

As to combinations, Section 5 sets size limits that are prima facie determined to be combinations under the Act. They are:

- Any acquisition where the parties have in India assets of more than Rs. 1000 crores or turnover of more than Rs. 3000 crores**,** or inside and outside of India have assets of more than US$500 million or turnover of more than US$1500 million; or
- Any acquisition where the group concerned has in India assets of over Rs. 4000 crores or turnover of more than Rs. 1200 crores, or inside and outside of India has assets of more than US$2 billion or turnover of more than US$6 billion; or
- Acquiring of control of an enterprise if that enterprise and the acquiring enterprise engaged in the production, distribution or trading of similar or identifiable or substitutable goods has in India assets of more than Rs. 1000 crores or turnover of more than Rs. 3000 crores, or inside and outside of India has assets of US$500 million or turnover of more than US$1500 million; or
- The group to which the enterprise acquired would belong after the acquisition has in India assets of more than Rs. 4000 crores or turnover of more than Rs. 12,000 crores, or inside and outside of India has assets of more than US$2 billion or turnover of more than US$6 billion; or
- Any merger or amalgamation in which the enterprise remaining has in India assets of more than Rs. 1000 crores or turnover of more than Rs. 3000 crores, or inside and outside of India has assets of more than US$500 million or turnover of more than US$1500 million; or
- Any merger or amalgamation in which the group to which the enterprise remaining would belong has in India assets of more than Rs. 4000 crores or turnover of more than Rs. 12,000 crores, or inside and outside of India has assets of more than US$2 billion or turnover of more than US$6 billion.

"Group" is defined as two or more enterprises that directly or indirectly exercise 26% or more of the voting rights of another enterprise, or appoint over 50% of the members of its board, or control the management or affairs of the other enterprise. "Value of assets" is book value for the preceding fiscal year minus depreciation plus the value of all assets such as goodwill, patent, geographic location, etc.

Beyond this list of statutory violations of the combination rule in Section 5, Section 6 of the Act states that any combination, which causes an appreciable adverse affect on competition within the relevant market in India, shall be void. The definition of "relevant market" has been discussed above. Section 20(4) sets out factors for determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market. Those factors are:

- Actual and potential level of competition through imports in the market;
- Extent of barriers to entry into the market;
- Level of combination in the market;
- Degree of countervailing power in the market;
- Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- Extent of effective competition likely to sustain in a market;
- Extent to which substitutes are available or are likely to be available in the market;
- Market share, in the relevant market, of the persons or enterprise in a combination, individually or as a combination;
- Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- Nature and extent of vertical integration in the market;
- Possibility of a failing business;
- Nature and extent of innovation;
- Relative advantage, by way of the contribution to economic development, by any combination having or likely to have appreciable adverse effect on competition; and

- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

These rules on combination, as those on anti-competitive agreements and abuse of dominant position appear to reflect common practice in the world with regard to the abolition of activities that stifle competition in different markets. It is too early to see how effective will be the enforcement of the Competition Act. 2002, but it is a sign to private investors, especially potential foreign investors, that India will be more open to them than it has been in the past.

4.3.4 Lacunae/Possible Shortcomings in the New Act

It is as yet early days to predict what the various shortcomings of the Act may be. This section only seeks to see which provisions of the Act have proved to be controversial.

Notification Procedure

The Raghavan Committee dealt with prior notification at some length. The Committee made the following points:

- There are two possibilities. The first is that approval or disapproval of the merger may be obtained (possibly within a specified time) before going ahead with the merger. This will be subject to a threshold requirement based on assets or market share. The second option is that no notification of permission is required and that the threat of action in case of a violation should generally enforce legal behaviour.
- Prior approval is likely to lead to delays and unjustified bureaucratic interventions. This is likely to hamper the vital process of industrial evolution and restructuring and is, thus, not recommended.
- In any case, all mergers have to be approved by the High Court and shareholders' interests are protected in this way.
- However, on the contrary, the complete absence of a pre-notification requirement could lead to more post-merger unscrambling with high social costs. For this reason, a pre-notification requirement for mergers above a certain threshold level was suggested. The Committee suggested that such notification be prescribed on the basis of assets, rather than market share, because the latter may be a deceptive indicator of the company's strength in the market.
- A pre- notification requirement for mergers only over a certain threshold is also administratively more convenient, because of many mergers that may be otherwise be scrutinized, very few may be the restrained in any manner at all. Therefore, if a threshold is set, this will reduce the need for expert staff to assess all mergers.
- The Committee expressed a concern that at present there are very few companies of an international size in India. In light of economic reforms and encouraged foreign investment, substantial corporate restructuring is taking place. While a prior notification process may act as a hindrance to such restructuring, most countries settle for prior notification, because the social costs of actions post-merger are very high.

The final position in the Act is that a "combination" has been defined in Section 5 as per a certain threshold level of assets. However, Section 6(2) does not establish a compulsory notification procedure for all combinations, as covered by Section 5. An optional notification procedure has been established under Section 6(2) of the Act, for a person or enterprise proposing to enter into a combination. The new Act has attempted to steer clear of the intrusive nature of regulatory control provided in the old Monopolies and Restrictive Trade Practices Act, so that it does not impede private sector involvement. An optional procedure has the advantage of being less restrictive.

However, many countries follow compulsory notification procedures for combinations over a certain threshold. A compulsory notification procedure over a certain level of assets has the advantage of not swamping the competition authority with too much information about all manners and sizes of combinations, of not unnecessarily making the corporate restructuring process too rigorous and of

still keeping a check on potentially dangerous combinations. The present optional notification process established in the Indian law may prove inadequate in terms of the CCI having to keep a check of those mergers that are not optionally notified.

In **France**, the French NRE Law (New Economic Regulations, Law No. 2001-420 of 15 May 2001) introduced significant changes in several areas of French Commercial Law. The competition law chapter of the law provides a new compulsory notification procedure in relation to concentrations and it defines the thresholds at which notification becomes mandatory. Pursuant to the NRE Law, a concentration falls within the scope of French Merger rules where:

- The combined aggregate worldwide turnover excluding taxes of all of the companies or groups who are parties to the concentration exceeds 150 million euro;
- The aggregate turnover (excluding taxes) in France of each of at least two of the relevant companies or groups is more than 15 million euro;
- The operation does not fall within the scope of the EC Merger Regulation; and
- Any transaction meeting the above three conditions must be notified to the Minister of the Economy as soon as the companies or natural persons concerned have concluded an irrevocable agreement and, in particular, following conclusion of any agreement setting up the transaction, the publication of a public bid or the acquisition of a controlling interest. The concentration may not take effect until the Minister of the Economy has authorized it. However, in certain cases, the parties may request from the Minister a derogation authorizing the transaction to proceed, in whole or in part, prior to formal receipt of the Minister's authorization.

In **Ireland**, the principal legislation regulating mergers and takeovers is the Mergers and Takeovers (Control) Acts, 1978 to 1996. This legislation provides for the compulsory notification of mergers and takeovers, before their implementation, to the Minister for Enterprise, Trade and Employment. The Department of Enterprise, Trade and Employment enforces it.

In **Canada**, Section 114 of the Canadian Competition Act, 1985, places an obligation on parties to a proposed transaction, which exceeds the party-size and transaction-size thresholds to notify the Commissioner of Competition. Section 110 of the Act indicates the types of transaction subject to notification and their applicable thresholds.

Both the **US and EU** laws require prior approval for mergers above certain thresholds; however they also impose a timeliness requirement on the relevant authority, with delays being subject to limitation. The EC Merger Regulation has a compulsory notification procedure. In December 2002, the European Commission came up with proposed amendments to the EC Merger Regulation. However, no change has been proposed to the compulsory notification procedure.

Extra-territorial Operation of the Act

Section 32 of the Competition Act gives jurisdiction to the Commission with regard to acts, which take place outside India, but the impact of those acts is on the Indian market itself. It is not clear yet how this provision is to operate in allowing the Competition Commission extra- territorial operation.[61]

[61] "Acts taking place outside India but having an effect on competition in India
32. The Commission shall, notwithstanding that,—
(a) An agreement referred to in section 3 has been entered into outside India; or
(b) Any party to such agreement is outside India; or
(c) Any enterprise abusing the dominant position is outside India; or
(d) A combination has taken place outside India; or
(e) Any party to combination is outside India; or
(f) Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India."

Jurisdiction in Relation to Mergers

In the Rajya Sabha debate preceding the passing of the competition bill, the question was raised as to how the Competition Commission's jurisdiction would operate in relation to other bodies exercising jurisdiction in relation to mergers. Other bodies such as the SEBI and the NCLT[62] also govern mergers of companies and now this matter is being examined by the CCI also. The RBI also steps in, in cases of foreign exchange involvement.

There is separation of powers here, though it is not clearly demarcated. The Competition Commission has to decide matters relating to mergers within 90 days. The Competition Commission decides from the point of view of competition, not on other aspects. There is no confusion in the jurisdiction of the CCI, the SEBI, the RBI or the NCLT.

It is to prevent conflict between the CCI and other bodies that Section 21 has been inserted in the Act.[63]

Nature of the Competition Commission of India

There was some debate in the Rajya Sabha with regard to the nature of the Competition Commission of India as well. The Commission is intended as a quasi-judicial body. Mr. Fali Nariman raised a doubt as to whether it is a corporate body, which can be sued,[64] or a quasi-judicial body, which cannot be

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[62] **"Sec 394 - Provisions for facilitating reconstruction and amalgamation of companies.**
(1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court
(a) That the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and
(b) That under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a " transferor company ") is to be transferred to another company (in this section referred to as the " transferee company");
The Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:
(i) The transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;
(ii) The allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
(iii) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
(iv) The dissolution, without winding up, of any transferor company;
(v) The provision to be made for any person who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and
(vi) Such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:
Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:
Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.
…"

[63] "**Reference by statutory authority**
21. (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.
(2) On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit:
Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference."

[64] "Establishment of Commission
7. …

sued. There are a number of implications of having a judicial body that is going to deal essentially with largely industrial and commercial considerations. It was clarified that the CCI is a regulatory body, with quasi-judicial functions. The suing provision is necessary because Section 7 (2) permits the CCI to hold and dispose of property, and it is on that account, for being able to sue or be sued, it is necessary.

There is a similar provision existing in the SEBI[65], IRDA Acts etc.

The Role of the Central Government and Independence of the Commission

An issue that may worry private sector investors is the role that the Central Government may play in the functioning of the CCI. The role of the Central Government is considerable. As per Section 8(1), the members of the Commission shall be appointed by the Central Government.[66] Section 50 of the Act makes the CCI dependent on grants from the Central Government for funding.

Section 55 of the Act, allows the Central Government to issue directions on matters of policy. On the question of what is a matter of policy, the decision of the Central Government is final.

Most importantly, Section 56 allows the Central Government to supersede the Commission.[67] The intervention of the Central Government to supersede the decisions of the Commission will be counterproductive. In effect, it means that the decisions of this Commission are not final. If the Government supersedes the decisions of the Commission, this will seriously impair the independence of the Commission. The Competition Commission of India is a quasi-judicial body and should therefore be allowed to protect its independence and not be subject to Government supersession. However, in the Rajya Sabha, this provision was justified by stating that a similar provision exists in other enactments too, for example, in the National Highways Authority, the Telecom Regulatory Authority, the National Trust for Persons with Autism, the Airports Authority, SEBI, etc.

(2) The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.."

[65] Section 3(2) of the SEBI Act reads as follows:
"**3. Establishment and Incorporation of Board.**
…
(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.
…"

[66] "**Composition of Commission**
8. (1) The Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government:
Provided that the Central Government shall appoint the Chairperson and a Member during the first year of the establishment of the Commission.
…"

[67] **"**Power of Central Government to supersede Commission
56. (1) If at any time the Central Government is of the opinion—
(a) That on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
(b) That the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or
(c) That circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification:
…"

It must be pointed out that though the Government can make policy directions, these are extremely rare in practice. Policy directives if made unjustifiably can always be called into question in a Court of law.

Appreciable Adverse Effect on Competition

The term "appreciable adverse effect on competition" has been repeatedly used in the Act but has not been defined. A definition of this term is necessary because it is extremely important to the decisions taken by the CCI. Section 19(3) only mentions the factors that may be kept in mind in deciding when an appreciable adverse effect is caused.

4.4 Labour Legislation

Labour law in India is a field where both Central and State Governments legislate under Entries 22, 23 and 24 of List III of the Constitution. However, the Centre has the power to control labour in vital industries such as railways, mines, oilfields and defence-related industries through entries 2, 22, 55. Till date India has ratified 39 International Labour Organisation (ILO) conventions of which 37 are in force. Of the ILO's eight fundamental conventions, India has ratified four - Forced Labour Convention of 1930, Abolition of Forced Labour Convention of 1957, Equal Remuneration Convention of 1951, and Discrimination (employment and occupation) Convention of 1958.

The 'organised sector' in India is the term used to refer to labour in sectors with a generally stable workforce and effective unions where employer/employee relations are determined by direct collective bargaining. The labour force in this sector is able to lobby and negotiate effectively with the management for implementation of the various laws. In contrast the 'unorganised sector' refers to the labour in those industries where the employees are not able to ensure an implementation of the various beneficial labour laws due to the fact that they are not able to coalesce into effective union groupings

The most recent case for a review of the labour laws was made by the National Commission on Labour in 2002. The Report of the National Commission has emphasised the need to rationalize and simplify the existing labour laws. Its argument has been that a comprehensive 'social safety net' should replace the present set of labour laws that result in rigidity in the economy and discourage investments.

4.5 Summary of Relevant Labour Laws

Below is a summary of the relevant labour laws, which might affect private sector participation in the infrastructure sector.

4.5.1 Apprentice Act, 1961

An Act to provide for the regulation and control of training of apprentices and for matters connected therewith.

Coverage and Salient Features

The Act extends to the whole of India and applies to areas and industries specified by the Central Government. The Act, however, does not apply to the notified special apprenticeship schemes.

It mandates:

- No person to be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade unless he is not less than 14 years of age and satisfies such standards of education and physical fitness as may be prescribed.

- Provides provisions for penalties for breach or contravention of the provisions of the Act by the employer or any person with imprisonment and /or fine. Also provides provision for offence by companies.
- Provisions of other labour laws do not generally apply to apprentices. In matters of conduct and discipline, the apprentices are to be governed by the same rules and regulations as are applicable to the employees of the same category in the establishment.
- The Minimum Wages Act and Industrial Disputes Act apply to apprentices as well. However, the Employees Provident Fund Act, Employees State Insurance Act and Payment of Bonus Act do not apply to apprentices.

The Act is a welfare legislation which aims to prevent the exploitation of young labourers under the pretext of hiring them as apprentices. It mandates a minimum age limit for apprentices and ensures that the basic minimum laws, like the wage laws and the Industrial Disputes Acts are made applicable to them.

4.5.2 Contract Labour (Regulation and Abolition) Act, 1970

An Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected herewith.
The Act provides a mechanism for regulation of an establishment (if more than twenty workers are engaged) and for the appointment of a Tripartite Advisory Board that investigates particular forms of contract labour.

Coverage and Salient Features

- The Act applies to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour and also to every contractor who employs or who employed on any day of the preceding twelve months, twenty or more workmen.
- It shall not apply to establishments in which work only of an intermittent or casual nature is performed. The Act defines the various criteria used.
- A workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer.
- If the contract labour is found to be in areas requiring perennial work connected with the production process, the Board could recommend its abolition.
- The principal employer should apply for registration of establishment, since failing registration an establishment cannot employ contract labour. A contractor should also be licensed to employ contract labour, otherwise he cannot undertake or execute any work though contract labour.
- The principal employer and contractor should maintain registers and records containing particulars of contract labour, nature of work performed, rates of wages etc.
- When a principal employer engages contract labour for work of perennial nature then the worker will become an employee of the principal employer if the worker has worked for 240 days.

The Government on the 13th of October 2003 has issued a notification to amend the Industrial Employment (Standing Orders) Central Rules, 1946 in accordance with recommendations made by a Group of Ministers on labour.[68]

These changes are to "*protect the interests of fixed term employees (i.e. contract labour.) as a precursor to a revamped law for contract labour designed to make it a driver of industrial growth"*

The changes can be summarised as follows:

[68] See news report "Contract Workers to enjoy 'regular' benefits" *Economic Times* 14th October 2003 page 1.

- Contract labourers shall not earn less benefits (wage, allowances) than a permanent workman and shall be eligible for all statutory benefits accorded to the latter.
- The working hours of a fixed term employee shall not be lesser than that of the permanent employee.
- In case of non-renewal of contract, the contract employee's employment will stand terminated. But termination cannot be meted out as a punishment unless the employer gives a fair hearing to the employee.

Contract Labour refers to labour hired for short-term work on a temporary work 'on contract' as opposed to being employed. While in some seasonal industries the use of such labour is justified in industries, which require a permanent work force, contract labour was being employed more to avoid compliance with labour laws, rather than due to functional necessity. This Act was thus enacted with the intention of reducing the abuse of this system of contract labour.

4.5.3 Employees' Provident Funds & Miscellaneous Provisions Act, 1952

An Act to provide for the institution of provident funds, pension fund and deposit link insurance fund for employees in factories and other establishments.

The Act provides benefits similar to those of a retirement pension scheme by mandating a monthly contribution to a 'provident fund' at 8-10 % of the basic salary and dearness allowance.

Coverage and Salient Features

This Act is extendible to all establishments in India employing 20 or more persons. This Act envisages a 'compulsory contributory fund' set up by the employer for the future of the employee following his retirement, or for his dependents in the case of premature death.

- The Act would be applicable to every establishment which is a factory engaged in any industry specified in Schedule I to the Act and in which 20 or more persons are employed and to such other establishments employing 20 or more persons or class of such establishments which the Central Government may by notification in the Official Gazette specify.
- The appropriate government has the power to exempt an establishment for specified reasons. The 'Wage ceiling' for coverage by this Act is Rs. 6,500 per month.
- The employer and majority of employees may agree for the voluntary application of the provisions of the Act in relation to that establishment.
- The Act is administered both by the Central and the State Governments in their respective spheres. The Act, however, does not apply to any Central/State Government establishment having its own scheme of provident fund or pension.

The Act in reality is a welfare measures akin to most retirement pension schemes. However unlike a pension scheme which provides recurring payments after retirement this is designed to provide a lump sum payment to the employee on retirement. The rates of contributions are quite reasonable.

4.5.4 Employees State Insurance Act, 1948

An Act to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto.

The Employees State Insurance Act provides a scheme under which the employer and the employee must contribute a certain percentage of the monthly wage to the Insurance Corporation that runs dispensaries and hospitals in working class localities.

Coverage and Salient Features

(i) It shall apply to all factories (including factories belonging to the Government) other than seasonal factories.

In this Act a 'Factory' means-

(i) any premises where ten or more persons are employed or were employed for wages on any day of the preceding 12 months and in any part of which a manufacturing process is carried on with the aid of power or is ordinarily so carried on; or
(ii) premises where twenty or more persons are employed or were employed for wages on any day of the preceding 12 months and in any part of which a manufacturing process is carried on without the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

The Act however, does not apply to Government factories or establishments, whose employees are in receipt of benefits similar or superior to the benefits provided under the Act.

(ii) Leave certificates for health reasons are forwarded to the employer who is obliged to honour them.
(iii) Employment injury, including occupational disease is compensated according to a schedule of rates proportionate to the extent of injury and loss of earning capacity. It facilitates both outpatient and in-patient care and freely dispenses medicines and covers hospitalisation needs and costs.
(iv) Payment, unlike in the Workmen's Compensation Act, is monthly. There are tripartite bodies to supervise the running of the schemes.
(v) An employer/ establishment covered under the ESI Act is exempt from the provisions of Maternity Benefit Act and Workmen's Compensation Act.

The appropriate Government under Section 1(5) is empowered to extend the provisions of this Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.
The Act is aimed at providing benefits in case of sicknesses etc to an employee, and imposes a corresponding obligation on the employer to make some contribution. An employee may still recover damages from the employer under the general civil law but he is precluded from recovering any sums under the Workman's Compensation Act , since this would amount to recovering compensation twice for the same event.

4.5.5 Equal Remuneration Act, 1976

An Act to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.

This Act prohibits discrimination between men and women in either requirements or payment of wages wherever their jobs are identical, except where employment of women in certain types of work is prohibited or restricted by law.

Coverage and Salient Features

- The Act extends to the whole of India and applies to the establishments or employments notified by the Central Government. The Act is now applicable to almost every kind of establishment.
- The employer is required to pay equal wages to men and women employees of his establishment, and not discriminate against women while recruiting, for performing same work or similar work.

- The employer is required to maintain an up to date register in relation to the workers employed by him in the prescribed form, containing particulars as to category of workers, nature of work, number of men and women employed, rate of remuneration paid, etc.
- The Act further provides that its provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service etc.
- The provisions of the Act shall however, not apply when special treatment is given to employment of women under any law or in connection with birth of a child, or in the terms and conditions relating to retirement, marriage or death of women, or when the Central or State Government declares that in a particular establishment or employment the difference in regard to remuneration of men and women workers is based on a factor other than sex.
- This Act implements the ideals enshrined in both the Indian Constitution as well as the ILO conventions and provides a specific legal basis for enforcing norms on gender equality in the Indian workplace.

4.5.6 Factories Act, 1948

An act to consolidate and amend the law relating to labour in factories.

This Act aims to regulate working conditions in factories and ensure minimum standards are followed for the safety, health and welfare of factory workers. The State Governments are empowered to legislate under this Act when dealing with the work conditions in their states.

Coverage and Salient Features

I 'Factory' in this Act means-
(i) any premises where ten or more persons are working or were working on any day of the preceding 12 months and in any part of which a manufacturing process is carried on with the aid of power or is ordinarily so carried on; or
(ii) premises where twenty or more persons are working or were working on any day of the preceding 12 months and in any part of which a manufacturing process is carried on without the aid of power or is ordinarily so carried on
but does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or a eating place.

- The Act regulates the working hours, leave, holiday, overtime and employment of children, women and young persons. This was amended in 1987 to set out safeguards in respect to the handling of hazardous substances.

II The Act was drastically amended in 1987 whereby safeguards against use and handling of hazardous substances and procedures for setting up hazardous industries were laid down.

III The Act provides for work conditions, for instance a 48-hour working week for an adult worker.

This Act confers powers on the Government to exercise powers of oversight over the industrial organisations to ensure that certain minimum work conditions are being adhered to by the organisation.

4.5.7 Industrial Disputes Act, 1947

An Act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes.

This Act provides the machinery for the settlement of industrial disputes through negotiations and adjudication.

Coverage and Salient Features

It applies to all industrial establishments all over India whatever its strength of workers. A number of the provisions of this Act specify certain minimum standards and practices to be followed in labour relations.

- The object of the Act is to make provision for investigation and peaceful settlement of industrial disputes.
- The Act applies generally to all industries with the object of ensuring fair wages and to prevent disputes. It applies to every industrial establishment carrying on any business, trade, manufacture, or distribution of goods and services, irrespective of the number of workmen employed therein, i.e. even in case of a single employee the Act shall apply.
- Every person employed in an establishment for hire or reward (including contract labour, apprentices and part-time employees) to do any manual, clerical, skilled, unskilled, technical, operational or supervisory work, is covered by the Act. The Act does not however apply to persons employed mainly in a managerial or administrative capacity, or employed in a supervisory capacity drawing wages above Rs. 1600 p.m.
- An 'industrial dispute' is said to mean any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms and conditions of employment of any person.
- The employer is required to not make any change in the conditions of service specified in the Act (such as payment and amount of wages and allowances, contribution to pension and provident fund, hours of work, rest intervals, etc) without giving at least 21 days notice in prescribed form to workmen.
- Employer is to set up a Grievance Settlement Authority for settlement of individual disputes of the workmen employed, failing which the matter is referred to the Conciliation Officer (appointed by the Government under the Act). The Government may also refer any dispute to a Conciliation Board, Labour Court or Industrial or National Tribunal.
- The Act provides the mechanism and regulates certain acts i.e. strike, layoff, retrenchment, termination, closure of the establishment, lockout etc. It mentions certain positive rights entitled to the workmen (such as right to receive compensation) on layoff, retrenchment, closure, transfer of undertakings and also provides the procedure and the mechanism for the same.
- Under this Act no employee in any industrial establishment who has worked more than one year may be retrenched without being given one months notice in writing indicating the reason for retrenchment. The employee is also entitled to compensation of 25 days salary for each year of service completed. The dismissal of workers may be contested through a petition to the Government.

The II National Commission on Labour's appraisal of rigidity in the Indian labour structure focussed in detail upon the provisions of this Act. Its provisions were singled out as enabling the government to interfere too much in labour relations that should be based upon collective bargaining. The dispute settlement process is also controlled by the government, which effectuates an award by publishing it. The provisions of the Act laying down conditions for closure and retrenchment and have therefore often been the focus of intense lobbying by industry representatives. There efforts have been directed towards amending the provisions of the Act in order to attract investment by making industry more 'exit-friendly'.

4.5.8 Industrial Employment (Standing Orders) Act, 1947

An Act to require employers in industrial establishments formally to define conditions of employment under them.

Until the employer prescribes standing orders, he is to follow the Model Standing Orders prescribed by Government.

"Standing Orders" means the rules of conduct for workmen employed in industrial establishments, relating to matters enumerated in the schedule appended to the Act, such as classification of workmen, working hours, holidays, attendance, leave, termination of employment, suspension or dismissal, misconduct, etc.

Coverage and Salient Features

(i) The Act applies to "industrial establishments"-
   a. Wherein 100 or more workmen are employed or were employed on any day in the preceding 12 months;
   b. Being "industrial establishments" as defined under in Section 2(e).

1. Further, once the Act becomes applicable to an establishment, it does not cease to apply on account of a subsequent fall in number of workmen in the establishment.
   The Act, however, does not apply to any establishment insofar as the workmen employed therein are governed by the Government Service Rules.
2. The employer to submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in the industrial establishment within six months of the Act becoming applicable to the industrial establishment.
3. Provision to be made in the draft standing orders for all matters set out in the Schedule which may be applicable to the industrial establishment and shall be accompanied by a statement giving prescribed particulars of the workmen employed including the name of the trade union, if any, to which they belong.
4. For the period commencing from the date on which the Act becomes applicable to an industrial establishment and ending on the date on which the standing orders finally certified under the Act come into operation, the prescribed model standing orders shall be deemed to be adopted in that establishment.

The Act attempts to provide uniform and stable conditions of service to employees in an establishment. The main obligation cast upon the employer is to define clearly the conditions of employment, to make them known to the employees and to modify them only after taking permission from a 'certifying officer'.

4.5.9 Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

An Act to regulate the employment of inter-State migrant workmen and to provide for their conditions of service and for matters connected therewith.

Coverage and Salient Features

The Act applies to firstly, persons called Inter-State Migrant Workmen. These are persons any person who are recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment.

The Act is secondly deemed applicable to certain establishments:

(a) to every establishment in which five or more inter-State migrant workmen (whether or not in addition to other workmen) are employed or who were employed on any day of the preceding twelve months;
(b) to every contractor who employs or who employed five or more inter-State migrant workmen (whether or not in addition to other workmen) on any clay of the preceding twelve months.
   - The Act primarily provides for registration of establishments where the workers are employed. No establishment can employ workmen as defined in the Act unless it obtains this certificate of registration.

- The Act also provides for licensing of contractors. The contractor has to provide particulars and returns with respect of the workmen, and issue a pass to the workmen detailing their rate and period of employment etc. He is also obligated to pay the workman regularly, and provide safe working conditions to the workman.
- The Contractor is also required to pay certain allowances like Displacement Allowance and Journey Allowance to the workmen. In certain cases when this is not paid, the principal employer over the contractor can be made liable for the same.

This Act is targeted at industries like the construction industry where the employees are not employed continuously in a fixed place and have to periodically migrate from one location to another. It seeks to create certain formal procedures and institutions whereby the employers of such labourers are obligated to provide certain basic minimum benefit to such category of workers.

4.5.10 Maternity Benefit Act, 1961

An Act to regulate the employment of women in certain establishments for certain period before and after childbirth and to provide for maternity benefit and certain other benefits.

Coverage and Salient Features

It extends to the whole of India and is applicable to every factory, mine or plantation (including those belonging to Government) and an establishment engaged in the exhibition of equestrian, acrobatic and other performances, irrespective of the number of employees.

- It also applies to every shop or establishment within the meaning of any law for the time in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day in the preceding twelve months.
- Further, the State Government may after giving two months notice declare that the act shall be applicable to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

However, the Act would not apply to establishment in which provisions of Employees State Insurance Act, 1948 apply, except where a woman employee is not qualified to claim maternity benefit because her wages exceed the amount specified in the ESI Act, or for any other reason, then such woman employee would be entitled to claim maternity benefit under this Act.

This Act, again, provides minimum levels of benefits that should be provided to pregnant women, and applies only when the ESI Act does not.

4.5.11 Minimum Wages Act, 1948

An Act to provide for fixing minimum wages in certain employments.

Under this Act a 'minimum statutory wage' has been established for all types of daily employment. It also lays down the maximum number of working hours per employee, mentioned in the schedule to the Act. The maximum daily hours, weekly rest days and overtime have been set out.

Coverage and Salient Features

- The Act extends to the whole of India and applies to all establishments employing one or more persons and engaged in any of the scheduled employments.
- The Act envisages fixing of minimum statutory rates of wages in respect of scheduled employments, by the appropriate government from time to time.
- The appropriate government may in relation to any scheduled employment, fix the minimum rates of wages which have been fixed under this Act, fix the number of hours which shall constitute a normal working day, provide for rest day in every period of seven days, payment

of remuneration in respect of days of rest, payment for work on a day at a rate not less than the overtime rate etc.

4.5.12 Payment of Bonus Act, 1965

An Act to provide for the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected herewith.

According to this Act the employer has a statutory liability to pay a bonus to employees in accordance to a prescribed formula. The Act also provides the machinery for the enforcement of the liability of payment of the bonus. The Act extends to any unit where more than 20 people are employed. Payments of bonuses are linked to profits or productivity of the establishment involved.

Coverage and Salient Features

It applies to every factory (as defined under the Factories Act) and every other establishment in which twenty or more persons are employed on any day during an accounting year.

Employees drawing salary more than Rs 3,500/- per month are not covered under the Act.

Further, employees of the general insurance companies, LIC, Central/State Government Establishments, Indian Red Cross Society, Universities and Educational Institutions, Hospitals, Chambers of Commerce, R.B.I. etc. are not entitled to bonus under this Act.

4.5.13 Payment of Gratuity Act, 1972

An Act to provide for a scheme for payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, companies, shop or other establishments and for matters connected therewith or incidental thereto.

This Act was promulgated to provide appropriate legal provisions for payment of gratuity. The Act introduced a scheme for the payment of gratuity as a retirement benefit and a measure of social security.

Coverage and Salient Features

Every employee irrespective of his wages is entitled to receive gratuity after he has rendered continuous service for 5 years or more, though this is relaxed in case of death or disablement.

- Gratuity is payable at the time of termination of his services, either (i) on Superannuation, or (ii) on retirement or resignation, or (iii) on death or disablement due to accident or disease. Termination of services includes retrenchment.
- The Act applies to:
  - Every factory, mine, oilfield, port, railway company
  - Every shop or establishment within the meaning of any law for the time in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day in the preceding twelve months,
  - Such other establishment or class of establishment, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months as Central Government may, by notification, specify in this regard.

(ii) This Act however is not applicable to apprentices and persons holding a post under the Central or State Government who are governed by any other Act or by any other rule providing for payment of gratuity.

(iii) The appropriate government is empowered to exempt, by notification, any establishment, factory, mine, oilfield, port, railway company or shop to which this Act applies from the

operation of this Act, if the government so opines that the employees of such establishment, etc. are in the receipt of gratuity benefits not less favourable than the benefits conferred under this Act. The appropriate government may also exempt any employee or class of employees, similarly.

The payment of gratuity on retirement or death/disability is a part of most wage negotiations; this Act merely makes it mandatory in certain cases. Liability is fixed, as the total amount of gratuity is not supposed to exceed the prescribed limit.

4.5.14 Payment of Wages Act, 1936

An Act to regulate payment of wages to certain classes of employed persons.

An employer under this Act has the statutory obligation to make payment of wages within the prescribed period, which differs from one establishment to the other**.**

Coverage and Salient Features

It applies in the first instance to the payment of wages to persons employed in any factory, any railway or any establishment or class of establishment specified in the Act.

The Act, however, does not apply to wages payable in respect of a wage-period which, over such wage-period, averages Rs.1600/- a month or more.

The Act is administered by the State Governments in their respective States. However, in case of railways, mines, oil fields and Central air transport service it is administered by the Central Government.

Every employer shall fix the wage period, which may be per day, per week or per month etc, however in no case may it exceed one month.

Wages must be paid within 7 days of the expiry of the wage period if the number of persons employed in an establishment is less than 1000, and in other cases within 10 days of expiry of the wage period.

4.5.15 Sales Promotion Employees (Conditions of Service) Act, 1976

An Act to regulate certain conditions of service of sales promotion employees in certain establishments.

Coverage and Salient Features

The Act covers Sales Promotion Employees engaged in pharmaceutical or other notified industries.
A sales promotion employee is defined as anyone working in a pharmaceutical industry or any notified industry doing work relating to sales/business promotion and who:

- draws wages of more than Rs. 1600/- being engaged in supervisory work,
- is not employed mainly in managerial or administrative capacity.
- The Act provides that certain enactments like the Industrial Disputes Act of 1947, the Minimum Wages Act, 1948 etc would apply to such persons.

The Act in main concerns itself with leave entitlements and cash compensation for such category of employees. It also mandates issue of appointment letters to these employees.

4.5.16 State Shops And Establishments Acts

Almost all State/Union Territory Governments have enacted their own Shops and Establishments Acts.

Coverage and Salient Features

- The Acts extend to the whole of the State (or Union Territory) and covers all establishments irrespective of their size, turnover and persons employed.
- The main objective of the Acts is to regulate the working and employment conditions of workers in the so-called unorganised sector, i.e. the shops and establishments including the commercial establishments, which are not covered by the Factories Act or Mines Act or any other Act regulating the employment conditions.
- The Acts in general apply to all persons employed, whether directly or through an agency or contractor, and whether for wages or not, in or about the business of an establishment, including the apprentices. The Act also applies to the clerical and other staff of a factory that are not covered by the Factories Act.
- The Acts generally provide for the working hours, rest intervals, overtime, holidays, leave, termination of service etc.

These Acts seek to regulate the working conditions of workers in the unorganised sector, including shops and establishments that do not come under the Factories Act. Other rights and obligations of the employer and employees are also laid down so as to safeguard and specify minimum standards.

4.5.17 Trade Unions Act, 1926

An Act to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions.

Coverage and Salient Features

The Act extends to the whole of India and is applicable to all the unions of workers and associations of employees.

In India the membership in a trade union is not obligatory in theory, but in practice most workers and office staff are enrolled as members of a union. The major trade unions are affiliated to political parties through the national trade union bodies.

The unions in the collective bargaining system enter into binding contracts and settlement with the employers on behalf of the workers. Wage negotiations in the 'organised' sector are left to this process of collective bargaining subject to conciliation, arbitration and adjudication.

- This Act provides for registration of trade unions and although registration of a trade union is not compulsory the Act confers on a registered trade union certain protection and privileges. The Act is a Central enactment but it is administered by and large, by the State Governments.
- The Act extends to the whole of India and it applies to all kinds of unions of workers and associations of employers, which aim at regularizing the Labour Management relations.
- Any seven or more members of a trade union may by subscribing their names to the trade union or otherwise complying with the provisions of the Act with regard to registration, apply for registration of the trade union under the Act.
- No trade union may be registered unless at least 10% or 100 of the workmen, whichever is less, who are engaged or employed in the industry with which it is connected, are members of such Trade Union.
- A registered trade union can sue and be sued, in its own name. However, no legal proceeding can be initiated against a registered trade union in respect of any act done in furtherance of a trade dispute under certain conditions, as provided under the Act.
- Office bearers of a Trade Union are 'Protected Workmen' under the Act. No employer may, during the pendency of any proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute by altering to his prejudice, his conditions of service or by discharging or punishing him, except with the express permission in writing of the adjudicating authority.

4.5.18 Workmen's Compensation Act, 1923

An Act to provide for the payment by certain classes of employers to their workman of compensation for injury by accident.

The general principle is that a workman who suffers injury in course of his employment should be entitled to compensation and in case of a fatal injury his dependants should be compensated. The liability of the Employer under the Act has no connection with any wrongdoing on the part of the employer.

This is one of the earliest pieces of labour legislation in India. It covers all cases of 'accident arising out of and in the course of employment' and the rate of compensation to be paid in a lump sum, is determined by a schedule proportionate to the extent of injury and the loss of earning capacity.

Coverage and Salient Features

- This law applies to the unorganised sectors and to those in the organised sectors who are not covered by the Employees State Insurance Scheme, which in effect is better than the Workman's Compensation Act.
- In particular it may be noted that the Act covers any person who is employed, but not in a clerical capacity, in natural petroleum or natural gas operations, manufacture or handling of explosives in connection with the employer's trade or business, and for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale of any article or part of an article in any premises wherein or within the precincts whereof twenty or more persons as so employed is a workman under the provisions of this Act. A detailed list of such establishments is given under Schedule II to the Act.
- The younger the worker and the higher the wage, the greater is the compensation subject to a limit. The injured person, or in case of death the dependent, can claim the compensation.

1. The Workmen's Compensation (Amendment) Act, 2000 with effect from 8.12.2000 has brought all the workers within its ambit irrespective of their nature of employment i.e. whether employed on casual basis or otherwise than for the purposes of the employer's trade or business. Therefore casual labourers are also to be provided compensation for death or disability.
2. If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions this Act. The concept of 'notional extension of the employer's premises' has been read into the Act by the Courts.

4.6 Disinvestment Policy and Recent Privatisation Initiatives in the Infrastructure Sector

4.6.1 Disinvestment Policy In India.

Introduction

Privatisation in a broad sense is the process of transferring control over sectors from the Government into private hands. This may involve the transfer of Government assets to private hands or merely involve the termination of a Government monopoly and allow private sector entry into hitherto public sector monopolies.

The Governments, either at the State or Central level, have formulated no overarching Privatisation policy in the above sense. But the State and Central Governments have formulated policies and procedures in relation to the sale of Public Sector Undertakings (PSUs). The term Disinvestment is used to refer to this process of the sale of PSU's. Normally disinvestment is a precursor to

privatisation. In many cases the Government may sell of its entire stake thus completing the privatisation process. Where however the government has seen it fit not to privatize the PSU's, either due to strategic concerns or otherwise, it has still seen it fit to divest some stake in these industries to retail investors. Disinvestments of this nature, it must be noted, are not necessarily precursors to privatisation.

The Disinvestment process does not directly impact upon Private Sector participation, since in the infrastructure sectors, the Government exercises control through administrative mechanisms rather than through PSU's. Disinvestment by definition can be carried out only with respect to PSUs. The process for privatisation in the infrastructure sectors, if any, is contained as a part of the general policy of allowing private sector participation in the particular infrastructure sector. For instance the privatisation efforts of the GoI in the power distribution sector. However for the sake of completeness an overview of the Disinvestment efforts by the State and Central Governments is given in this subsection.

Union Disinvestment policy

The Disinvestment Commission , describes the development of the disinvestment policy of the Central Government in a comprehensive manner. The Central Governments Disinvestment policy is briefly set out below.

Broad-basing equity, improving management, enhancing availability of resources for PSU's and yielding resources for the exchequer are some of the key objectives, which have driven the Governments disinvestment programme.

For the purpose of guiding its decisions on which PSU's must be disinvested the Central Government determines whether the PSU falls in a strategic or non-strategic sector. The extent of disinvestment in a given PSU is primarily determined by whether it is in a strategic sector or a non-strategic sector. In the strategic sector the stated policy of the Government is to retain a majority shareholding. The following three industries have been defined as falling in the strategic sector,

- Arms and ammunitions and the allied items of defence equipment, defence aircrafts and warships.
- Atomic energy (except in the areas related to the generation of nuclear power and applications of radiation and non-radio isotopes to agriculture, medicine and non-strategic industries).
- Railway transport.

All the other industries are considered to fall in the non-strategic sector. As far as the PSU's in the non-strategic sector are concerned the Government is prepared reduce its stake to 26% or lesser. But even in the case of the non-strategic sectors the Policy provides for two situations where disinvestment would be contra-indicated. The first situation is in sectors, which are natural monopolies. In these sectors the government might find it advisable to retain it's holdings and position the PSU's as a countervailing force. Also in areas where there is a need for the development of regulatory mechanisms it might not be advisable for the Government to privatize the sector through disinvestment until such mechanisms are put in place.

Once the decision to disinvest has been taken, the next issue before the Government is the manner in which such disinvestments should take place. Disinvestment normally involves a sale to private sector with a change in ownership or management. But sale of shares to public without transfer of ownership or management can also take place. Where the Government feels that the PSU cannot be revived than it also exercises the option of closure of the PSU with a sale of its assets. Before offering the PSU's for sale, the Disinvestment Commission carries out a systematic analysis of the Company's strengths and weaknesses and then recommends the options before the Government. These could include restructuring or offering a stake for a strategic investor to take over the management of the Company and improve its performance.

The Disinvestment Commission is a five-member body headed by a Chairman. All the members are senior and eminent persons with wide and varied experience in the fields of business and finance. The current Chairman of the Disinvestment Commission is Mr.R.H.Patil.

Till date, as per the statistics available with the Disinvestment Commission , there are 231 PSU's. Of these nearly 64 PSU's have been referred to the Commission and the process of Disinvestment has been commenced in respect of 48 PSU's. A sectoral break up of the PSU's referred to the Disinvestment Commission is given below:

Sector	**Number of PSU's**
Minerals and Metals	7
Ind. Dev and Technology	5
Petroleum	5
Trade and Marketing	5
Consumer Goods	4
Contract and Const Services	4
Fertilizers	4
Tourist Services	4
Transport Services	4
Chemicals and Pharmaceuticals	3
Medium and Light Engineering	3
Steel	3
Transport Equipment	3
Fertilizers	2
Power	2
Coal and Lignite	1
Consultancy Services	1
Dairy Products	1
Heavy Engineering	1
Telecom Services	1
Transport and Marketing	1

As can be seen from the above break up except for a few PSU's in Power and telecom there are no other PSU's in the infrastructure sector that have been considered for disinvestment. A similar pattern is prevalent in the States as well. The policies of Disinvestment thus as stated earlier, do not have a significant impact on the enabling environment for PSP in the infrastructure sector.

4.6.2 State Disinvestment policies

Andhra Pradesh

In AP efforts have been made to restructure the public and cooperative enterprises since 1983. Significant institutional machinery has been set up to systematically carry forward the process of Disinvestment. The Cabinet Sub-Committee on Disinvestment operates under the direct purview of the Chief Minister. It is assisted by the Public Enterprise Department as well as the Implementation Secretariat. The roles of these two Departments appear to overlap but their activities are presumably coordinated by the Sub-Committee so as to achieve smooth functioning. The efforts of the GoAP to facilitate the process of disinvestment has received wide coverage especially in light of the fact that in 2003 when the Central Governments plan to disinvest HPCL was being litigated at the Supreme Court, the State reported the maximum number of PSU's disinvested .

The GoAP as on date owns 40 PSU's and holds dominant shareholding in 73 cooperatives. As per the Strategy Paper issued by the GoAP the main industries under the GoAP which are being considered for disinvestment are as follows

Sector/Industry	Number of PSU's (Includes societies and cooperatives)
Promotional Development	21
Trading/Marketing	6
Production/Manufacturing	65
Service	32

The government of Andhra Pradesh has formulated two Action Plans. In the Phase I Action Plan which was a tentative first step, Government of Andhra Pradesh identified 19 small and medium size Public and Co-operative Enterprises for restructuring, downsizing and even closure. On successful completion of this Phase I in 2002 the GoAP has now embarked on Phase II.

Some of the key features that have guided the GoAP in deciding which companies to privatize in Phase II are mentioned below;

1. Enterprises which prima facie have ceased to have any relevance in the post liberalisation scenario;
2. Enterprises, which are engaged in manufacturing and trading activities where private sector has already significant presence;
3. Enterprises that Government considers, for any specific reasons, need priority for privatisation or restructuring;
4. Enterprises that have both commercial and social obligations;
5. Enterprises whose products are not available in the private sector ; and
6. Large labour intensive enterprises that have high social and political costs in terms of redundancy and where considerable preparatory work will be required for retraining and redeployment.

The study on each enterprise reviews all relevant aspects and makes specific recommendations as to what method should be followed for privatisation or restructuring to get optimum results. All possible options for privatisation such as sale of business, sale of assets, strategic alliance, division of business before privatisation, placing the company on stock exchange are usually considered.

In Andhra Pradesh the following SLPE's have been closed

1. AP Scale Inds Development Corporation
2. AP Textile Development Corporation
3. Allwyn Watches Ltd
4. AP Non Resident Indl. Corporation Ltd
5. AP Consumer Fedn Ltd
6. AP Electronic Development Corporation
7. AP Fisheries Development Corporation
8. AP Spinfed
9. Sri Krishnadevaraya Co-op Oil Seeds
10. Sri Vijayavardhani Co-op Oil Seeds
11. AP Sugarfed
12. Chirala Co-op Spinning Mill

Out of a total number of 128 SLPE's, 87 have been identified for disinvestment and the process has been initiated for 79 of these units. Of these 12 PSU's have been closed as indicated in the above list.

Gujarat

The Government of Gujarat constituted a State Finance Commission ("SFC") in 1992 and the blue-print for disinvestment was set out in the State Finance Commission Report of 1994. In 1996, the Cabinet approved the Public Sector Restructuring Program (PSRP) based on the SFC recommendations on PSU restructuring.

The GoG has set out a four options in disinvesting PSU's.

1. The first mode is closure of loss making and unviable units.
2. The second approach is complete divestment of government stake through a strategic sale to a private promoter.
3. The third strategy is of partial privatisation, where the government would in some cases go down below 51 per cent.
4. The fourth approach is through mergers of units performing similar functions.

To strengthen its efforts in this direction, the state government has set up a State Renewal Fund along the lines of the National Renewal Fund created by the centre in 1991. The proceeds of this corpus will be utilised to fund VRS and also retraining of the retrenched workforce wherever it is required. However the State has no specific Department or Commission of disinvestment to implement its policies. As of January 2002 the State had identified 24 PSU's for disinvestment and initiated the process of disinvestment in respect of all of these units.

1. Gujarat State Textiles Corporation
2. Gujarat State Construction Corporation
3. Gujarat Fisheries Development Corporation
4. Gujarat Small Industries Corporation
5. Gujarat Dairy Development Corporation
6. Gujarat Communications & Electronics Ltd.

In Gujarat out of a total of 54 PSU's, 24 were identified for disinvestment and the process of disinvestment was initiated in respect of all 24 of these PSU's.

Karnataka.

In February 2001, the Karnataka Government announced its "Policy on Public Enterprises and Reforms" (the "Policy"). Subsequently, a Department of Disinvestment and Public Enterprises Reform was established August 2002.

The Policy states that PSUs that are commercial in nature and are in competition with a strong private sector presence would be "restructured" through privatisation or closure. Those PSU's not involved in commercial activities would be restructured by the induction of strategic partners, or through mergers, so as to reduce dependence on State budgetary support. No new PSUs would be started unless for the "expeditious execution" of specific major projects, for example for infrastructure projects. Finally, "rationalisation" of employment in the PSUs would be ensured through implementation of voluntary retirement schemes.

The following are a list of the PSU's that have been closed,

1. Chamundi Machine Tools Ltd.,
2. Mysore Cosmetics Ltd.,
3. Karnataka Telecom Ltd.,
4. Mysore Match Company Ltd.,
5. Mysore Acetate & Chemicals Company Ltd.,
6. NGEF Ltd.
7. Karnataka State Textiles Ltd.,
8. Mysore Lamp Works Ltd.,
9. Karnataka Agro Proteins Ltd.,
10. Karnataka State Veneers Ltd.,
11. Karnataka Small Industries Marketing Corporation Ltd.

Out of a total of 85 PSU's, 38 were selected for disinvestment and the process was initiated in respect of 20 PSU's. Of these 11 have been closed as shown above.

Madhya Pradesh

The Government of Madhya Pradesh does not have a specific policy on disinvestment. However, it has formulated a policy for reform of public sector enterprises, entitled "Policy for Public Sector Reform and Restructuring" .

This Policy discusses the role of the public sector and the national policy regarding public sector reforms. The Policy also states that though, the State Government had not issued any specific guidelines regarding setting up of PSUs over the years, a large number of PSUs have been established to carry out specific tasks as per the priorities of the Government and there is no uniformity in the structure of these PSUs. While some are Statutory Boards under legislative enactments, others are companies registered under the Companies Act, 1956. The Government has also established PSUs as registered/cooperative societies.

The Policy further states that only a few of the PSUs are earning profits and a huge amount of capital has been tied up in these enterprises with little or no return to the State Exchequer. Many of them are depending on budgetary support even to meet their revenue expenditure.

The Policy therefore states that in future, State enterprises may be restricted to areas of continuing relevance, made financially viable and serve as dynamic instruments of State Policy. For PSUs which are not doing well it recommends that they must be restructured by change in the capital structure, merger or creation of independent entities, down sizing of manpower and improvement in management systems.

The Policy also envisages that PSUs in the future would be restricted to the following areas, from the standpoint of public purpose:

1. Provision of merit goods and services.
2. Exploitation of natural resources.
3. Small and village industries where marketing support, etc. for artisans and other vulnerable sections is required.
4. Technology development/creation of manufacturing capability/service in strategic areas which are crucial in the long term development of the economy and where private sector investment in inadequate.
5. Financial institutions to ensure flow of funds to vulnerable groups.
6. Promotion of investment in infrastructure and resource mobilisation for the growth of the economy.

In line with the above objectives, the Policy provides for a review by the Government of the existing portfolios of public investment in

- Non strategic areas,
- Inefficient, unproductive and loss making areas,
- Areas with low social and public purpose
- Areas where private sector has developed sufficient expertise and resources, so as to decide on their continuing relevance so that the reform of the PSU's in these sectors can be commenced in accordance with the stated policy objectives.

The Policy further states that part of the Government holding in the share capital of existing PSU's may, be disinvested in order to introduce market discipline in relation to their performance. Chronically sick public enterprises incurring heavy losses, operating in a competitive market and serving no public purpose may be wound up.

The Policy recommends that the Government shareholding in strategic areas be reduced to 51% and to 26% in non-strategic areas. The proceeds of disinvestments must be utilized for investment in infrastructural facilities and in social sectors like education and health. The process should be totally

objective and transparent and based on the best available professional advice. The Policy also lays down guidelines for those PSUs wherein Government decides to retain management control.

Out of a total of 26 PSU's, 14 have been identified for disinvestment and the process has been initiated for all 14 of these PSU's. Of these only one has been privatized. None of the identified PSU's have been scheduled for closure presently.

4.6.3 Power

The power sector has seen widespread changes relating to proposed privatisation and unbundling of generation, transmission and distribution services. Rightsizing the State electricity utilities is an important precondition for their successful privatisation. This can be done either by laying off workers, or by stopping recruitment and gradually privatising functions. Attempts in this direction by the government have faced significant resistance from the existing labour force. In 2000 there were protests and strikes in UP by employees of the State Electricity Boards over the UP State Electricity Board's decision to corporatize the electricity industry in the state.[69]
Issues relating to the freedom of a reconstituted SEB to recruit and retain the required kind of personnel form an important consideration for the employees of the SEB's while giving their consent to privatisation initiatives.[70]

The Uttar Pradesh state electricity employees, numbering over 100,000, *enmasse*, had declared a strike from 15 January 2000, when notices were issued to the effect that UPSEB would be trifurcated into UP Power corporation, the UP Thermal Power Generation Corporation and the UP Hydroelectric Power Corporation, and that the Tanda thermal power project would be sold off to National Thermal Power Corporation (NTPC) and Kanpur power supply would be corporatised. This occurred, despite assurances from the government that all the rights and privileges of the employees will be protected in the new entities which would be created.[71]

The strike continued for 11 days, and the UP Government was forced to declare the strike illegal and invoke the Essential Services Maintenance Act and National Security Act to resume services.

However, in Rajasthan the model of 'privatisation through the back-door' seems to have been tried successfully.[72] This was done by stopping fresh recruitment and gradually outsourcing functions like accounting, billing and sanitation to private bodies.[73] The reforms that are being proposed in most SEB' s would also involve use of the Voluntary Retirement Scheme[74] ("VRS") to achieve a successful transformation of the labour composition, so as to make it appropriate in a privatised set up.[75]

4.6.4 Telecom

The telecom sector too had seen its share of strikes against corporatisation of telecom service providers. In August 2000 seven labour unions had launched a two-day strike against the proposed corporatisation of the department of telecom services and department of telecom operations.[76]

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[69] Dr. Pachauri, "Power Sector Reforms", *TERI Newswire* VI(1), 1-15 January 2000 at http://www.teriin.org/features/newswire/tnw61.htm (visited on 9th of October 2003).

[70] See http://www.indiainfoline.com/infr/spfe/sebs.html (visited on 11th October 2003).

[71] *Id.*

[72] *See* P. N. Bhandari on "Privatisation of SEBs" in *Powerline* Vol. V (No. 12) at 47.

[73] *Id.*

[74] Voluntary Retirement Schemes, in India, refer to the method of offering an incentive for employees in the Public Sector to take up early retirement usually in the form of a lump sum cash payment.

[75] See the comments in S. D. Naik, "Labour Market Reforms", *Business Line* January 24, 2002 http://www.thehindubusinessline.com/bline/2002/01/24/stories/2002012400050800.htm (visited on 11th October 2003)

[76] On http://www.economictimes.com/today/25econ05.htm (visited on 9th of October 2003).

The impact of this strike was felt mostly in the states of West Bengal, Kerala and Tamil Nadu.

The disinvestment by the government of its stake in Videsh Sanchar Nigam Limited in 2002 did not precipitate any serious labour unrest, and is an encouraging sign for future privatisations. The proposed privatisation of Mahanagar Telecom Nigam Limited in the recent future would be the next milestone in this sector. Once both VSNL and MTNL are fully privatised, the stage would be set for the eventual privatisation of the rest of the DoT network.[77]

As late as in September this year telecom major Bharat Sanchar Nigam Limited has been examining the option of using VRS to downsize its manpower and reduce operational costs.[78] Videsh Sanchar Nigam Limited has already offered VRS to 953 employees at a cost of Rs 94 crore.[79]

4.6.5 Transport

The strike by workers in a number of state transport undertakings, in May of 2003 was indicative of the mood against privatisation initiatives of the government.[80]

The fact that transport is a 'public utility' sector makes its privatisation of loss making services and routes an unpopular exercise. The Tamil Nadu government in 2002 on opposition from opposition from political parties, labour unions and the public at large privatised only 50 per cent of all the public transport routes.[81]

There have been strikes by airport employees too, opposing a plan by the government to partially privatise the operations of the airports at Mumbai and Delhi.[82] These were continuing even till September of this year.[83]

The Ministry of Surface Transport and the Indian Ports Association's initiatives to privatise operation of ports and docks have also met with similar opposition. The policies of handing over the management of ports and docks to private players have been called 'anti-labour' and strikes have been regularly threatened.[84] Similar resistance can be expected on any initiatives to downsize the port or dock operations.

To rationalise manpower a number of institutions in the transport sector have taken to proposing VRS schemes. In July of 2003 a Voluntary Retirement Scheme for some employees of Railways was introduced. VRS is being offered in a number of ports through the port trusts[85], for instance the

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[77] See the comments by D. Sampathkumar, "Labour in a Reforms Era" *Business Line* http://www.blonnet.com/iw/2000/09/24/stories/0824h151.htm (visited on 9th of October 2003).

[78] http://www.indiatelecomnews.com/detail.asp?newsid=312 (visited on 11th of October 2003).

[79] http://www.ciol.com/content/news/2003/103090208.asp (visited on 11th October 2003).

[80] http://www.dawn.com/2003/05/22/top12.htm (visited on 9th of October 2003).

[81] http://www.financialexpress.com/fe_full_story.php?content_id=23895 (visited on 9th of October 2003).

[82] http://www.thehindubusinessline.com/2003/09/19/stories/2003091902470500.htm (visited on 9th of October 2003).

[83] See the news article at http://autofeed.msn.co.in/pandoraV15/output/C50E54A1-E3AF-4EB0-9F61-BF5EEB1BDAF3.asp (visited on 11th of October 2003).

[84] See news articles http://www.blonnet.com/businessline/2001/05/10/stories/091059s2.htm and http://www.blonnet.com/2002/01/05/stories/2002010501480600.htm (both visited on 9th October 2003).

[85] See "Another VRS Proposed for Port Employees", January 14, 2002 *The Hindu* http://www.hinduonnet.com/thehindu/2002/01/14/stories/2002011401790400.htm (visited on 11th October 2003).

Mumbai Port Trust.[86] The Shipping Corporation of India too introduced VRS schemes in 2001 and 2002.[87] But national labour unions, some in the transport sector, have been protesting these schemes, calling them 'unfair' to the employees.[88]

In conclusion it may be noted that resistance to privatisation in these sectors is not due to any deficiency in the legal framework. The workers would be in a position to avail themselves of the same legal benefits in a privatised framework as well. A well-planned privatisation strategy minimising direct methods of layoff and incentivizing the same through schemes like VRS should considerably smoothen the privatisation process.

4.6.6 Developments in Focal States

Gujarat

The Gujarat government vide Govt. Resolution No: SIU- 1098- 668 Ch Dt. 13-8-1998 has taken up the policy of 'Amicable settlement of disputes by management and representatives of labour through proactive action of Labour Department'. The thrust in this GO seems to be on small-scale industries. Also, the government has enacted a group insurance scheme, called the *Shramik Suraksha Scheme*, for unorganised sector and rural workers.

The Gujarat Industrial Policy for the year 2003 plans to put in place a number of labour law reforms, such as:

- Simplification of Rules and Procedures- providing for an Annual Consolidated Return.
- Flexibility in Labour Laws in the SEZs or Industrial Parks.
- Features like the Single Business Act, enabling Self-certification through accredited consultants, introducing 'one comprehensive visit of inspectors' on an annual basis.

Andhra Pradesh

AP has amended some of its labour laws to attract investment. This was done vide G.O. Ms.No.33 Dt.5-7-99 keeping in mind Information Technology industries like the Business Process Outsourcing industry.

Changes were made through this directive to the Factories Act Rules, Payment of Gratuity Rules and also the AP Shops and Establishments Act. Self-certification has been introduced for the IT sector in number of labour enactments. The effects of these laws include allowing women and young persons (between the age of 18 and 21) to work at night, providing flexibility to the companies in the maximum numbers of hours an employee can work, without payment of overtime, freedom to operate 24 hours a day and 365 days a year, and to simplify the 'separation' of employees. In the Shops and Establishments Act amendments relating to application of holiday provisions to manufacturing units have been made.

Madhya Pradesh

The most striking feature in MP is the proposed simplification of labour laws for SEZs to attract more investment. the industries in the Indore SEZ have the freedom to 'hire and fire' The State

[86] "Mumbai Port may go in for another VRS" *Infraline*, Friday June 15 2001, http://www.infraline.net/Transport/2001/JUNE/JUNE152001Transport.htm.

[87] See http://pib.nic.in/archieve/lreleng/lyr2001/rjul2001/24072001/r240720017.html and http://www.myiris.com/shares/company/snapShotShow.php?icode=SHICORIA (both visited on 11th of October 2002).

[88] "VRS Offer is Unattractive" February 7 20002, *The Tribune* http://www.tribuneindia.com/2002/20020207/biz.htm (visited on 11th October 2003).

Government has proposed to notify a single reporting format for all SEZ units that would cover all Labour Laws. In these SEZs Appropriate officials of the SEZ are to be designated as Inspectors, Conciliation officers and Registration officers under various Labour Laws to provide single window services for industries.

It is further proposed that for inspections relating to worker's health and safety and other Labour Laws, the State Government would use best international practices by permitting units to get such inspections done through such accredited agencies (outside Labour Department) as may be notified by the Government.

Karnataka

State specific legislations in Karnataka include the Karnataka Industrial Establishments (National and Festival Holidays) Rules, 1964, which specify the number of holidays and provide for holidays on polling days. Under the Karnataka Labour Welfare Fund Act, 1965 a fund for financing and conducting activities to promote welfare of labour in the State is provided for. Also, the Labour Department through SL.No.9 Circular No. SSI/CSI/133/90/91 Dt.2-1-1991 has taken the initiative of assisting the sick units in reaching equitable agreement with Labour Union through its Labour/ Law Department.

4.6.7 Labour – Summary and Conclusions

The necessity of labour reforms in India generally focuses on providing employers the flexibility to retrench a redundant work force when business or project becomes unviable. The duration, types and other conditions of employment and matters relating to outsourcing of work are always issues of concern for the employer. Labour reforms are therefore essential for raising investor confidence in India.

Labour laws are perceived as imposing barriers to green field investment since the industry would not be able to downsize if and when there is a downturn in the business environment. Pursuant to the announcement in the 2001-2002 budget that the labour laws would be reformed, a Group of Ministers was set up to work out the modalities but has not yet come up with a final proposal.

Among the laws selected for review, the most contentious were the reforms proposed to the Industrial Disputes Act, 1947, the Contract Labour (Regulation and Abolition) Act, 1970, and the Payment of Wages Act, 1936, all summarized above. As one example, in terms of Chapter V-B of the Industrial Disputes Act, establishments employing up to 100 persons should secure prior permission from the Government concerned before resorting to closure. Such a provision impedes the ability of the management to close down an unviable establishment. Therefore, the Report of the II National Commission on Labour proposes a flexible procedure for closure of establishments employing up to 300 workers, and a different, less complicated procedure for establishments employing more than 300 workers. In the latter case, the employer shall apply for permission to the appropriate Government 90 days before the closure and also serve a copy of the application to the recognised negotiating agent. If the Government does not respond within 60 days of receipt of such an application, then the permission shall be deemed to have been granted.

Another major issue relates to the entitlement of contract labourers to get absorption in the permanent services of the establishment upon the abolition of contract labour. The Supreme Court of India, in State Authority of India, Ltd. v. National Union of Waterfront Workers & Others 2001(2) Labour Law Journal, p. 1087, while reviewing a three Bench decision of the Supreme Court in the Air India case, held that the contract labourers have no automatic right to get absorption in the establishment upon such abolition. Despite this decision, there has not been any decisive move to effect necessary changes in the Contract Labour (Regulation and Abolition) Act to incorporate those findings of the Supreme Court.

It is also seen that certain state legislation on Shops and Establishments, described above, creates difficulties in carrying out round the clock work in an establishment. Thus such legislation may be required to be amended to remove this impediment.

The Report of the National Commission on Labour, 2002 emphasized the need to rationalize and simplify the existing labour laws in the area as similar expressions and terms have been used in more than one legislation with different interpretation. It also suggested the setting up of a Grievance Redressal Committee as an alternative forum for the settlement of labour disputes. These issues will have to be addressed to encourage private sector participation in infrastructure projects, especially participation by foreign investors. It is hoped that the report of the Group of Ministers as stated in the year 2001 budget will soon be issued.

4.7 Land and Land Acquisition Legislation

Land and land acquisition legislation is a very important aspect regarding successful private sector participation in infrastructure projects. The ownership of land and its transferability is a primary question raised by potential private investors. Almost all infrastructure projects in India raise the issue of land acquisition due to the high population density. The transfer of large areas of land and/or right of way in or over land or right of use of land is a necessity for such projects and the rights of the persons who now own it or use it must be determined for this purpose. In most infrastructure projects, the land for the project is transferred from the State Government to the developer from private landowners by means of the provisions of the Land Acquisition Act, 1894 (Act No. 1 of 1894), as amended or similar legislation.

Entry 42 on the Concurrent List of Schedule III of the Indian Constitution provides for acquisition and requisitioning of property. Thus both the Central Government and the State Governments have the power to legislate on the subject. Article 31-A of the Constitution further provides that no land acquisition law can be challenged on the grounds of being in violation of Article 14 or Article 19 (1)(f). Article 19(1)(f) provided for the general rights of a citizen to acquire, hold and dispose of property while Article 14 provided safeguards against arbitrary action by the State either through legislative or executive acts. Thus many of the land acquisition acts, prior to the insertion of Article 31A were open to challenge on the ground that the law deprived the individuals right to property or that it deprived them of such right in an arbitrary manner. Article 19(1)(f) has since been deleted with effect from 1979. However Article 31A still continues to provide protection against Article 14.

The Land Acquisition Act, 1894, as amended, mentioned above is the primary piece of legislation governing acquisition of land by the Central Government. However, there are also separate laws in which powers have been granted for land acquisition for specific purposes at both the State level and the level of the Central Government. Examples include the Atomic Energy Act, 1962, the Ancient Monuments Preservation Act, 1904, the Gujarat Private (Forests) Acquisition Act, 1972, the Karnataka Acquisition of Land for Grant of House Sites Act, 1972, the Madhya Pradesh Housing Board Act, 1950, the Madhya Pradesh Municipalities Act, 1961, and the Karnataka Industrial Development Areas Act, 1966.

Since the Land Acquisition Act, 1894 provides the template for most of those subsequent enactments, we review its important facets below. Under the Act, the Central Government may declare a particular piece of land is required for a "public purpose. (Section 4). The term "public purpose" initially was not defined and resulted in a significant amount of case law. The main point which evolved from those cases was that such a purpose must be one which is beneficial to the community and in which the general interest of the community, not the particular interest of individuals, is directly and vitally concerned. (see Babu Barkya Thakurs v. The State of Bombay and Ors., AIR 1960 SC 1203, (1961) I SCR 128). However, the Act was amended by a new Section 3(f) in 1984 to explicitly state that certain purposes are public purposes.

Some of the important purposes mentioned in Section 3(f) include acquisitions for,

1. Creating or extending village sites.
2. Town or rural planning.
3. For planned development of land for pursuance of any scheme or policy of Government.

4. Provision of land for a corporation owned or controlled by the State.
5. Provision of land to the poor or landless or to persons affected by natural calamities or to persons displaced by reason of implementation of any scheme undertaken by the Government.

Yet the Amendment does not codify the criteria on the basis of which a determination of public purpose shall be tested.

After the 1984 Amendment, there were certain other aspects regarding public purpose which were clarified by judicial decisions. Firstly, it has been held that a change of public purpose after the land has been acquired does not vitiate the acquisition proceedings. Also, once the original acquisition is valid and title vested in the acquiring authority, how the said authority uses the land is of no concern to the original owner. (see Ghulam Mustafa v. The State of Maharashtra, (1974) 2 SCC 288). Similarly, it has also been held that the land acquired for one public purpose can be used for another public purpose on account of change or surplus thereof. Further, a particular scheme may serve a public purpose at a given point of time but due to change in circumstances it may become essential to modify or substitute it by another scheme. (see State of Maharashtra v. Mahadeo Deoman Rai alias Kala, I (1990) 3 SCC 579).

Thus within the broad parameters of the doctrine of public purpose, the appropriate Government has discretion to acquire real property under the Land Acquisition Act. The judiciary normally does not interfere with the exercise of this discretion once it is shown that the condition precedent of a public purpose has been satisfied.

The Land Acquisition Act states that there must be a preliminary enquiry by the District Collector concerned to ascertain objections, if any, to the public purpose for which the land is proposed to be acquired. (Section 5-A). The objecting persons must be given an opportunity to be heard.

After considering the report of the Collector, the appropriate Government (State or Central) will declare that the land is required for a public purpose. (Section 6 of the Act.) This declaration will then be followed by the passing of an award by the Collector after the area of land acquired has been determined. Based on this area, there will be a computation of the amount of compensation payable to rights holders. (Section 11.)

In case of the need for **urgent possession** of the land, it may be taken by the appropriate Government even before the award is passed. (Sections 16 and 17 of the Act.) Furthermore, the law states that once the emergency provisions have been activated, the provisions which mandate declaration of public purpose and the passing of an award no longer have an effect. (see Satendra Prasad Jain and Others v. State of U.P., (1993) 4 SCC 69; Awadh Bihari Yadav v. State of Bihar, (1995) 6 SCC 31). However, the compensation would in all cases have to be paid before possession can be obtained.

The Land Acquisition Act also has provisions relating to:

- spreading information about the proposed acquisition (Section 9);
- review, revision and correction of the award before it is made final (Section 13-A);
- the payment of 80% of the amount of compensation when possession is taken using the special powers of urgency (Section 17);
- an interest payment of 15% per annum if the deposit of compensation determined by the court is delayed beyond a period of one year from the date of taking possession (Section 28); and
- the remedy to seek compensation based on a determination by the Court even by those persons who were not a party to such determination (Section 28-A).

In addition, there are important provisions on compensation payable. The Act envisages that the performance of the determination of compensation will take place in two stages. In the first stage, the District Collector determines the amount of compensation payable. If the party receiving the

compensation decides that the amount is insufficient, then he can approach the Court concerned on a reference made by the Collector. Under the Act, that Court is defined as the principal Civil Court of original jurisdiction or a special judicial officer within any specified local limits that the appropriate Government may appoint. Some States have appointed the Civil Judge (Senior Division) as the special officer to discharge the functions of the Court under the Land Acquisition Act.

Though there are guidelines on the basis of which the Court is supposed to determine the compensation, the same guidelines are not applicable to the Collector. Thus, under Section 23 of the Act, the Court is required to take into account the following factors:

- the market value of the land acquired;
- damage sustained to other property, movable or immovable, while taking possession;
- reasonable expenses incidental to change of residence or place of business, and damage bona fide resulting from diminution of the profits of the land between the time of publication of the declaration and the taking of possession;
- damage sustained by reason of the taking of any crop or trees; and
- damage on account of severance of land from other land of interested persons.

Under Section 18 of the Act, the compensation determined by the Collector can be objected to by the owners/interested parties on the following grounds:

- measurement of the land;
- the amount of the compensation;
- the persons to whom the compensation is payable; and
- the apportionment of compensation among the persons interested.

Delays during the process are endemic since there is no defined manner in which Collectors can be made accountable for delays in the passing of the acquisition order. In recent times, there have been instances where the concerned developer has opted for direct purchase of the land without using the framework of the Land Acquisition Act. In such a case, obviously there can be no objections as to public purpose or the passing on of benefits. However, the obvious pitfalls to such an approach are the increased costs of negotiation and the possibility that prices in the area will increase dramatically if the needs of the developer become well known.

The spirit of activism witnessed on the part of the Indian Supreme Court in the 1990s was witnessed in the field of land acquisition. Earlier the Supreme Court had confined itself to issues of appropriate market valuation and use of suitable multipliers. Nowadays, however, the courts have been seen to go beyond these issues and to try to ensure that the persons who are affected are identified and are included as beneficiaries in the project. For instance, the court in State of U.P. v. Smt. Pista Devi, (1986) 4 SCC 251 held that the principle of providing accommodation on the land developed by a Development Authority to the original owner was a salutary principle and that the principle should be followed by Development Authorities throughout the country. The judiciary is thus increasingly showing a greater sensitivity to issues of rehabilitation and resettlement. The final outcome of this trend remains to be seen.

Yet beyond a discussion of the land acquisition legislation itself lies the need to improve land record access and land record verification systems. Land records are not available on line so there is considerable difficulty in verifying their authenticity. The matter is further complicated due to the fact that a simple land transaction may relate to properties under the jurisdiction of different sub-registrars. Therefore, a mechanism is required to simplify and strengthen the framework with reference to verification of land records. This complexity has contributed to the length of time and cost of acquiring land for industrial and related purposes. Private investors must generally rely on the Government to acquire land for them and this has also led to many problems. These problems will be explored more fully with regard to the specific case studies conducted as part of Phase II of this Project.

4.8 Loan Security Legislation

Granting security to loans is a very important requirement imposed by lenders on borrowers in the infrastructure sector as well as in other areas of lending and investment. This Section of the Working Paper will summarise the laws governing the different kinds of loan securities, such as mortgages, charges, and pledges. It must be noted that there is no one legislation which comprehensively covers loan security creation and that the law governing loan security creation is to be found in more than one law. In addition, we will comment on the present lack of a full-fledged bankruptcy law in India.

4.8.1 Mortgages and Charges

The Transfer of Property Act, 1882, as last amended in 2002, is the primary legislation that deals with mortgages, especially for immovable property. The Act has been periodically amended to take into account various judicial decisions and other developments but the basic framework of the 1882 Act has been retained. Recent changes include the 2001 amendment of Section 54 with regard to the definition of Sale and the 2002 amendment of Section 106 which deals with the duration of certain kinds of leases.

Chapter IV of that Act defines the various terms, mentions the different kinds of mortgages and outlines the rights and liabilities of the mortgagor and the mortgagee. Section 58 of the Act provides for the following six different kinds of mortgages:

- Simple mortgage;
- Mortgage by conditional sale;
- Usufructuary mortgage;
- English mortgage;
- Mortgage by deposit of title deeds; and
- Anomalous mortgage.

The Transfer of Property Act also deals with Charges (Section 100) and defines what a Charge is. However, reference must also be made to Part V. Registration of Charges in the Companies Act, 1956, as amended. That Part provides certain additional rules and regulations to which companies will be subject when they are creating charges and mortgages.

In addition, the Civil Procedure Code, 1908, in Order XXXIV, also deals with certain important procedural aspects relating to the foreclosure, sale and redemption of property subject to mortgage. R. 15 of Order XXXIV states that the provisions that apply to a simple mortgage shall also apply to a mortgage by deposit of deeds and a charge consistent with Section 100 of the Transfer of Property Act. The other rules in that Order then proceed to describe the steps that need to be taken by the plaintiff before he can obtain a final decree from the Court. In a suit for foreclosure or for sale if the plaintiff succeeds initially, then the Court will pass a preliminary decree. At this stage, the Court gives the mortgagor an opportunity to redeem the property by paying the amount declared in the preliminary decree. If the mortgagor does not pay that amount, then the plaintiff (mortgagee) may apply to the Court for the passing of a final decree for foreclosure or for sale of the property, as the case may be.

4.8.2 Bailments and Pledge

The Contract Act of 1872, as amended, is the primary piece of legislation which deals with bailment and pledge. Chapter IX of the Act deals with **bailments**. Bailment under the Act is conceptualised as the delivery of goods by one person to another for some purpose, the goods being returned to the person after the purpose is accomplished. Sections 170 and 171 of the Contract Act also delineate the power of a bailee and banker to exercise the right of lien over the goods in their possession for services rendered by them.

Sections 172 to 181 of the Contract Act deal with the rules governing the creation and enforcement of **pledges**. A pledge is defined as a bailment of goods as security for payment of a debt or performance of a promise. The move towards dematerialisation of securities under the Depositories Act, 1996 initially created some confusion as to whether the dematerialised shares could be pledged. This issue now has been resolved with the various institutions, such as the regulator- the Securities and Exchange Board of India (SEBI) and the depositories- National Securities Depositories Limited clearly publicizing the modalities involved in pledging the shares. The procedure requires that both the investor (pledgor) and the lender (pledgee) must have depository accounts. The investor has to initiate the pledge by submitting to the Depository Party (DP) the details of the securities to be pledged in a standard format. The pledgee has to confirm the request through his or her DP. Once this is done, securities are pledged. All financial transactions between the pledgor and the pledgee are handled according to the usual practice outside the depository system.

However, it must be understood that the Contract Act does not seek to provide for a comprehensive framework for the creation of a security interest. It is therefore possible for parties to contractually create for themselves any permutation and combination of security interests that they feel best suits their needs. For instance, hypothecation, a variant of pledge where the possession of the property concerned remains with the pledgor, is a common kind of security interest in India but is not specifically mentioned in any of the provisions of the Contract Act.

4.8.3 Negotiable Instruments

The law relating to promissory notes, bills of exchange, cheques and other negotiable instruments is codified in India under the Negotiable Instruments Act, 1881, as last amended in 2002. The Act defines "promissory note", "bill of exchange", "cheque", "foreign instrument" and "negotiable instrument". A "negotiable instrument" is defined as a promissory note, bill of exchange or cheque payable either to order or to bearer.

The Act has been periodically amended to bring it in line with the increasingly electronic nature of financial transactions. The 2002 Amendment, for example, expanded the definition of "cheque" to include "the electronic image of a truncated cheque" and "cheque in electronic form" and made provision for the presentation of the electronic image of a truncated cheque and other related matters.

Under the Act, every person capable of contracting according to law may bind himself by means of a promissory note, bill of exchange or cheque. Also, the Act provides for the liability of the various potential parties to a negotiable instrument, such as the agent, legal representative, drawer, drawee, maker and acceptor of a bill, endorser, holder in due course, and surety. Detailed provisions have been made concerning presentment, payment, interest, discharge from liability, notice of dishonour, noting and protest, reasonable time for payment, acceptance and payment for honour and reference in case of need, compensation, special rules of evidence, providing for certain presumptions and estoppels, cross cheques and bills in sets.

An important amendment made to the Negotiable Instruments Act in 1989 adding Chapter XVII provides for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. Under that Chapter, dishonour of a cheque in certain cases is an offence. Thus through criminalisation lawmakers have sought to strengthen the provisions for the enforceability of negotiable instruments.

4.8.4 Stamp Acts and Registration Act

Stamp Acts and the Registration Act, 1908, as amended, and its State amending acts form an important complement to the substantive acts outlined above. As in the case of other countries, in India also the State seeks to profit from the conduct of economic activities within the country by levying stamp duties. The extent of stamp duties is an important determinant of the way in which transactions are structured.

The levy of stamp duty is split between the Central Government and the State Government in terms of legislative powers as follows:

- the Union/Central Government is given the power to levy stamp duties on bills of exchange, cheques, promissory notes, bills of lading, letters of credit, transfer of shares, debentures, proxies and receipts.
- The State Government is given the power to levy stamp duty in respect of duties other than those spelled out in the Union List above.

The major disadvantage that is incurred when title is transferred through an instrument which is not properly stamped is that such a instrument may not be permitted to be admitted in evidence in case of dispute. This is the major penalty which is imposed on the person who seeks to avoid the payment of stamp duty. Stamp duty varies among the States. Generally, however, an English mortgage uniformly attracts the maximum rate of duty in all states and is an ad valorem duty. Equitable mortgages and unattested hypothecation agreements attract lesser stamp duties as the rights transferred are less strong. Some states have even reduced the stamp duty on unattested hypothecation agreements to a negligible fixed sum of Rs.50. In the interest of clarity, it would be better if English mortgages were not so discriminated against with regard to rate of stamp duty and if stamp duty rates were rationalized and made uniform across states.

The purpose of the **Registration Act**, as distinct from a Stamp Act, is not to augment the State revenue but for the benefit of the general public. Its purpose is to provide information to persons who may deal with property as to the nature and extent of the rights which persons may have affecting that property. It enables persons to find out whether any particular piece of property with which they may be concerned has been made subject to some particular legal obligation. Since land registration is a concurrent subject under the Indian Constitution, there is the national Registration Act, 1908, as amended, and amending acts in each of the Project States.

The other purposes of the Registration Act include giving solemnity of form and legal importance to certain classes of documents by directly that they shall be registered. Another purpose is to perpetuate documents which may afterwards be of legal importance. Overall, the Registration Act helps to determine the priority of claims. Section 17 of the Act read with Section 49 lists some types of documents for which registration is compulsory. These documents include:

(a) instruments of gift of immovable property;
(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;
(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

However, the Registration Act is not the only legislation which mandates registration. Such acts as the Indian Trusts Act, 1882, the Transfer of Property Act 1882, the Cantonments Act 1924, the Bombay Agricultural Debtors Relief Act 1947, and the Central Provinces Land Revenue Act 1917 which specifically deal with the subject matter of certain documents also mandate their registration.

4.8.5 Enforcement Acts

In order to facilitate the enforcement of security interests and thus to strengthen the lending process, the Central Government in the last decade has enacted two important laws- the Recovery of Debts

Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

By virtue of Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, the Debt Recovery Tribunal has been conferred the jurisdiction over an application for recovery of debts due to banks and financial institutions. An Appellate Tribunal has been constituted to entertain appeals from orders of the Debt Recovery Tribunal. The jurisdiction of the civil courts has been excluded in relation to matters falling within the jurisdiction of that Tribunal, except for matters falling under the extraordinary writ jurisdiction of the High Courts as provided under Articles 226 and 227 of the Constitution.

The Securitisation Act is a modern and sophisticated piece of legislation providing for:

- securitisation;
- asset reconstruction; and
- enforcement of security interests.

Enforcement of security interests is the major concern of this Project. The prime attraction of the Act is that it enables secured creditors to enforce any security interest created in their favour without the intervention of a court or tribunal. The Securitisation Act provides two specific types of recourse to a secured creditor:

- against the secured assets; and
- against the business of the borrower.

The Act cannot be used in cases where the amount due from the borrower is less than 20% of the principal amount and the interest thereon. It is also not applicable to a security interest that is in the nature of a pledge of movable property, or as a lien on any goods, money or security given under law, or in relation to any rights of an unpaid vendor, or in relation to any security interest created in agricultural land.

The various financial institutions and the market watchers have been quite appreciative of the provisions of the Securitisation Act, though there have been some criticisms as well. Since the Act is new, its impact on the legal framework in actual practice still remains to be determined.

4.8.6 Bankruptcy

A related issue is that of collection of loans in case of sick companies. India does not yet have a full-fledged bankruptcy law. The issues relating to insolvency and the consequent revival and reconstruction of sick companies are dealt with in the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). That legislation was enacted to detect sick and potentially sick companies and to ensure the adoption of remedies and measures needed to revive and rehabilitate such companies.
However, the SICA itself has become a barrier to restructuring because the procedures and formalities stipulated in the Act have led to endemic delays. Under the SICA, a company has to be referred to the Board of Industrial and Financial Reconstruction (BIFR), a quasi-judicial body established in 1987 to implement the Act and responsible for rehabilitating or winding up companies where the accumulated losses at the end of any financial year have resulted in an erosion of 50% or more of its maximum net worth during the preceding four financial years. Moreover, the BIFR is widely criticized for delaying resolutions, and for not being able to provide viable options for the revival of sick companies within a reasonably short time frame. Therefore, the Government of India constituted a Group of Ministers for the revival, reconstruction and/or winding up of companies. The Group of Ministers has proposed to repeal the SICA, and to set up a National Company Law Tribunal under the Companies Act, 1956 which would be entrusted with the powers and jurisdictions presently exercised by the Company Law Board, the BIFR, and the Appellate Authority of Industrial and Financial Reconstruction (AAIFR). However, that proposal has yet to be implemented by enacting appropriate legislation.

4.9 Dispute Resolution Legislation

Private sector participation in infrastructure requires a well-developed mechanism for the resolution of disputes arising out of concession agreements and between the providers and users of a utility.

Indian courts have consistently shown a fair degree of deference when it comes to reviewing economic policy decisions. Recently, in Balco Employees'Union v. Union of India and Others (2002) 2 SCC 333, the Supreme Court of India held that the courts would not interfere with economic policy decisions, unless such a decision was contrary to any statutory provisions or to the Constitution of India. According to the Supreme Court, the courts will not look into the relative merits of different economic policies on the ground that another policy could have been fairer or better. Such an approach flowing from the top court has been reflective of the efforts to sustain the economic liberalization process begun in 1991.

The law relating to arbitration and conciliation has been codified under the Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996) which is modelled on the United Nations Commission on International Trade (UNCITRAL). The Act has incorporated the provisions of the Geneva Convention 1927 and the New York Convention 1958. The UNCITRAL model law and rules reflect that excessive regulation of the dispute resolution process hinders international trade and commerce and provides the parties the freedom to submit disputes to arbitration. They may determine their own procedure, including the number of arbitrators, the procedure to be used, and the applicable law for arbitration. However, there are certain overriding principles to ensure fairness and due process.

Under the Act, the grounds for setting aside an international award are limited and are granted only if the court finds that the award would be against public policy. The award will not be enforced by a court in India if it is satisfied that the subject matter of the award is not capable of settlement by arbitration under Indian law or if the enforcement of the award is contrary to public policy. In a proceeding for enforcement of a foreign award, the scope of enquiry of the court in which the award is sought to be enforced is limited to the grounds mentioned above. A party to the award may not impeach the award on the merits. However, in practice, the courts are permitting the parties to challenge awards on grounds specified in Part I of the Act. The Supreme Court of India in Bhatia International v. Bulk Trading S.A. (2002) 4 SCC 105, held that Part I of the Arbitration and Conciliation Act would apply to the enforcement of Convention awards in India. Such an approach would further make the enforcement of foreign awards dilatory, and parties to an arbitration agreement would be encouraged to challenge international awards on fresh grounds under the guise of public policy. It is important that the concept of "public policy" be more precisely defined and that an award not be made susceptible to challenges on flimsy grounds.

In addition, in India under the Act, it is left to the freedom of the parties to determine the composition of the arbitration panel. This has led to arbitration panels being composed of panelists not possessing the requisite skills and experience in dealing with complex technical issues. The result has been that the quality and authority of the findings have met consequent judicial challenge and thus further delay. Therefore, amendments are called for in the Arbitration Act which add provisions prescribing the qualification and experience of nominated arbitrators.

The 176th Law Commission of India proposed a number of amendments to the Arbitration and Conciliation Act, 1996 including the more precise definition of public policy, the setting up of a fast track arbitral tribunal, the establishment of a specific time frame for passing awards, and provisions regarding the qualification of arbitrators. These steps are essential to strengthen to alternative methods of dispute in India and to instil confidence in private investors. The needs for dispute resolution will be explored further with regard to specific case studies in Phase II of the Project.

Appendix A - Andhra Pradesh

Table of Contents

1 Introduction

This Appendix summarizes the policies and legislative framework in the State of Andhra Pradesh with regard to private sector participation and privatisation in the relevant sectors of roads, power, ports, airports, urban mass transit, cyber parks and optical fibre, special economic zones (SEZs), and water and sewerage.

This background information is meant to provide a fuller description and analysis of these policies and legislation which then can be referenced in the main text of the Working Paper. Throughout this discussion, reference is made to problems related to specific projects that are designated, or may be otherwise eligible, for assistance under the ADB PSI II Facility.

While some references are made to the regulatory framework for each of the mentioned sectors in the State of Andhra Pradesh, the detailed discussion of those matters is found in the companion Working Paper No. 2, **Regulatory Framework**.

2 General Policy and Framework

2.1 General Policy

The general policy regarding private sector participation and privatisation in the infrastructure sector in Andhra Pradesh is laid out generally in Andhra Pradesh Vision 2020 and specifically in the State Infrastructure Policy (G.O.Ms. No. 427 dated December 18, 2000. That Policy is then reflected in the purpose clause of the legislation establishing the Andhra Pradesh Infrastructure Authority (APIA).

Vision 2020

As found on the APIA website (www.apinfrastructure.com), Vision 2020 states the goal that Andhra Pradesh will create enough infrastructure to spur development of the growth engines to sustain future growth. The introduction of private sector participation will not only provide the people with better quality and affordable services, it will free Government resources and attention for higher priority developmental goals. With particular regard to infrastructure, the Government will invest in infrastructure much more than in the past, but it will not be able to raise these funds on its own. Besides international investment, there will need to be private investment from non-resident Indians and others. However, before it can involve the private sector in infrastructure building, the Government will need to create the necessary conditions for its participation. These include rationalizing pricing, creating a new regulatory framework and restructuring government infrastructure agencies. The Government will need to provide an appropriate regulatory framework to enable private sector participation in infrastructure development. For example, autonomous bodies will need to be set up to determine tariffs and set quality standards for services. In addition, Government infrastructure agencies will need to operate autonomously and efficiently and, where possible, be subject to the same rules of competition as the private sector. Some of these institutions could also be progressively privatised, keeping public interest in view. The distribution and generation segments of the electric sector are cases in point. To further increase the State's attractiveness to investors, the Government will also need to simplify its procedures for approvals. It will need to undertake additional initiatives to simplify procedures such as creating cross-ministry investment promotion boards that minimize the numbers of decision-makers and steps involved.

Vision 2020 goes on to state that infrastructure and construction will be the principal growth engines in the immediate future. Specialized infrastructure can be built by the State, by the private sector, or jointly by the two. However, in all cases, the State will actively facilitate its development. Roads, ports, airports and power will need to be built to achieved targeted growth levels. Deregulating or creating regulation that fosters investment and facilitates business will be essential to allow market-based growth and to prudently regulate this growth. This will require the identification and elimination of outdated laws that constrain growth. To encourage investment in the growth engines, the State will specifically aim to simplify and rationalize procedures and clearances. Examples are land identification and acquisition/leasing procedures. Thus the Andhra Pradesh Industrial Infrastructure Corporation has earmarked land for industrial estates to reduce inconvenience in identifying and acquiring project suitable land. However, to achieve dramatic growth, the Government will have to do much more. First, it will need to cultivate a mindset of "partnership" with private investors and consult them in setting policies and procedures for the State. Second, it will need to introduce wide-reaching measures to simplify and hasten approvals mainly by cutting down the vast number of regulations that currently apply. (see example of "deregulation czar" in Mexico).

2.1.1 AP Infrastructure Policy (G.O.Ms.No. 427 dated December 18, 2000)

The Order establishing the AP Infrastructure Policy notes that the State has identified 31 Mega Infrastructure Projects for immediate implementation with Private Sector Participation. The Policy applies to all infrastructure projects implemented with Private Public Partnership (PPP) and requiring Government support. It determines to provide guidelines to provide a speedy and transparent selection mechanism, adequate administrative support and reduction in procedural delays and a bankable risk sharing mechanism. It envisions the need for a special Infrastructure Development Act which would establish an Infrastructure Authority.

21 infrastructure sectors are covered by the policy, including the 14 such sectors listed specifically in Schedule III of the APIA Act, as described in detail below, plus minor ports and harbours, airports and heliports, information technology and telecommunications, industrial/knowledge parks and townships, tourism, education, and metro railroads and other urban transport systems. (Section 6).

The functions of the Task Force established under Section 8 of the Policy are basically those functions then set forth for the APIA in Section 10 of the IDEA Act. They include:

- conceptualising new projects;
- identifying inter-sectoral linkages;
- providing enablers for privatisation;
- vetting consultant TORs and the consultant selection process;
- deciding the form and extent of Government support;
- resolving process-related issues;
- removing bottlenecks from the project development process;
- deciding issues pertaining to user levies;
- preparing model contracts;
- prescribing timelines for clearances and denial conditions;

- issuing rules and guidelines; and
- building support in public opinion.

Section 10 states that the Government may directly negotiate with developers where they initiate a project that is viable even when land is granted at market rates, where only State-level clearances are necessary and where no fiscal incentives and minimal interlinkages are required. Under Sections 11 and 12, the Swiss Challenge Approach would be used for such initiated projects where those things are required. Section 13 states that for all other projects, the Government would use competitive bidding for developer selection. Section 14 covers limited bids where an offer may be negotiated in a fair manner or rejected.

Sections 15 and 16 then set specific criteria for developer selection. Under Section 15, for BOOT, BOT, BOO and similar projects, the Government shall use one or more of the following criteria:

- lowest bid in terms of the present value of user fees;
- highest revenue share to the Government;
- highest up-front fee;
- shortest concession period;
- lowest present value of the subsidy;
- highest investment levels of proposed capacity creation;
- lowest capital cost and operation and maintenance (O&M) cost for projects having a definite scope;
- highest equity premium; and
- lowest quantum of Government Support solicited.

Section 16 then states that the selection criteria for BT, BLT and BTL projects shall be based on the lowest Net Present Value (NPV) of payments from the Government.

Section 19 of the Policy provides for State Support in the form of Administrative Support, Asset-Based Support and Foregoing of Revenue Streams. The latter shall include exemption of all inputs required during the construction period from sales tax, the exemption of the first sale/transfer from payment of stamp duty and registration charges, and the exemption from payment of seigniorage fees and cess on minor minerals during construction of the project. (see Schedule V of the IDEA Act for similar provisions but with the addition of Guarantees). In addition, Section 21 states that the Government may also grant concession not provided in this Policy, on a case-by-case basis. Under Section 22, the investor would be allowed to charge user levies during the concession period. Section 23 provides that, for investments of more than Rs. 5,000 million, the Government may consider granting further concessions/incentives which are directly related to the project, based on the merits of each case.

Sections 24-26 of the Policy concern mitigation of risks. Section 24 states that the Government understands as important risk issues that should be adequately addressed in a concession agreement the following:

- right over assets;

- competition policy;
- expansion/upgradation of facility;
- change in law;
- force majeure;
- licensor and licensee events of default;
- insurance; and
- indemnities.

In addition, Section 25 states that in order to mitigate risks perceived by lenders, the Government will provide:

- mortgage of leasehold rights; and
- step-in rights/right of substitution to lenders.

However, under Section 26, the developer shall be required to provide the following to safeguard the interest of the Government:

- assignment of insurance proceeds to the Government after meeting the charge of the lenders;
- protection in case of breach of License provisions; and
- Indemnity to the Government against flaws in design, engineering and construction, and operation and management.

These types of provisions are also covered by the IDEA legislation.

2.1.2 Andhra Pradesh Infrastructure Development Enabling Act, 2001

Similar provisions to those in the Infrastructure Policy are then set in legislation by the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (AP IDEA 2001) (Act No. 36 of 2001). It is one of two examples of legislation establishing a statewide infrastructure authority in India. The other is the Gujarat Infrastructure Development Act, 1999 which establishes the Gujarat Infrastructure Development Board (GIDB). The Gujarat Act is discussed in detail in Appendix B.

Preamble

The preamble of the AP IDEA 200l lists its principal purposes as:

- to provide for the rapid development of physical and social infrastructure in the State and to attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State;
- to provide a comprehensive legislation for reducing administrative and procedural delays, identifying generic project risks, detailing various incentives, detailing the project delivery process and setting procedures for the reconciliation of disputes;

- also to provide for otherwise ancillary and incidental matters with a view to presenting bankable projects for the private sector and improving the level of infrastructure in the State of Andhra Pradesh.

Composition of the Act

The Act is divided into eight chapters which cover the establishment and business of the authority, the infrastructure project delivery process, the generic risk disclosure and allocation, the securitisation of the right of lenders, the facilities to be provided by the Government Agency or Local Authority concerned, the establishment of a Conciliation Board and conciliation proceedings, and the establishment of an infrastructure fund.

In addition, there are five appended Schedules. Schedule I lists the types of concession agreements permitted- BT, BOT, BLT, BOO, BOOT, BTO, CAO, DOT, ROT, and ROO. Schedule II sets two categories of projects. Category I projects are those where no fiscal incentives are required nor exclusive rights granted to the Developer. Category II projects are those where there is Government asset support, financial incentives and exclusive rights conferred on the Developer, and where extensive linkages/support facilities for the project are required, such as water connection. Schedule III provides a list of sectors for which projects are covered under the Act. Schedule IV provides a list of Generic Risks which will be included as part of a Concession Agreement under the Act. Schedule V lists the kinds of State Support that may be provided, including administrative support, asset-based support, foregoing revenue streams, guarantees and financial support.

Coverage

Section 2 of the Act states that it applies to all infrastructure projects implemented through public-private partnership in the sectors listed in Schedule III. The sectors specifically listed in Schedule III are roads (including bridges and bypasses); water supply, treatment and distribution; waste management; sewerage, drainage; health; land reclamation; canals, dams; public markets; trade fair, convention, exhibition and cultural centres; public buildings; inland water transport; gas and gas works; sports and recreation infrastructure, public gardens and parks; real estate; and other sectors as may be notified by the Government under the Act. This is a more limited list than is found in the companion Gujarat statute. Particularly, it does not specifically cover ports and airports projects although these projects have been reviewed based on the "other sectors" clause. It might be better to make the list more inclusive. In addition, the Act does not cover privatisation or disinvestment projects unless fresh, additional investment is made by the Private Sector Participant. (See Section 1(3)).

Establishment and Constitution of the Authority

Section 4 of the Act provides that the Authority shall consist of a Chairman and up to 15 other members, including ex-officio members. The Act states that the Chairperson shall be the Chief Secretary to the Government of Andhra Pradesh (although in practice, the present Chairman is the former holder of that position). The ex-officio members shall be the following:

- Secretary to Government, Finance and Planning (Fin. Wing) Department;
- Secretary to Government, Transport, Roads and Buildings Department;
- Secretary to Government, Municipal Administration and Urban Development Department;
- Secretary to Government, Information Technology Department;
- Vice Chairman and Managing Director, Andhra Pradesh Industrial Infrastructure Corporation (APIIC);

- Director General, National Academy of Construction, Hyderabad.

Their term of office shall be during the pleasure of the Government. (Section 5).

Functions and Powers.

Section 10 of the Act sets forth the functions of the APIA. They are:

- to conceptualise and identify projects and ensure their conformance to the objective of the State;
- to receive and consider projects under the Act from the Government or relevant Government Agency or Local Authority and process the same;
- to advise the Government or Government Agency or Local Authority on the project and give recommendations or suggestions in that behalf;
- to coordinate between concerned departments regarding a project;
- to monitor the comprehensive bidding process for Category II Projects (those receiving some form of aid) and to provide for course correction, if required;
- to provide enablers for projects;
- to prioritise and categorize projects and prepare a project shelf;
- to prepare a road map for project development;
- to identify inter-sectoral linkages;
- to approve the Terms of Reference (TOR) for consulting assignments in Category II projects as well as the consultation process thereof;
- the decide the financial support and approve the allocation of contingent liabilities for projects;
- to recommend and approve bid documents, risk sharing principles and bid processes for Category II projects;
- to approve the scale and scope of a suo-moto proposal or project undertaken through the Swiss-Challenge approach and to recommend modifications of a non-financial nature, if required;
- to resolve issues relating to the project approval process;
- to prescribe time limits for clearances of any project;
- to review periodically the status of clearances and ensure that clearances are accorded within specified time frames and grant clearances itself (if they are not granted within the time frames set or if they are denied, as may be specified (by the Government);

- to decide issues related to user levies, included, but not limited to, prescribing the mechanism and procedure for setting, revising, collecting and/or regulating user levies, and to decide and settle disputes related to user levies;

- to approve sectoral policies and model contract principles;

- to issue and/or amend guidelines needed to effectively implement the Act;

- to coordinate with sector regulators;

- to administer and manage the Fund and its assets;

- to coordinate the execution of projects with the relevant Government Agency or Local Authority;

- to supervise or otherwise ensure adequate supervision over the execution, management and operation of the project;

- to build public opinion;

- to fix and provide for the recovery of fees, levies, tolls and charges, as may be prescribed or specified from time to time;

- to levy and recover charges for abuse and polluter charges from the developer;

- to prescribe regulations to regulate its own procedures;

- to take all steps necessary for enforcing provisions of the Act and the realizing of the objectives of the Act.

This broad set of functions potentially gives great power to the Authority both with regard to the approval of projects and the monitoring of their execution. It is supplemented by the provisions of Section 11 on specific powers of the Authority. Under Section 11(1), not withstanding anything contrary in any other laws, the Infrastructure Authority shall have the power to grant any clearance or permission required for any project that comes under the Act, save only the sanction required from the Government itself. Such clearance or permission when granted shall be final and binding on the concerned State agencies. Section 11(2) states that the Authority may give directions to any Government Agency or Local Authority or other authority or developer or person with regard to the implementation of any project under the Act, or for the carrying out of its functions under the Act. Such Agency or person shall be bound to comply with such directions. Section 11(3) provides that the Authority has the power to call upon any such Agency or person to furnish information as may be required by the Authority in connection with any project. Further, Section 11(4) states that the Infrastructure Authority shall have the power to inspect, visit, review and monitor any Project and its implementation, execution, operation and management through its officials. Persons in charge of a project are bound to give full cooperation to the Authority. Finally, Section 11(5) provides that the Authority shall have full powers to carry out its functions under the Act.

Infrastructure Project Delivery Process

Chapter III of the Act (Sections 13-27) then sets out the rules of the Infrastructure Project Delivery Process. It covers project identification, project prioritisation, recommendations by the APIA, sanction by the Government, consultant selection, and developer selection- including bidding procedures and selection criteria.

Under Section 13, any private sector participant (defined in Section 2 as a body with no less than 51% paid up share capital held by a private/non-Government party) may participate in the financing, construction, maintenance, operation and management of the Infrastructure Projects covered by the Act. Section 14 provides that the APIA may identify or conceptualise a project. If it does so, then that project must be referred to the relevant Government Agency or Local Authority for its consideration and further action. If the project is identified by that relevant agency, then it is referred to the APIA for its consideration, evaluation and further action. Thus the APIA is not permitted to go forward with a project without its consideration by the relevant sectoral agency.

Under Section 15, the APIA shall prioritise projects based on demand and supply gaps, interlinkages and any other relevant parameters to create a project shelf. Section 16 states that the Agency or Local Authority concerned shall submit the project to the Government for sanction in accordance with the advice, recommendations and suggestions of the APIA. That submission shall include a proposed concession agreement. Then under Section 17, the Government shall consider that proposal and proposed concession agreement. It shall accept it with or without modification or return it to the Agency for reconsideration or reject it, within a prescribed time limit (not set in the legislation itself). If the Bidder is not able to meet the conditions set, then the proposal of the second most competitive bidder may be considered.

Section 18 covers **consultant selection**. The Agency or Local Authority concerned shall "ensure adequate competition" in the process. For Category II Projects (those receiving support) the proposed TOR shall be presented to the APIA for approval or modification. In all cases, "adequate weight" shall be given to technical capabilities.

Section 19 then concerns the **developer selection process**. The Government Agency or Local Authority concerned may adopt an appropriate process, including:

- Direct Negotiations (for Category I projects (no support) and some others;
- Swiss Challenge Approach (used for any Category II (supported) Project initiated by a private sector participant);
- Competitive Bidding- all projects initiated by a Government Agency or Local Authority.

Under Section 20, the Infrastructure Authority shall formulate or approve contract principles where no model contract has yet been adopted for the sector or where deviations are proposed for an approved model contract.

Section 21 then states **selection criteria** for the developer. The Government Agency or Local Authority concerned must first satisfy itself about the technical ability of the developer to undertake and execute the project. Competitive bidding is required for BOOT, BOT and BOO projects which follow one or more of the following criteria:

- the lowest bid in terms of present value of user fees;
- the highest revenue share to the Government;
- the highest up front fee;
- the shortest concession period;
- the lowest present value of subsidy;
- the lowest capital cost and operation & maintenance cost for projects having a definite scope;

- the highest equity premium; and

- the quantum of State Support solicited, in present value.

For BT, BLT and BTL projects, the selection criteria used will be the lowest net present value of payments from the Government. However, Section 21(c) permits the APIA to use such other suitable criteria as it may allow or determine.

Section 22 covers the treatment of a sole bid. Section 23 concerns treatment of a Limited Response. Section 24 covers treatment of a bid submitted by a consortium. Section 25 concerns speculative bids. They are treated as non-responsive. Section 26 states the principle of no negotiation generally on a financial or commercial proposal. Section 27 then covers the bid security.

These types of specific rules are generally found in subsidiary regulations rather than in legislation itself, as such regulations are generally easier to amend if necessary.

Generic Risks Disclosure; Rights of Lenders; Facilities to be Provided.

Chapter IV (Sections 28-31) concerns generic risk disclosure and allocation, facilitation of securitisation, rights of lenders, and facilities to be provided to the developer by the Government Agency or Local Authority concerned.

Section 28 states that the Government Agency or Local Authority will, as far as possible, disclose **generic risks** involved in a project and a list of such risks, along with the allocation and treatment of such risks may be provided in the Concession Agreement or other contract entered into with the developer. That Agency or Authority will make maximum disclosure of generic risks. However, if any risk is not disclosed due to inadvertence or circumstances beyond its control, then the same shall not be ground for any claim by the developer. (This seems a very big exception!).

A list of generic risks is set out in Schedule IV of the Act. They include:

(1) **Construction Period Risks** (land expropriation; cost overruns; increase in financing cost; time & quality risk; contractor default; default by the developer; time, cost & scope of identified but related work, and variations;

(2) **Operation Period Risks** (Government Agency default; Developer default; Termination of Concession Agreement by Infrastructure Authority or Government or Government Agency);

(3) **Market & Revenue Risks** (Insufficient Income from User Levies; Insufficient Demand for Facility);

(4) **Finance Risks** (Inflation; Interest Rate; Currency Risk);

(5) **Legal Risk** (Changes in Law; Title/lease rights; Security Structure; Insolvency of Developer; Breach of Financing Documents);

(6) **Miscellaneous Risks** (Direct Political Force Majeure; Indirect Political Force Majeure; Natural Force Majeure; Sequestration; Exclusivity; Development Approvals; Adverse Government Action/Inaction; Provision of Utilities; Increase in Taxes; Termination of Concession by the Government; Payment Failure by the Government).

The above list of generic risks sets a minimum level of subjects to be covered by a project concession agreement or contract. It should help to make a potential private investor more comfortable. A more thorough examination of model concession agreements and actual concession agreements negotiated under the Act will take place in Phase II of this Project.

Section 29 provides that the Agency or Authority may facilitate the **securitisation** of project receivables and assets by the developer in favor of lenders. Such securitisation shall be subject to such terms as may be fixed by the Government or by the APIA to safeguard the successful implementation of the project. This is a very important provision with regard to the attractiveness of such projects to developers.

Section 30 covers **rights of lenders**. They shall be entitled to recover their money due from the developer in the form of **user levies**. In the event of default by the developer, the lender shall have the right to substitute a new developer with the consent of the Government and subject to the approval of that substitute by the Agency or Authority concerned, and also by APIA. Such substitution shall be on the same terms and conditions as applicable to the previous developer, or with such modifications as are specifically approved.

Section 31 concerns **facilities to be provided by the Government Agency or Local Authority concerned**. It shall provide all facilities to the developer for obtaining statutory clearances at the State-level, and for providing construction power and water at the project site on such terms as may be prescribed. It shall provide Best Effort support for obtaining Central Government clearances and assistance in rehabilitation and resettlement activities (if any) incidental to the Project. This latter is an important clause and help to a potential developer.

State Support

In addition, Schedule V of the Act gives a list of the types of State Support that may be provided to a developer in order of preference. They are:

(1) **Administrative Support** (to all projects under the Act) (provide State-level statutory clearances within specified time limits after the project is sanctioned; automatically grant non-statutory State level clearance if the Project meets specifications; provide Best Effort support for obtaining all central level clearances; undertake all rehabilitation and resettlement activities and recover the cost from the developer; provide construction power and water at the project site; acquire land necessary for the Project, if such land does not already belong to the Government);

(2) **Asset-Based Support** (to all Category II projects and to Category I projects where the sector policy so provides) (Government-owned land at concessional lease charges for projects where ownership would revert to the Government within a maximum period of 33 years; the State Government will commit/facilitate development of linkage infrastructure for projects);

(3) **Foregoing Revenue Streams** (for all Category II Projects and for Category I projects where sector policy so states) (exemption of sales tax on all inputs required for Project construction; exemption of stamp duty and registration fees on the first transfer of land from the Government to the developer and on project agreements registered in the State; exemption from payment of segniorage fees- cess on minor minerals during construction period);

(4) **Guarantees** (may guarantee of receivables for Category II Projects, provided they are not collected directly from users; may also provide off-take guarantees if it is a service distributor and is responsible for collection of user levies);

(5) **Financial Support** (direct financial support only for Category II Projects, and Government will have final authority to approve such support; but APIA shall ensure that appropriate project

structuring eliminates such need to extent possible. Also the extent of such support shall be used as a selection criteria).

The above list of State Support gives the developer of a Category II project some specifics as the type of support that might be provided by the State of Andhra Pradesh. The attractiveness of these types of support will be explored for specific cases as part of this Project.

Conciliation Board and Conciliation Proceedings

The conciliation/dispute resolution process under the Act is found in Chapter V. Conciliation Board (Sections 32-40) and Chapter VI. Conciliation Proceedings (Sections 41-53).

With regard to the Conciliation Board, Section 32 provides that the Board shall be established by notification of the State Government. Under Section 33, the Board shall have three members. A retired High Court judge shall be chairperson, and the other two members shall be experts in infrastructure or finance or banking or law. Under Section 35, the term of members shall be three years, with the possibility of appointment for one more term of three years. As of August 2003, the APIA was about to seek notification of such appointments, with the additional two members from the finance sector.

Section 37 sets forth the functions of the Conciliation Board. They are:

- to assist the Government Agency or Local Authority and any developer in an independent and impartial manner to reach an amicable settlement of their disputes arising under the Act or the Concession Agreement;

- that the Board shall be guided by principles of objectivity, fairness, obligations of the parties, usages of the trade and circumstances governing disputes, including the good business practice prevalent in the national and international field covered by the dispute between the parties;

- that the Board may conduct conciliation proceedings in such a manner as it may consider appropriate, taking into account the circumstances of the case, the wishes of the parties that may be expressed, and so as to reach a speedy settlement of the dispute; and

- that the Board may, at any stage of the conciliation proceedings, make proposals for settlement, though such proposal need not be in writing or accompanied by reasons.

Under Section 38, the Board may arrange for assistance to be administered by a suitable institution or person, with the consent of the parties, and in order to facilitate the conduct of the conciliation proceedings. Section 39 states that the Board shall have the powers of a civil court under the Code of Civil Procedure, 1908, regarding summoning of parties and witnesses, discovery, production of documents, etc. Under Section 40, every proceeding before the Board shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code of 1860. The Board shall be deemed to be a civil court also for the purpose of Section 195 and Chapter XIV of the Code of Criminal Procedure, 1973.

With regard to conciliation proceedings, Section 41 states that the general principles that disputes under a concession agreement or contract shall, as far as possible, be amicably settled between the parties. If this is not possible, the dispute shall be referred to the Conciliation Board. Under Section 42, conciliation proceedings commence with a formal written invitation from one party to the other. Under Section 43, the provisions of Section 66 of the Arbitration and Conciliation Act, 1996, apply. Section 44 then provides that the parties shall cooperate with the Conciliation Board, especially with regard to submitting written materials, giving evidence and attending meetings. Section 45 states that each party may at its own initiative or the invitation of the Board submit to the Board suggestions for settlement of the dispute.

Section 46 covers a settlement agreement. Under Section 47, such settlement agreement shall have the same status and effect as if it were 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.

Section 48 provides the terms under which conciliation proceedings shall be terminated, including order of the Board after consultation with the parties, written communication jointly by the parties to the Board, and on the expiration of three months from the date of commencement of the conciliation proceedings.

Section 49 provides that generally parties shall not initiate arbitral or judicial proceedings for a dispute that is subject to conciliation proceedings except where a party feels that such proceedings are necessary for preserving his rights during the conciliation proceedings. Section 50 provides that conciliation must be tried first. Section 51 concerns costs. Section 52 covers required deposits. Finally, Section 53 provides that Section 81 of the Arbitration and Conciliation Act, 1996 shall apply to matters before the Conciliation Board relating to admissibility of evidence in other proceedings.

These extensive dispute resolution provisions are important. They are tied to the modern Arbitration and Conciliation Act, 1996, which should provide some comfort for the potential investor. However, many such persons will seek international arbitration as the means they are most comfortable with to settle any disputes that arise under a contract or concession agreement for a project under the Act.

Infrastructure Projects Fund

Chapter VII (Sections 54-60) of the Act provides for an Infrastructure Projects Fund. Section 54 states that the Andhra Pradesh Government shall establish such a fund, making an initial contribution of Rs. 100 lakhs and further contributions as deemed appropriate. Under Section 55, the Government Agency or Local Authority concerned shall levy fees and charges with regard to applications for projects as well as a project fee on the developer under the concession agreement. The amounts received from these fees will be credited to the Fund. Section 56 states that the Fund will be administered and managed by the Infrastructure Authority. Section 57 provides that the Infrastructure Authority shall utilise the Fund for achieving the objects and purposes of the Act and for financing its activities for realizing the objectives and purposes of the Act. Under Section 58, the Fund shall be operated by and under the name of the APIA. Section 59 states that the APIA shall formulate the policy and regulations for the financing, working, administration and management of the Fund. Finally, under Section 60, the working of the Fund shall be subject to an annual audit. That report shall be presented to the State Government to be presented to the State Legislative Assembly.

As of August 2003, the Fund was not yet operational. The APIA was seeking an amendment to the Act to permit borrowing by the Fund. This is not mentioned in the present law. The Cabinet-level committee to which the APIA reports is considering whether to amend the IDEA Act or to set up the Fund under a separate Act.

Abuser and Polluter Charges

Sections 63 and 64 of the Act, respectively, concern the setting of abuser charges and polluter charges. Under Section 63, the APIA may levy **abuser charges** on a developer if he abuses the rights granted to him under a concession agreement. What constitutes such abuse of rights shall be set in that concession agreement. Such charges shall be final and conclusive subject to an indemnity of the developer against defects under Section 66. However, the developer shall have the right to challenge them in writing within 15 days of service of notice to show cause why the charges should not be levied on him. In addition, Section 65 permits an appeal of the setting of the charge may be made to the Government within 30 days of the receipt of the order. The decision of the Government shall be final and conclusive.

Polluter charges are set under Section 64. Such charges shall be set by APIA if the developer pollutes the environment and/or does not adhere to specified mitigation measures set in the concession agreement. As with the abuser charges, such charges are final but may be challenged by the developer within 15 days of service of notice. The appeal under Section 65 also applies to polluter charges.

Penalties/Appeals

Section 69 of the Act sets penalties for anyone who fails to follow orders or directions of the APIA. Each such failure is liable to a fine of not less than Rs. 50,000 up to a maximum of Rs. One Crore or by imprisonment of from one month to three years, or by both. A similar set of penalties is set for failure to follow orders or directions of the Conciliation Board. This system of penalties has not yet been used in practice. It appears that the level of fines is too low for violations regarding very large and mega projects. However, Section 70 does permit the APIA to charge an officer of a violating company for an offence unless he can show it was done without his knowledge or that he exercised proper due diligence. In addition, Section 71 provides for the compounding of offences by the APIA or Conciliation Board if reasons are set out in writing.

In addition, there are other related rules. Section 67 provides for APIA or the Government Agency or Local Authority concerned to recover all sums due for fines or charges, etc., under the provisions of the Andhra Pradesh Revenue Recovery Act, 1864 as if it was a recovery of land revenue. Section 76 provides for a bar of jurisdiction under which an order or proceeding under the Act shall be heard only by the High Court and not by a subordinate court.

Miscellaneous.

In addition to the penalty, appeals and charges provisions, Chapter VIII of the Act (Sections 61-82) contains other rules. Section 61 concerns control of the Infrastructure Authority by the Government. Section 62 regards transparency. Section 78 grants both the APIA and the Conciliation Board the power to make regulations for the proper performance of their functions under the Act, with the approval of the Government. Section 79 then permits the Government to make rules, by notification, for the carrying out of all or any of the purposes of the Act. Section 80 further permits the Government, by notification, to delegate any power exercisable by it to an officer of the Government, subject to such terms as may be specified in such notification. Finally, Section 81 permits the Act to override other State laws.

Summary and Conclusion.

The Andhra Pradesh Infrastructure Development Enabling Act, 2001 is a broad and comprehensive piece of legislation which attempts to place many of the types of incentives that would be provided to a private developer of an infrastructure project in the State as provisions of the Act itself. Thus the types of generic risks to be covered in contracts and concession agreements, and the types of State Support that might be provided are covered in detail in Schedules attached to the Act. In addition, a separate Schedule defines 10 types of concessional agreements covered by the Act. Further, elaborate provisions are made for a Conciliation Board and for conciliation proceedings to deal with dispute resolution.

2.2 Other Relevant Legislation

In addition to the APIA, the Andhra Pradesh Industrial Infrastructure Corporation Ltd. (APIIC) which was first established in 1973 and began operation on January 1, 1974 under the Andhra Pradesh Industrial Infrastructure Act, 1972, remains the major agency for the actual supervision of the execution of large projects. It is a 100% State-owned agency originally established to acquire land necessary for industrial development and then to develop the necessary services for that land, especially water, power and roads. Thus it is a parallel agency to the Karnataka Industrial Areas Development Board established for the same purpose a few years earlier.

The APIIC was responsible for the development of the Hi-Tech City and has since been made the nodal agency for the preparation of project documents and development of projects. For example, the Visakhapatnam Industrial Water Project is a recent APIIC initiative. APIIC is self-financing largely through profits made on the sale of its land bank, and it is the Government stakeholder in a number of private participation projects. It may sign concession agreements on behalf of the Government of Andhra Pradesh as in the case of the Convention Centre.

In practice, for projects now designated as under the APIA by Government Order, the APIIC oversees the preparation of project documents and may enter into partnerships with private parties to develop specific projects. This partnership may be by means of a Memorandum of Understanding (MOU) with a private company such as Larsen & Toubro. It has also entered into a more specific Memorandum of Agreement (MOA) for "project development and promotion partnership" with IL&FS to assist with project preparation. The partnership then engages consultants to develop feasibility studies and bid documents. The partnership then seeks the necessary clearances and approvals.

The APIIC then prepares the agenda for the APIA Executive Committee and provides the necessary supporting documents for approval decisions. Once there is a decision by the Cabinet Sub-Committee which reviews the APIA recommendation and ratification by the Cabinet itself, then the APIIC may conduct the developer selection process through transparent competitive bidding procedures. APIIC and its partners may then receive an upfront fee from the successful bidder that covers their development costs and a margin on the financial closure of the project. Thus APIIC retains a major role regardless of the powers given the APIA under its Act. This is due to its much larger staff and greater experience.

3 Policies and Legislative Framework by Sector

3.1 Roads

3.1.1 Background

Andhra Pradesh relies upon its road network due to a limited rail network. However, while the number of registered vehicles has increased from 24,500 in 1956 to 2,468,300 in 1997, the road network has only increased in that time from 26,762 kms. to 165,000 kms. The share of road transport has increased from 20% to 80% over that period. Thus it has become necessary to expand and improve the road infrastructure while also upgrading the existing network where necessary.

3.1.2 State Road Policy

In general terms, Andhra Pradesh Vision 2020 recognizes the need for an efficient transportation system, with an emphasis on roads, to improve access to market and promote the growth of productive activities and employment. Roads are trunk infrastructure constituting the infrastructure backbone of the State. The Vision Document also stresses the need for developing four lane superhighways along the growth corridors connecting the key economic centres, as well as upgrading existing roads to double lanes, and providing 6 lane carriageways to all arterials in the major municipal corporations of Hyderabad, Visakhapatnam, Rajahmundry, Vijayawada, Guntur, Kurnool and Warangal. In general, it hopes to achieve a doubling of the present road length to over 400,000 kms, to provide good quality roads to 70% of that network, to achieve 100% connectivity to all villages by means of all weather roads, and to develop a road network connecting growth and marketing centres in every mandal with its district headquarters.

In order to meet its great needs, Andhra Pradesh seeks private investment in the roads sector. To that end, the Government issued a policy framework for private participation in the Roads Sector (G.O. Ms. No. 184 T(R&B), dated 23 September 1997). The main features of these Guidelines are:

- projects identified for private investment must be state roads and district roads maintained by the State Roads and Buildings Department which are capable of yielding an adequate Economic Internal Rate of Return (EIRR);

- the Government will carry out all preparatory works and meet the cost of the detailed feasibility study, land for right of way and en-route facilities; clearance of right of way land, relocation of utility services, cutting of trees, resettlement and rehabilitation of the affected establishments; It may try to recoup its investment on those items, depending the financial viability of the project;

- as to financial concessions, besides the above, land for road projects will be provided by the Government at its own cost with a lease for the term of the concession; also the Government may provide up to 30% of the project cost as a subsidy on a case to case basis depending on project feasibility and viability;

- as to tax concessions, there shall be a tax exemption for 100% of profits for the first five years and for 30% thereafter up to 10 years. In addition, there shall be a deduction of 40% of income for participating financial institutions and deductions under Section 88 of the Income Tax Act, 1961, as amended, to subscribers of equity shares or debentures of the private party;

- as to non-financial concessions, private parties may be permitted to develop wayside facilities to generate income during the BOT period; and may be permitted changes in land use along project corridors even when they conflict with existing town planning regulations. Such road-related facilities may include restaurants, motels, rest/parking areas, as well as other real

estate development that would help improve the revenue stream of the project. Specifically mentioned in the Guidelines are loading/unloading terminals for cargo, warehouses, vehicle repair facilities, insurance and medical facilities, and commercial and residential complexes;

- foreign direct investments are permitted up to 100% equity for construction of roads and bridges;

- the concession period may be a maximum of 30 years, but may be extended to cover any default of the Government in fulfilling its obligations. That period will consist of the construction period and the operating period when the private operator is permitted to levy tolls and liable for maintenance of the road facilities;

- any dispute between the parties will be resolved based on the provisions of the Arbitration & Conciliation Act, 1996.

3.1.3 Results To Date

To date, three BOT projects for bye-pass roads have been completed costing Rs. 13.81 crores, and another 7 BOT projects (one for bye-pass roads and six for bridges) amounting to Rs. 174.41 crores are on-going. Plans exist for five toll expressways and two by-pass expressways for which techno-economic studies have been completed. However, the State Roads and Buildings Department does not see any such projects as fitting under the PSI II Facility.

3.1.4 Urban Roads

In addition to the general State Road Policy, Andhra Pradesh is also concerned with the development of its urban roads which are under the purview of the urban local bodies. Of the 11,461 kms. of such roads in the State, only 14% are cement concrete roads. In addition to an annual budget expenditure for the upgrading and proper maintenance of such roads (Rs. 145.00 crores in FY 2000-2001), Hyderabad is one of six cities participating in the Government of India Megacity Scheme. For each such scheme 25% of the funding is provided by the Government of India, 25% by the State Government and the remaining 50% by the implementing civic agency. For the implementation of the Hyderabad Megacity Scheme, the Municipal Corporation of Hyderabad is working with the Hyderabad Urban Development Authority (HUDA) with regard to the road sector. Further, the Government of Andhra Pradesh has launched a massive road-widening programme for important high-density corridors. A key programme is the decongestion of the twin cities of Hyderabad and Secunderabad, including road widening, development of link roads, improvement of road junctions, installation of traffic signals, proper street lighting and related activities.

3.1.5 Legislative Framework

The roads sector is generally a State function based on item 13 of List II-the State List of the Constitution (Article 246, Seventh Schedule). That item says that States shall be responsible for communications, that is to say, roads, bridges, ferries and other means of communication not specified in List I-the Union List. However, item 23 of the Union List specifically gives the Central Government authority over highways declared by law made by the national Parliament to be national highways.

The relevant national legislation declaring such national highways is the National Highways Act, 1956 (Act No. 48 of 1956), as amended, with its attendant National Highways Rules, 1957 and other rules related to fees for use of such highways or bridges on such highways. Section 2 of the Act concerns the method of declaration of such highways. An initial list is found in the Schedule to the Act and other roads may be declared national highways by the Central Government by notification in the Official Gazette. Section 3 concerns land acquisition for national highway purposes which provides a streamlined procedure that replaces that of the national Land Acquisition Act, 1894, as amended. Section 4 of the Act provides that such highways vest in the Union. Section 5 states that generally the responsibility for the development and maintenance of national highways is with the Central Government but that it may delegate that authority to a State Government or to any authority or officer under either the Central Government or a State Government. In addition, Section 6 provides that the Central Government has the power to issue directions to the Government of any State regarding the carrying out of provisions regarding national highways.

Sections 7 and 8-A of the Act set rules related to private participation. Section 7 regards the setting of fees for the use of national highways and of bridges and tunnels on such highways. The Central Government may set such rates by notification in the Official Gazette. This section is the legal basis for tolls on national highways, whether collected by the Government itself or by private parties under a concession agreement. Section 8-A, added by Amending Act No. 26 of 1995, then gives the Central Government the power to enter into agreements with private parties for the development and maintenance of national highways. In addition, subsection (2) of that Section specifically provides that such a private party may collect and retain fees set for services rendered by him as specified by the Central Government. Such fees are to be related to expenditures involved in the building, maintenance, management and operation of the whole or part of such a national highway, interest on the capital invested, a reasonable return on that investment, the volume of traffic and the period of such agreement. Further, subsection (3) of that Section gives such a private party the power to regulate and control traffic on that national highway as required for its proper management in accordance with the provisions of Chapter VIII of the Motor Vehicles Act, 1988 (Act No. 59 of 1988).

Section 8-B of the Act, also added by Amending Law No. 26 of 1995, provides penalties for persons who commits an act which renders or he knows is likely to render injury to a national highway so as to make it impassable or less safe for travel. He shall be punished with imprisonment for up to five years, or with a fine (unspecified maximum), or by both.

Section 9 of the Act gives the Central Government the power to make rules for its implementation, by notification in the Official Gazette. Among the subjects for which such rules may be made are the rates at which fees, including tolls, may be levied. Finally, Section 10 states that such rules, as well as all other notifications and agreements issued or entered into under the Act shall be laid before both Houses of Parliament as soon as they are issued.

Thus the National Highway Act provides a specific legal basis for both private sector participation in the construction and maintenance of such national highways, as well as for collection of tolls to pay for those expenditures under a concession agreement.

3.1.6 Other Relevant Rules and Legislation

The basic National Highway Act itself has been followed by several specific rules to implement such private sector participation. The National Highways (Collection of Fees by any Person for the Use of Section of National Highways/Permanent Bridge/Temporary Bridge on National Highway) Rules, 1997 implements Section 8-A of the Act. Rule 3 regards the agreement and rate of fee. After reiterating the general power to make an agreement and the variables to be considered in setting a toll fee, that rule states specifically that such after the period of collection of such fees, all rights pertaining to that section of highway shall be deemed to have been taken over by the Central Government and that the Government shall continue with the collection of fees, as notified from time to time. Rules 4-6 then contain details regarding the mode of fee collection, who is in charge of fee collection and the verification of fee collection.

Further, the National Highways (Rate of Fee) Rules, 1997 implement Section 7 of the National Highways Act. Rule 3 states that the rate of such fees shall be set by the Central Government by notification in the Official Gazette. Such fee shall be set with regard to the expenditures involved in the building, maintenance and management operations of the section of highway or bridge, and the volume of traffic and vehicle operating costs thereon. The wording here for what types of expenditures shall be considered in setting a fee is not exactly the same as is mentioned in Section 8-A with regard to tolls under concession agreements. The Section 8-A wording is more specific and should be repeated here. Rule 3 then sets maximum fees at June 1997 prices for projects converting existing two lane national highways into four lane highways. For a car, that rate is Rs. 0.40 per km. For light commercial vehicles, the rate is Rs. 0.70 per km. For trucks or buses, the rate is Rs. 1.40 per km. The Rule also provides that the rate may be increased annually, and rounded to the nearest rupee, based on the annual wholesale price increase.

The Control of National Highways (Land and Traffic) Act, 2002 (Act No. 13 of 2003) then sets rules for the control of land within national highways and their rights of way, of traffic moving on such highways and for removal of unauthorised occupation on such highways through the establishment of Highway Administrations for a State or individual highway. (Sections 3 and 4).

In addition, the National Highways Authority of India (NHAI) Act, 1988 (Act No. 68 of 1988), as amended, established the NHAI as an independent authority attached to the Ministry of Road Transport and Highways (MORTH) to carry out the development, management and maintenance of national highways. Under Section 16(2)(h), added by amending Act No. 16 of 1997, the Authority may entrust the carrying out of any of its functions to any person on terms and conditions as may be prescribed. Section 34(2)(dd), as added by the same amending Act, then gives the Central Government the power to set rules for such terms and conditions by notification in the Official Gazette. Thus the powers and functions of NHAI may now be delegated to private parties for the carrying out of road development through concession agreements and other contracts.

Finally, the Central Road Fund Act, 2000 (Act No. 54 of 2000) gave statutory status to the existing Central Road Fund established in 1988 as a sustained financial arrangement for the development of State and local roads, as well as national highways. The Fund is financed through a cess leviable on petrol and high speed diesel oil. Section 10 of the Act indicates that 50% of the cess on high speed diesel oil shall be for the development of rural roads, while the remaining 50% of that cess and all of the cess collected on petrol shall be spent 57.5% on national highway development and maintenance; 12.5% on roads under or over railways; and the remaining 30% on the development and maintenance of roads other than national highways (but 3% of that shall be kept by the Central Government as reserve for allocation to States for road schemes of inter-State and economic importance approved by the Central Government).

3.1.7 State Legislation

For all highways not designated as national highways, the State Government has responsibility. The Andhra Pradesh Roads and Buildings Department has its functions specified in the Andhra Pradesh Public Works Code, 1976, as amended. However, some roads in the Hyderabad Metropolitan Area are designed and developed by the Hyderabad Urban Development Corporation (HUDA) under its general development functions under the Andhra Pradesh Urban Areas (Development) Act, 1975 (Act No. 1 of 1975), as amended. Section 5 of that Act gives each Urban Development Authority in the State broad powers to do what is necessary to promote and secure development of all or any of the areas comprising the development area concerned based on an approved urban development plan.

Unlike Karnataka, Andhra Pradesh does not have a separate State Highway Act parallel to the National Highway Act, although the enactment of such an Act is being considered[1]. The State Motor Vehicles Act has been amended to enable the private sector to levy tolls and regulated traffic on toll roads.

Further, the AP Road Development Corporation Ltd. has been established as an independent authority under the Roads and Buildings Department to execute certain important road projects. This is parallel to the similar development in other States.

3.2 Power

3.2.1 Background

As in the earlier appendix relating to Karnataka we will be analysing the evolution of the Andhra Pradesh Power Policy in relation to the three milestones set up by the Central Government[2].

3.2.2 State Power Policy

The Andhra Pradesh State Electricity Board (APSEB) also was facing problems of revenue deficit and consequent deterioration in its financial health. In Andhra Pradesh however unlike in Karnataka the enactment of the Reform Act, (The Andhra Pradesh Electricity Reform Act, 1998), establishing the Regulator preceded the unbundling and corporatisation of the SEBs.

The initiation of the reform process in AP can be traced to the appointment of a High Level Committee of experts headed by Mr. Hiten Bhaya, by the GoAP to suggest measures, including any structural changes to encourage PSP in the power sector[3]. In addition, there was the Common Minimum National Action Plan at the Central Level that espoused similar sentiments. Keeping in mind the recommendations arising out of the issues raised by both the Committee Report and the Common Minimum National Action Plan, the GoAP decided to come out with a comprehensive policy statement on reforming the power sector.

As a first step, in this direction the GoAP issued a policy statement on Power Sector Reforms in February 1997[4]. In this reform paper, the GoAP outlined the following as the objectives of the reform process and the method whereby those objectives would be achieved.

1. To ensure that power will be supplied under the most efficient conditions in terms of cost and quality to support the economic development of the State;

2. To aim at reducing the burden on the State's budget due to the power sector with the objective of the sector becoming a net generator of resources.

3. Ensuring that the Government will withdraw from its earlier role as a regulator of the industry and will be limiting its role to one of policy formulation and providing policy directions.

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[1] Andhra Pradesh Highways Act 1989 was passed by the AP Legislative Assembly but was never enacted.

[2] "New Initiatives in the Power Sector – A Brief" 22 in India's Electricity Sector Widening Scope for Private Participation (Investment Promotion Cell, Ministry of Power, GOI : New Delhi, , 6th Edn., 2000).

[3] V.S.Sampath, (PS to GoAP), "Power", 8, undated paper.

[4] V.S.Sampath, (PS to GoAP), "Power", 8, undated paper.

Improving the financial condition of the SEB's.

To give a legal framework to the proposed reform initiatives, the GoAP introduced the A. P. Electricity Reform Bill in the Assembly and the same was passed on 28-04-1998. The A. P. Electricity Reform Act became effective from 01-02-1999.

Following the enactment of the A.P. Electricity Reform Act , the GoAP undertook the reform and restructuring of APSEB. This was implemented through two statutory transfer schemes. The first statutory transfer scheme was notified in February 1999, separating the Generation business from the Transmission and Distribution businesses. The Generation business was transferred to and vested in Andhra Pradesh Power Generation Corporation Limited ("APGENCO") while the Transmission and Distribution businesses were transferred to and vested in the Transmission Corporation of Andhra Pradesh Limited ("APTRANSCO").

The second statutory transfer scheme was notified in March 2000 by the GoAP, separating the Transmission and Bulk Supply business from the Distribution and Retail Supply business by creation of separate undertakings for Distribution and Retail Supply business. APTRANSCO retained the business of transmission and Bulk Supply while four Distribution Companies ("DISCOMS") were constituted to undertake Distribution and Retail Supply business.

Introducing independent regulators.

The A.P. Electricity Regulatory Commission as envisaged in the A.P. Electricity Reform Act was setup on 31-03 1999 to balance the interests of the various stakeholders and the utility.

The following are some of the major activities performed by the APERC till date:

- It has finalized and issued practice directions on the use of Captive Generation in the State;
- A tariff philosophy paper has been issued which was widely discussed;
- It has issued Regular licences to APTRANSCO and other sanction holders;
- It has issued guidelines for submission of ARR and Tariff proposals by the licencees;
- It has delivered its tariff orders for the years 2000-01 and 2001-02;
- It has issued regular licences to the four Distribution Companies effective from 01-04-2001;
- Performance standards have been prescribed for the licencees and the same have been notified; and
- It has Issued orders on Power Procurement Policy to be followed by APTRANSCO .

Creating an enabling environment for PSP in an incremental manner at all levels in the electricity sector.

As per the Strategy Paper of the Andhra Pradesh Government[5], the Distribution Companies, which are presently wholly owned subsidiaries of APTRANSCO, will be converted into Joint Ventures with Private Sector Participation. In all these Companies, the Joint Venture partner will hold the majority shares and management control to bring in better management practices of private sector and to facilitate required investments into the Sector. The selection of JV partner will be through international competitive bidding and the selection process will be fair and transparent. Further action will be taken after a view is taken on some of the important issues like the strategy to be followed, extent of disinvestment, simultaneous or staggered privatisation of the Distribution Companies, number of Companies for which a bidder can quote, finalization of selection criteria for Joint Venture partner etc.

According to the Strategy Paper, the Vision 2020 Plan, prepared by the Government of AP envisages supply of power at competitive prices, reduction of energy losses to 10% and total elimination of commercial losses by 2020. The stated objective is to reach a per capita consumption level of over 2000 KWH by 2020. A Business plan is being developed keeping in view the goals and objectives of the vision document by providing for required investments year after year. In order to have a realistic and implementable plan, the business plan is being prepared taking into account projections in load growth, capacity additions envisaged, losses reduction estimation and investments contemplated during the business plan period. The GoAP hopes to achieve an 8.2% compound annual growth rate (CAGR) of sales for the period from 2001-2007. The Transmission and Distribution losses are expected to be reduced to 20% during this period, with a net capacity addition of about 5,000 MW and Transmission Distribution investment to the tune of Rs. 15,000 Crores during the period 2001-2007.

3.2.3 Legislative Framework

The AP Electricity Reform Act, 1998

The enactment of the AP Electricity Reform Act, 1998 ("APERC Act") as per the Statement of Objects and Reasons was to achieve the twin objectives of

1. Unbundling the integrated power sector and thus end the monopoly of the State Electricity Board.

2. Incorporate an autonomous statutory State Regulatory Commission to promote healthy growth of power sector in the State.

Preamble

The preamble to the Act lists its principal purposes as being :

- To provide for the constitution of an Electricity Regulatory Commission;

- To bring about restructuring of the electricity industry, rationalisation of the generation, transmission, distribution and supply of electricity; and

- To enhance avenues for participation of private sector in the electricity industry.

[5] GoAP, "Strategy Paper on Power", available at, http://www.aponline.gov.in/quick%20links/strategy%20papers/strategy_paper_power_index.html visited on 1st September 2003.

Composition of the Act

The Act is divided into fourteen Parts which cover the establishment of the Regulatory Commission, enumeration of the powers and functions of the Commission, provisions relating to the licensing of transmission and supply, reorganisation of the electricity industry, tariffs and financing of the licensees, constitution of advisory committee and consultation with consumers, arbitration mechanisms for resolving disputes under the Act and offences and penalties for contravention of the provisions of the Act.

In addition the Act has a Schedule. The First part of the Schedule deals with preparation of the Annual Financial Statement of the Commission and the method and the manner in which the same shall be audited. The second part details the remuneration that is to be paid to the Chairman and Members of the Commission and grant of power to the Commission to delegate performance of functions.

Scope of the APERC Act

The Act extends to cover the whole of the State of Andhra Pradesh.

Definitions under the APERC Act

Section 2 of the Act defines a series of terms. The more important of these include

Section 2(a) which defines the term "area of transmission" exhaustively as the area within which the holder of a transmission licence is for the time being authorised by licence to transmit energy in accordance with the conditions prescribed;

Section 2(p) defines "transmit" in relation to electricity, as the transportation or transmission of electricity by means of a system operated or controlled by a licensee which consists, wholly or mainly, of extra high voltage and extra high tension lines and electrical plant and is used for transforming and for conveying and/or transferring electricity from a generating station to a sub-station, from one generating station to another or from one sub-station to another or otherwise from one place to another;

Section 2(q) and (r) of the Act direct that the meaning of the words if not defined in the APERC Act should be taken to be the same as that in the Electricity Supply Act, 1948 and if that is not applicable then the Electricity Act, 1910.

The Andhra Pradesh Electricity Regulatory Commission.

Part II contains provisions relating to the establishment of the Andhra Pradesh Electricity Regulatory Commission. Part III of the Act deals with the Proceedings, Powers and Functions of the Commission. Section 9 of the APERC Act refers to the place and manner in which the proceedings of the Commission shall be conducted.

Section 10 of the Act details the procedural powers which are vested with the Commission.

Section 11 of the APERC Act details the functions that are entrusted to the Commission.

Among them are following functions:

- To aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;

- To regulate the working of the licensees and to promote their working in an efficient, economical and equitable manner including laying down standards of performance for the licensees in regard to services to consumers;

- To issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences;

- To regulate the purchase, distribution, supply and utilisation of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;

- To promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers;

- To collect data and forecast on demand and use of electricity, require licensees to formulate perspective plans, lay down a uniform system of accounts and all incidental activities, etc.;

- To regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State; and

- To require licensees to formulate perspective plans and schemes in co-ordination with others for the promotion of generation, transmission, distribution and supply of electricity.

The powers of the Commission in relation to tariff setting, which are to be found in the other parts of the Act are also discussed below.

Section 26 of the APERC Act entitles the Commission to prescribe the methodologies and procedures for the determination of the licensee's revenue and tariffs. The section also lays down the following principles for determination of licensees' revenues and tariffs:

- the financial principles and their applications provided in the Sixth Schedule to the Electricity (Supply) Act, 1948;

- the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments, performance of license conditions;

- the interest of the consumers.

In following these principles, the Commission may depart from factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 in determining the licensees' revenues as well as tariffs by recording the reasons therefor in writing. The overriding expectation is that the Commission will pursue factors that encourage efficiency, efficient use of resources etc., and in the process depart, if necessary, from the strict application of Sixth Schedule.

Licensing Supply and Transmission.

The Act refers to the licensing of only Transmission and Supply.

Section 14 of the APERC Act makes it mandatory for persons to obtain a licence for the purposes of carrying on the business of supply and transmission of electricity and Section 15 of the APERC Act makes the Commission the nodal agency for granting licences for the purposes of transmission or supply of electricity. Section 15 also lays down the detailed procedure for grant of licences. In particular the Section enumerates that the Commission in granting a license to the licensee may require the licensee to ,

- enter into agreements on specified terms with other persons for the use of any electric lines, electrical plant and associated equipment operated by the licensee;
- comply with any direction given by the Commission;
- act in accordance with the terms of the license;
- refer all disputes arising under the license for determination by the Commission;
- furnish information, documents and details which the Commission may require for its own purpose or for the purposes of the Central or State Government or Central Electricity Authority or Central Electricity Regulatory Commission;
- comply with the requirements of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or rules framed thereunder in so far they are applicable;
- undertake such functions and obligations of the Board under the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 as the Commission may specify by regulation;
- obtain the approval of the Commission of such things that are required under the license conditions or for deviation from the same;
- notify the Commission of any scheme that he is proposing to undertake including the schemes in terms of the provisions of the Electricity (Supply) Act, 1948;
- purchase power in an economical manner and under a transparent power purchase procurement process;
- supply of electricity in bulk to other licensees or to customers.

Section 15 also provides for the modification of the terms and conditions of the License by the Commission.

Section 16 grants power to the Commission to frame regulations to grant exemption from the requirement to have a supply license with or without conditions. The Commission would however be required to take the permission of the local authority, the Central Government or an already existing licensee as the case may be.

Section 17 provides that it shall be the duty of the holder of a supply license or a transmission license in respect of a particular area to develop, provide and maintain an efficient, co-ordinated and economical system of electricity supply or transmission in the area of supply, as the case may be.

Section 18 enumerates the cases wherein the Commission can revoke the License which has been granted. Section 20 provides the detailed procedure which is to be followed by the Commission in such cases. Section 19 provides that the Commission in the public interest may amend the terms and conditions of the license.

Section 21 of the Act makes it mandatory for any licensee or generating company to obtain prior consent of the Commission in writing before such a company takes over the business of another company engaged in transmission, supply or distribution of electricity.

Reorganisation of the Andhra Pradesh State Electricity Board

Part VII of the APERC Act details the manner in which the Andhra Pradesh State Electricity Board ("APSEB") will be reorganised. Under Section 13 of the APERC Act the State government was required to set up a company under the name APTRANSCO under the provisions of the Companies Act, with the principal objects of engaging in the business of procurement, transmission and supply of electric energy.

Further the APERC Act provided in Section 13 that APTRANSCO shall own the extra high voltage transmission system, and shall be responsible for the transmission system operation and shall operate the power system in an efficient manner.

Section 13(6) further provided that subject to the overall supervision and control of the APTRANSCO, a number of subsidiary or associated transmission or distribution companies could be established in the State and the Commission may grant licenses under the terms of this Act to such transmission or distribution companies, in consultation with APTRANSCO.

Part VII of the Act further detailed the manner in which the assets and liabilities of the APSEB were to be transferred, during the process of reorganisation.

Tariff Setting

Explanation (b) under Section 26 of the AP Electricity Reform Act, 1998, says that "tariff" means a schedule of standard prices or charges for specified services, which are applicable to all such specified services provided to the type of customers specified in the tariff published. According to the provisions of Sub-Section (1) of Section 26, the holder of each licence granted under the Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the Expected Revenue from Charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect such revenues.

The provision of Section 11 which lays down the functions of the Commission, in this regard have already been mentioned earlier. Section 11 enjoins the Commission to promote efficiency, economy and safety in the use of electricity apart from promotion of quality, continuity and reliability of service.

In particular the Commission is to be guided by the following factors, namely: -

- The financial principles and their applications provided in sections 46, 57 and 57A of the Electricity (Supply) Act 1948 (54 of 1948) and the Sixth Schedule thereto;

- The tariff should progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency;

- Factors which would encourage efficiency, economical use of the resources, good performance and optimum investments and other matters which the Commission considers appropriate for the purpose of this Act;

- Safeguarding the interests of the consumers while at the same time respecting the user pays principle.

Keeping in mind the National and State power plans formulated by the Central or State Government as the case may be.

Sub-Section (7) of Section 26 of the APERC Act says that any tariff implemented under the Act shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor and total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of the supply and the purpose for which the supply is required or paying capacity of the consumers and need for cross subsidization. It shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and shall satisfy all other relevant provisions of the APERC Act, regulations and conditions of the Licence. Sub-Section (8) of Section 26 further lays down that the Commission shall endeavour to fix tariff in such a manner that as far as possible similarly placed consumers in different areas pay similar tariff.

Section 12 of the APERC Act specifies the power of the State Government to issue policy directives on matters concerning electricity in the State including overall planning and co-ordination. The policy directives given by the Government have to be consistent with the objectives sought to be achieved by the Act. In case the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the Commission, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the Commission may direct as a condition for the licensee or any other person to implement the subsidy provided for by the State.

Section 27 provides an option to the Government to provide various kinds of support to the licensees.

1. The State Government may, with the approval of the State Legislature, make subventions to any licensee for the purpose of this Act or the Electricity (Supply) Act 1948 for such amounts as may be recommended by the Commission and on such terms and conditions as the State Government may determine.

2. The State Government may from time to time advance loans to any licensee or Generating Company which for the time being is wholly or partly owned by the State Government on such terms and conditions, not inconsistent with the provisions of this Act or the Electricity (Supply) Act, 1948, as the State Government may determine.

3. The State Government may guarantee in such manner as it thinks fit, the repayment of the principal or the payment of interest (or both) on any loan proposed to be raised by any licensee or generating company, which is for the time being wholly or partly owned by the State Government or the discharge of any other financial obligation of any licensee, provided that the State Government shall, so long as such guarantees are in force, lay before the State Legislature during the budget session in every year a statement of the guarantees, if any, given during the current financial year of the State and an up-to-date account of the total sums, if any, which have been paid out of State revenues in each case by reason of any such guarantees or paid into State revenues towards repayment of any money so paid out.

Other Subsidiary Provisions

Sections 28 to 31A detail the procedural aspects of the Commission's power to pass Orders and enforce Decisions. S.31 grants power to the Commission to impose fines and charges for non-compliance with the provisions of the APERC Act. Section 54 gives the Commission general power to frame binding regulations under the Act. Section 32 provides for the constitution of an Advisory Committee having representation from the various stakeholders so as to enable their involvement in the policy formulation and implementation processes thus making the process more participatory and transparent.

Section 35 provides that the Commission may disseminate information of relevance to the public after complying with certain procedures. Section 34 allows the Commission to set standards of performance to be achieved by the licensees. Section 35 provides that the Commission may also collect information from the licensees which indicates their level of performance which however they are required to keep confidential under Section 36 of the Act. Section 37 empowers the Commission to be the arbitrating authority or nominate the arbitrating authority to adjudicate and settle any dispute arising between the licensees.

Section 39 provides for an appeal against the order of the Commission to the High Court of Karnataka. Sections 40-45 of the Act detail the various penalties and the circumstances in which they would be imposed. Section 48 then provides that the licensee, generating companies and others on whom the fines or charges are imposed under the Act shall not, directly or indirectly, pass the same to the consumers in the form of tariff or charges payable.

Section 50 provides for a Bar of jurisdiction and saving of consumer actions. Section 55 provides the Government the power to make rules to carry out the purposes of the Act. Section 56 lays down the detailed framework within which the provisions of the APERC Act will interact with the Central Legislation, as it existed in 1998. Section 57 provides for the provisions of certain Central Laws to be saved.

3.3 Ports

3.3.1 Background

Andhra Pradesh has twelve minor and intermediate ports and one major port (Visakhapatnam) along its 1000 km. Coast. Visakhapatnam is the country's largest major port (44.4 mmt in 2000/2001). At the state port level, Andhra Pradesh is ranked third behind Gujarat and Maharashtra and handles 9% of total minor port traffic. Kakinada is the largest minor port in the State handling 2.77 mmt of traffic in 1999-2000, while Rawa Port handled 2.53 mmt.

3.3.2 State Port Policy

Andhra Pradesh was one of the first maritime states in India in 1994/1995 to recognize the need for increased port infrastructure and the central role required by the private sector to meet that need. Port privatisation in the State is based on the Build-Operate-Share-Transfer (BOST) approach.

The main features of the BOST policy are as follows:

- 30 year concession period, with the possibility of extension for two more periods of 10 years each;
- an in operation period of five years;
- concession agreement on either the BOST or Build-Operate-Maintain-Share and Transfer (BOMST) basis;
- port developer to be designated as Conservator for the Port under the Indian Ports Act,1908;
- freedom of the developer to fix the tariff;
- freedom to set own employee policies;
- sharing of revenue with the State Government (5% in the first five years progressing to 12% in later years;

- Government land to be leased. Where land is acquired, the cost of such acquisition is to be borne by the developer and adjusted against the share of revenue payable to the Government;

- In the case of new port development activity within 30 km, the developer is assured exclusivity in terms of right of first offer and refusal;

- At the end of the concession, immovable assets are to be transferred to the Government free of cost. Movable assets will revert on the payment of the consideration specified in the Concession Agreement.

Privatisation mandates will be granted based on a competitive bidding process. Tendering will be to pre-qualified bidders based on their technical and financial competence with their bids assessed for technical and commercial sufficiency. The final award will be made based on an assessment of project viability and the financial offer made to the Government by way of:

- minimum guaranteed revenue share (in Rupees per annum) (50% weighting);

- percentage of revenue share offered per annum (30% weighting);

- maximum investment proposed in Phase I (20% weighting).

3.3.3 Vision 2020

In Andhra Pradesh Vision 2020, ports are identified as "trunk infrastructure" constituting the infrastructure backbone of the State. That Document envisions the following development targets:

- Visakhapatnam to be a Mega Port (about 70 mmt per annum capacity);

- Four ports of 30-50 mmt per annum capacity each to be developed at the State level (Kakinada, Krishnapatnam, Gangavaram, Machilipatnam);

- Other ports to be developed for captive use, linked to specific growth engines.

Vision 2020 calls for a minor port capacity augmentation from 9.7 mmt per year to 186 mmt per year by 2020. This would require an investment of about Rs. 14000-17000 crore (based on an estimate of Rs.80-Rs.100 crore per mmt of capacity).

3.3.4 Results To Date

As of August 2003, four ports had been privatised (Kakinada, the LNG Terminal, Krishnapatnam and Vodarevu. The other ports were to be developed with private participation. In addition, the concession agreement for the greenfield Gangavaram Port was signed by the parties on August 7, 2003, along with a shareholders' agreement and a State Support Agreement. The State Support Agreement for the Gangavaram Port follows the AP Infrastructure Development Enabling Act, 2001 in providing for 100% exemption from stamp duty and registration charges on the first transfer of land, mortgage deeds and financial agreements, and exemption from sales taxes on inputs required for project construction and from payment of segniorage fees-cess on minor minerals found during the construction period.

3.3.5 Legislative Framework

Ports are a mixed responsibility under the Indian Constitution. Ports declared by law to be major ports, such as Visakhapatnam, are governed under Central legislation, the Major Port Trusts Act of 1963 (Act No. 38 of 1963), as amended. (see item 27 of the Union List under the Seventh Schedule of the Constitution). Central legislation also governs rules regarding maritime shipping and navigation on tidal waters (item 25 of the Union List), lighthouses (item 26 of the Union List) and port quarantine (item 28 of the Union List). Port matters are also handled by uniform international rules set by conventions signed by the Government of India. For major ports, the Tariff Authority for Major Ports (TAMP) was established in 1997 to set tariffs and act as an economic regulator. (Act No. 15 of 1997, adding Chapter V-A, Sections 47A-47H, to the Major Port Trusts Act.

Other ports are the concurrent responsibility of both the Central Government and the State Government based on item 31 of the Concurrent List under the Seventh Schedule of the Constitution. The Indian Ports Act, 1908 (Act No. 15 of 1908), as amended, grants powers to State Governments with regard to all ports not designated as major ports. They include the power to make port rules in all areas except questions of public health, to appoint port officials except health officers, to set rules for the safety of shipping and the conservation of ports, to set port dues and charges and to group ports. Andhra Pradesh has not passed any further legislation but acts under notified orders in these areas unlike Karnataka which has its Ports (Lands and Shipping Fees) Act, 1961, as amended, and Gujarat which established a Maritime Board under the Gujarat Maritime Board Act, 1981 and is now considering the creation of a Gujarat Port Authority. (see discussion of the latter in Appendix B).

For privatisation of ports projects, such as the recent agreement for the Greenfield Gangavaram Port, most matters including tariffs are set in the Concession Agreement itself. That Agreement will be examined in detail as part of Phase II of this Project which will concern itself with the effectiveness of regulation by contract in such situations. It is the first use of the model concession agreement developed for port privatisation projects. Section 5 of the Agreement gives the Concessionaire full freedom to fix and revise tariffs for its various port services.

3.4 Airports

3.4.1 Background

The greenfield Hyderabad International Airport project is the major concern in the airport sector for the Government of Andhra Pradesh. It is to be built by a private-public consortium on a Build-Own-Operate (BOO) basis. That consortium has 74% private ownership and 26% ownership by the public sector, including the Government of Andhra Pradesh and the Airports Authority of India. **(exact shareholders)**

In addition, Andhra Pradesh Vision 2020 states that the State Government plans to develop two additional international airports at Visakhapatnam and Shamshabad, five or six small domestic airports (possibly at Vijayawada, Tirupati, Puttaparti, Cuddapah, Kakinada/Rajahmundry, Warangal and Nellore), and 17 smaller airstrips, all through public-private partnerships if possible.

3.4.2 State Airport Policy

As civil aviation is a central subject, the Government of Andhra Pradesh follows the policies of the Government of India. However, Andhra Pradesh Vision 2020 identified development of airport infrastructure as critical to the overall development of the State economy. There is an increasing focus of improving the logistics and distribution network in the State. The State is planning to create a logistics and distribution hub that connects Visakhapatnam, Vijayawada and Kakinada, as well as the airport development discussed above.

The greenfield Hyderabad International Airport is to be developed as a major part of a strategy to position the State as a convenient hub and central location with easy accessibility to the Arab world as well as to all of Southern India and Southeast Asia.

3.4.3 Legislative Framework

Civil aviation is a central Government subject in India. (see items 29 and 30 of the Union List of the Seventh Schedule of the Constitution.) Item 29 covers airways, aircraft, air navigation and airports. Item 30 covers carriage of passengers and goods by air. At the national level, the Aircraft Act, 1934, with its attendant Aircraft Rules, 1937 sets the basic rules for civil aviation. The Ministry of Civil Aviation formulates national policies for airports, including rules regarding airport facilities, air traffic services and the carriage of passengers and goods by air. The Office of the Directorate General of Civil Aviation is the main regulatory body responsible for the regulation of air transport services to, from and within India and for the enforcement of civil aviation regulations, air safety and airworthiness. The draft Civil Aviation Act, 2000 would establish a Civil Aviation Authority, chaired by the Director General of the Office of Civil Aviation, as an independent regulatory authority under the Ministry. (see Chapter II, Sections3-19).

In addition, there is a draft Civil Aviation Policy which would encourage private sector investment in the airport sector. Further, there is a Policy on Airport Infrastructure. The main elements of the draft Civil Aviation Policy concerning private sector participation in airports are:

(a) private sector investment in constructing, upgrading and operating new and existing airports will be encouraged;

(b) foreign equity participation in providing airport infrastructure will be permitted up to 100%. However, such participation above 74% will require the approval of the Government of India. (NOTE: The Hyderabad International Airport would have foreign equity participation of 74%);

(c) private sector participation will include participation by a State Government, urban local bodies, private companies, individuals and joint ventures on a BOO basis or any other pattern of ownership and management depending on the circumstances;

(d) restructuring of the major airports will be undertaken by long-term leasing to private investors to bring efficient management, to improve facilities and standards of services and to attract private investment;

(e) some existing domestic airports will be declared to be international airports to ensure that there is an international airport in every region of the country.

The Policy on Airport Infrastructure also contains a number of major policies relevant to private sector participation. They are:

(a) to reclassify the airports as follows:

(i) **International Hubs.** This category would include the present international airports at Mumbai, New Delhi, Kolkata and Chennai, as well as those airports deemed appropriate to become international airports, including the present projects at Hyderabad and Bangalore, and also Ahmedabad, Amritsar and Guwahati. It is intended that these airports will have world-class standards, including convenient connections for international and domestic passengers, airport-related infrastructure like hotels, shopping areas, conferencing and entertainment facilities, and aircraft-maintenance bases.

(ii) **Regional Hubs**. This category will cover regional airports acting as operational bases for regional airlines that will have the facilities currently specified for model airports,

including the capability to handle limited international traffic. It is intended that the Government of India and the State Governments will be co-promoters of regional airlines.

(iii) **Other Airports.** This category will be developed where cost-effective on a case-by-case basis. Airports serving state capitals will be given priority.

(b) to develop detailed master plans to upgrade airports to the level of international and regional hubs in line with international ICAO standards;

(c) to adopt a flexible and positive attitude towards private (including foreign) investment. Government will take all possible steps to encourage such private sector participation. Specifically:

(i) an Airport Restructuring Committee in the Ministry of Civil Aviation will identify existing airports and greenfield sites for such participation and carry out pre-feasibility studies that will be made available to the private sector;

(ii) The Airports Authority of India (AAI) will create separate profit centres for each airport and, on a case by case basis, will establish subsidiary companies to enter commercial arrangements or joint ventures with the private sector;

(iii) Where airport operators desire private participation in their existing airports, this should be allowed without any necessary government approval.

(d) to optimise Government of India revenue from aeronautical charges through negotiation with IATA;

(e) to allow airport operators freedom to set all non-aeronautical charges without government control;

(f) to determine that the AAI will set standards of performance in various areas of passenger and cargo handling so that both ICAO standards and comparable standards at similar airports throughout the world are achieved;

(g) to determine that AAI will provide the air traffic services over the Indian airspace and adjoining oceanic areas in accordance with ICAO standards and recommended practices;

(h) to require Government of India approval before public or private development of a greenfield airport (given that there are already many non-viable airports), except in the case of other airports where the approval of the Office of the Directorate General of Civil Aviation will be sufficient.

Regarding the operation of airports, the Airports Authority of India Act, 1994 (Act 55 of 1994) established that Authority as a financially independent agency under the Ministry of Civil Aviation to construct, operate and maintain all civilian airports, international and domestic, as well as 28 civil enclaves at defence airports. As originally enacted, that Act did not allow for private sector participation in any of the airports under the control of the Authority. However, the Airports Authority of India (Amendment) Act, 2003 has made revisions that allow the Authority to assist in the establishment of private airports (new Section 12(3)(ad)), and to lease the premises of an airport to a private party (new Section 12A). Thus the Authority now may assist a private party to establish a greenfield airport like the Hyderabad International Airport or may lease an existing airport to a private party for renovation and improvement.

3.5 Urban Mass Transit

3.5.1 Background

The Municipal Corporation of Hyderabad (MCH) is actively pursuing the development of an urban mass transit system. Phase 1 of that system using mainly old tracks has been completed and began operation in August 2003. It is a 50%-50% joint venture to share costs between Indian Railways and the State Government of Andhra Pradesh. The second and more ambitious Phase II is presently being designed by an international consortium. The first Phase was completed entirely with Government money. The second Phase will seek private sector participation.

3.5.2 State Urban Mass Transit Policy

There is no State Urban Mass Transit Policy beyond the efforts by the State Government of Andhra Pradesh to assist the Hyderabad urban mass transit system.

3.5.3 Legislative Framework

Municipal tramways are designated as under the State based on item 13 of the State List. (Article 246, Seventh Schedule, of the Indian Constitution). However, that function is granted to the Municipal Corporation of Hyderabad (and potentially also to Secunderabad, Visakhapatnam and Vijayawada Municipal Corporations) under Section 115 of the Hyderabad Municipal Corporations Act, 1955 (Act II of 1956), as amended. Subsection (34) of Section 115 provides that "the construction, purchase, organization, maintenance, extension and management of tramways, trackless trams and mechanically propelled transport facilities for the conveyance of the public" is one of the matters that a municipal corporation may provide for at its discretion under the Act.

Where tracks of the Indian Railways are used, as for Phase 1 of the Hyderabad Metro, then such urban transit project must follow the rules set under the Indian Railways Act, 1989.

3.6 Cyber Parks/Infromation Technology (IT) Parks

(see main text)

3.7 Special Economic Zones (SEZs)

3.7.1 Background

Andhra Pradesh does not have legislation in relation to Special Economic Zones. It does however have a policy document and various state government notifications in relation to exemptions for Special Economic Zones. The Government of India has already given an in-principle approval for setting up an SEZ in Andhra Pradesh near the port city of Visakhapatnam on the east coast of India. An SEZ has also been approved at Kakinada in Andhra Pradesh.

The Government of Andhra Pradesh introduced a policy in relation to Special Economic Zones after the in- principle approval was granted to the SEZ at Vishakapatnam, because it intended to exploit the SEZ concept for impacting the State's socio-economic fabric through industrial development and enhanced job opportunities. The development of Special Economic Zone(s) initiated by the State Government is primarily to be led by Private Sector Investors and Developers to undertake international class and scale of infrastructure development.

The Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC) has been designated to be the nodal agency by the Government of Andhra Pradesh in respect of the Special Economic Zone being developed at Achutapuram-Rainbilli Mandals of Visakhapatnam District and also for future SEZ developments in the State of Andhra Pradesh. APIIC will function as interim Development

Commissioner of SEZs. APIIC has already taken the lead in developing the SEZ at Achutapuram and Rambilli Mandals, Visakhapatnam District as a public-private partnership.

To facilitate speedy development of the SEZ at Achutapuram-Rambilli Mandals and as a first step in the direction of establishing more SEZs in the State, the Government of Andhra Pradesh decided to formulate a SEZ Policy, with the background of the Government of India guidelines for SEZs, to provide a comprehensive framework for establishment, operations and sustainability of SEZs in the State.

In addition to this, the Government of Andhra Pradesh is examining additional incentives and benefits that can be extended to all the stakeholders, especially developers & operators. Some of these include a state Infrastructure Development Enabling Act (IDEA), an Area Development Act to delegate "Single Window" approvals and clearance powers for zone administration and additional enabling provisions in the state Contract Labour Act.[6]

3.7.2 State SEZ Policy

In light of the Union Government's Policy, the Government of Andhra Pradesh has also introduced a policy framework for Special Economic Zones (SEZs) in Andhra Pradesh. The salient features of the Policy are:

- Special Economic Zone(s) development will primarily be led by Private Sector investors and Developers to undertake international class and scale infrastructure developments. These developers (herein after referred to as SEZ Company) will act as SEZ managers in designing, planning, financing, building, operating and marketing the zones to investors. The SEZ Company would endeavor to provide world-class utilities, social and municipal services.

- The Government will facilitate creation of linkage and social infrastructure including telecom facilities, inter modal transport linkages (road, rail and air connectivity).

- APIIC is the nodal agency for the state of Andhra Pradesh for AP Special Economic Zones being developed at Atchutapuram and for other future SEZ developments in the State. APIIC will also perform as Interim Development Commissioner for the SEZs.

- The Development Commissioner: shall be deemed to be appropriate Development Authority for the notified area of SEZ.

- The Special Economic Zone will provide for a Single Window Clearance for approvals and clearances for investors, using Electronic Data Interchange.

- The policy provides for a 'Simplified Business Working Environment', which means that all procedures will have pre-laid guidelines and time lines for disposing off cases as well as approval with certification fees.

- There are simplified registration and certification procedures.

- The SEZ Company will provide the necessary infrastructure (building, office space and equipment) for the DC and pay equitable amounts as salary and prerequisites to the DC's office staff through a suitable escrow account.

[6] Mentioned at http://www.apsez.com/policy/policy.htm.

- The role of Development Commissioner is one of regulation i.e. to provide clearances under various statues and regulations of Government of India and State Government, facilitation i.e. to facilitate clearances not granted within the SEZ and advise Government on issues requiring framework amendments of clarifications and promotion i.e. to undertake marketing of the zones along with private promoters.

- Tax benefits are as follows:

  - 50% exemption is allowed on Stamp Duty and Registration Fee on transfer of lands meant for Industrial use in the SEZ area.

  - There is a complete exemption of stamp duty and registration fee for loan agreements, credit deeds, mortgages and hypothecation deeds executed by the SEZ Units for assets in the SEZ in favour of banks or financial institutions.

  - In keeping with the national uniform floor rate policy and exemptions given to SEZs throughout the country, certain benefits are extended to the AP-SEZ, Achutapuram.

- With regard to power, Special Economic Zones are exempted from electricity duty and tax.

- Captive Power will be allowed in SEZs.

- The SEZ Company will ensure the provision of adequate water supply within the SEZ.

- The State Government has delegated powers of the Labour Commissioner to the DC and will also place an officer of Labour Department under the DC. It has also approved simplified submissions of reports by SEZ Units and created a Consolidated Annual Report System. Self-Certification is also approved.

- The policy states that the Development Commissioner will be notified as the appropriate authority to represent the Andhra Pradesh Pollution Control Board (APPCB), with regard to clearances for all SEZ Units.

- The SEZ does not require Environment Impact Assessment (EIA) approval.

- The policy document states that the State Government will declare the SEZ as a local authority, which shall replace the existing Panchayats. Such local authority will be vested with all powers and shall carry out all functions in the existing provisions.

- The State government will process creation of State Police, Fire Services and Home Guard Structures for SEZ(s) for the maintenance of Law & Order.

- Special territorial jurisdiction will be accorded to Special Courts as necessary in the SEZ, in consonance with High Court approvals.

- The State Government will facilitate development and augmentation of education and training facilities through suitable formats including private sector formats.

- The Annexure A to the policy documents lists out the proposed amendments to various labour laws such as Industries Disputes Act, 1947, Minimum Wages Act, 1948, AP Shops and Establishments Act, 1988, Industrial Employment (Standing Orders) Act, 1946, Payment of Equal Remuneration Act, 1976 and Factories Act, 1948.

3.7.3 Legislative Framework

Instruments of Delegated Legislation

There are certain benefits available under notifications/ rules etc. in Andhra Pradesh, though no law as such on Special Economic Zones exists. These include:

- Exemption from levy of sales tax on the inputs supplied by the units located off zone and within the Special Economic Zone to the units located in the Special Economic Zone.[7]

- Exemption from levy of tax on entertainments held within Special Economic Zones and on luxuries provided in hotels in Special Economic Zones.[8]

- Delegation of powers of the Commissioner of Labour to the Development Commissioner of Export Promotion Zones and Special Economic Zones in A.P.[9]

- 50% Exemption from payment of stamp duty and registration fee on transfer of lands meant for industrial use in the Special Economic Zone Area.[10]

- A policy framework on Environment & Forests for Special Economic Zones has been issued.[11] The salient features are:

  - The Joint Chief Environmental Engineers (JCEE), zonal Office (ZO) of Andhra Pradesh Pollution Control Board (APPCB) Visakhapatnam is notified as the appropriate authority to represent the APPCB with regard to clearances of APPCB for all SEZ units under single window clearance system.

  - All the industrial units in the SEZ do not require Environmental Impact Assessment (EIA) approvals. Only 30 categories of industries proposed to be established in SEZ need to take EIA approval.

  - No development zone shall be maintained within 500-meter radius from the SEZ periphery.

  - Collection of environment tax equal to the cost of raising green belt plantation and maintaining it for 5 years in envisaged.

  - APIIC and EFS&T agreed to jointly rationalize and streamline procedures as necessary to enable speedier progress inc completing various formalities.

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[7] G.O.Ms.No.306, dated 3 June 2002.

[8] No: 277, dated : 20 June 2002.

[9] G.O.Rt.No.1544, dated 26 June 2002 and G.O.Rt.No.1545, dated 26 June 2002.

[10] No: 290, dated 27 June 2002.

[11] G.O.Ms.No.72, dated 15 July 2002.

- 100% Export Oriented Units located in the Export Processing Zones/Special Economic Zones in the State of Andhra Pradesh are declared to be a Public Utility Service for a period of six months.[12] (This six- month period has lapsed.)

- The Policy framework for Special Economic Zones in Andhra Pradesh is also applicable to the Visakhapatnam Export Processing Zone (VEPZ), Visakhapatnam which has been converted into 'Visakhapatnam Special Economic Zone' (VSEZ)[13]

3.8 Water and Sewage

3.8.1 Background

Andhra Pradesh has a present deficiency in per capita water supply. Its per capita is only 18.79 gallons per day as compared to the national minimum standard of 22-30 gallons per day. In addition, it has a deficiency in rural and urban sewerage which are being addressed by the programs set out below. Solid waste management is also a problem in Hyderabad and other large municipalities.

3.8.2 State Water Policy

Andhra Pradesh does not have a specific State policy with regard to water supply. However, as part of achieving the goal of "Health for All", the State Government is committed to providing drinking water to every habitation in the State. Such provision of drinking water supply has been a primary consideration of all of the State five-year plans, including the present Tenth Plan (2002-2007). The deficiency in per capita water supply mentioned above is being dealt with through water supply improvement schemes in municipal towns and the programs of water harvesting and the Neeru Meeru Programme for villages. The latter concentrates on the provision of percolation tanks, channels, check dams, sunken ponds and similar works involving local self-help groups and water user associations. Andhra Pradesh Vision 2020 has proposed covering the balance of partially covered and no safe source habitations (35405 in number) over a five-year period at an estimated cost of Rs. 5098 crores.

In urban areas, the responsibility for providing water supply and sanitation facilities is with the respective local bodies with the exception of the twin cities of Hyderabad and Secunderabad where the responsibility lies with the Hyderabad Metropolitan Water Supply and Sewerage Board (HMWS&SB). In municipal towns, 53 water supply improvement schemes costing Rs. 46990 crores have been taken up, of which 37 have already been commissioned. HUDCO has recently sanctioned loan assistance for 13 Water Supply Projects. To improve water supply availability, the State Government is interested in promoting private sector participation to improve the overall efficiency of the water supply system. There are schemes to both augment the water supply from source and to achieve water and distribution efficiencies.

[12] F.O. Rt No. 1515, dated 22 September 2002.

[13] G.O.Ms.No.159, dated 29 May 2003.

With regard to sewerage, there has been a rural sanitation programme in the State since 1983 to provide good sanitation facilities. Andhra Pradesh Vision 2020 provides a program to provide 31.77 lakh families with individual sanitary latrines. A subsidy of Rs. 2000 per toilet has also been proposed. With regard to urban sewerage, the HMWS&SB is presently considering a centrally funded project for abatement of pollution, which has now reached the stage of calls for proposals. The project calls for the construction and operation and maintenance of sewage treatment plants that will provide primary and secondary treatment for 590 Ml/day by the completion date of 2005. At present, of 400 Ml/day of sewerage in Hyderabad, about 270 Ml/day is untreated, 113 Ml/day receives primary treatment, 20 Ml/day receives secondary treatment and none of the sewerage receives tertiary treatment.

Solid waste management in all areas of the State is under the relevant urban local body with monitoring of the implementation of national environmental rules with the Andhra Pradesh Pollution Control Board. The Ministry of Environment and Forests of the Government of India has issued the Municipal Solid Waste (Management and Handling) Rules, 2000 which require all urban local bodies to do the following:

- organise house to house collection of garbage;
- separate collection of waste from slums;
- separate collection of waste from slaughterhouses, fruit and vegetable markets;
- separate collection of bio-medical waste from hospitals;
- separate collection of demolition waste/debris;
- introduce containerised collection;
- mechanism of municipal solid waste collection;
- establishing of sanitary land fill sites;
- establishing of composting plants/processing plants.

For compliance, the setting up of suitable processing and waste facilities by all cities and towns is required by 31 December 2003. Additional financial resources are being sought to meet that goal. The Andhra Pradesh Pollution Control Board is insisting that all municipal bodies should adhere to the above rules and the deadlines.

3.8.3 Legislative Framework

Water supply, sewerage and solid waste management are local responsibilities under the 74th Amendment to the Constitution 1992. The Twelfth Schedule under amended Article 243-W, added by Section 4 of that Amendment, has the following items as powers, authorities and responsibilities of municipalities where so endowed by a law enacted by the Legislature of the concerned State Government:

> "item 5. Water supply for domestic, industrial and commercial purposes" and
>
> "item 6. Public health, sanitation conservancy and solid waste management".

Previous to the enactment of that Constitutional Amendment, these responsibilities were already with urban local bodies in Andhra Pradesh based upon several municipal corporations statutes. Thus the Andhra Pradesh Municipal Corporations Act, 1994 (Act No. 25 of 1994) applies to the whole State except for local areas covered by the Hyderabad, Visakhapatnam and Vijayawada Municipal Corporations. Those municipal corporations are covered, respectively, by the Hyderabad Municipal Corporations Act, 1955 (Act II of 1956), as amended; the Visakhapatnam Municipal Corporation Act, 1979 (Act No. 19 of 1979); and the Vijayawada Municipal Corporation Act, 1981 (Act No. 23 of 1981). Chapter X of the Hyderabad Municipal Corporations Act, Sections 341-372, concerns water supply. Chapter XIV of that Act, Sections 480-572, concerns provisions on sanitation. Section 7 of both the Visakhapatnam and Vijayawada Municipal Corporation Acts then state that all provisions of that Hyderabad Act apply to them, unless specifically provided otherwise.

Hyderabad Metropolitan Water Supply and Sewerage Board

However, for Hyderabad and its twin city of Secunderabad themselves, those provisions in the Hyderabad Municipal Corporations Act have now been replaced by the Hyderabad Metropolitan Water Supply and Sewerage Act, 1989. (Act No. 15 of 1989, as amended by Act No. 4 of 1997). That Act applies to the entire Hyderabad Metropolitan Area and establishes the Hyderabad Metropolitan Water Supply and Sewerage Board. Solid waste management is not mentioned in the Act and remains the responsibility of the Municipal Corporation of Hyderabad.

The Act is divided into six chapters, as follows:

- Chapter 1 (Sections 1-2)- Preliminary (extent; definitions);
- Chapter 2 (Sections 3-7)- Establishment of the Board;
- Chapter 3 (Sections 8-16)- Board's Finance, Accounts and Audit;
- Chapter 4 (Sections 17-52)- Water Supply;
- Chapter 5 (Sections 53-77)- Sewerage and Sewage Treatment Works;
- Chapter 6 (Sections 78-120)- Miscellaneous (power to make rules; entry and inspection; penalties for offences; appeals; compensation).

With regard to Chapter 2, under Section 3(2), the Board shall be headed by the State Chief Minister as ex-officio Chairman and consist of the following members:

- State Minister for Municipal Administration, as Vice Chairman;
- Secretary to Government, Housing, Municipal Administration and Urban Development Department, as Director;
- Secretary to Government, Finance Department, as Director;
- Secretary to Government, Irrigation Department, as Director;
- Commissioner, Municipal Corporation of Hyderabad, as Director;
- Chairman, Andhra Pradesh State Pollution Control Board, as Director;
- Director, Medical, Health and Family Welfare Services, as Director;

- Board Chief Engineer, appointed by the State Government, as Director;
- A person of the rank of Additional Accountant General or similar status with at least 20 years of experience in finance and accounts, as Director;
- One person of the IAS cadre, as Managing Director.

Under Section 7 of the Act, the general duties of the Board are to provide for:

(a) the supply of potable water, including the planning, design, construction, maintenance, operation and management of the water supply system; and

(b) sewerage, sewage disposal and sewage treatment works, including planning, design, construction, maintenance, operation and management of all sewerage and sewage treatment works in the Hyderabad Metropolitan Area.

Under Chapter 3 on Financial matters, Section 9 of the Act permits the Board to levy rates, fees, tariffs and other charges so as to provide sufficient revenues to:

(a) cover operating expenses, taxes and interest payments; and to provide for adequate maintenance and depreciation;

(b) to meet repayments of loans and other borrowings;

(c) to finance normal year to year improvements;

(d) to provide for further capital works as are necessary from time to time;

(e) to provide for the cost of such other purposes beneficial to the promotion of water supply and construction of sewerage and sewage treatment works in the Hyderabad Metropolitan Area as the Board may determine.

Thus the Board has sufficient power to set water tariffs at any reasonable rate. Section 55 of the Act concerns similar power to set a sewerage cess not exceeding 35% of the bill charged for water concerned to defray the capital cost and operation and maintenance of the sewerage system. Similar provisions regarding the levying of a water tax and a conservancy tax are found, respectively, in Sections 200 and 201 of the Hyderabad Municipal Corporations Act, which still apply to the municipal corporations of Visakhapatnam and Vijayawada, and in the Andhra Pradesh Municipal Corporations Act, 1994. Further, Section 36 of the Act requires owners to have water meters.

In addition, Section 12 gives the Board the power to borrow and to issue bonds, as sanctioned by the State Government. Section 13 gives the State Government the power to guarantee the principal or interest of any such loans.

Chapter IV (Sections 17-52) then gives detailed rules regarding water supply. Under Section 17 all waterworks connected with the supply of water to the Hyderabad Metropolitan Area shall vest in the Board and be subject to its control. Section 18 provides that the Board may construct water works or cause existing works to be maintained or closed. Section 23 provides that the Public Health Engineer is in charge of the provision of water supply for domestic consumption. Under Section 26 he may also approve the supply of water for non-domestic purposes. Section 29 gives the Board the power to lay water mains in the municipality, regardless of provisions of the Hyderabad Municipal Corporations Act, 1955 (Act No. 2 of 1956), and Section 30 provides a similar power to lay service pipes. As noted above, Section 36 of the Act states that every owner seeking water supply from the Board shall provide a water meter at his own cost, and shall maintain it.

Regarding violations, Section 39 of the Act gives the Public Health Engineer the power to enter on premises to detect waste or misuse of water. Under Section 42, the Board may cut off water supply where the owner damages his meter or does not pay his bill within 15 days of its presentation. The supply may also be cut off where he has not complied with any rule of the Board or refused to admit a Public Health Engineer who wishes to inspect the water works on his premises. Section 43 states that the owner and the occupier of the premises shall be jointly and severally liable for any offence related to water supply. Section 44 gives the non –liability of the Board when water supply must be cut off or reduced due to drought or other unavoidable cause or where necessary to lay or repair pipes. Under Section 47, the Board may execute necessary repair works at the expense of the person liable, after giving notice. Section 49 then prohibits certain acts, including obstructing a person acting under the authority of the Board, wilfully or negligently damaging a pipe or meter or other water works, polluting the water supply or obstructing the flow of water. Section 50 gives the Board the power to set rules to stop the supply of water, to take charge of private connections, to prohibit the unauthorised use of water and tampering with meters and the licensing of plumbers, with the previous approval of the State Government. It may provide a maximum penalty of a fine of up to Rs. 1000 for such violation, with a further daily fine of up to Rs. 100 for a continuing violation.

Section 52 gives the Board the power set bye-laws with regard to:

- the connection of water supply to a premises, including the renewal of such connections;
- the equitable distribution of water to occupiers;
- the size, quality, description and other matters related to water pipes;
- the provision and maintenance of meters;
- the maintenance of pipe cisterns and other water works.

Finally, Section 53 sets penalties for offences under the Act as set forth in the Second Schedule. These offences include:

- trespasses on premises connected with water supply- Rs. 500 maximum basic fine;
- failure to maintain house connections properly- Rs. 300 maximum basic fine;
- use of water supplied for domestic purposes for non-domestic purposes- Rs. 1000 maximum basic fine;
- waste or misuse of water- Rs. 200 maximum basic fine;
- wilful or negligent acts related to water works- Rs. 200 maximum basic fine.

In addition to these basic fines, these offences may have a term of imprisonment of up to one month, or both. For a second offence, the fine may be from Rs. 1000 to Rs. 2000, with imprisonment of from one to two months. There is also a daily fine. These fines may be too small now for these types of offences.

Chapter V (Sections 53-77) sets similar rules regarding sewerage and sewer treatment works. Section 53 vests all such works in the Board. As noted above, Section 55 concerns the setting of a sewerage cess. Section 56 gives the Board the power to lay sewerage or sewer treatment works. Section 57 gives the Board the power to lay service pipes for sewerage. Section 60 provides that new premises are not to be erected without drains or sewers. Under Section 61, the Board is given the power to drain a group or block of premises. Section 62 gives the Board the power to close or limit the use of private sewers. Section 64 provides that drains for rainwater and sewage are to be distinct. Section 66 requires that connections to sewerage must be with permission of the Board. Similar to Section 47 for waterworks, Section 70 gives the Board the power to execute necessary works at the expense of the person liable, after giving notice. Section 72 gives the Board the power to examine and test sewers believed to be defective.

Section 74 provides for the prohibition of certain acts similar to Section 49 regarding water supply. They include wilful or negligent harm to works, unlawfully cutting off the flow, and obstructing an officer or employee of the Board in his duties. Section 75 gives the Board the power to set regulations on sewage with the prior approval of the State Government. A violation of such regulations may have a maximum fine of Rs. 1000 with an additional daily fine of Rs. 100 for a continuing violation. Section 76 then permits the Board to provide bye-laws to provide for such matters as the nature of sewerage works for which a certificate from a licensed Engineer or Plumber are necessary; prohibition of certain types of discharge, cleaning of sewers; regulations regarding construction and maintenance of sewers; location of latrines and cesspools; regarding trade effluent including the provision and maintenance of meters as required to measure the flow of such effluent. Finally, Section 77 is parallel to Section 52 for water supply. The Third Schedule of the Act lists sewage offences and the maximum penalties for each. They include:

- damage to sewers or interference with free flow- Rs. 1000 maximum basic fine;
- connection to Board sewers without permission- Rs. 1000 maximum basic fine;
- prohibition of wilful or negligent acts relating to sewerage works- Rs. 200 maximum basic fine.

In addition to the fine, a first offence under Section 77 may have a maximum imprisonment of one month, or both penalties. For a subsequent offence, the fine may be from Rs. 1000 to Rs. 2000, and the imprisonment from one month to two months, or both. Also, there is a daily fine for a continuing violation.

Chapter VI (Sections 78-120) then includes miscellaneous provisions. Section 79 gives the State Government the power, by notification, to make rules to carry out the provisions of the Act, which are then to be laid before the State Legislature. Section 80 gives the Board the power to make regulations, with the previous approval of the State Government, regarding such matters as the fine for violations of its bye-laws and the inviting and accepting of tenders. Section 81 then states that the Board shall be guided by policies of the State Government. Under Section 82, licensing under the Act shall be done by the Public Health Engineer or another empowered officer.

Sections 83-88 are rules regarding the entering and inspection of premises under the Act. Sections 90-94 concern notices and compliance with them. Section 95 states the principle that an occupier must pay a water or sewerage charge/cess in default of such payment by the owner. Section 96 requires an occupier to execute works for which an owner is responsible if the owner defaults.

Section 98 covers payment of damages by offenders while Section 99 states that amounts due shall be collected as if they were arrears of land revenue or on application to a Magistrate if it were a fine imposed by him. Section 100 then sets a general penalty for all offences not otherwise specifically mentioned. For such offences, there is a maximum fine of Rs. 1000, plus a daily fine of Rs. 100 for continuing offences. Section 101 states that officers and other persons responsible shall be liable for offences by companies. Under Section 103, the Board may compound offences by an order and notice to the offender. Section 111 requires that appeals be made within 60 days of the date of service of the decision or order. Section 116 states that two months' notice must be given for suits against the Board or its officers and employees.

Section 109 states that the Board, by notification, may delegate any of its powers to another officer or employee. Section 110 states that the Managing Director shall be the chief controlling authority of the Board. Under Section 114, members, officers and employees of the Board shall be public servants for purposes of the Indian Penal Code, 1860, and the Prevention of Corruption Act, 1988. However, Section 115 gives such persons protection regarding lawsuits for actions done in good faith. Finally, Section 118 gives the State Government the power to make certain supplemental orders as appear necessary or expedient.

As to private sector participation in the water and sewerage sector, the Board is permitted under its legislation to contract out the construction of all works and to set operation and management contracts for water or sewerage. At present, there are management contracts for the operation of sewage treatment plants on both a three-year and one year basis. In addition, in 2001, the State Water Supply Department prepared a draft Terms of Reference for Transaction Advisors for a water concession or management contract for the City of Hyderabad which was strongly opposed by the Board and its employees. The plan was subsequently shelved. The Gdansk (Poland) model for operations and maintenance with the private sector providing technology and the urban local body providing assets and some financial resources still may be a possibility according to Board officials. Further, there is a wider plan for which Feedback Ventures has conducted a pre-feasibility study and is now conducting a feasibility study. That plan would establish a special purposes vehicle/corporation to take operation and maintenance lf all Board water treatment facilities as well as some other water treatment facilities (such as the HUDA facilities associated with lake cleanup). The wastewater from these facilities would then be reused by sale as industrial water.

Thus the Hyderabad Metropolitan Water Supply and Sewerage Act, 1989, gives the State Government powers that allow private participation in the water sector. The Hyderabad Metropolitan Water Supply and Sewerage Board has sufficient powers to set water and sewage rates so as to guarantee a sufficient return. Metering is required under the Act, and the Board has sufficient powers to set penalties for unauthorised use, waste and other offences, although it would be better if the Act permitted an automatic increase in such penalties related to price of living increase/wholesale price index, as is done for road tolls under the National Highways (Rate of Fees) Rules, 1997, Rule 3.

Appendix B - Gujarat

Table of Contents

1 Introduction

This Appendix summarizes the policies and legislative framework in the State of Gujarat with regard to private sector participation and privatisation in the relevant sectors of roads, power, ports, airports, urban mass transit, cyber parks/information technology parks, special economic zones (SEZs), and water and sewerage.

This background information is meant to provide a fuller description and analysis of these policies and legislation which then can be referenced in the main text of the Working Paper. Throughout this discussion, reference is made to problems related to specific projects that are designated, or may be otherwise eligible, for assistance under the ADB PSI II Facility.

While some references are made to the regulatory framework for each of the mentioned sectors in the State of Gujarat, the detailed discussion of those matters is found in the companion Working Paper No. 2, **Regulatory Framework**.

Gujarat is one of two states, along with Andhra Pradesh, which have enacted legislation establishing a State-wide Infrastructure Authority. The Gujarat Infrastructure Development Act, 1999 provides the legal basis for the Gujarat Infrastructure Development Board. The Act is described and analysed in detail below.

2 General Policy and Framework

2.1 General Policy

The general policy regarding private sector participation and privatisation in the infrastructure sector in Gujarat are laid out in Gujarat Infrastructure Agenda- Vision 2010, prepared by the Gujarat Infrastructure Development Board. That Agenda assesses the emerging demand-supply gap in infrastructure capacity over the period 2000-2010 and identifies projects in various sectors to cover the gap. It generates a shelf of projects for development to be undertaken by the public/private sector, and analyses the financial and investment implications for implementing those projects and the private sector investment necessary. Further, it provides for inter-sectoral linkages and looks at various policy imperatives to translate the vision into reality.

The vision relies on power, ports and industrial parks as drivers. It relies on port-led development strategy to attain regional growth and demand for other sectors. Roads, water supply and townships are envisioned as linkage. Though these are dependent on drivers, they are critical to the success of the latter. The critical factors for success in infrastructure development are meeting the financial requirement and State Support. Gujarat will prioritise its financial involvement and thus must clear the way for sustainable private investment.

These general policies are then reinforced by the functions and powers of the Gujarat Infrastructure Development Board.

2.1.1 Gujarat Infrastructure Development Act, 1999

The Gujarat Infrastructure Development Act, 1999 (Gujarat Act No. 11 of 1999) is one of two State Acts in India establishing an independent infrastructure authority. The other is the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (AP IDEA 2001) which is described and analysed in detail in Appendix A- Andhra Pradesh.

The purpose of the Act is to provide a framework for participation of persons other than the State Government and Government Agencies in the financing, construction, maintenance and operation of infrastructure projects. For that purpose, the Gujarat Infrastructure Development Board (GIDB) is established.

The Act is divided into six chapters (40 sections) covering the definition of infrastructure projects, the establishment and constitution of the Board, the functions of the Board, finance, accounts and audit, and miscellaneous provisions covering charges, disputes and the making of rules and regulations.

In addition, there are two schedules. Schedule I lists the type of projects that come under the Act. With regard to the areas covered by this Project, they include:

- power generation, transmission and distribution systems;
- roads, bridges and bypasses;
- ports (other than major ports) and the harbours thereof;
- urban transportation;
- water storage, water supply and sewerage systems;
- industrial estates, including industrial parks;
- solid waste management; and
- information technology related projects.

This list is more comprehensive than that found in Schedule III of the Andhra Pradesh Infrastructure Development Enabling Act, 2001.

Schedule II concerns the Nature of Concession Agreements under the Act. It defines BOOT, BOOM, BT, BLT, BTO, Lease Management Agreement, Management Agreement, ROT, ROM, Service Contract Agreement, SOT and Joint Venture Agreement. This list is also more comprehensive than the similar list found in Schedule I of the Andhra Pradesh IDEA Act.

Rules Regarding Infrastructure Projects. Chapter II (Sections 3-16) of the Act sets the rules regarding infrastructure projects. Section 3 sets the broad rule that any person may participate in the financing, construction, maintenance and operation of an infrastructure project under the Act.

Section 4 concerns **concession agreements**. Under Section 4(1), a person may enter into a concession agreement of the type stated in Schedule II, as mentioned above, with the State Government, a Government Agency or corporation, or a specified Government Agency (the State Government and a Government Agency participating jointly). The scheme for such concession agreement shall be prescribed. Under Section 4(2), the Board, where it is considered necessary based on the nature of the Project, may permit the combination of two or more such concession agreements into one agreement. Section 4(3) then sets the maximum period for any concession agreement at 35 years. Section 4(4) permits the State Government, by notification in the Official Gazette, to add to Schedule II any other nature of agreement than those listed as long as that change is laid before the State Legislature.

Section 5(1) provides that a proposal prepared by the Government or a Government Agency for private participation where the cost exceeds a set amount (thus a mega project) shall be submitted to the GIDB for its consideration, along with the proposed concession agreement for that project. Different amounts of cost may be prescribed for different types of projects. Under Section 5(2), the Board shall consider the proposal and the proposed concession agreement as submitted under Section 5(1) or a proposal submitted by a private individual under Section 10(1). It may recommend it with or without modification or not recommend it or return it for reconsideration.

Section 6 covers assistance (State Support) to the project by the State Government, Government Agency or specific Government Agency concerned. Such assistance may be provided in the following manner:

(a) participation in the equity of the project, but not exceeding 49% of the total equity;

(b) subsidy not exceeding 15% of the total cost of the project;

(c) senior or subordinate loans;

(d) guarantee by the State Government, a Government Agency or specified Government Agency in respect of the liability of a Government agency arising out of a concession agreement;

(e) opening and operation of an escrow account;

(f) conferment of a right to develop any land;

(g) incentives by 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;

(h) or, in any other manner as deemed fit.

Unlike under the Andhra Pradesh Act, the types of guarantees and incentives are not spelled out in the Act itself.

Sections 7 to 10 concern procedures regarding a **concession agreement**. Section 7 states the general principle that no concession agreement for undertaking a project shall be entered into with any person unless the procedures of either Sections 8 and 9 or Sections 8 and 10 are followed. Section 8 relates to the selection of a person for a project. Such a person may be selected by competitive bidding under Section 9 or by direct negotiation under Section 10. The matters related to those two methods shall be prescribed.

Section 9 concerns selection of a person by **competitive bidding**. The detailed definition for each type of concession agreement is set out, as well as the process of pre-qualification and for consideration of proposals from the technical aspect, and then from the financial aspect.

For BOOT and BOT agreements, any of the following factors shall be taken into consideration in evaluation of the proposal:

(i) the lowest bid of the present value of user charges, where the period of the concession is fixed;

(ii) the highest revenue share to the State Government, the Government Agency or the specified Government Agency;

(iii) a bid in terms of the shortest concession period, where the user charges are fixed;

(iv) the lowest present value of the subsidy, where the period of concession is fixed. (Section 9(d)(3)(a)).

For BT and BLT agreements, the lowest net present value of the amortization payment from the State Government or other Agency shall be taken into consideration. (Section 9(d)(3)(b)). For lease management agreements, the highest present value of the lease payment shall be taken into consideration. (Section 9(d)(3)(b)). For a management and service agreement, the lowest present value of the management fees to be paid shall be taken into consideration. (Section 9(d)(3)(d). For any other type of agreement, the State Government, Government Agency or specified Government agency may consider such factors as may be recommended by the Board.

Section 10 covers proposals for projects made by private persons. They shall be selected by **direct negotiation**. Such a proposal shall first be considered by the Agency to whom it is submitted. It shall be submitted to the GIDB if it is over the cost limit set in Section 5 and no financial subsidy is required from the State Government or a Government Agency. On acceptance of the recommendation of the Board, the concerned Agency shall either adopt the proposal for the purpose of entering a concession agreement for undertaking the project or follow competitive public bidding. If competitive bidding is followed, then the proposal of the selected person shall be compared to the proposal originally submitted by the private person. If the earlier proposal is not preferable, then that proposer shall have 30 days to make his proposal competitive to that proposal. If his proposal is not chosen, then the cost incurred by him to prepare that proposal and concession agreement shall be reimbursed by the State Government or Government Agency concerned.

Section 11 concerns the amount to be charged by a developer for providing goods and services during the period a project was vested in him which was later vested in the State Government or a Government Agency. Section 12 concerns the provision of financial security for maintenance of the project by a developer through an escrow account, and the execution of a bond.

Section 13 covers training of employees of the State Government or Government Agency concerned by the developer at his own expense.

Section 14 states where a project is transferred to the State Government or a Government Agency according to the provisions of a concession agreement, all the rights of the developer to that project will be so transferred. Section 15 then concerns the termination of a concession agreement. Where that is done with the consent of the developer and he is not in default, then the developer is entitled to such an amount of compensation for such termination as is specified in the concession agreement. If there is a default by the developer, then the State Government or Government Agency concerned, after letting the developer be heard, shall be entitled to terminate the concession agreement and:

(a) take over the project without repaying the amount invested by the developer in the equity and shall assume the liability of the developer toward loans taken by him for the project; or

(b) enter into a concession agreement with another person recommended by the lenders of the developer and approved by the State Government or Government Agency concerned, on the same terms and conditions as specified in the concession agreement so terminated.

Under Section 16, the State Government, by notification in the Official Gazette, may add to the list of types of projects in Schedule I any other project which falls within the executive power of the State. Such notifications shall be laid before the State Legislature as soon as may be possible after it is issued.

Establishment and Constitution of the Board. Chapter III (Sections 17-27) of the Act contains the provisions regarding the establishment and constitution of the Board. Under Section 19, the Board shall consist of a Chairman, Vice Chairman and Member-Secretary, and such other members (not exceeding 15), appointed by the State Government. Section 20 provides that members hold office during the pleasure of the State Government. Section 21 provides that vacancies shall be filled by the State Government as soon as possible. Under Section 25, the Board may constitute an Executive Committee. Section 26 provides for the appointment of officers and servants of the Board. Section 24 states that the Board may obtain information with regard to the process of a project submitted to it under Section 5(1) or undertaken under Section 10 from the State Government or Government Agency concerned.

Functions of the Board. Chapter IV (Section 28) sets the functions of the Board as follows:

(a) to promote the participation of private persons in the financing, construction, maintenance and operation of any project irrespective of its cost;

(b) to advise the State Government, Government Agency or specified Government Agency on matters of policy in respect of that participation;

(c) to lay down priorities of projects to be undertaken by the State Government or a Government Agency;

(d) to consider a proposal for undertaking a project and the proposed concession agreement submitted to it to recommend (with or without modification) or not recommend or return the proposal for reconsideration;

(e) to elicit information relating to national and international financial institutions, and to ensure the cooperation of such institutions;

(f) to coordinate and monitor the projects undertaken in the State;

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

(h) to undertake such projects as may be entrusted to it by the State Government;

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

This list of functions goes beyond approval, preparation and review of projects to permitting the Board to undertake projects on its own and also to prepare pre-feasibility and feasibility studies. Most such agencies in the world would not have those additional functions.

Finance, Accounts, Audit and Annual Report. Chapter V (Sections 29-31) concern finance, accounts, audit and annual report. Under Section 29, the Board shall have its own fund. As in the case with the Andhra Pradesh Act, this Fund is to contain monies received from charges and payments received. There is no mention of borrowings. This shall include payments by the State Government or any other body, as well as amounts charged by the Board for considering proposals and proposed concession agreements. (see Section 32). The Board may spend such sums as it thinks fit for the performance of its functions under the Act. Section 30 covers accounts and audit. Under Section 31, the Board shall prepare an annual report which shall be laid before the State Legislature as soon as may be.

Arbitration. Sections 35 and 36 of the Act concern arbitration of disputes. Section 35 states that a concession agreement shall contain an arbitration clause providing that:

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

(b) the place of arbitration shall be at Ahmedabad or any other place in India agreed to by the parties, and

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

Section 36 then provides that nothing contained in the Gujarat Public Works Contracts Disputes Arbitration Tribunal act, 1992 (Gujarat Act No. 4 of 1992) shall apply to any arbitration arising out of the provisions of the concession agreement entered into by the State Government or Government Agency concerned with a developer.

These dispute resolution provisions do not refer to international arbitration or to the provisions of the modern Arbitration and Conciliation Act, 1996. They may not be acceptable to many foreign investors. It should be noted that the Andhra Pradesh Infrastructure Development Enabling Act, 2001, has a number of references to the Arbitration and Conciliation Act.

Rules and Regulations.Sections 37 and 38 concern the setting of rules and regulations under the Act by the State Government and the GIDB, respectively. Under Section 37, the State Government may, by notification in the Official Gazette, make rules to carry out the purposes of the Act. Such rules may provide for all or any of the following matters:

(a) the scheme for concession agreement under Section 4(1)(b);

(b) the amount of cost of a project exceeding which a proposal shall be submitted to the Board under Section 5(1), and there may be different amounts of such cost for different types of projects;

(c) matters relating to competitive public bidding and direct negotiation under Section 8(2);

(d) the manner in which the cost of preparation of a proposal and a concession agreement shall be determined under Section 10(5)(b) for reimbursement by the State Government if it was not accepted;

(e) other factors having regard to which charges may be revised and the manner of such revision under Section 11(2);

(f) the manner in which an opportunity to be heard shall be given to a developer under Section 15(2);

(g) any other matter which is to be or may be prescribed.

All such rules shall be laid before the State Legislature as soon as possible for its approval, rescission or modification.

Section 38 gives the GIDB the power to make regulations for enabling it to discharge its functions under the Act. Such regulations may provide for all or any of the following matters:

(a) the time and place at which the Board shall meet and the rules of procedure the Board shall observe in regard to the transaction of its business at its meetings under Section 22;

(b) the other committees the Board may constitute, the number of members which the executive committee and other committees may consist of, and the functions the Board may perform under Section 25;

(c) the remuneration, allowances and conditions of service of officers and servants of the Board under Section 26(2);

(d) the form and manner in which the accounts of the Board shall be prepared and maintained under Section 30(1);

(e) the form in which an annual statement of accounts of the Board shall be prepared under Section 30(2);

(f) the form in which and time at which an annual report of the Board shall be prepared under Section 31(1);

(g) any other matter which is, or may be, necessary to be prescribed for the efficient conduct of the affairs of the Board.

It should be noted that the Board itself is not permitted to set rules for important matters not of an internal nature. All policies matters need the approval of the State Government.

Miscellaneous. In addition to the provisions regarding dispute resolution and the setting of rules and regulations, Chapter VI (Sections 32-40) covers a number of other matters. As mentioned above, Section 32 states that the Board may charge such amount as deemed by it for considering the proposal and proposed concession agreement under Section 5(2). Section 33 provides that members, officers and servants of the Board shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code, 1860 with regard to their actions. However, Section 34 then provides that they shall be protected against legal proceedings for actions taken in good faith. Finally, Section 39 states that nothing in the Act shall affect a concession agreement entered into before the date of commencement of the Act.

Summary and Conclusion. The Gujarat Infrastructure Development Act was the first such act in India and has served as a model, particularly for the Andhra Pradesh Infrastructure Development Enabling Act, 2001. In relation to that Act, it has a more comprehensive list of projects coming under the Act and of types of concession agreements. However, it is not so explicit with regard to types of generic risks covered by such concession agreements or the types of State Support that may be provided. Its dispute resolution provisions are not modern in nature but require all disputes to be decided by the law of India. The effects of these provisions will be studied further as part of Phase II of this Project. Unlike the Andhra Pradesh Infrastructure Authority, the GIDB has a significant staff to carry out its functions and has been in operation for a longer period. Thus its experience will serve as the example for the benefits and difficulties facing this type of Statewide infrastructure authority.

3 Policies and Legislative Framework by Sector

3.1 Roads

3.1.1 Background

The road network of Gujarat has increased eight-fold from 7622 kms. in 1947 to 70,609 kms. in 1995. However, even though that road network is qualitatively rated as the best in the country, it is insufficient and in need of major upgradation and improvement in order to meet present transportation needs.

3.1.2 State Road Policy

To meet that challenge, the Government of Gujarat issued a Road Policy in December 1996. The objectives of the Policy are:

- to provide connectivity to all villages by all weather roads and thus improve the quality of life in rural areas in terms of quick access to health and education and services;
- to provide an adequate and efficient road system encompassing all transportation needs to ensure smooth and uninterrupted flow of goods and passenger traffic both within the State and on interstate routes;
- to constantly upgrade technology by inducting superior and quicker construction to reduce total transportation cost as well as reduce the overall cost of roads;
- to induct more scientific principles of resource allocation for maintenance and new construction programs; and
- overall, to set high standards of road safety and travel comfort.

With regard to Strategy and Approach, the existing road network would be upgraded by removing existing deficiencies in road length, providing new links especially to areas of concentrated industrial growth and to speed up the movement of agricultural products, to provide missing bridges and cross drainage works, to connect the remaining villages by all weather roads, to improve road geometric and safety provisions, and to remove regional imbalances in the road network.

In order to fund this program, optimal use will be made of available resources for efficient use of resources, including prioritisation of roads for widening/strengthening based on existing and projected commercial traffic. In view of the paucity of budgetary resources, private sector participation in road projects will be sought in a big way. As discussed in more detail below, such participation will be facilitated through the recent amendment of Section 20 of the Bombay Motor Vehicles Tax Act, 1958 (Bombay Act LXV of 1958) by Gujarat Act No. 9 of 1994) to permit the levying of tolls on either new construction or on improvements of road and bridge projects. Guidelines for such private sector participation are annexed as Annexure-B of the Policy.

The other major features of the Policy are as follows:

- parties would be selected on the basis of open competitive bidding ensuring transparency with evaluation of bids by a high level committee set up for that purpose;
- to ensure commercial viability of projects, an appropriate combination of the following incentives would be considered by the State Government:
  - (i) acquiring land at Government cost for right of way;
  - (ii) in cases where levy of toll alone is not enough to ensure financial viability, then the Government will consider providing additional land to the investor for commercial development so as to increase returns;
  - (iii) granting advertisement and air space rights within the right of way;
  - (iv) subsidising loss of revenue due to traffic being less than that projected;
  - (v) exemption from royalty on construction materials;

(vi) granting permission for planting of trees and deriving revenue from them in the land width during the concession period;

(vii) utilisation of Government quarries in the vicinity of the project;

(viii) allowing construction in segments and levying of toll on completed segments so as to utilise the revenue from those segments to complete the remaining segments;

(ix) Government/Government Corporation equity participation in special purpose vehicles for road projects.

- seeking of funding from external funding agencies;
- supporting schemes with beneficiary participation, such as industry specific roads where the beneficiary industries would bear 50%-70% of the cost;
- resource mobilisation, including alternative sources of revenue for road development such as a special levy on fuel;
- funding by philanthropists, especially for rural roads.

The Road Policy will be implemented by the State Roads and Bridges Department through an implementation cell. The Gujarat State Government has set up a high level committee headed by the Chief Secretary to review progress. The progress on implementation will be reported periodically to the Infrastructure Development Board of the State Government.

3.1.3 Guidelines for Private Participation in Road Projects

As noted above, Annexure-B of the Policy sets forth 13 Guidelines for Private Participation in Road Projects in Gujarat. They are:

- land acquisition (land will be acquired by the State Government and made available to the entrepreneur. He will bear the land cost unless the Government decides otherwise);
- finance (all finance for the project shall be arranged by the entrepreneur. No guarantee will be made available for the project.);
- mode of selection (selection will be on the basis of open competitive bidding of pre-qualified bidders, first on technical bid and then on a commercial bid which will involve only one variable- the concession period. The selection will be based on the evaluation of a High Level Committee set up for that purpose.);
- project details, designs and specifications (all design and specification will need State Government approval, even if done by the entrepreneur);
- return on investment and finalising rates of toll (A Tariff Committee, appointed by the State Government with representation from both the Government and the investor will consider return on investment and also decide the initial tariff and period revision of that tariff. The basic aim would be a mechanism for adjusting toll rates fairly and equitably so that the viability of the project is not adversely affected);
- settlement of disputes (suitable arbitration mechanism would be fixed with a time limit for such settlement. NOTE: no mention is made of the Arbitration & Conciliation Act, 1996);

- additional benefits over and above Toll Rights (where toll revenues alone are not sufficient for project viability, then the Government may allow the entrepreneur to develop suitable land in the vicinity of the project. This shall be done after thorough analysis of that particular case);

- management and maintenance of the project (the entrepreneur shall be responsible for management and maintenance of the project until its completion and until the investment is fully recovered. Proper maintenance shall be based on the terms of the concession agreement);

- environmental protection (the entrepreneur will have to undertake and meet all standards of environmental protection as laid down by the concerned authorities. NOTE: No best efforts clause for Government assistance here);

- legal requirement (all proposals must meet existing rules and regulations, and such rules must be followed by the entrepreneur throughout the concession period);

- ownership (ownership of the facility shall vest with the Gujarat State Government and be leased to the Operator/Entrepreneur. He will have the right to build and operate the facility for the specified period of the Agreement. At the end of that time, the facility shall be handed back to the Government);

- payment of taxes and duties (responsibility for payment of all taxes and duties is with the concerned Entrepreneur/Operator. Normally, no tax concession will be considered for such projects.);

- period of toll (the period of the toll will depend on the traffic, rate of toll and amount invested by the Entrepreneur, the cost of toll collection, cost of maintenance, return on investment, etc. The toll may be increased or decreased periodically based on these factors and finalised by the Tariff Committee mentioned above. NOTE: Section 4(3) of the Gujarat Infrastructure Development Act, 1999 (Act No. 11 of 1999) sets the maximum period of operation for a BOT project at 35 years).

The lack of a government guarantee has been an impediment to increased private sector participation. In addition, the awarding of development rights to land in the vicinity of the road projects at a later stage than in the bidding process itself has given rise to legal complications with regard to whether the land is acquired for a legitimate purpose under the Land Acquisition Act, 1894.

3.1.4 Results To Date

To date, nine BOT road/bridge projects have been implemented in Gujarat. In addition, the Gujarat State Road Development Corporation Ltd (GSRDC) (discussed below) and the GIDB have identified four projects to be offered to interested private sector parties at the Vibrant Gujarat Global Investors' Summit 2003 to be held in Ahmedabad from September 28-30, 2003. These projects are:

- four laning of the Magdalla-Palsana Road (feasibility study completed);

- four laning of the Ahmedabad-Viramgam Road (feasibility study in progress);

- four laning of the Trapaj-Bhudel-Vartej Road (feasibility study completed and final report received);

- two laning of the Disa-Pantwada-Gundri Road (feasibility study and RFQ in progress).

There has been a poor response to recent such projects. GIDB feels that this is because of the lack of a clear-cut policy for the granting of a government subsidy, low estimate of traffic levels and the questionable prospects when tolling is suggested for two lane roads.

3.1.5 Legislative Framework

Gujarat does not have a separate State Highway Act as does Karnataka. As mentioned above, the legal basis for the levying of tolls is through Gujarat Act No. 9 of 1994, which amended Section 20 of the Bombay Motor Vehicles Tax Act, 1958 (Bombay Act LXV of 1958). That Amendment permits the levying of such tolls for either new construction or improvements of roads or bridges by the party responsible for such construction or improvements after approval by the Government. However, problems have arisen due to delays by the Government in issuing toll notification due to pressure by local users and their representatives. In addition, the Act does not provide for a strong enforcement mechanism for enforcing payment of tolls by road users.

The Gujarat Infrastructure Development Board (GIDB) acts as the nodal agency for private sector participation in the road sector, as in other infrastructure sectors. The Gujarat Roads & Buildings Department has general responsibility for roads in the State. In addition, parallel to other states, there is a Gujarat State Road Development Corporation Ltd. (GSRDC), which was incorporated on May 12, 1999 as a limited company under Section 149(3) of the Companies Act, 1956, as amended, to implement road development and bridge programmes on a commercial basis. The GSRDC does not itself build roads or bridges.

3.2 Power

3.2.1 Background

The process of reforms for the power sector was initiated by the Central Government in the year 1991 with the liberalisation of generation. Despite initial enthusiasm, however, private sector investment in generation could not be sustained, primarily due to the poor financial health of the State Electricity Boards. Gradually, therefore, the focus of reforms shifted to distribution.

In the discussion below, the power policy issued by the State Government in 1995 is examined in some detail, before reviewing other reform initiatives in the power sector. Thereafter, a brief overview of the progress to date is provided, followed by a summary of recent state legislation in the sector.

3.2.2 State Power Policy

The Government of Gujarat announced its **Power Policy** in December 1995 to facilitate private sector participation (PSP) in the generation, transmission and distribution of power supply. More specifically, the Policy sets out the following objectives:

- To plan and build up adequate capacities in generation, transmission and distribution of power through efficient and cost effective means.
- To achieve optimum utilization of existing equipments and assets through renovation and modernisation.
- To rationalize the tariff structure to ensure reasonable rate of return to power utilities and generate surplus needed for future investment.
- To improve delivery of services and achieve cost effectiveness through technical, managerial and administrative restructuring of the utilities.

- To achieve conservation of energy through efficient utilization and demand side management, and minimising waste.

- To encourage generation of power through non-conventional sources of energy.

Acknowledging the importance of attracting greater investment by the private sector for the fulfilment of the above objectives, the major thrust of the Policy is to promote a transparent and competitive environment to provide a level playing field for state sector and private sector enterprises.

At the same time, the Policy recognises the scope for co-operative, complementary and participative ventures between private (both domestic and foreign) and state sectors in developing the power sector. In this context, steps are to be taken to facilitate infrastructural linkages for early completion of all power projects and to identify, in advance, project feasibilities, sites and other preparatory steps for reducing the gestation period of projects.

The Policy envisages an enhanced role for the private sector in the following areas:

- Capacity addition by independent power producers (IPPs) selected through open competitive bidding process and to whom the State would provide attractive returns in accordance with the guidelines prescribed by the Central Government.

- Renovation and modernisation of existing plants, which would facilitate the introduction of more efficient management practices leading to greater availability of power. Such PSP could be in the form of Lease, Rehabilitate, Operate and Transfer (LROT), joint asset management with the Gujarat Electricity Board (GEB), or sale of existing plants to private sector or to any joint sector venture.

- Captive generation of power by private industries, which would augment the power supply and ease the burden on the distribution system. Further, the captive units could sell their surplus power to GEB, at its option, on mutually agreed terms.

- Power generation through non-conventional sources of energy such as wind power, solar energy, bagasse, biomass, urban waste and tidal wave. The State would devise suitable incentive schemes to encourage PSP in this regard[1].

- Setting up of transmission lines and equipment for or on behalf of GEB, which would be responsible for maintaining the State Power Grid. The selection of the private sector companies would be through a transparent bid and GEB would pay such companies rental for using their transmission lines.

- Distribution of electricity on a territorial basis by distributing companies, selected through open competitive bidding process. GEB could participate in the equity of such distributing companies in terms of its existing assets.

Further, each territory would have an appropriate mix of the different categories of consumers and electronic meters would be utilised for both HT and LT consumers. The distribution centres would operate as 'profit centres', with accountability for loss/theft as well as the grant of monetary incentives for higher productivity and better management.

[1] Wind energy major Suzlon Energy has submitted a proposal to the Gujarat government to set up a Rs 2,200-crore wind park with a capacity of around 450 MW in the Kutch district of Gujarat, which would be the biggest in the country (*Economic Times, September 6, 2003*).

The Policy notes the need to restructure GEB, both financially and organisationally, to improve its financial position. Further, it recognises the centrality of tariff rationalisation, if the operational efficiency of GEB is to be increased and private investments are to be forthcoming in the power sector.

In this regard, the Policy proposes the establishment of an Independent Statutory Power Tariff and Regulatory Commission for the purpose of fixing tariffs and sets forth the following guiding principles:

- Utilities should operate on commercial principles and earn adequate rate of return on capital investment;
- Tariff should be rationalised so as to take advantage of higher tariff for peak hour power consumption;
- Cost of inefficiency of the utilities should not be passed on to the consumers;
- Subsidies granted by the State Government, to be included in the determination of tariffs, would have to be explicit, quantified, reasonable and targeted.

Also envisaged in the Policy is the establishment of an autonomous association, the 'Gujarat Council of Power Utilities', which would among other things act as an apex body for co-ordination amongst utilities and also as an advisor to the functioning of the system grid.

In terms of strategy, the Policy contemplates the preparation of a Power System Master Plan to estimate the load forecast, determine the region-wise deficit and formulate ways of bridging the gap. The implementation of the Plan would be the responsibility of a Planning and Monitoring Cell, especially set up for that purpose in the Energy and Petrochemicals Department. This would ensure the speedy implementation of power projects, including the obtaining of various clearances from the different governmental authorities. In addition, the State Government would form a high-level committee, headed by the Chief Secretary, to monitor the implementation of the Policy.

The Power Policy, though issued in 1995, continues to form the basis for the state power policy. It has, however, been supplemented over the years by a combination of Centre-led and State-led initiatives, which are briefly summarised below.

In 1996, the Chief Ministers of the States adopted, at a conference convened by the Ministry of Power, the **Common Minimum National Action Plan for Power**. Some of the noteworthy features of this Plan included the setting up of the Central Electricity Regulatory Commission by the Union Government, State Electricity Regulatory Commissions by each State/Union Territory, and the rationalisation of retail tariffs. Subsequently, the Electricity Regulatory Commissions Act was enacted in 1998 to give effect to the above purposes. The Gujarat Electricity Regulatory Commission (GERC) was established under this Act and passed its first Tariff Order in the year 2000.

The Government of Gujarat issued a **Captive Power Policy** in November 1998 for the supply of surplus electrical power from captive power plants (CPPs) to its group companies, as defined therein, and GEB. The main features of the policy are as under:

- Tariff for supply of power to the group company would be on pro-rata cost sharing and on no profit no loss basis.

- Power supplied or wheeled to different recipient units of group companies from the CPP of a supplying company would be subject to payment of electricity duty and tax on sale of electricity.

- Wheeling of electricity from the CPP of an industrial company to the other industrial units within the same company or to any/or industrial units of its' group companies would be permitted on the terms specified in the policy, including the condition that the supplying company consumes at least 50% of the generated power.

- GEB may, at its option, purchase surplus power from the CPP. The rate of purchase of such surplus power would depend on the fuel being used and would be on fuel-cost basis.

- Banking of electrical power with GEB/Licensee would not be permitted.

- Fees payable for installation of CPP shall be as decided by GEB/Licensee.

- Electricity duty shall be payable by industrial undertaking(s) on self- generated consumption.

- The State Government may review this policy in the light of actual experience gained so as to effectively fulfil the objectives of the Power Policy, 1995.

The **Gujarat Infrastructure Agenda-Vision 2010** provides an assessment of the requirements of the State across the major infrastructure sectors for the decade 2000-2010, identifies projects in various sectors to meet these requirements, analyses the financial and investment implications thereof and the extent of private sector involvement necessary, and formulates linkages across sectors for co-ordinated development. Apart from developing a prioritised 'shelf of projects' for PSP, the Agenda identifies policy initiatives necessary to facilitate the same, noteworthy amongst which are:

- Restructuring of the power sector (through corporatisation of GEB, creation of a single dominant entity in transmission with a major role in generation and complete restructuring of distribution or complete unbundling of all segments of the sector);

- Inclusion of guidelines on certain matters in the framework for regulation by the GERC;

- Formulation of an appropriate fuel mix policy; and

- Review of provisions of the Captive Power Policy unfavourable to the industry, for instance, not allowing banking of electrical power and non-exemption of electricity duty for self-generation.

Further, while taking account of the inter-sectoral linkages for co-ordinated infrastructure development, the Agenda groups sectors into 'drivers', i.e. demand generators for other sectors, and 'linkages', i.e. facilitating infrastructure. Power, ports, and industrial parks have been identified as drivers, while roads, water supply and townships have been defined as linkages.

The current power policy recognises the constraints faced by the State in terms of non-availability of local fuel resources like lignite, coal and hydel; difficulties in getting coal linkages for the power plants and the long distance from the coal pit-head, and accordingly, proposes to harness the potential offered by the geographical location of the State for setting up port-based power plants using imported coal or liquid fuel like LNG, naphtha and natural gas. This is in line with the port-led development being planned for the State.

The Accelerated Power Development and Reform Programme (APDRP), launched by the Ministry of Power in the year 2000-2001, provides an example of power reforms pushed through at the State level by the Central Government. Under the Programme, the Central Government provides financial assistance to the States for the strengthening and upgradation of sub-transmission and distribution network as well as incentives in the form of grants, aimed at actual cash loss reduction by the State Electricity Boards/Utilities. In this regard, it may be noted that during the year 2002-03 the Central Government has sanctioned sub-transmission and distribution (ST&D) projects totalling an amount of Rs. 1035.80 crores for upgradation of sub-transmission and distribution in Gujarat.

Subsequently, in March 2001, the Ministry of Power organised a conference of Chief Ministers/Power Ministers on power sector reforms. This conference recognised that the real challenge of reforms lies in distribution and resolved to achieve commercial viability in distribution within the next two/three years. As a result of the decisions taken at the conference, States have entered/are entering into the following agreements with the Central Government:

- Memorandum of Understanding (MoU)- The MoUs signal the joint commitment of the Centre and the States to undertake reforms and restructuring in a time bound manner and link the support of the Central Government to the achievement of predetermined milestones. Thus, the States would set up State Electricity Regulatory Commissions, undertake energy audit through full metering, reduce transmission and distribution losses and attain commercial viability. In return, the Central Government would provide assistance including allocation of additional power from new Central Sector generating stations and funds under specific programmes/schemes.

- Memorandum of Agreement (MoA) – The signing of MoAs by States has been made a pre-requisite for the release of APDRP funds. The MoAs build upon the MoUs and provide clearer and more specific milestones for the reform programme in the States. As per the MoAs, the States are required to benchmark their performance and periodically monitor the same. The existing benchmarks shall then be compared with the expected level to be achieved within the agreed time frame.

- Tripartite Agreement (TPA) – The TPA provides for a one-time settlement of dues payable by the State Electricity Boards (SEBs) to the Central Public Sector Undertakings (CPSUs). As per the scheme formulated by the Expert Group appointed in this regard, 60% of the interest/surcharge on the delayed payments as on September 30, 2001 would be waived and the rest of the dues would be securitised through tax-free bonds issued by the respective State Governments. Also, incentives would be provided to the States for timely payment of current dues.

3.2.3 Progress To Date

The Gujarat Electricity Regulatory Commission (GERC) was constituted in the year 1998 and is functional. At present, PA Consulting, UK is providing technical assistance to GERC in terms of capacity building, procedures, formulation of codes and regulations and future technical development of the Commission.

Further, the GoG has signed the Tripartite Agreement, Memorandum of Understanding and Memorandum of Agreement with the Central Government to implement the power reforms in a phased manner.

The State Government has announced that the GEB is to be corporatised by reorganising the Board into subsidiaries handling generation (Gujarat State Electricity Corporation Limited)[2], transmission (Gujarat Energy Transmission Corporation Limited) and distribution (four separate companies for north, central, south and west Gujarat). In this context, the State Government has issued a Gujarat Power Industry (Restructuring and Regulation) Ordinance and proposes to transfer the assets to the new companies by formulating a transfer scheme thereunder[3].

In terms of legislation, the GoG has enacted the Indian Electricity (Gujarat Amendment) Act, 2003 regarding theft of electricity in the State and the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 for reorganization and rationalization of the electricity industry of the State.

3.2.4 Legislative Framework

Electricity is one of the subject matters enumerated in the Concurrent List (i.e. Entry 38, List III), which means that both Parliament and the State legislatures have been empowered to legislate concurrently on the subject.

The State of Gujarat has enacted its electricity reform act, namely, The Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 (Gujarat Act No. 24 of 2003), which came into force on May 12, 2003, after having received the assent of the President. In addition, The Indian Electricity (Gujarat Amendment) Act, 2003 (Gujarat Act No. of 2003) has been passed, which amends relevant provisions of The Indian Electricity Act, 1910 (now repealed) regarding theft of electricity in the State of Gujarat.

Subsequently, Parliament has enacted The Electricity Act, 2003 (Act No. 36 of 2003)[4], which seeks to create an enabling framework for the development of an efficient and competitive power sector. The Act replaces the three existing laws, i.e. The Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998[5].

The Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 ("GEIA")

Preamble

The Preamble to the GEIA states that it is an Act to provide for the reorganization and rationalization of the electricity industry and for establishing an Electricity Regulatory Commission in the State.

[2] GEB has already transferred 500MW of its plant to GSECL.

[3]

[4] The Electricity Act, 2003 has come into force with effect from June 10, 2003. However, the State of Gujarat has obtained an extension of six months and hence, the Central Act shall not apply in the State until December 10, 2003.

Composition of the Act

The GEIA is divided into thirteen Chapters (72 sections), which cover the establishment and constitution of the Gujarat Electricity Regulatory Commission (the "Commission); functions and powers of the Commission, including its power to pass orders and enforce decisions; licensing of transmission and supply of electricity; reorganisation of the Government Electricity Industry; determination of tariffs, accounts, audit and reports of the Commission; arbitration and appeals in relation to disputes under the Act; offences and penalties for contravention of the provisions of the Act; miscellaneous provisions regarding, *inter alia*, the recovery of fees, fines and charges due to the Commission, power of the State Government to give directions and make rules, and power of the Commission to make regulations; and the effect of the Act on existing central legislation.

Scope of the Act

The GEIA extends to the whole of the State of Gujarat.

Definitions under the Act

Chapter I (Section 2) of the Act contains certain definitions, including that of 'electricity industry' in Section 2(f), which is defined as "business or activities of generation, transmission, distribution or supply of electricity, the operation of power system and activities and matter connected thereto".

As regards terms used but not defined in this Act and defined in the Electricity Regulatory Commissions Act, 1998, Section 2 (r) states that such terms shall have the meanings respectively assigned to them in that Act. The Act further provides in Section 2(s) that words and expressions used but not defined either in this Act or in the Electricity Regulatory Commissions Act, 1998 and defined in the Indian Electricity Act, 1910, or in the Electricity (Supply) Act, 1948 shall have the meanings respectively assigned to them in those Acts.

Establishment and Constitution of the Commission: Chapter II (Sections 3-16) contains provisions concerning the establishment and constitution of the Commission. Section 3 stipulates the establishment of the Commission for regulation of the electricity industry in the State. The said Section also states that the Commission established under the Electricity Regulatory Commissions Act, 1998 shall be deemed to be the first Commission set up under this Act. Section 4 refers to the location of the Commission headquarters. Section 5 provides that the Commission shall consist of a Chairperson and two other members to be appointed by the State Government on the recommendation of a Selection Committee constituted under Section 6, according to which such Committee shall comprise of a Judge of the High Court, designated by the Chief Justice to be the Chairperson *ex-officio*; the Chief Secretary to the Government of Gujarat *ex-officio*; and the Chairman of the Authority or a member thereof nominated by the Chairman *ex-officio*.

Section 7 stipulates that a member shall hold office for a period of five years and shall not be eligible for re-appointment. In addition, the said Section provides that the salary and allowances and other conditions of service of the members shall be prescribed by rules made by the State Government. These shall not, however, be varied to the disadvantage of the members during their term of office. Section 9 details the grounds on which a person shall be disqualified from being appointed or being a member of the Commission, while Section 10 envisages the removal by the State Government - in certain cases only upon an inquiry by the High Court - of any member on the grounds specified therein, the suspension of any member pending an inquiry by the High Court against such member, and the resignation of any member by written notice to that effect.

Section 11 prohibits any person who ceases to be a member of the Commission from, among other things, appearing in any proceedings before the Commission for a period of three years or being appointed, directly or indirectly, in the service of the State Government or of any company, body corporate, institution or undertaking owned or controlled by the State Government. Section 12 concerns the place and manner in which the proceedings of the Commission shall be conducted and permits the taking of decisions on urgent matters by circulation. Sections 13 and 14 provide for the appointment of officers and employees of the Commission and consultants, respectively. Section 15 stipulates that the expenditure of the Commission shall be charged upon the Consolidated Fund of the State, whereas Section 16 states that the Commission may levy fees and charges and utilize the same towards meeting its expenses.

Functions and Powers of the Commission: Chapter III (Sections 17-18) deals with the functions and powers of the Commission. Section 17 lists, amongst the functions of the Commission, the following:

- to regulate the purchase, transmission, distribution, supply and utilization of electricity, the quality of service and the tariff and charges payable therefor, having regard to the interest of both the consumers and other persons availing the services and the utilities;
- to promote efficiency, economy and safety in the use of the electricity in the State;
- to determine the tariff for electricity: wholesale, bulk, grid or retail, in accordance with the provisions of this Act;
- to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences;
- to levy fees, charges and fines in accordance with the provisions of this Act and retain the same for its expenses;
- to regulate the working of the licensees and to enable that the working of licensees is efficient, economical and equitable;
- to set and enforce standards for the electricity industry in the State including standards relating to safety, quality, continuity and reliability of service;
- to promote competitiveness in the electricity industry in the State;
- to formulate standards, codes and practices for operation of the State Grid and the power system;
- to promote efficient utilization and conservation of electricity, reduction of wastes and losses in the use of electricity;
- to advise the State Government on matters concerning generation, transmission, distribution, supply and utilization of electricity in the State; and
- to adjudicate upon the disputes between licensees and to refer matters for arbitration, if considered necessary.

Section 18 stipulates that the Commission shall, for the purposes of any inquiry under this Act, have the powers of a civil court in respect of matters such as summoning and examining of witnesses, requiring the production of any document or other material object and receiving of evidence on affidavits. Under the said Section, the Commission also has the power to authorize entry, search and seizure of any books, accounts or documents, call for information and documents and consult persons likely to be affected by its decisions.

Licensing of Transmission and Supply of Electricity: Chapter IV (Sections 19-27) covers the licensing of transmission, distribution and supply of electricity and matters related thereto. Section 19 specifies the entities permitted to carry on the business of transmitting, distributing or supplying electricity (whether in bulk or not) in the State and provides for compulsory metering from the date of commencement of the Act. The said Section also prescribes the conditions under which a license to distribute or supply electricity in a specified area shall be granted to a generating company. Section 20 provides for the grant of a license by the Commission for the transmission, distribution and supply of electricity and sets out the procedure therefor and terms and conditions to be included therein. In this connection, the Section requires that an application for a license to transmit electricity shall have obtained the approval of the State Transmission Utility. Further, the Commission may grant a licence to more than one person within the same specified area for a like purpose.

Section 22 empowers the Commission to make amendments to the terms and conditions of a license, if the public interest so requires, and prescribes the procedure to be followed for the same. Section 23 deals with the revocation of license by the Commission, while Section 24 stipulates the provisions that shall apply to the undertaking of any licensee whose license is revoked. This includes the payment of such value as may be determined by the State Government, in case any such undertaking of the licensee vests in the State Government. Section 25 imposes certain restrictions on licensees. Section 26 entitles the Commission to exempt any person from the requirement to have a license. In certain cases, however, the Commission may have to take the permission of the Central Government or an existing licensee, as the case may be.

Reorganisation of the Government Electricity Industry[6]: Chapter V (Sections 28-31) provides for the restructuring of the Government Electricity Industry. Section 28 contemplates the transfer, first to the State Government and later to subsequent transferees, of the functions, duties, powers and obligations and such of the undertakings of Government Electricity Industry or such portion thereof in the manner and on the terms and conditions prescribed by the State Government in the transfer scheme. The said Section further stipulates prior approval of the State Legislature for any such transfer to any company, body corporate, person or authority, other than that owned or controlled by the State Government. Section 29 contains provisions relating to the transfer of personnel of the GEB. Section 30 entitles the State Government to treat such transfers as provisional for a period of twelve months and to make any variations in the terms thereof. Section 31 provides for the furnishing of information with regard to the establishment, acquisition, extension, and replacement of generating stations.

Tariffs: Chapter VI (Sections 32-33) covers tariffs. Section 32 provides for the determination by the Commission of the tariff for intra-State transmission of electricity and for distribution and supply of electricity (wholesale, bulk or retail, as the case may be) in the State. In so doing, the Commission shall be guided by certain factors mentioned therein. Further, the State Government shall compensate any person affected by the grant of subsidy to any category of consumer or class of consumers, as a condition for the licensee or any other person concerned to implement any such subsidy.

[6] The term "Government Electricity Industry" means the State Electricity Board and any other electricity industry owned or controlled by the State Government.

The said Section also lays downs the principles for the determination/implementation of retail tariffs, including the progressive reduction of existing cross-subsidy to the extent that within a period of five years from the commencement of this Act, the tariff to every class of consumer shall reflect a minimum of sixty-seven per cent of the licensee's average cost of supply of electricity to that class. In this regard, no tariff or part of any tariff may generally be revised at the instance of the licensee more than once in any financial year. Section 33 stipulates the provision of financial assistance to licensees by the State Government in the form of subventions, loans, and guarantee of repayment by a licensee of the amount of loan or interest thereon or both.

Commission's Power to Pass Orders and Enforce Decisions: Chapter VII (Sections 34-40) concerns the power of the Commission to pass interim/final orders to prevent any licensee from contravening any of the provisions of the Act, rules or regulations thereunder or license conditions. While Section 34 deals with the interim orders, including the procedure to be followed, Section 35 refers to final orders. Section 36 empowers the Commission to modify or revoke the final order. Section 37 stipulates that such orders of the Commission shall be enforced as if it were a decree of a civil court. Section 38 permits the Commission to authorize any person to take over the management or assume control in respect of the whole or part of the undertaking any licensee in certain cases. Section 39 provides for the imposition of fines and charges by the Commission for non-compliance with the provisions of the Act.

Advisory Committee, Standards of Performance and Disclosure of Information by Licensees: Under Section 41, an Advisory Committee shall be constituted, with five to fifteen members, each appointed for a term of three years. The Chairperson and members of the Commission shall be Chairperson and members of the Committee, *ex-officio*. Section 42 envisages the laying down of standards of performance by the Commission for the transmission, distribution, supply or use of electricity. Sections contains general restrictions on the disclosure by the Commission of confidential information obtained under the Act relating to the business of generation, transmission or distribution and supply of electricity carried on by any person.

Accounts, Audit and Reports: Chapter IX (Sections 46-48) covers accounts, audit and reports of the Commission. Section 46 states that the Commission shall prepare its budget for each financial year and forward the same to the State Government. Section 47 provides for the accounts for the Commission to be audited by the Comptroller and Auditor-General. The audit report and the annual report to be prepared by the Commission under Section 48 shall be laid before the State Legislature by the State Government, as soon as may be.

Arbitration and Appeals: Chapter X (Sections 49-52) concerns arbitration of disputes and appeals therefrom. Section 49 stipulates that disputes between licensees shall be referred to the Commission, which may arbitrate itself or nominate an arbitrator (s) to adjudicate and settle such dispute. Further, any award made by such arbitrator shall be filed before the Commission for confirmation and enforcement; setting aside or modifying; or remitting to the arbitrator for reconsideration. Any award made by the Commission under this Section shall be enforceable as if it were a decree of a civil court. Under Section 50, an appeal against any decision or order of the Commission shall lie before the High Court, on question of law arising out of such decision or order. Section 51 asserts that the every order passed by the Commission under the Act or the rules or regulations made thereunder shall be final. Section 52 bars the jurisdiction of civil courts.

Other Provisions: Chapter XI (Sections 53-57) details the offences and penalties under the Act.

Chapter XII (Sections 58-68) covers miscellaneous provisions. Section 58 provides that the fees, fines, charges and other sums due to the Commission shall be recoverable as arrears of land revenue. Section 60 states that all proceedings before the Commission shall be deemed to be judicial proceedings. Under Section 63, the State Government may give directions to the Commission on matters of policy and public interest and the Commission shall comply with such directions. Sections 64 and 65, respectively, deal with the power of the State Government to make rules and of the Commission to make regulations. Section 66 enables the State Government to pass orders up to three years from the commencement of the Act, to remove any difficulty that may arise in giving effect to the provisions of this Act.

Chapter XII (Sections 69-72) refers to the effect of the Act on existing central legislation and details provisions of Central Acts that are to be saved and those that shall cease to apply, including the consequences of such cessation.

3.3 Ports

3.3.1 Background

Gujarat is one of the major maritime states with a coastline of 1600 km, one-third of the total coastline of India. It has 41 ports- one major port (Kandla) and 40 other ports (11 intermediate ports and 29 minor ports), the latter ports under the control of the Gujarat Maritime Board. Those 40 ports handled a total of 162.2 million metric tons of cargo in 1999-2000 which was over 80% of the traffic handled by all minor and intermediate ports in the country. The major port of Kandla is the country's largest port (39 mmt per annum).

3.3.2 State Port Policy

The State Government of Gujarat, through the Gujarat Maritime Board, framed and declared a comprehensive and integrated Port Policy in 1995 to integrate the development of ports with industrial development, power generation and infrastructure development. That Policy had seven objectives:

- to increase Gujarat's share in the export and import sector in national and international trade and commerce in pursuant of liberalisation and globalisation policy;
- to decongest the overburden on existing major ports in Western India to provide efficient services and support the country's domestic and international trade;
- to handle 100 million tonnes of cargo in Gujarat maritime waters by the year 2000, accounting for 25% of India's total cargo;
- to provide port facilities to promote export-oriented and port-based industries in Gujarat given that an estimated 50% of total industrial investment was expected to be port-based;
- to take fullest advantage of the strategic location of the Gujarat coast to encourage shipbuilding and ship repairing and related industries and to provide facilities for coastal shipping of passenger and cargo traffic to nearby States;
- to fulfil future power requirements of Gujarat by establishing barge-mounted power plants and to provide exclusive port facilities for importing different kinds of power fuel;
- to attract private sector investment in the existing minor and intermediate ports and in new port locations.

The last objective of encouraging private sector investment was then furthered by Government of Gujarat Resolution No. WKS-1097-G-213-GH, dated 29 July 1997, **Build-Own-Operate-Transfer (BOOT) Principles Under Port Policy-1995**. These Principles were developed to support the Policy's vision of the development of ten green field ports- six of them fully private and the other four as joint sector ports. They will serve as a framework for involvement of the private sector in the construction and operation of these new ports. The guiding BOOT principles are as follows:

- timeliness of infrastructure creation;
- efficiency of operations and operational autonomy to the private sector (encouragement of competition and efficiency);
- synchronisation with hinterland development;
- maintenance of a Government role only in appropriate areas (security, defence, environment and to protect economic development) through the establishment of a suitable regulatory framework;
- recourse to Government kept to a minimum with the responsibility of financing the port with the developer. However, the Government will keep ownership of the land and waterfront but will permit the developer to create a mortgage/hypothecation of real estate as security for lenders to the project.

The above five principles are then spelled out in more detail in the Annexure to the Resolution for the following categories:

(1) **Build Stage of the BOOT Package**

- land location (identified or approved by the Gujarat Maritime Board (GMB);
- land acquisition (the responsibility of the Gujarat Government/GMB);
- terms of lease for land (for term concurrent with the term of the concession agreement);
- land expansion (Government will facilitate future expansion of port-related activity , and the setting of industrial parks, commercial ventures, roads and railways, etc. in the vicinity of the port. It will not allow other development say within 500 meters of the port limit);
- State Government tax concessions (lowered Stamp Duty and Registration Fee);
- Demarcation of the Port Areas as a Notified Area;
- Site Studies (GMB will make available to a potential developer the latest available traffic study and the site-specific engineering pre-feasibility report, but the developer would need to pay expenses incurred for site studies. He would have to prepare the Detailed Project Report and the site-specific Environmental Impact Assessment);
- Configuration (the developer would be able to decide the Capacity/Configuration/Cargo for the site as long as it met standards of environmental safety and technical sufficiency. The Government may set stipulations on the handling of certain cargo as part of the Concession Agreement);
- Clearances (the developer would be responsible for obtaining all relevant Central Government and State Government clearances but the Government will set up a single

window mechanism for the speedy processing of all State level clearances- see present role of Gujarat Infrastructure Development Board as mentioned above);

- Construction (the developer would be charged with full responsibility for the creation of port infrastructure as per the Concession Agreement. During construction, the Government would concern itself only with basic inspection);

- Financial Stake of Developer (the developer would be free to finalize the means of finance for the project and to structure the financing for the project);

- Developer's Financial Commitment (the members of the consortium of the developer must retain their financial commitment to the project of at least 51% for a minimum period of five years of commercial operations);

- Financial Stake of Government (the Government intends to participate in the development of Joint Sector ports as an investor and co-promoter, through equity participation in the port company by various Government agencies);

- Infrastructure Development (to facilitate port development, the Government intends to initiate concomitant development of road and rail corridors and industrial parks);

- Linkages to Transport Corridors (road and rail linkages from the port to the nearest highway or railhead will be structured as separate BOOT packages. The port developer will have right of first refusal for those packages before they are offered to other private investors).

(2) Ownership Rights of Different Parties

- Ownership Rights of Government (the Government has all sovereign rights as owner, overseer and conservator of the waterfront and licensor to the Contract);

- Ownership Rights and Responsibilities of the Developer (the developer has the right to mortgage the port assets or execute necessary covenants to a lender to the project. He may sell or transfer his rights and interests at the request of a lender to the project. In the latter case, the new developer must be selected by the lender in consultation with the GMB and, if necessary, the terms and conditions of the Concession Agreement may be renegotiated).

(3) Operation of the Port

Operational Issues

- Conservancy (the developer will take on the conservancy function of the port on behalf of the GMB);

- Port Operator Subcontracting of Services (the developer may operate the port as a full service or landlord port. He may sublease facilities or subcontract services as long as he remains responsible to the Government for due performance);

- Pilotage Provision (pilotage of vessels within the particular port limit will be the responsibility of the port operator. GMB will lay down qualification criteria for pilots and grant licenses);

- Obligatory Services (to promote the port's safe and unhindered operations, the Government may specify essential non-commercial services (typically with respect to safety, health, the environment) that the developer will be obligated to render. The broad areas of such service will be set in the Concession Agreement);

- Value Added Service (the developer will have complete freedom to offer cargo-related value-added services in the port premises);

- Expansion of Facilities and Competition Between Ports (the developer is encouraged to add port capacity and may receive incentives. At the time of the signing of the Concession Agreement he will submit to GMB for approval a broad perspective plan for development of the port in the next 15 to 20 years. As to competition between ports, the Government will encourage such competition but will see that port development of the ten priority ports is appropriately phased and will not grant permission to set up captive jetties, except in exceptional circumstances.)

- Manpower (the developer will be free to recruit manpower for the port);

- Operational Flexibility (the developer will have complete operational autonomy with respect to port operation, within the framework of relevant legislation).

Commercial Issues

- Tariff Flexibility (the developer will have complete flexibility to set and collect all tariffs. However, the port regulatory authority (GMB or successfor) will act on representations of unfair or monopolistic behaviour);

- Royalty Payments to the Government (a "Waterfront Royalty" will be set by the GMB and payable to the Government by each new port. It will be charged on a per-ton-per type of cargo basis. However, the Government will not take a share of any other core/value-added port service undertaken by the developer);

- Royalty Concessions (the Developer will be granted a concession on the royalty payable to the Government for a specific period of time. During this Royalty Holiday Period, the developer will pay only Rs. 10 per ton of liquid cargo and Rs. 5 per ton of solid cargo. The balance will be set off against the approved Capital Cost of the project. The Holiday will extend until such time as that total approved capital cost is so set off. However, the Holiday can be extended for a maximum of two major expansions of the facility by the developer. The royalty concession will automatically cease on completion of the BOOT period when the port reverts to the Government);

- Regulation (the Government will provide for the institution of an independent Port Regulatory Authority (Maritime Regulatory Commission) for the working of the port. Its mandate will include environmental protection, safety, relief and rehabilitation, issues of security and national interest, protection of port user interests, and any other matter of public interest).

3.3.3 Transfer of Assets

- Duration of the Concession Period (30 years to commence after three years after signing or after the period mentioned in the Concession Agreement. A longer BOOT period could be considered for projects which entail sizeable capital investment on account of site-specific marine conditions and backup infrastructure such as road/rail linkages.);

- Approved Capital Cost (this cost will be formalized in the Concession Agreement and would include the construction cost of the project, pre-operative expenses and interest during construction plus items approved by the Government/GMB. Any expansion with an investment of at least 25% of the initial approved capital cost will be considered a "Major Expansion");

- Transfer of Assets (at the end of the BOOT period, immovable assets would be transferred to the Government at a consideration of fair market value as set by a predetermined mechanism at the time of the signing of the Concession Agreement. For movable assets, the developer may take them away or receive a fair market value).

Based on the above BOOT Principles, the GMB has developed a model port concession agreement. That Agreement will be examined in detail as part of Phase II of this Project.

3.3.4 Progress To Date

GMB is now facilitating the development of six privatised Greenfield ports. They are Simar Power Port, Mithiwirdi Steel and Automobile Port, Dholera General Cargo Port, Hazira Industrial Port; Vansi-Borsi Petroleum & Liquid Chemical Port; and Maroli Industrial Port. Investment in the sector have been US$1.5 billion since the announcement of the port privatisation policy in 1995.

At present, a long term (June 2000-December 2003) Port Development Gujarat Programme (PODEG) is being carried out as a joint Indian-Dutch venture. Its mission is to support the structural development of the Gujarat port sector through organisational restructuring, knowledge transfer, technical assistance and human resource development.

3.3.5 Legislative Framework

Ports are a mixed responsibility under the Indian Constitution. Ports declared by law to be major ports, such as Kandla, are governed under Central legislation, the Major Port Trusts Act of 1963 (Act No. 38 of 1963), as amended. (see item 27 of the Union List under the Seventh Schedule to the Constitution). Central legislation also governs rules regarding maritime shipping and navigation on tidal waters (item 25 of the Union List), lighthouses (item 26 of the Union List) and port quarantine (item 28 of the Union List). Port matters may also be handled by uniform international rules set by conventions signed by the Government of India. In addition, for major ports, the Tariff Authority for Major Ports (TAMP) was established in 1997 to set tariffs and act as an economic regulator. (Act No. 15 of 1997, adding Chapter V-A, Sections 47A to 47H, to the Major Port Trusts Act.

Other ports are the concurrent responsibility of both the Central Government and State Government based on item 31 of the Concurrent List under the Seventh Schedule of the Constitution. The Indian Ports Act, 1908 (Act No. 15 of 1908), as amended, grants powers to State Governments with regard to all ports not designated as major ports. They include the power to make port rules in all areas except questions of public health, to appoint port officials except health officers, to set rules for the safety of shipping and the conservation of ports, to set port dues and charges, and to group ports.

Gujarat has been at the forefront in establishing State law for ports, as permitted by the Constitution. It established the Gujarat Maritime Board under Gujarat Maritime Board Act, 1981 (Act XXX of 1981) to carry out the functions specified to State Governments under the Indians Ports Act, 1908. It reports to the State Department of Ports & Fisheries. The port policy described above, as well as the 1997 BOOT principles, were prepared by the Board, which is responsible for their implementation. The Board has created two commercial companies to help in that execution in partnership with the Gujarat Industrial Investment Corporation. They are:

(a) the Gujarat Port Infrastructure Development Corporation Ltd (GPIDCL), as an investing arm of the Board for routing equity into the new joint sector ports;

(b) Alcock & Ashdown Ltd, for ship-breaking, shipbuilding, ship-repairing and dry docking.

The State Government is now planning to separate service delivery and development from regulatory functions. Thus it would create two new institutions- a Gujarat Port Authority to act as the concessioning body with private parties and to administer, maintain and develop port infrastructure assets, and a separate Maritime Regulatory Commission, along the lines of the State Electricity Regulatory Commissions, to enforce navigational standards, environmental protection standards, monitor concession agreements, act as a dispute resolution agency and encourage competition in the sector. The PODEG consultants mentioned above have prepared two draft laws- one for a revised Gujarat Maritime Board Act and the other which would create a new Gujarat Maritime Authority. Thus Gujarat will again be foremost with regard to an appropriate legislative framework for port development and regulation.

3.4 Airports

3.4.1 Background

Gujarat has 11 airports, of which only six are presently operational. There are also several aerodromes but most of these are not operational. Ahmedabad is the major state airport . The other existing airports presently being considered for development are those near Surat, Jamnagar and Vadodara. Surat Airport is actually owned by the Government of Gujarat but its operations are entrusted to the Airports Authority of India. No airport projects far enough advanced for PSIF-II funding, and such projects would suffer from the closeness of the international airport at Mumbai.

3.4.2 State Airport Policy

As noted with regard to the other states, civil aviation policy is set at the national level by the Government of India. In Gujarat, the subject falls under the Ministry of Industry and Mines. The Gujarat Infrastructure Development Board, in its role to coordinate infrastructure development particularly with private sector participation, has engaged aviation consultants to prepare a master plan for the development of aviation infrastructure in the State. That plan would include an examination of possible ownership structure within the framework of the amendments to the Airports Authority of India Act discussed below, and for plan implementation with emphasis on private sector participation in the development and future operation of airports in Gujarat.

3.4.3 Legislative Framework

There is no specific State legislation regarding airports in Gujarat. Airports are not specifically listed under Schedule I of the Gujarat Infrastructure Development Act, 1999 as one of the types of projects that must be considered by the Gujarat Infrastructure Development Board, but of course are so considered under the provision permitting other sectors to be so considered by the Board after notification by the State Government.

3.5 Urban Mass Transit

3.5.1 Background

The Government of Gujarat and the Ahmedabad Urban Development Authority (AUDA) are presently supporting the development of a multi-modal (rail and road) integrated transportation system for Ahmedabad in an area that includes the Ahmedabad Municipal Corporation, areas under the AUDA, and the corridor between Ahmedabad and Gandhinagar. The feasibility study has been done by an international consulting consortium consisting of Louis Berger International (USA), Lahmeyer International (Germany), MTR Corporation (Hong Kong) and ICICI and Dalal Consultants. An MOU was signed with the DMRTC for the conduct of the Detailed Project Report (DPR) at the Vibrant Gujarat Global Investors' Summit held in Ahmedabad from September 28-30, 2003.

3.5.2 State Urban Mass Transit Policy

Gujarat has no separate State policy regarding urban mass transit. It present policy is the support of the Ahmedabad Integrated Public Transit System described above. The GIDB is also developing plans for the establishment of such systems in Baroda and Surat.

3.5.3 Legislative Framework

Municipal urban mass transit/tramways are designated as under the State based on item 13 of the State List of the Constitution. (Article 246, Seventh Schedule). However, that function has then generally been granted to municipal corporations under the State Municipal Corporations Act. (see Bombay Provincial Municipal Corporation Act, 1949, as amended for Ahmedabad and Surat and the Gujarat Municipalities Act, 1963 for other municipalities of Gujarat.

In addition, if national railway lines are used, then such use is controlled by the Indian Railways Act, 1989.

3.6 Cyberparks/Information Technology (IT) Parks

(see main text)

3.7 Special Economic Zones (SEZs)

3.7.1 Background

The first SEZ to be approved in the country, under the SEZ Policy of the Union Government, is in Gujarat. On November 1, 2000, the Surat Export Promotion Zone was converted into India's first private SEZ. The Diamond & Gem Development Corporation was the promoter of the Surat SEZ and attempted to make it a model SEZ for the country.

In addition to this, the existing Free Trade Zone of Kandla has been converted into an SEZ and is in operation in the State. Besides, there are new proposals to establish SEZs in the State. Gujarat appears to have passed the Gujarat Special Economic Zone (SEZ) Act, which aims to involve the private sector in setting up SEZs[7].

3.7.2 State SEZ Policy

The Policy regarding the establishment of SEZs in Gujarat has been issued in 2002, in line with the Government of India guidelines in this regard. Such SEZ Policy will apply to all SEZs in the State i.e. the Kandla SEZ, Surat SEZ and the proposed SEZs at Positra, Mundra and Dahej and at any other locations where SEZs may come up in Gujarat, subject to the framework for SEZs determined by Government of India from time to time. The Policy bases itself on the Central Government policy with regard to SEZs.

The salient features of Gujarat's SEZ Policy are:

- **Management of the Zones**: The SEZs in the State will be declared an Industrial Township. The management of Special Economic Zones will be under the designated Development Commissioner (DC). The DC will grant all the permissions as a Single Point Clearance from his

[7] As reported at cm.narendramodi.org/work_repo/work_repo_july.htm. However, there is no report available as regards the content of this legislation, or whether it has come into force or not.

office. These will include registration of the unit, allocation of land, permission for construction of building and approval of building plan, power connection, environmental clearance, and water requirement.

- **Power**: The SEZ authority will ensure continuous and quality power supply to SEZ units. The SEZ developer will be allowed to arrange power as an independent power producer (IPP) as well as through transmission and distribution of power, while SEZ units will be granted automatic approval to set up captive power plants. The SEZ developer will approve power connections and carry out billing of units in the SEZ. Further, SEZ units shall be exempted from electricity duty for a period of ten years from the date of production or rendering of services.

- **Environment**: Applications for Site clearance, NOC, consent order and other clearances required from Gujarat Pollution Control Board under different Acts for units and activities within SEZ, other than thosethat require clearance from the Ministry of Environment and Forests (MoEF), Government of India, will be accepted by Development Commissioner of the SEZ, who shall have the power to grant approvals. In addition, the exemption from the requirement of obtaining NOC, currently restricted to small-scale industries, shall be extended to include medium and large-scale industries.

- **Water**: The SEZ developer will be granted approval for development of water supply and distribution system to ensure the provision of adequate water supply for SEZ units.

- **Labour Regulations**: The power of the Labour Commissioner, Government of Gujarat, shall be delegated to the Development Commissioner in respect of SEZs. Further, a designated Officer will function as the relevant officer under various Labour Laws to provide a single window service, under the supervision and control of the Development Commissioner of the SEZ. SEZ units will no longer be required to file periodically separate returns in respect of the Acts specified therein, but a Consolidated Annual Report instead. . All industrial units and other establishments in an SEZ will be declared "public utility services" under the provisions of the Industrial Dispute Act. Also, units will be permitted to get inspections in relation to workers' health and safety done through accredited agencies notified by the Government.

- **Sales, Tax and Other Levies**: The exemptions granted to the SEZ developer and SEZ units, including during the implementation period, under various state taxes and levies are as follows:

  - Complete exemption on payment of stamp duty and registration fees on transfer of land meant for industrial use in the SEZ;

  - Complete exemption on payment of stamp duty and registration fee for loan agreements, credit deeds, mortgages etc. pertaining to SEZ units or which will be executed within the SEZ;

  - Transaction within the SEZ shall be exempted from all State taxes including Sales Tax, VAT, motor spirit tax, luxury tax and entertainment tax;

  - Inputs (goods and services) made to SEZ units from Domestic Tariff Areas (DTA) will be exempt from Sales Tax and other State taxes;

  - Any sales from the SEZ to DTA will be treated as import and import duty and other levies as well as rules and procedures applicable to normal imports shall be applicable to such sales.

- **Other Provisions**: The State Government shall take all required suitable steps within the SEZs for the maintenance of law and order. Further, a Committee has been constituted under the Policy to resolve various issues pertaining to the promotion, development and functioning of SEZs in the State.

3.7.3 Legislative Framework

The text of the Gujarat Special Economic Zone (SEZ) Act, 2003, was not available for review.

3.8 Water and Sewage

3.8.1 Background

Gujarat has a problem of uneven distribution of water resources in the State which has led to over-exploitation of ground water in water deficient areas. While South Gujarat has abundant water resources, North Gujarat, Sarasota and Kutch are water-deficient. The shortfall in some urban areas is critical. Due to the depletion of ground water, in the future the State will have to rely on surface water. For that reason, the Sandar Sarovar Narmada Main Canal is being developed.

3.8.2 State Water and Sewage Policy

The State of Gujarat has no specified water and sewage policy. However, efforts are being made to ensure a supply/demand balance through the addition of new sources, artificial recharge and recycling of water. This requires an integrated policy framework for the development of irrigation, hydropower and water for utilities. In the case of bulk water supply, there is an emphasis on the use of special purpose vehicles and private sector financing while retaining government control and ownership. In the case of utility water, proposed institutional responsibilities have been subdivided into municipal water and urban water, rural water and industrial water.

In the case of municipal and urban water, the policy calls for BOT arrangements for developing supply sources, for increased corporatisation and commercialisation, and for increased operating and commercial efficiencies. In the shorter term, management contracts and leases are to be pursued. Movement will be toward concession agreements in the long term. For industrial water, BOT arrangements will also be pursued. Service delivery agencies are to be corporatised and given a higher degree of commercial and operating autonomy. There is to be gradual introduction of privatisation of urban and industrial water. An independent water regulatory framework to facilitate the entry of private sector operators is being considered.

For rural water, Government control will continue but with increased commercialisation and increased operating efficiencies. This will be accompanied by direct State Government financial aid in the form of targeted subsidies to support off-take contracts from bulk supply entities.

The major attention in the State has been the reduction of water losses in the transmission and distribution system, and the augmentation of water resources, especially in water-deficient areas. There is no private sector participation project in this area. However, the Gujarat State Drinking Water Infrastructure Corporation Ltd. (GSDWICL) has identified some projects for the purpose of construction of the bulk supply at the Sardar Sarovar scheme, and the intention is that this project would attract significant private sector participation.

3.8.3 Legislative Framework

Water supply, sewerage and solid waste management are local responsibilities under the 74th Amendment to the Constitution added in 1992. The Twelfth Schedule under Amended Article 243-W, added by Section 4 of that Amendment, lists "water supply for domestic, industrial and commercial purposes" (item 5) and "public health, sanitation conservancy and solid waste management" (item 6) under the powers, authorities and responsibilities of municipalities where they are granted by a law enacted by the Legislature of the concerned State.

Even previous to the enactment of that local government amendment, such powers were granted to municipalities/urban local bodies by the relevant acts establishing them. For Gujarat, the corporations of Ahmedabad and Surat are governed by the Bombay Provincial (Gujarat Amendment) Municipal Corporation Act, 1999. All other municipal corporations are governed by the Gujarat Municipalities Act, 1963. These acts also permit private sector participation in the water and sewage sector.

In addition, the Gujarat Water Supply and Sewerage Board (GWSSB), established under the Gujarat Water Supply and Sewerage Board Act, provides water extraction, water treatment, bulk supply and water transmission services. Municipalities generally purchase bulk water from the Board or other bulk sources while retaining control of retail distribution. The GWSSB has established the Gujarat Water Infrastructure Ltd. (GWIL) which operates as a water development company. The State Irrigation Department supplies water for agriculture. They have their own bore hole schemes and water is usually supplied at a nominal charge. Finally, the Department of Narmada/Water Resource and Supply is responsible for the Sardar Sarovar Dam which is expected eventually to supply bulk water to the seven municipal corporations and 142 municipalities.

With regard to private sector participation, the GIDB facilitates BOOT projects in the water sector, as it does in other sectors.

Appendix C - Karnataka

Table of Contents

1 Introduction

This Appendix summarizes the policies and legislative framework in the State of Karnataka with regard to private sector participation and privatisation in the relevant sectors of roads, power, ports, airports, urban mass transit, cyber parks and optical fibre, special economic zones (SEZs), and water and sewerage.

This background information is meant to provide a fuller description and analysis of these policies and legislation, which then can be referenced in the main text of the Working Paper. Throughout this discussion, reference is made to problems related to specific projects that are designated, or may be otherwise eligible, for assistance under the ADB PSI II Facility.

While some references are made to the regulatory framework for each of the mentioned sectors in the State of Karnataka, the detailed discussion of those matters is found in the companion Working Paper No. 2, Regulatory Framework.

2 General Policy and Framework

2.1 General Policy

Karnataka does not have a special agency for coordinating infrastructure projects, including private sector participation, similar to the Andhra Pradesh Infrastructure Authority or the Gujarat Infrastructure Development Board. Instead, there are several agencies, which perform functions to encourage and approve of such private sector participation. The process is in flux, and may only be clarified with the adoption of a new State infrastructure policy, as discussed below.

2.2 Present Karnataka Infrastructure Policy

The present Infrastructure Policy of Karnataka is set forth in a Government Order dated 26 December 1997. Its purpose is to give potential investors the State Government commitment to encourage private sector investment in infrastructure. The key features of the Policy are:

(a) The Government of Karnataka will play an enabling role to promote private sector investment in infrastructure;

(b) The Government of Karnataka will make efforts to ensure that infrastructure projects are commercially viable before offering them to the private sector;

(c) The Government of Karnataka will offer projects to the private sector by open competitive bidding. However, it may execute a Memorandum of Understanding (MOU), valid for a limited period, in cases where the private investor proposes a project that the Government had not contemplated offering to the private sector because it did not appear commercially viable or if he proposes a project that is novel or visionary.

(d) For investments about Rs. 100 crores, there will be a streamlined process for project approval, as follows:

    (i) An inter-departmental Committee, chaired by the Chief Secretary will coordinate the various infrastructure projects and make recommendations to the relevant Minister or to the Cabinet;

    (ii) In the case of a project proposed by a private investor on his own initiative, the Government would respond by approving, rejecting or seeking amendments within 90 days;

(iii) If the project is approved, then the Committee will ensure that the relevant authorities give all necessary assistance and clearances.

(e) The Government of Karnataka will propose amendments to relevant Acts and Rules where necessary to facilitate private sector participation in the infrastructure sector.

(f) The Government of Karnataka will take action to ensure that there is a single window agency for all necessary clearances.

(g) The Government of Karnataka may offer certain incentives (beyond those already available) to make projects viable. These incentives may include exemption from certain State taxes and the provision of land free of charge;

(h) The investor will be allowed to charge user fees (such as tolls or port dues) during the period of the concession.

(i) The Government of Karnataka will prioritise resources for key infrastructure sectors, particularly roads, power and water supply.

2.3 Present Approval Procedures; Role of Infrastructure Development Department

The present approval procedures for large infrastructure projects with private sector participation appear somewhat different from what is stated in the Policy above. The Department of Industries and Commerce takes a leading role in the development of large projects involving private sector participation. The Infrastructure Development Department (IDD) was established on 20 September 1996, being separated from the Department/Directorate of Industries and Commerce. Its role is to determine infrastructure needs in the various sectors, to prepare and evaluate projects profiles for selected projects that would seek private sector participation and to seek such investment. It would act as a consultant department for infrastructure departments and would develop such private sector participation in infrastructure projects above Rs. 100 crores which would have significant investment from the State Government.

IDD is a Secretariat only. It does not have field units. Thus the Infrastructure Development Corporation (Karnataka) (iDeCK) was established in June 2000 as special public vehicle to act as a nodal agency for the promotion of private sector investment in infrastructure and to facilitate the process of public-private partnership in infrastructure. The Government of Karnataka holds 49% of its share capital, IDFC holds 49.5% and the remaining 1.5% is held by HDFC. The Chairman of its Board is the Additional Chief Secretary, IDD. The paid up capital of iDeCK is Rs. 10 crores. It receives funds from the Karnataka Government for project development and project investment activities. The corporation has taken up the task of building up a pipeline of infrastructure projects for possible private sector participation in sectors such as tourism and urban development. To date such technical assistance has been given by iDeCK to the State Urban Development Department (for urban water supply and sanitation, and for the planning of growth of cities and towns), to the State Public Works Department (for roads and ports), and the Directorate of Industries and Commerce (for different types of zones- SEZs, apparel parks, agroparks), among others. Thus iDeCK is closely related to the IDD but is not legally authorized to act for it.

Thus the present system of approvals for potential private sector participation in the infrastructure sector in Karnataka appears as follows. IDD acts as the nodal agency for coordinating and liasing with all other relevant departments concerning all significant infrastructure projects, whether or not they are developed with private sector participation. In principle, the State Cabinet is the one stop shop for it resolves differences between departments, but this is seldom necessary. Very large projects, such as Bangalore-Mysore Infrastructure Corridor Project, are reviewed by all departments and key decisions are approved by the Cabinet.

For other large projects involving private sector participation above Rs. 50 crore, a High Level Committee, chaired by the Chief Minister acts as the final authority. For projects below Rs. 50 crores, there is a Single Window Agency chaired by the Chief Secretary (or his nominee- often the head of the KIADB) which acts as the final authority.

2.4 Proposed Revised Karnataka Infrastructure Policy

The Karnataka Cabinet is presently considering a revision to the present Infrastructure Policy which would appear to make the situation clearer. Although we have not seen the new draft Policy, we understand that the new policy would have a High Level Committee, headed by the State Chief Secretary, as the final decision-maker for large-scale private sector participation projects. All such projects of over Rs. 100 crores would first go to the IDD for approval, with iDeCK acting as its implementing secretariat. Thus the new Policy would give iDeCK two roles- one as the technical advisor/consultant to Government Departments in the preparation of projects and the second as the Secretariat for the vetting of private sector participation projects. It will be necessary throughout the Project to see how this new Policy is implemented in practice, as compared to the present Policy.

It should be noted that, in addition to the general infrastructure policy, the Government of Karnataka has issued a number of separate policy statements for specific infrastructure sectors, such as power (1997 and 2001), information technology (1997), roads (1998), special economic zones (2002) and urban drinking water and sanitation (2003). These Policy Statements will be described in detail below under that specific sector.

2.5 Other Institutional Actors

There are several other major institutional actors with general responsibilities to assist private sector participation in the infrastructure sector in Karnataka. In effect, they may also be said to offer one stop facilities, in addition to the Infrastructure Development Department as implemented through iDeCK. The Karnataka State Industrial Investment and Development Corporation (KSIIDC) is a company under the State Finance Department. At present, it is mainly concerned with the development of the proposed Bangalore International Airport, but it has a broader mandate.

In addition, the Karnataka Industrial Areas Development Board (KIADB), reporting to the Directorate of Industries and Commerce, is involved with the acquisition of land and the development of that land for all types of industrial projects, including for SEZs and agroparks. It is a parallel institution to the Madhya Pradesh Industrial Infrastructure Development Corporation and the Andhra Pradesh Industrial Infrastructure Development Corporation.

KIADB was established under the Karnataka Industrial Areas Development Act, 1966 (Karnataka Act No. 18 of 1966) to develop industrial areas so declared by the State Government, by notification (Section 3), and to generally promote the establishment and orderly development of industry in such areas. (Section 3). As added by Amending Act No. 11 of 1997, it may provide industrial infrastructure and amenities to such areas. (see Section 14 (c)). However, its major role is to provide land for such areas, acting for the State Government. (see Chapter VII (Sections 27-31)). The land acquisition procedure is an expedited one which may take as little as 30 days. Once a declaration of taking is made by notification in the Official Gazette, the land vests absolutely in the State Government. (Section 28). There is no provision regarding how long that land can be held before being used for an industrial purpose. The main revenue streams for the Board are charges for treated water it provides, service charges for the acquisition of land and revenues from the resale of land to an industrial user.

KIADB now has an excess of land that it is trying to dispose of. KIADB would like to expand its role to have a greater project development capability, as well as a stronger marketing department to help dispose of this surplus developed land. To date, it used iDeCK as a technical consultant to help develop the Hassan SEZ but might consider other possible parties for that job, including the KSIIDC.

Thus the present system in Karnataka is a complex one, with a number of actors having one stop shop responsibilities.

3 Policies and Legislative Framework by Sector

3.1 Roads

3.1.1 Background

As stated in the address of the Governor of Karnataka to the State Legislature on 27 February 2003, roads are the lifeline of the State economy and therefore must be given necessary importance. The Karnataka Budget 2003-2004 indicates that there has been substantial public investment since 2000 in developing and improving the road network in the State. The State Rural Investment Development Fund (RIDF) Programme has been used to develop and upgrade the rural road network. In addition, there is an extensive programme for the privatisation of maintenance of 7300 kms. of State highways which will be extended to major district roads. Karnataka is the only State with such a programme. Further, the Budget proposes the establishment of a dedicated Road Maintenance Fund to be called "Mukhya Mantri Grameena Raste Abhivrudhi Nidhi" with an initial capital of Rs. 100 crores to be funded by a cess on fuel and motor vehicles.

Further, there are several larger highway projects. The World Bank funded Karnataka State Highway Improvement Project (KSHIP) proposes to strengthen and improve 1000 kms. of State Highways-nine major bridges and 21 kms. of road have already been completed. The Karnataka State Road Development Corporation is carrying out the four laning of the Bangalore-Mysore State Highway with the initial link from Bangalore to Maddur.

In addition, the Bangalore-Mysore Infrastructure Corridor is to be carried out by Nandi Infrastructure Corridor Enterprises Ltd. (NICEL). That Project is to include a toll road (comprising four toll lanes and expandable to include two untolled lanes) with associated township and land development. The Project began in 1995 but has been held up due to problems of land acquisition and environmental clearance. Phase I has just reached financial closure and construction is to begin in September 2003. The Phase II Feasibility Study is to be completed also in September 2003. (CHECK). Its financial viability will depend on the development of the associated land. Phase II of that Project might be a possible project for funding under PSIF II.

3.1.2 State Road Policy

Karnataka issued its Policy on Road Development in Karnataka through a Government Order dated 20 August 1998. The following are the key features of that Policy:

(a) concerning physical development, the State Government intends:

  (i) to widen all state highways to at least two lanes, with four lanes and expressways along high density traffic corridors;

  (ii) to strengthen the roads to carry heavier loads and to improve the geometry to allow faster traffic;

  (iii) to provide all weather linkages to unconnected settlements;

  (iv) to maintain state roads to acceptable standards.

(b) concerning financing, consistent with Government of India policy, the State Government will encourage the private sector to participate in road projects as follows:

(i) Projects which are commercially viable will be offered to the private sector as a BOO, BOT or BOOT scheme in which the Karnataka State Government will participate on mutually agreed terms on a case-by-case basis;

(ii) Projects which are not commercially viable may be combined with other viable projects and offered to the private sector.

(c) concerning concession contracts:

(i) the concession agreement would generally be for a period of up to 30 years;

(ii) the private operator will have the freedom to set tariffs within the framework of existing statutes for charging users;

(iii) the private operator will guarantee performance standards;

In addition, the Government of Karnataka will offer a project through competitive bidding procedures but may enter into a Memorandum of Understanding with any qualified company in the event that competitive bidding does not elicit a response.

3.1.3 Results To Date

The four laning of the Bangalore-Maddur section of the Bangalore-Mysore State Highway (SH-17) is the major BOT project to date, under the management of the Karnataka Road Development Corporation Ltd. (KRDCL). Its total cost is Rs. 188 crore. The concession period is 10 years and three months- including three months for financial closure, 24 months for construction and then an eight year operations period. The return will be via semi-annual annuity payments based on the projected traffic volume of the road. The two year construction period is expected to begin in September 2003.

The other such project is the Sandur Bypass, Bellary District, which is a 16 km. BOT project being prepared by the Karnataka Infrastructure Development Department and the Public Works Department. The Infrastructure Development Corporation (Karnataka) (iDeCK) is helping with project preparation. The revenue would be from tolls on iron ore trucks (1000 daily) which are prohibited from passing through the town centre.

3.1.4 Legislative Framework

Karnataka is the only one of the four project states to have its own highways law- the Karnataka Highways Act, 1964 (Karnataka Act No. 44 of 1964), as amended, as implemented by the Karnataka Highway Rules, 1965. The original purpose of the Act was to modernize highway legislation in the State to provide not only rules for construction and development of highways under State control but for the levy of betterment charges to help pay for such highways and their improvements, and also regarding restriction of ribbon development along highways and to prevent encroachment on highways. However, the Act was amended in 1983 to permit the levying of tolls on bridges and roads. (Chapter VI-A, Section 48-A of the Act, as added by Amending Act No. 15 of 1983 and later by Act No. 22 of 2000). In addition, Chapter II-A (Section 19-A) was added to the Act by amending Act No. 35 of 1998 to allow the State Government to enter into an agreement with any person in relation to the construction, development and maintenance of the whole or part of a highway. This gives specific legal standing to concession agreements for highway construction or rehabilitation. That later provision is parallel to Section 8-A added to the National Highways Act, 1956, by Amending Act No. 26 of 1995.

The Highways Act itself is divided into chapters, as follows:

- Chapter I- Preliminary- Title, Application and Definitions (Sections 1-2);
- Chapter II- Declaration of Highways, Highway Authorities, and Their Powers and Functions (Sections 3-6);
- Chapter III- Restriction of Ribbon Development (Sections 7-19);
- Chapter III-A- Power of State Government to Enter Into An Agreement for the Development and Maintenance of Highways; Punishment for Mischief That Injures a Highway (Sections 19-A and 19-B);
- Chapter IV- Prevention of Unauthorised Occupation and Encroachment on a Highway and Removal of Encroachment (Sections 20-25);
- Chapter V- Compensation (for damage to a person through the construction or improvement/expansion of a highway) (Sections 26-40);
- Chapter VI- Levy of Betterment Charges (Sections 41-48);
- Chapter VI-A- Levy of Toll (Section 48-A);
- Chapter VII- Supplemental Provisions to Secure Safety of Traffic and Prevention of Damage to Highways (Sections 49-54);
- Chapter VIII- Penalties (Sections 55-60);
- Chapter IX- Miscellaneous (Sections 61-76).

There is a schedule referring to Sections 28 (2) and 30 that sets amendments to the Land Acquisition Act, 1894 to be followed in carrying out the Act.

Section 1 of the Act provides that it applies to all highways of the State except for National Highways declared as such by the Central Government under the National Highways Act, 1956. However, the State Government has the power to exclude any road or class of roads in an area designated by notification from the provisions of the Act.

Section 3 states that the State Government may, by notification in the Official Gazette, declare any road or land to be a highway, classified as:

- State highway (Special);
- State highway;
- Major District Road;
- Other District Road;
- Village Road.

Sections 4-6 concern the designation of a highway authority for all the highways of the State or for a particular highway or highways. Such an authority shall be so designated by notification in the Official Gazette. That Authority may carry out any powers and duties under the Act. Subject to the approval and orders of the State Government, such an Authority may undertake the construction, maintenance, development or improvement of highways. (Section 5). For roads in urban areas, this general authority is with the Karnataka Urban Development Department (KUDD), which then transfers the roads to the relevant urban local body for maintenance. For roads outside urban areas, the Karnataka Public Works Department is responsible for state highways, major district roads and other district roads. Village roads are developed and maintained by the Karnataka Rural Development and Panchayat Raj Department.

As noted above, Chapter III-A, Section 19-A, added in 1998, also gives the State Government the power to enter into an agreement with any person, including a private individual or corporation in relation to the construction, development, and maintenance of the whole or part of any highway. To facilitate such construction or maintenance, the State may transfer land belonging to it or acquired by it to such persons by way of lease or otherwise for the period of that agreement. It should be noted that only a lease is permitted, not outright transfer of the land.

Chapter III (Sections 7-19) of the Act concerns the restriction of ribbon development. This includes the fixing of building or control lines, and restrictions on buildings between a highway boundary and building line, or between building and control lines. (Sections 7 and 9). Section 14 gives the Highway Authority the power to enter land to take surveys and demarcate boundaries. Section 15 permits the State Government to acquire land declared by notification to be needed for highway purposes. Under Section 19, that land may be taken into possession at any time after the publication of that notification, and shall then vest in the State Government.

Chapter IV (Sections 20-25) provides for the prevention of unauthorised occupation and encroachment on a highway, and the rules for removal of the encroachment. Under Section 25, the cost of removal shall be collected from the person responsible, including the auctioning off of any materials on the site if necessary.

Chapter V (Sections 26-40) then sets rules regarding the payment of compensation when there is damage to the rights of a person by restriction of use of their building or land or acquisition or extinguishment of any rights. Under Section 28, the determination of the amount of compensation in default of agreement shall be set by the Highway Authority after holding an enquiry and following the procedures for setting value set by Sections 23 and 24 of the Land Acquisition Act, 1894, as substituted for by the Schedule to this Act. That Schedule, as a substitution for Section 23, states that consideration shall be given to the market value at the date of the publication of the declaration under Section 15, the use to which the land was put at that date, the damage sustained based on loss of standing crops or trees, severing of that land from his other land, and other injury to his property or his earnings. Substituted Section 24 then states that no consideration in granting compensation shall be given to the degree or urgency which led to the acquisition, any damage which if caused by a private person would not render such person liable to suit, any increase in value of the land likely to accrue from the new use or increase in value of other land of the interested person, the cost of any improvement made after the date of the declaration not specifically approved by the Highway Authority, any special suitability of the land if there is no market apart from the special needs of the Highway Authority, or any increase in value due to a use contrary to public health. This change modernises the Land Acquisition Act for highway purposes in Karnataka.

The rest of Chapter V contains other similar provisions on compensation. Section 29 states that no compensation shall be paid if a similar restriction on the land is in force under another law or if compensation has already been received regarding that restriction. Under Section 30, compensation to be paid for refusal of permission to build shall not exceed the difference between its value when that refusal was made and the value which it would have had if the permission was granted. Section 31 states that compensation for diversion of access to a highway shall not exceed the cost of alternative access. Section 32 concerns compensation to be paid for the cutting of standing crops and trees. Section 33 states that no compensation shall be paid for unauthorised buildings, and Section 34 provides for no compensation for removal of an encroachment. Under Section 35, an aggrieved party must appeal a compensation decision by making written application to the Highway Authority within six weeks of the date of the award to have the matter referred to the concerned Civil Court Judge. That decision shall be enforceable as a decree of a Civil Court. (Section 38). Section 39 states that payment of compensation shall be made by the Highway Authority to the persons concerned, but betterment charges if due may be deducted under Section 40.

Chapter VI (Sections 41-48) sets the rules for such betterment charges to be paid by all parties with land affected favourably by the highway construction or improvement.

As noted above, Chapter VI-A (Section 48-A) then permits the State Government, by notification in the Official Gazette, to levy a toll on all motor vehicles entering bridges, causeways and tunnels, with different rates for different classes of vehicles and different classes of roads and bridges. The Government is also permitted to exempt any class of motor vehicles from such tolls. The toll collected shall be credited to the Karnataka Roads and Bridges Fund constituted under Section 17-A of the Karnataka Motor Vehicles Taxation Act, 1957.

Chapter VII, Sections 49-54, of the Act provides additional provisions to secure the safety of traffic and to prevent damage to highways. Section 49 requires the prevention of obstruction of the view of any persons using a highway. Section 50 permits the Highway Authority to regulate traffic when a highway has been declared unsafe. Section 51 permits the Authority to prohibit the use of heavy vehicles on certain highways. Section 52 sets procedures to be followed for the closing of any highway. Section 53 requires the consent of the Authority to construct or carry a cable or pipe or channel or other acts on a highway. Under Section 54, where a highway is wilfully damaged, then the Highway Authority may have that damage repaired and the cost charged to the guilty party following the collection and auction procedure of Section 25.

Chapter VIII (Sections 55-60) then concerns penalties for violations under the Act. Section 56 sets the penalty for restrictions on access or erecting a building at a maximum fine of Rs. 500 plus a continuing daily fine of up to Rs. 100 if the violation is not removed. Under Section 57, unauthorised occupation of a highway leads to a penalty of up to Rs. 250 for a first offence, and up to Rs.500 for plus a daily fine of up to Rs. 50 for non-removal for a second or subsequent offence. Section 58 provides a penalty of up to Rs. 1000 for causing damage to highways. Section 58-A gives a penalty of up to Rs. 100 for a first offence for not paying a toll, and a penalty of up to Rs.400 for a subsequent offence. Section 59 then sets a general penalty for other offences at up to Rs. 50 for a first offence and up to Rs. 200 for subsequent offences. Finally, Section 60 permits the compounding of offences by the Highway Authority. This set of penalties is comprehensive, but the size of the penalties may not be sufficient to deter major offences.

Finally, Chapter IX (Sections 61-76) contains miscellaneous provisions. Section s 62 and 63 concern the powers and duties of the police and of village officials, respectively, to inform the Highway Authority of violations of the Act. Section 65 provides for summary eviction of a violator by the Deputy Commissioner where required to do so by the Highway Authority or other officer acting on behalf of the State Government. Section 66 covers official inquiries by the Highway Authority. Section 69 bars the jurisdiction of a Civil Court for matters to be settled under the Act by the Highway Authority or other officer. Section 70 protects public servants from suit when they are acting in good faith under the Act.

Section 72 gives the State Government the power to make rules necessary to carry out the provisions of the Act, including regarding the following:

- closing of highways to traffic or to certain weight of vehicles;'
- prevention of obstruction and nuisance on highways;
- rules under which the plying of vehicles may be prohibited;
- general guidance to the Highway Authority in the discharge of its functions under the Act;
- any other matter which is to be or may be prescribed under the Act.

Under Section 73, the Savings Clause, a local authority retains its rights to make excavations for laying drains, sewers or watercourses, as does any authority appointed to control water, electricity, railways or trolleys, and also the telegraph/telephone authority.

Section 74 states that the provisions of this Act shall generally prevail over the provisions of other State laws except as regards the savings clause above. Under Section 75, the building and control lines for a national highway may still be fixed by the State Government even after that highway has been so declared.

Karnataka Highway Rules, 1965

As further detailed implementation of the Karnataka Highways Act, 1964, there are the Karnataka Highway Rules, 1965. There are 25 such rules covering such matters as forms related to permissions under the Act, manner of Section 15 notification, conditions on which permission shall be granted under Section 21 to occupy highway land, the rent to be charged for the occupation of highway land, the date on which betterment charges are payable, the prohibition or regulation of traffic when a highway is considered unsafe under Section 50, and the prohibition or restriction of the use of heavy vehicles on a highway under Section 51.

Of particular interest for this project are Rules 18-25 concerning payment of tolls. Rule 18 states that the rate of toll to be paid to the Highway Authority on behalf of the State Government is set by the Second Schedule (Substituted) to the Rules. For constructions costing more than Rs. 50 lakhs constructed after 1-4-1983, the toll for a motor car shall be Rs. 5.00, and for a bus and other heavy vehicles- Rs. 15 if laden and Rs. 10 if up-laden. Rule 19 requires that a table of tolls to be levied be put up in a conspicuous place near the collection booth. Rule 20 sets the procedure for the collection and handling of tolls. Rule 21 states that the driver shall pay the toll and receive a receipt for his payment. Rule 22 requires the toll inspector to maintain a cash register and handover tolls for collection when relieved of his duty. Rule 23 requires the Highway Authority concerned to furnish a statement of tolls collected for each construction concerned to the State Accountant General on a quarterly basis. Rule 24 states that collection charges shall not exceed 12% of total collections, and be reimbursed to the Highway Authority. Larger amounts needed for collection by the Authority may be made by the State Government through a specific budget provision. Finally, Rule 25 requires that police officers are bound to assist Toll Inspectors when required and shall have their normal police powers in such instances.

This Highway Act and Rules can serve as a model for other States. They are comprehensive in nature. The only problem in the legislation itself may be the size of the penalties set for infractions. There might also be new rules in the Highway Rules themselves with regard to private sector participation.

3.2 Power

3.2.1 Background

The evolution of the policy in the power sector lends itself easily to division on the basis of the three milestones set up by the Central Government to monitor the status of reforms aimed at privatisation at the State Level[1]. In this sub section on the power sector we first examine in some detail the policy framework before moving on to examine the laws in which they have been expressed.

3.2.2 State Power Policy

Improving the financial condition of the SEB's.

Karnataka had unbundled and corporatized the Karnataka Electricity Board (KEB) even prior to the reform agenda pushed by the Central Government. The KEB was set up in 1957 and subsequently in 1970 a separate corporation, Karnataka Power Corporation Limited (KPCL), was set up for the generation of power. KPCL was involved in the generation of power while KEB's operations have been largely confined to the transmission and distribution of electricity.

The Government of Karnataka announced a reform policy for the energy sector vide its order dated January 1997[2]. According to the policy statement, reform for the power sector was designed to achieve the following objectives:

- Attracting private sector investment to this sector to meet the growing demand for power.
- Keeping generation costs to a minimum through a process of competitive bidding, by establishing a regulatory environment.
- Providing incentives for energy conservation.
- Releasing scarce government resources that are now required by the power sector for being used in areas of greater priority.
- The reforms process as envisaged in the Policy Statement involved unbundling of transmission from distribution, with the distribution function being organised into several economically viable units.

Pursuant to the above objectives in July 1999, the GOK approved the incorporation of Visvesvaraya Vidyut Nigam Ltd. and Karnataka Power Transmission Corporation Ltd. ("KPTCL") for taking over the generation and transmission and distribution activity respectively. The transfer scheme of the assets and liabilities of the newly formed entities was notified in March 2000. The Government of Karnataka also issued provisional licences to the KPTCL in exercise of its powers under Section 18(4) of the KERC Act. These Licenses were issued for Transmission and Bulk Supply and for Distribution and Retail Supply. Subsequently KPTCL made applications to the Commission for issue of Regular Licences by the Karnataka Electricity Regulatory Commission ("Commission") set up under the Karnataka Electricity Reform Act 1999. These licences have been issued to the KPTCL on 6.12.2000 and 7.12.2000 respectively.

[1] "New Initiatives in the Power Sector – A Brief" 22 in India's Electricity Sector Widening Scope for Private Participation (Investment Promotion Cell, Ministry of Power, GOI : New Delhi, , 6th Edn., 2000).

[2] Reliance Review of Energy Markets 334 (Reliance Industries Limited: Mumbai, 2002).

In February 2000 the GOK signalled its further commitment to the reform process by signing a Memorandum of Agreement with the Ministry of power, Government of India. Further policy measures are being taken by the Government to reform the financial health of the KEB. In March 2001 the GOK approved the Financial Restructuring Plan of the Power Sector in the State and Balance Sheet restructuring plan of the Karnataka Electricity Board[3]. Thus these are some of the reforms carried out by the Karnataka Government in the power sector. In line with its 1997 policy, a regulatory framework for the power sector was set up under the Karnataka Electricity Reform Act, 1999 ("KERC") Act.

Introducing independent regulators.

In terms of the policy the Karnataka legislature enacted the Karnataka Electricity Reform Act 1999 in terms of which the Karnataka Electricity Regulatory Commission was set up.

The Karnataka Regulatory Commission ("commission") set up under the KERC Act has proved in practice to be an effective monitoring and standard setting mechanism on governmental performance in the private sector. Due to the lack of privatisation of the various levels of the electricity generation, transmission and distribution process it has focussed more on the activities of the government rather than the private players.

This stance of the regulator has attracted a considerable degree of resistance from the Government owned entities. While pronouncing its first tariff order in December 2000, on the licensee's application for the revision of tariffs, the Commission had included several directions. These included directions relating to the quality of service to be provided to the Licensee to its customers, directions related to procedures for assessment of T & D Losses and action to be taken for reducing them, obtaining the approval of the Commission for capital investments, prioritisation of capital investments, conducting studies required for tariff determination etc.

This order was immediately challenged by KPTCL on the following grounds viz

1. That the Commission did not have the power to direct the manner in which the Licensee shall function,

2. That the Commission through the directives is assuming the role of a supervisory authority.

3. That the directions go beyond the scope and power of the Commission.

4. That the role of the Commission under the Reforms Act has not been properly appreciated by the Commission while considering the tariffs proposal and that the Commission is interfering in every activity of the Licensee.

However before the arguments could proceed to an advanced stage KPTCL withdrew the appeal. This episode however sent a strong signal on the independence of the Commission.

[3] Reliance Review of Energy Markets 340 (Reliance Industries Limited: Mumbai, 2002).

Creating an enabling environment for PSP in an incremental manner at all levels in the electricity sector.

After the enactment of the KERC Act the policy focus of the Karnataka Government has shifted to increasing PSP in power. In terms of further increasing the component of PSP in the power sector the GOK in January 2000 decided to invite PSP participation in electricity distribution in the State through the competitive bidding process. A report was prepared by M/s Cameron McKenna Consortium of UK acting as Financial and Distribution Privatisation Consultants in October 2001[4].

To offset the continued revenue deficits being faced by KPTCL the GOK felt the need to encourage IPP's. Therefore it constituted a Committee under the Chairmanship of the Principal Secretary to the Government, Energy Department. After the Committee came out with its recommendations the Government looked into the matter in detail and adopted the following policy on the issue of IPP's:

1. The total incremental capacity addition to be encouraged over the ten year period during FY 2000-01 to FY 2009-10 would be in the range of 3,500-4,000 MW.

2. Capacity addition programme envisaged above would include those arising out of both State and Central Sectors as well as IPP's.

3. Location specific and Load specific environment-friendly generation facilities using Non-conventional/renewable energy fuels/sources, and Cogeneration facilities, would be encouraged along with the IPPs' so that such projects constitute up to 10% of the electricity consumed by the year 2009-10.

4. Naphtha/Liquid fuel based or Barge Mounted Projects would not be encouraged, as they are not cost effective.

5. The Power Purchase Agreements shall include appropriate provisions for the following: for making evacuation arrangements by KPTCL or its successor entities, safeguards against commitment to pay exorbitant/ avoidable deemed generation charges to IPPs, commitment on the part of IPPs to pay penalty for not making available the contracted generation to KPTCL or its successor entities.

6. The Power Purchase agreements or arrangements are to be entered into with the IPPs or others by KPTCL or its successor entities as the case may be, in the manner approved and as directed by the Karnataka Electricity Regulatory Commission, under the provisions of the Karnataka Electricity Reform Act, 1999, from time to time.

7. No provision of escrow facilities or similar arrangements and no provision of any other form of guarantees to any IPP would be available.

8. To consider reform-based arrangements, for encouraging capacity additions, as has been done in the Multi-partite Agreement with IDFC in respect of RTPS 7th Unit of KPCL, with such modifications as may be necessary.

9. Projects would be prioritized based on the above mentioned principles and parameters, the least tariff criterion, timing, and the extent of capacity requirement synchronized with corresponding evacuation arrangements, on a year-on-year basis. Further, such prioritization would apply only to the firm projects, which are expected to occur and fructify from time to time.

[4] *Reliance Review of Energy Markets* 341 (Reliance Industries Limited: Mumbai, 2002).

10. Efforts would be made to encourage procurement of energy from any other source within or outside the state, if such procurement is on least cost and available on competitive terms to meet the State's demand for power at a given point of time.

The Reform Secretariat of the Government of Karnataka, had set the following Agenda for power reform in the State[5]:

- Constitution of independent Electricity Regulatory Commission and rationalization of tariffs.
- Corporatisation of the erstwhile Karnataka Electricity Board, unbundling Transmission and Distribution and formation of several Distribution Companies.
- Creating healthy and viable Power Sector, Turnaround in the sector in next five years.
- Privatisation of Distribution Companies.
- Augmentation of Generation based on Least Cost Options.
- Reliable and quality power supply to all consumers.
- "Electricity for All" by year 2010.
- Access to ultimate end-consumers through evolution and development of market.

The power sector policy of the GOK[6], mention the following as the objectives of the reform exercise,

1. Attracting enough private investment to this sector, in generation, transmission and distribution to meet the growing demand of power.

2. Establishing a regulatory environment which will ensure that generation costs are kept at a minimum through a process of competitive bidding for setting up of capacity and also ensure that adequate incentives are provided for improvements in operational efficiency, cost reduction and enhancement in the quality of customer service in the transmission and distribution sectors.

3. Providing incentives for energy conservation.

4. Releasing scarce Government resources, which are now deployed in the power sector for being used in other areas of greater priority (i.e., where private investments will not be available).

In terms of implementation the Government saw the following broad steps as being integral to the reform process:

1. Restructuring.

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[5] *See* "Power Reforms Agenda", undated, available at, http://karenergy.kar.nic.in/frames/mainframe.htm *visited on* 1st September 2003.

[6] "Power Sector Policy of the GOK", undated, available at http://karenergy.kar.nic.in /frames /mainframe.htm visited on September 1, 2003.

2. Establishing an Independent Regulatory Commission

3. Tariff Reform.

4. Introducing Competition

5. Privatisation

6. Reform Management.

The Karnataka Electricity Distribution Privatisation Strategy Paper[7] lists out the following steps which have been taken in achieving the aforementioned policies.

(i) Enactment of the Karnataka Electricity Reform Act, 1999;

(ii) Establishment of the Karnataka Electricity Regulatory Commission ("KERC");

(iii) Amendment to the Electricity Act, 1910 to deal with theft of electricity and expeditious disposal of cases of theft;

(iv) Disaggregating the generation transmission and distribution businesses of the former Karnataka Electricity Board into separate corporate entities;

(v) Splitting the distribution sector into four distribution companies, namely:

(a) Bangalore Electricity Supply Company (BESCOM);

(b) Mangalore Electricity Supply Company (MESCOM);

(c) Hubli Electricity Supply Company (HESCOM); and

(d) Gulbarga Electricity Supply Company (GESCOM).

As per this policy paper the next step is the privatisation of above Electricity Supply Companies ("Escoms"). Both the Central Government and the State Government regard it as a key step in the reform of the electricity sector for the purposes of ensuring financial stability in the sector, reducing state's financial burden towards the sector, providing adequate and reliable quality power to consumers, and ensuring better service to consumers. Introduction of the private sector in power distribution will achieve improved operating efficiency and capital investment efficiency, which will result in the supply of quality power to consumers at reasonable costs. In addition, implementation of new systems by the private sector for administration, billing, collection, customer management and tackling theft of power will not only improve the viability of the sector, but also result in improved customer service.

The Government has announced its intention to gradually bring about privatisation and has recognised the need to take the following steps:

1. Restoration of the financial health of the sector by

[7] "Karnataka Electricity Distribution Privatisation Strategy Paper", undated, available at http://karenergy.kar.nic.in /frames /mainframe.htm visited on September 1, 2003.

a. Provisions of subsidy

b. Rationalisation of retail tariffs over a period of time to cost of service levels.

c. The State Government would, however, continue to subsidise certain categories of consumers, directly or indirectly, though the amount of subsidy will decrease over time, so as to gradually impact upon the consumer.

2. If found suitable the introduction of an appropriate wholesale electricity trading arrangement. It is, however, expected that in the short to medium term KPTCL will continue to perform the functions of both transmission and bulk purchase of electricity.

3. Certainty with respect to the tariff path and overall regulatory framework.

4. Availability of credible and verifiable data (e.g., on non-technical losses, consumption by agriculture).

5. Operational freedom to disconnect non-paying customers and to control theft both by way of regulation and actual enforcement and

6. A track record of timely payment by State Government / Government undertakings for both subsidy payment as well as consumption of electricity.

In order to prevent the existing financial problems from stalling privatisation the Government has, decided to adopt the "Distribution Margin and Risk Allocation Approach" ("DM Approach") for privatising the electricity distribution businesses. This approach has been developed with the objective of privatising the electricity distribution businesses in the entire state, and not limiting it to cover urban centres only.

The DM Approach provides a commercial and regulatory framework for a transition period. During this transition period, since the investor will not be able to bear all the risks which it should normally bear, some of these risks will be allocated to other stakeholders such as the Government and Government-owned companies, while some other risks will be mitigated through a number of measures. Once the transition period ends i.e. when the requisite preconditions for effective private sector participation have evolved, these risks will be borne by the investors.

As part of the DM Approach, a detailed Risk Allocation Matrix is being prepared that addresses the risks to be assumed by the GOK, privatised Escoms and consumers during the transition period. The risk allocation would be so designed that the private Escom would bear a reasonable share of the risks associated with the distribution function, even during the transition period. The precise allocation of risks will be developed during the detailed design process. However, it is expected that most risks would either be allocated entirely to the private Escom, or shared between the KPTCL/State Government and the Escoms. The State Government is also looking at ways of mitigating some of the risks, through introducing predictable multi-year regulatory principles etc. The State Government has decided to attempt privatisation of the four DISCOMS simultaneously.

3.2.3 Legislative Framework

The Karnataka Electricity Reform Act, 1999

The Karnataka Electricity Reform Act, 1999 ("KERC Act") (Karnataka Act No.25 of 1999) is the legislative centre piece of the reform policy initiated by the GOK. The KERC Act being an Act which was enacted on a matter on which Central legislation existed, it was sent to the President for his approval and the approval was duly received on the Twentieth day of August, 1999.

Preamble

The preamble to the Act lists its principal purposes as being :

- To provide for the constitution of an Electricity Regulatory Commission ('The Commission') for the State of Karnataka;

- To provide for the restructuring of the electricity industry in the State, the corporatisation of the Karnataka Electricity Board and the rationalisation of the generation, transmission, distribution and supply of electricity in the State;

- To provide for avenues for participation of private sector entrepreneurs in the electricity industry in the State and generally for taking measures conducive to the development and management of the electricity industry in the State in an efficient, economic and competitive manner

- To provide reliable quality power and to protect the interest of the consumer including vesting in the Commission the powers to regulate the activities of the power sector in the State and for matters connected therewith or incidental thereto.

Composition of the Act

The Act is divided into fourteen Parts which cover the establishment of the Regulatory Commission, enumeration of the powers and functions of the Commission including its power to enforce its decisions, Reorganisation of the Karnataka Electricity Board ("The KEB"), the regulations relating to generating companies and generating stations, the licensing of transmission and supply, tariffs and financing of the licensees, creation of forums and processes for obtaining inputs from the key stakeholders in the industry in the tariff setting process, arbitration mechanisms for resolving disputes under the Act and offences and penalties for contravention of the provisions of the Act.

In addition there is one Schedule which again is divided into two parts. The first part stipulates the components which should be contained in the budget which is required to be prepared by the Commission as per Section 8(7) of the KERC Act. Part II of the Schedule provides details in relation to the Remuneration to be provided to the Commission members, the Official Seal and the Delegation of the activities associated with Compliance with the Act by the Commission.

Scope of the KERC Act

The Act extends to the whole of the State of Karnataka.

Definitions under the KERC Act

Section 2(o) of the Act defines "transmit" exhaustively as the transportation or transmission of electricity by means of a system operated or controlled by a licensee which consists, wholly or mainly, of extra high voltage and extra high tension lines and electrical plant and is used for transforming and for conveying and/or transferring electricity from a generating station to a sub-station, from one generating station to another or from one sub-station to another or otherwise from one place to another.

In general the Act provides in Section 2(p) and (q) that words and expressions used but not defined in the KERC Act and defined in either the Electricity (Supply) Act, 1948 (Central Act No. 54 of 1948) or the Indian Electricity Act, 1910 (Act No.IX of 1910), will have the meanings respectively assigned to them in that Act.

The Karnataka Electricity Regulatory Commission.

Part II contains provisions relating to the establishment of the Karnataka Electricity Regulatory Commission. Part III of the Act deals with the Proceedings, Powers and Functions of the Commission. Section 9 of the KERC Act refers to the place and manner in which the proceedings of the Commission shall be conducted. Section 10 details the powers that the Commission can exercise while carrying out its functions. Section 11 sets out the functions of the Commission. These include:

- Regulating the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable. In determining the tariffs the Commission is expected to keep in mind the fact that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected.

- Promoting efficiency, economy and safety in the use of the electricity in the State. The Commission is expected to incentivise in this regard appropriate demand side management and reduction of wastes and losses in the use of electricity

- Issuing licenses in accordance with the provisions of the KERC Act and determining the conditions to be included in the licenses;

- Regulating the working of the licensees

- Regulating the assets, properties and interest in properties concerning or related to the electricity industry in the state;

- Aiding and advising, in matters concerning electricity generation, transmission, distribution and supply in the State;

- Promoting competitiveness and progressively involve the participation of private sector;

- Collecting data and forecast on the demand for, and use of, electricity and to require the licensees to collect such data and forecast;

- Requiring licensees to formulate prospective plans and schemes in co-ordination with others for the promotion of generation, transmission, distribution and supply of electricity;

- Setting appropriate codes of conduct and standards for the electricity industry in the State and standards of service to the consumers by licensees;

- Arbitrating or nominating arbitrator(s) in matters of disputes and difference between licensees in accordance with the provisions of this Act ;

- Coordinating with environmental regulatory agencies and to evolve policies and procedures for appropriate environmental regulations of electricity sector and utilities in the state; and

- Undertaking all incidental or ancillary functions connected with the electricity sector.

Reorganisation of the Karnataka Electricity Board

Part V of the Act contains the manner in which The Karnataka Electricity Board (KEB) will be reorganised and the manner in which the board's functions, transfer of properties, liabilities and other matters will be transferred to the new entities which would succeed the KEB. Section 13 mandates the State Government to incorporate under the provisions of the Companies Act, 1956 the Karnataka Power Transmission Corporation, ("KPTC") with the principal objects of engaging in the business of purchase, transmission, sale and supply of electrical energy. It also provides that the KPTC shall be responsible for,

i. Planning and co-ordination concerning the electricity sector.

ii. KPTC shall also be the principal company to undertake transmission and work connected with transmission,

iii. determining the electricity requirements in the State in co-ordination with the Generating companies, State Government, the Commission, the Regional Electricity Board and the Central Electricity Authority.

iv. extra high voltage transmission system operation and shall operate the power system in an efficient manner.

v. discharging such powers, duties and functions of the Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder, as may be specified in the license.

Section 13 (6) provides that subject to the overall supervision and control of the KPTC, a number of subsidiary or associated transmission or distribution companies may be established in the State and the Commission may grant licenses under the terms of this Act to such transmission or distribution companies, in consultation with KPTC.

Sections 14-16 detail the manner in which the assets and liabilities of KEB are to be transferred, during the process of reorganisation.

Licensing, Generation, Supply and Transmission.

Section 17 of the Act stipulates that a generating company will have to take the consent of the Commission for

1. Transmitting or supplying or selling electricity.

2. For the establishment or acquisition of a new generating station, or to extend or replace any major unit or plant or works pertaining to generation of electricity in a generating station, to meet the applicant's need for the electricity, subject to the following modifications:

Similarly Section 18 of the KERC Act makes it mandatory for persons to obtain a licence for the purposes of carrying on the business of supply and transmission of electricity and Section 19 of the KERC Act makes the Commission the nodal agency for granting licences for the purposes of transmission or supply of electricity. Section 19 also lays down the detailed procedure for grant of licences. In particular the Section enumerates that the Commission in granting a license to the licensee may require the licensee to:

- enter into agreements on specified terms with other persons for the use of any electric lines, electrical plant and associated equipment operated by the licensee;

- comply with any direction given by the Commission;
- act in accordance with the terms of the license;
- refer all disputes arising under the license for determination by the Commission;
- furnish information, documents and details which the Commission may require for its own purpose or for the purposes of the Central or State Government or Central Electricity Authority or Central Electricity Regulatory Commission;
- comply with the requirements of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or rules framed thereunder in so far they are applicable;
- undertake such functions and obligations of the Board under the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 as the Commission may specify by regulation;
- obtain the approval of the Commission of such things that are required under the license conditions or for deviation from the same;
- notify the Commission of any scheme that he is proposing to undertake including the schemes in terms of the provisions of the Electricity (Supply) Act, 1948;
- purchase power in an economical manner and under a transparent power purchase procurement process;
- the purchase of power from KPTC to the extent necessary to enable the KPTC to perform its obligations under the contracts concluded by the State Government or the Board referred to in clause (j).
- supply of electricity in bulk to other licensees or to customers.

Section 19 also contains further detailed provisions on the power of the Commission in modifying the licenses. Section 20 grants power to the Commission to frame regulations to grant exemption from the requirement to have a supply license with or without conditions. The Commission would however be required to take the permission of the local authority, the Central Government or an already existing licensee as the case may be.

Section 21 casts a duty on the holder of a supply license or a transmission license in respect of a particular area to develop, provide and maintain an efficient, co-ordinated and economical system of electricity supply or transmission, as the case may be, in the area of supply.

Section 22 enumerates the cases wherein the Commission can revoke the License which has been granted. Section 24 provides the detailed procedure which is to be followed by the Commission in such cases. Section 23 provides that the Commission in the public interest may amend the terms and conditions of the license.

Section 25 of the Act makes it mandatory for any licensee or generating company to obtain prior consent of the Commission in writing before such a company takes over the business of another company engaged in transmission, supply or distribution of electricity..

Tariff Setting

Explanation (b) under Section 27 of the Karnataka Electricity Reform Act, 1999, says that "tariff" means a schedule of standard prices or charges for specified services, which are applicable to all such specified services provided to the type of customers specified in the tariff published. According to the provisions of Sub-Section (1) of Section 27, the holder of each licence granted under the Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the Expected Revenue from Charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect such revenues.

Section 11 of the KERC Act, lays down the functions of the Commission. As per Clause (a) of Sub-Section (1) of this Section, the Commission is responsible to regulate the purchase of power, distribution, supply and utilization of electricity, the quality of service, the tariff and charges, keeping in view the interest of consumers as well as the consideration that the supply and distribution of electricity cannot be maintained unless the charges for electricity supplied are adequately levied and duly collected.

Section 11 enjoins the Commission to promote efficiency, economy and safety in the use of electricity apart from promotion of quality, continuity and reliability of service.

As per Sub-Section (2) of Section 27 of the KERC Act, 1999, the Commission has the power to lay down the methodology and terms and conditions for determination of revenue of the licensee and the determination of tariff in such a manner as the Commission considers appropriate. The Commission is to be guided by the following factors, namely: -

- The financial principles and their applications provided in sections 46, 57 and 57A of the Electricity (Supply) Act 1948 (54 of 1948) and the sixth schedule thereto;

- In the case of the Board or its successor entities, the principles under section 59 of the Electricity Supply Act 1948;

- That the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

- The factors which would encourage efficiency, economical use of the resources, good performance and optimum investments and other matters which the Commission considers appropriate for the purpose of this Act;

- The interest of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

- The electricity generation, transmission, distribution and supply are conducted on commercial principles;

- National and State power plans formulated by the Central or State Government as the case may be.

Sub-Section (5) of Section 27 of the KERC Act says that any tariff implemented under the Act shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor and total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of the supply and the purpose for which the supply is required or paying capacity of the consumers and need for cross subsidization. It shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and shall satisfy all other relevant provisions of the KERC Act, regulations and conditions of the Licence. Sub-Section (6) of Section 27 further lays down that the Commission shall endeavour to fix tariff in such a manner that as far as possible similarly placed consumers in different areas pay similar tariff.

Section 12 of the Karnataka Electricity Reform Act, 1999 specifies the power of the State Government to issue policy directives on matters concerning electricity in the State including overall planning and co-ordination. The policy directives given by the Government have to be consistent with the objectives sought to be achieved by the Act. In case the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the Commission, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the Commission may direct as a condition for the licensee or any other person to implement the subsidy provided for by the State.

As mentioned earlier Section 27(1) of KER Act, 1999 requires that the each Licence holder has to observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges (ERC) which it is permitted to recover and in designing a suitable tariff system for this purpose. The licence holder will have to provide full details of the calculations of the expected earning for the ensuing financial year from charges which it is permitted to recover for supplying electrical energy to consumers. Based on this provision, the Commission has framed Regulations for furnishing details regarding filing of expected revenue from charges and proposed tariffs by the licensees. The objectives of the Commission in framing Tariff Regulations were:

a. To inform licensees of the basic minimum data and information requirements for seeking the Commission's approval to the expected revenue from charges and for any proposal for modification of the tariffs.

b. To provide standardized formats in which such information is to be provided.

c. To specify the procedure by which the Commission would take up the ERC filings and Tariff filings for consideration before according its approval thereto.

d. To ensure the greatest possible transparency in such procedure and the fullest possible opportunity for all concerned to participate in such a process.

The information that is to be furnished by the licensee includes consumer category-wise energy demand projections, sources of supplying the energy, cost of energy and break up of expenses proposed to be incurred for supplying the energy to the consumers, total capital employed to provide the service, total revenue requirement including return on investment and proposed tariff for different categories of consumers to meet the total revenue requirement. This information in detail relating to Expected Revenue from Charges is to be furnished to the Commission in the prescribed format not later than four months prior to the beginning of a financial year. No specific date for the tariff filing has been prescribed. The only requirement is that this should be filed at least three months before the implementation date. The Commission on receipt of ERC and tariff filing by the licensee can notify the licensee for any additional information and clarification required within fifteen days and also specify dates by which such information/clarifications are to be furnished. On receipt of all information the Commission would treat the filings of the licensee as a petition before it. The ERC filing and/or Tariff filing would then be published by the licensee in daily newspapers in the format as approved by the Commission. The responses of the consumers to the publication and the replies by the licensee would be considered by the Commission while passing Orders on the filings.

Section 27(2)(b) of KER Act, 1999 states that in the case of Electricity Board or its successor entities the principles under Section 59 of the Electricity (Supply) Act, 1948, will apply. Sub-Section (5) of Section 13 of the KER Act lays down that upon the grant of licence to the KPTCL under Chapter VII of the Act, the KPTCL shall discharge such powers, duties and functions of the Board including those under the Indian Electricity Act, 1910, and the Electricity (Supply) Act, 1948, or the rules framed there under as may be specified in the licence, and it shall be the obligation of the KPTCL to undertake and duly discharge the powers, duties and functions so assigned.

The general principles regarding the finances of Electricity Boards are given in Section 59 of the Electricity (Supply) Act, 1948. This Section states that the Board shall, after taking credit for any subvention from the State Government under Section 63, carry on its operation and adjust its tariff so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than 3 % or such higher percentage as the State Government may, by notification in the official gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year. The value of fixed assets means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of the Act and consumers contribution for service lines. The Government of Karnataka has not specified any higher percentage of surpluses for the purposes of Section 59 of the Electricity (Supply) Act.

Section 28 provides an option to the Government to provide various kinds of support to the licensees.

A. The State Government may, with the approval of the State Legislature, make subventions to any licensee for the purpose of this Act or the Electricity (Supply) Act 1948 for such amounts as may be recommended by the Commission and on such terms and conditions as the State Government may determine.

B. The State Government may from time to time advance loans to any licensee or Generating Company which for the time being is wholly or partly owned by the State Government on such terms and conditions, not inconsistent with the provisions of this Act or the Electricity (Supply) Act, 1948, as the State Government may determine.

C. The State Government may guarantee in such manner as it thinks fit, the repayment of the principal or the payment of interest (or both) on any loan proposed to be raised by any licensee or generating company, which is for the time being wholly or partly owned by the State Government or the discharge of any other financial obligation of any licensee, provided that the State Government shall, so long as such guarantees are in force, lay before the State Legislature during the budget session in every year a statement of the guarantees, if any, given during the current financial year of the State and an up-to-date account of the total sums, if any, which have been paid out of State revenues in each case by reason of any such guarantees or paid into State revenues towards repayment of any money so paid out.

3.2.4 Other Subsidiary Provisions.

Sections 29 to 31 details the procedural aspects of the Commission's power to pass Orders and enforce Decisions. Section 33 grants power to the Commission to impose fines and charges for non-compliance with the provisions of the KERC Act. Section 33 also gives the Commission general power to frame binding regulations under the Act. Section 34 provides for the constitution of an Advisory Committee having representation from the various stakeholders so as to enable their involvement in the policy formulation and implementation processes thus making the process more participatory and transparent.

Section 35 provides that the Commission may disseminate information of relevance to the public after complying with certain procedures. Section 36 allows the Commission to set standards of performance to be achieved by the licensees. Section 37 of the KERC Act provides that the Commission may also collect information from the licensees which indicates their level of performance which however they are required to keep confidential under Section 38 of the Act. Section 39 empowers the Commission to be the arbitrating authority or nominate the arbitrating authority to adjudicate and settle any dispute arising between the licensees.

Section 41 provides for an appeal against the order of the Commission to the High Court of Karnataka. Sections 42-47 of the Act detail the various penalties and the circumstances in which they would be imposed. Section 50 then provides that the licensee, generating companies and others on whom the fines or charges are imposed under the Act shall not, directly or indirectly, pass the same to the consumers in the form of tariff or charges payable.

Section 52 provides for a Bar of jurisdiction and saving of consumer actions. Section 56 confers power upon the Commission to make regulations while Section 57 provides the Government the power to make rules to carry out the purposes of the Act. Section 58 lays down the detailed framework within which the provisions of the KERC Act will interact with the Central Legislation, as it then existed in 1999. Section 59 provides for the provisions of certain Central Laws to be saved.

Apart from the KERC Act the State government has in recent times passed the following two enactments in relation to the power sector, The Electricity (Karnataka Amendment) Act, 2001 (Anti-Theft Law) (Karnataka Act 35 of 2001) and The Karnataka Electricity Board (Recovery of Dues) and other Law (Amendment) Act, 2001 (Karnataka Act 27 of 2001).

3.3 Ports

3.3.1 Background

Karnataka is a major maritime state with one major port (New Mangalore), two intermediate ports (Karwar and Old Mangalore) and seven minor ports. It has a ports policy but no general legislation on ports. However, the Karnataka Ports (Landing and Shipping) Fees, Act, 1961, as amended, does provide for the setting of port charges and tariffs.

3.3.2 State Port Policy

The ports policy for Karnataka is set forth in a Government Order dated 12 February 1997. Its key features are as follows:

(a) the Government intends to develop three minor ports in strategic locations so that port facilities can be accessed more readily from all districts;

(b) the Government intends to attract private sector investment for the development of existing minor and intermediate ports as well as other green field locations. Private sector participation in existing ports can include:

- Construction of new wharves, jetties and terminals;
- Installation of mechanical cargo handling equipment;
- Construction and operation of captive jetties in selected locations;
- Operation of services such as cranes, tug towing, warehousing and essential utilities.

(c) With regard to implementation, the Karnataka State Government:

- Intends to coordinate port development with associated industrial estate development and infrastructure development. In particular, it intends to promote the proposed rail link from Karwar to Hubli (check spelling);
- The Government will acquire and allot lands and may offer incentives to enhance the economic viability of projects on a case-by-case basis;
- Karnataka State Industrial Investment & Development Corporation (KSIIDC) will assist the Karnataka Public Works Department Secretariat for Ports where necessary to achieve the above goals;

(d) Concerning private sector participation, the broad outline will be as follows:

- The private party would be licensed;
- Development and operation would be through the Build-Own-Operate-Share and Transfer (BOOST) mechanism;
- Relevant Government of Karnataka assets would be leased to the private sector in return for a fee;
- The BOOST agreement and license would be for a specified period of up to 30 years.

3.3.3 Legislative Framework

Ports are a mixed responsibility under the Indian Constitution. Ports declared by law to be major ports, such as New Mangalore, are governed under Central legislation, the Major Port Trusts Act, 1963 (Act No. 38 of 1963), as amended. (see item 27 of the Union List under the Seventh Schedule to the Constitution). Central legislation also governs rules regarding maritime shipping and navigation on tidal waters (item 25 of the Union List), lighthouses (item 26 of the Union List) and port quarantine (item 28 of the Union List). Port matters are also handled by uniform international rules set by conventions signed by the Government of India. In addition, for major ports, the Tariff Authority for Major Ports (TAMP) was established in 1997 to set tariffs and act as an economic regulator. (Act No. 15 of 1997, adding Chapter V-A, Sections 47A to 47H, to the Major Port Trusts Act.

Other ports are the concurrent responsibility of both the Central Government and the State Government based on item 31 of the Concurrent List under the Seventh Schedule of the Constitution. The Indian Ports Act, 1908 (Act No. 15 of 1908), as amended, grants powers to State Governments with regard to all ports not designated as major ports. They include the power to make port rules in all areas except questions of public health, to appoint port officials except health officers, to set rules for the safety of shipping and the conservation of ports, to set port dues and charges, and to group ports.

Karnataka does not have a separate Maritime Board like Gujarat, but it does have specific legislation regarding the setting of dues and charges- the Karnataka Ports (Lands and Shipping Fees) Act, 1961. Its authority is carried out by the Director of Ports and Inland Water Transport under the State Public Works Department Secretariat but reporting to a separate Minister of Ports and Inland Waters.

3.4 Airports

3.4.1 Background

The airport sector in Karnataka consists of the current Bangalore international airport owned by Hindustan Aeronautics Ltd. and operated by the Airports Authority of India, Mangalore airport, and many small airstrips.

In addition, a contract was recently signed for the Bangalore International Airport Project (BIAP). The new Bangalore International Airport will be constructed as a BOO project by a public-private consortium of which 74% of the shares will be held by the private parties, including Siemens, Larsen&Toubro and Unique Zurich Airport. The remaining 26% is held by the State Government of Karnataka and the Airports Authority of India, each with 13%, as the public parties. This is the maximum amount of private participation allowed under the Government of India Draft Civil Aviation Policy without specific approval by the Central Government Cabinet. In addition, the government of Karnataka is providing land on a long term lease basis and investing Rs. 300-400 crores in the project.

The State interest in aviation is looked after by the Karnataka Infrastructure Development Department. There is no separate State Department of Civil Aviation.

3.4.2 State Airport Policy

As civil aviation is a national Government matter, there is no State policy on airports beyond the support being given to the project for the new Bangalore International Airport. Also, Karnataka officials have indicated that the small airport sector should be considered as a perceived need under the PSI II Facility.

3.4.3 Legislative Framework

There is no present State legislation dealing with the aviation sector in Karnataka.

3.5 Urban Mass Transit

3.5.1 Background

At present, the possible urban mass transit projects being considered for Karnataka are both in Bangalore. The Bangalore Metro is presently being planned by the Bangalore Mass Rapid Transit Ltd (BMRTL) (a wholly owned corporation of the State of Karnataka) in consultation with the Delhi Metropolitan Rail Corporation (DMRC), which is 50% owned by the Government of New Delhi and 50% owned by the Government of India. The DMRC has constructed and now operates a small section of the metro presently being constructed in New Delhi. It has been asked to provide a proposal for a light rail scheme. Its alternative scheme calls for a portion of the track to run underground in the central business district with the additional cost offset by higher traffic volumes. A detailed project report is now being prepared by BMRTL, after initial Government of Karnataka approval. After Government of India approval, new special corporate vehicle- Bangalore Metro Ltd.- would be formed with equal equity from the Government of India and the Government of Karnataka for implementation, following the model of Delhi. There do not appear to be any plans for private sector participation in this project.

In addition, the Bangalore Metropolitan Transport Corporation (BMTC) (also 100% owned by the Government of Karnataka), which was one of four corporations split off from the Karnataka State Road Transport Corporation Ltd. (KSRTC), all of which retain the same key officials, is promoting a scheme for articulated buses with dedicated lanes in Bangalore.

3.5.2 State Urban Mass Transit Policy

There is no specific urban mass transit policy for the State of Karnataka, beyond the support for the specific projects mentioned above.

3.5.3 Legislative Framework

Under the Indian Constitution, municipal tramways are mentioned as a State matter under item 13 on communications of List II-State List under Article 246, Seventh Schedule). However, authority over urban mass transit has generally been granted by the States to municipalities under the relevant State municipal corporation act. There is no specific provision of the Karnataka Municipal Corporations Act, 1976 (Karnataka Act No. 14 of 1977), as amended, regarding this matter but delegation to Bangalore has occurred based on the general authority of the State Government for such delegation under Section 58(30) of the Act. A draft Karnataka Tramways Act, 2000 was prepared for the Bangalore project but has not yet been enacted.

On the national level, there is not an adequate legal framework for metro construction and operation or to deal with private sector participation. The Metro Railways (Construction of Works) Act, 1978 (Act No. 33 of 1978), as amended, applies to Kolkata and other notified metropolitan cities (only Delhi, Bombay and Madras are specifically mentioned). It would not appear to apply to Bangalore. (see Section 1(3) and the definition of "metropolitan city" in Section 2(k)). The function of metro railway administrations, as set in Section 18 of the Act, relate mainly to construction but also include under (g) do all other acts necessary for making, maintaining, altering or repairing and using the metro railway. However, it has been interpreted as extending only to the construction phase. Such administration also has the power to control development over a metro alignment. (Section 20). Where tracks of the Indian Railways are used, then that Act governs. (see Section 43 stating that the provisions of the Act are held to be in addition to and not in derogation of, the Indian Railways Act (now the Railways Act, 1989) unless specifically stated otherwise.)

3.6 Cyber Parks/Information Technology (IT) Parks

(see main text)

3.7 Special Econimic Zones (SEZs)

3.7.1 Background

Karnataka is also a state that is in the process of finalizing a law on Special Economic Zones. The Bill has been passed but not notified, so as to come into force as a law. For the time being, the Bill shall be evaluated, since the final version of the law is not known. Karnataka also has a policy in relation to Special Economic Zones.

3.7.2 State SEZ Policy

In light of the Union Government's Policy, the Government of Karnataka also came up with a policy in relation to Special Economic Zones. The first SEZ to be proposed in Karnataka was at Hassan. In order to utilize the benefits available under the Government of India guidelines for the special Economic Zone and to achieve the twin objectives of attracting investments to Karnataka and augmenting exports from the State, the State Government approved the establishment of a Special Economic Zone at Hassan. On the basis of a proposal from the State Government, approval had been granted in principle for setting up an SEZ in Hassan. The State Government has initiated action to prepare a detailed techno-economic feasibility study for the Special Economic Zone and also to identify suitable firms to take-up the development of Special Economic Zone. The Karnataka Industrial Area Development Board (KIADB) is promoting the project. As of April 2003, 2,500 acres of land was needed for setting up the SEZ, but the State Government had acquired only 1,663 acres.

The Preamble to the Government of Karnataka's Policy on Special Economic Zones states that in light of the State Government having approved an SEZ at Hassan, the Government of India suggested that with a view to boost investors' confidence in the scheme and to highlight the State Government's stand on issues relating to state levies, generation and distribution of power, environmental clearances, etc., it would be desirable to have a State Level Policy for Special Economic Zone. After examining the matter in detail, the State Government deemed it fit to issue such a policy. The salient features of the Policy are:

- The Implementing Agency, Karnataka Industrial Area Development Board, (KIADB) will be the State Agency for implementation of SEZs either independently or in association with the private sector partners.

- All matters pertaining to SEZs in the state will be looked after by an exclusive Development Commissioner for each SEZ, who will function from the SEZ site.

- Clearances required from the Karnataka State Pollution Control Board for units and activities within an SEZ will be granted by the empowered officer of the Board working under the administrative supervision and control of the designated Development Commissioner for the SEZs.

- The SEZ authority shall ensure the provision of adequate water supply within the SEZ.

- The SEZ authority will ensure continuous and good quality power supply to the SEZ. Public Sector Enterprises or Joint Ventures promoted by the SEZ Authority can establish independent Power Plants (IPPs), which will be permitted to establish dedicated provision of power to the SEZ, including generation, transmission and distribution, besides fixing tariffs for the Zone.

- Developers of SEZs and industrial units and other establishments within the SEZs will be exempted from all State and local taxes and levies.

- The powers of the Labour Commissioner, Government of Karnataka, shall be delegated to the designated Development Commissioner or other authority in respect of the area within the SEZs. Clearances relating to various labour laws can be provided at a single point in the SEZs. All industrial units and other establishments in the SEZs will be declared as 'Public Utility Service' under the provisions of the Industrial Disputes Act.

- The State Government will take appropriate steps to declare the SEZs an Industrial Townships to enable the SEZs to function as self-governing, autonomous municipal bodies. The State Government shall also make appropriate and exclusive arrangements within the SEZs for the maintenance of law and order.

- The State Government shall constitute a Committee for the review and development of Special Economic Zones.

3.7.3 Legislative Framework

The Karnataka Special Economic Zones Development Bill, 2003

The state has recently passed the Karnataka Special Economic Zones Development Bill, 2003 (L.A.Bill No. 24 of 2003) on 8 August 2003. The Act has not yet been notified in the Official Gazette. However, it is pertinent to assess the provisions of the legislation.

Preamble

The Preamble describes the law as a Bill to provide for the development of Special Economic Zones in the State of Karnataka and for matters connected therewith.

Definitions

Section 2 of the Act deals with definitions. The Act defines "developer" to means a person or body of person, company, firm and such other private or Government undertaking, who develops, builds, designs, organizes, promotes, operates, maintains or manages a part of whole of the infrastructure facilities in the Zone as approved by the Central Government and amenities; the Act further defines "infrastructure facilities" to mean industrial, commercial and social infrastructure or any other facilities for the development of the Special Economic Zone as notified by the central Government;

Declaration and Administration of the SEZ

Chapter II (Section 3) states that on receipt of the proposal from the State Government for setting up a Special Economic Zone, the Central Government may by notification in the Official Gazette declare any area in the State to be a Special Economic Zone.

The Central Government shall by notification establish a Special Economic Zone Development Board in respect of each Zone. Section 4 lays down the powers and functions of the Zonal Board as being:

- To oversee and coordinate the activities of agencies and departments engaged in the development of Zone;
- To co-ordinate with the revenue authorities of the State for preparation and maintenance of land records in the zone in accordance with the provisions of the Karnataka Land Revenue Act 1964;
- To lay down guidelines including those related to ground coverage, and floor space index for framing of the master plan for the development of the Zone;
- To approve the master plan for the development of the zone, oversee compliance to the master plan and approve any change required or requested by the Developer in the master plan;
- To co-ordinate with the departments of the State Government and ensure timely implementation of projects and plans prepared by it;
- To resolve disputes of commercial nature between the agencies providing services and consumers thereof within the territorial jurisdiction of the Zonal Board;
- To discharge such other functions and exercise such other powers as may be delegated by the State Government.

Section 5 lays down the powers and functions of the Unit Approval Committee, which is to be constituted for each Zone under that Section. It has numerous powers and functions, which are:

- To grant approval, clearances, permissions and licenses for the establishment and operation of Units in the SEZ;
- To consider applications for grant of various approvals, clearances, permission and license for setting up of Units in the Zone and to grant or refuse approval as per the rules made under the Act;

- To monitor the performance of the Units and take action against the Units wherever necessary as may be prescribed;

- To take appropriate action in accordance with applicable law in case of violation of the conditions of approval, clearance, permission and license;

- To supervise and monitor approval, permission, clearances and licenses granted by it to the Units and take appropriate action in accordance with the applicable law;

- To call for information required to monitor the performance of the Unit to whom the approval, permission, clearances and licenses are granted by it;

- To discharge any other functions or exercise any other power delegated by the Central Government or its agencies or the State Government or its agencies.

Section 6 elaborates the single window clearance procedure to be established, with powers in respect of the same being given to the Units Approval Committee.

As per Section 7, the State Government shall nominate officers to represent various Departments in the Unit Approval Committee and these may include labour, rural development and panchayatraj, industries, housing and environment, commercial taxes, urban development and energy;

Section 8 deals with the selection and appointment of the Developer and provides that Special Economic Zones may be set up in the public, private or joint sector.

Section 9 deals with acquisition of land;

Section 10 lays down the functions of the Developer as being:

- To secure the planned development of the Zone and to provide for development, operation and maintenance of infrastructure facilities and amenities in the zone.

- To prepare a master plan for the development of the zone in conformity with the guidelines approved by the Zonal Board;

- To ensure compliance with the master plan as approved by the Zonal Board;

- To erect substantial boundary marks defining the limits of or any alteration in limit of the zone;

- To erect buildings as per Zonal Board guidelines.

Sections 11, 12 and 13 lay down the various powers of the Developer in respect of land, levy of charges, and in providing infrastructure or amenities.

Other Provisions

Sections 14 and 15 deal with the power of the Governor to declare any SEZ as an Industrial Township Area;

Section 16 deals with exemption from state taxes, levy and cess including purchase tax, specified sales (lease tax) in respect of lease of goods, stamp duty, registration fee, sales tax, turn over tax and any other tax, cess, duty or levies, levied by the State Government, subject to specified conditions and restrictions.

Chapter IX (Sections 17- 20) deals with provisions in respect of generation of electricity, development of a minor port, roads, bridges and transportation and tourism;

Chapter X, Section 21 states that this Act shall override all other laws; unlike the Indore legislation, it does not restrict itself to overriding state legislations.

Chapter X also confers the power to make rules, regulations, power to remove difficulties and protection of actions taken in good faith.

Other Legislation

There are certain other benefits also available specifically under notifications/ rules etc. in Karnataka. These include:

- Sales Tax Exemption to SEZ Units.[8] The notification provides that tax payable by a dealer under the Karnataka Sales Tax Act, 1957, on the sale of goods excluding petroleum products to another dealer who is a developer of a Special Economic Zone in the State or an industrial unit or any other establishment located in the Special Economic Zone established in the State, is exempt, subject to certain restrictions and conditions.

- Sales Tax Exemption to SEZ Developers and setting up of units.[9] The notification provides that tax payable under the Karnataka Sales Tax Act, 1957, by a dealer who is a developer of a Special Economic Zone in the State or an industrial unit or any other establishment located in the Special Economic Zone established in the State, on his purchase of goods excluding petroleum products, is exempt, subject to certain conditions and restrictions.

- Exemption from Entry Tax for SEZ Units/Developers.[10] The notification provides that tax payable under the Karnataka Tax on Entry of Goods Act, 1979, by a dealer who is a developer of a Special Economic Zone in the State or an industrial unit or any other establishment located in the Special Economic Zone established in the State, on goods excluding petroleum products, brought into a local area in such Special Economic Zone is exempt, subject to certain conditions and restrictions.

- Reduction in tax on supply of Petroleum products to SEZ.[11] The notification provides that tax payable by a dealer under the Karnataka Sales Tax Act, 1957, on the sale of petroleum products to another dealer who is an industrial unit or an independent power plants located in the Special Economic Zone established in the State for use in captive power generation, is reduced to four per cent, subject to certain conditions and restrictions.

- A notification also provides for a simpler procedure of environment clearance to SEZ. [12]

- The Energy Department has provided a procedure for setting up of a power plant in an SEZ.[13]

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[8] No. FD 96 CSL 2003(1), dated 5 June 2003.

[9] No. FD 96 CSL 2003(2), dated 5 June 2003.

[10] No. FD 96 CSL 2003(3), dated 5 June 2003.

[11] No. FD 96 CSL 2003(4), dated 5 June 2003.

[12] No. FEE 32 ENV 2001 dated 5 May 2003.

- Yet another notification has been issued pertaining to matters relating to labour concerning Special Economic Zones.[14] Under this, the Government has delegated all the powers of the Labour Commissioner under certain Acts and the Rules framed there under to the Development Commissioners of SEZs in Karnataka, who will exercise these powers over the units with in the SEZ. The concerned Acts are the Trade Union Act, 1926, the Industrial Employment (Standing Orders), 1946, the Industrial Disputes Act, 1947, the Contract Labour (R&A) Act, 1966, the Inter State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1963, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1967.

3.8 Water and Sewage

3.8.1 Background

Karnataka has a specific policy regarding urban drinking water and sanitation, as described below, which encourages private sector participation and the setting of tariffs that permit full cost recovery. The Bangalore Water Supply and Sewerage Board has been recognized internationally for its metering and collection policies although subsidization has not been completely eliminated.

3.8.2 State Water and Sewage Policy

Karnataka issued an "Urban Drinking Water and Sanitation Policy" by Government Order on 3 May 2003. The key features of the Policy are:

(e) to provide piped water supply and sanitation at or near their residences to all urban residents who are willing to pay and a minimum level of service to all other urban residents;

(f) to confirm as a longer-term objective the establishment of a tariff that allows full cost recovery (that is, a tariff that covers operation and maintenance costs, debt service cost, and a reasonable rate of return on capital employed);

(g) to confirm that the Government of Karnataka will be responsible for:

- formulating policy;
- setting minimum tariffs;
- setting minimum service standards;
- monitoring service provision by the urban local bodies;
- ensuring provision of the resources necessary to meet those goals;

(h) to confirm that urban local bodies will be responsible for water supply and sewerage services from water catchment through to waste water treatment;

(i) to confirm that that the Karnataka Urban Water Supply & Drainage Board (KUWSDB) will continue to be responsible for construction of water and sewerage facilities in all urban local

[13] No. DE.201 PTC 2001 dated 8 May 2003.

[14] No. DD116 KABANI 2002, dated 5 May 2003.

bodies, and for operation and maintenance in selected urban local bodies. It is intended that KUWSDB be restructured in the medium term to meet those responsibilities;

(j) to confirm that the Government of Karnataka will actively encourage private sector participation in the sector through mechanisms appropriate to the very different sizes of urban areas in the State, while recognising that such private sector participation will be gradual;

(k) to note that a sector strategy and action plan will be developed as a follow-up to the policy statement.

Within this framework, the State Government intends that the Bangalore Water Supply & Sewerage Board (BWSSB) will become an asset owner and regulator in the Bangalore Metropolitan Area, with all of the investment, operation and maintenance activities conducted by the private sector under management contract. (see description of its functions below.) Those contracts will include:

(a) drinking water quality standards;

(b) technical standards, such as size and type of pipe;

(c) monitoring by independent technical consultants. (these will be hired under a separate contract for a technical oversight.)

3.8.3 Legislative Framework

Water supply, sewerage and solid waste management are local responsibilities under the 74th Amendment to the Constitution of 1992. The Twelfth Schedule under amended Article 243-W, added by Section 4 of that Amendment, lists "water supply for domestic, industrial and commercial purposes" (item 5) and "public health, sanitation conservancy and solid waste management (item 6) as powers, authorities and responsibilities of municipalities where so established by a law enacted by the concerned State Legislature.

In practice, even prior to that date, the States had enacted legislation that gave authority over water and sewerage to special local boards, while solid waste management generally remained the responsibility of the municipal corporation concerned. Thus the Karnataka Municipal Corporations Act, 1976 (Karnataka Act No. 14 of 1977), as amended, under Section 58 makes it obligatory for a municipal corporation to carry out those functions. However, Section 186 of the Act then states that the provisions of Chapter XIII. Water Supply and Sewerage (Sections 187-244) shall not apply to any city where separate water supply and sewerage arrangements have been made. Thus the Bangalore Water Supply and Sewerage Board (BWSSB) was established for the Bangalore Metropolitan Area, while the Karnataka Water Supply and Sewerage Board (KUWSDB) has responsibilities for the nearly 230 other urban local bodies in the State.

Bangalore Water Supply and Sewerage Board

For Bangalore, the Bangalore Water Supply and Sewerage Act, 1964, as amended, establishes the Bangalore Water Supply and Sewerage Board (BWSSB). The Board is composed of from three to seven members appointed by the State Government. (Section 3). They are:

- one person with experience and capacity in commercial matters and administration;
- one person with wide experience in civil engineering works, preferably in water, sanitation and public health;
- one person who has experience in accounting and financing matters in a public utility, preferably in a water supply or sewage disposal utility.

One of the members shall be appointed by the State Government as the Chairman of the Board.

Under Section 14 of the Act, the State Government shall appoint a Consultative Committee consisting of the members of the Board and such other persons (from three to nine in total), the latter appointed in consultation with the Municipal Corporation of Bangalore, the Bangalore Urban Development Authority, consumers of water and other interested parties. That Committee shall meet at least quarterly and advise the Board on major questions of policy and major schemes, review the progress and work of the Board, and consider such matters as may be placed before it by either the Board or the State Government.

The general duties of the Board, under Section 15, shall be the providing of water supply and improving the existing supply in the Bangalore area, as well as making adequate provision for sewage and its disposal. To accomplish those purposes, it may prepare and carry out schemes within its area of jurisdiction. Any such scheme costing more than a crore of rupees must be first approved by the State Government. Section 26 provides that all works connected with water supply for the Bangalore Metropolitan Area are vested in the Board. Section 27 gives authority to the Board to carry out any necessary construction works, and Section 39 gives it the power to lay mains where necessary.

Under Section 16, the Board shall levy rates, fees and other charges in order to carry out its operations. Such fees shall provide sufficient revenue:

(a) to cover operating expenses, taxes and interest payments, and to provide for adequate maintenance and depreciation;

(b) to meet repayments of loans and other borrowing;

(c) to finance normal year to year improvements; and

(d) to provide for such other purposes beneficial to the promotion of water supply and disposal of sewage in the Bangalore Metropolitan Area, as the Board may determine.

In addition, Section 47 gives the Board the power to provide meters at the expense of the owner of the premises. Thus there is sufficient legal authority to set any reasonable tariffs for water, and for metering.

In general, Chapter IV, Sections 26-62, of the Act sets rules regarding water supply. Section 53 gives the Board the power to cut off the water supply if the owner does not pay or he damages the meter or damages or causes pipes to be removed or other things against the rules set by the Act. Under Section 58, the Board can then execute any necessary repair work at the expense of the person liable after first giving him notice. Other prohibitions under the Act with regard to water supply are set by Section 60. They include wilfully obstructing the flow of water, illegally taking water and other matters. Section 62 then sets fines for each type of offence. Maximum fines are set for each offence and a daily fine may be imposed for each day that the offence continues after the first conviction. The level of such fines may not be an adequate deterrent.

Chapter V, Sections 63-85, then sets similar rules regarding sewers and sewerage. Section 63 vests all sewers in the Board. Section 64 gives control of all sewers and sewage disposal works to the Board. Sections 69 and 70 give the Board the authority to drain a block of premises and to close or limit the use of private drains in certain cases. Section 73 gives the Board the power to require an owner to carry out certain works for satisfactory drainage. Section 79 gives the Board the power to execute sewage works at the expense of the person who shall have the benefit of such works after giving written notice. Under Section 72, sewage and rain drains must be distinct. Section 75 requires that connections with sewers not be made without written permission of the Board.

Section 83 prohibits certain acts to wilfully or negligently brake or close or obstruct the sewage system or an officer of the Board in carrying out his work. Section 85 then sets fines and additional fines as penalties for offences, parallel to the system set for water supply. Again, these fines may be too low to be an adequate deterrent in many cases.

Chapter VI, Sections 86-129, then contains Miscellaneous provisions. Under Section 88, the Board is given the power to make regulations in a number of areas, including the fines to be set. However, a low maximum of Rs. 100 is set for the original fine and then Rs. 10 for each additional daily fine. Section 89 provides that the Board shall follow policy directions set by the State Government but must be first consulted. Sections 90-96 then concern the power of officers authorised by the Board to enter a premises in certain instances, after notice, for inspection and to investigate possible obstructions. Sections 104 and 105 require the occupant of a dwelling to pay amounts due in default of the owner and also to execute any necessary work in his place. Section 108 permits the Board to collect amounts due as if it were an arrear of land revenue or through a magistrate as if it were a fine imposed by him. Section 113 permits arrests of offenders by officers of the Board where the person is not known to him or refuses to give his name. Under Section 114, police officers and employees of the offender must give information to the Board. Section 118 permits the Board, by notification, to delegate authority to another specified person to carry out powers or duties. Section 120 permits appeals by aggrieved parties to an Appellate Authority as set in the Board regulations. Under Section 121, every rule and regulation of the Board under the Act shall be laid before the State Legislature for its approval, modification or rejection.

Section 124 provides that members, officers and servants of the Board are public servants for purposes of the Indian Penal Code (Central Act 45 of 1860) and the Prevention of Corruption Act, 1947. (Central Act 2 of 1947). However, Section 125 provides that there shall be no suit or prosecution against the Board or its officer or employee for anything were actions were taken in good faith. Under Section 126, notice must be given of any such suit in writing at least two months' in advance.

Thus the Bangalore Water Supply and Sewerage Act, 1964, as amended, retains State Government authority over policy in the water and sewerage sector and over the monitoring of implementation through the actions of a Board whose members are appointed by it.

Karnataka Urban Water Supply and Drainage Board (KUWSDB)

The Karnataka Urban Water Supply and Drainage Board Act, 1973 (Karnataka Act No. 25 of 1974), as amended, provides a similar structure for all urban local bodies in the State outside of the Bangalore Metropolitan Area. (Section 1). The Karnataka Urban Water Supply and Drainage Board is established under Section 3. Under Section 4, it shall be constituted of the following directors, each appointed by the State Government:

- a Chairman, with prescribed qualifications;
- a Managing Director, with prescribed qualifications;
- four directors, of whom one shall be the State Director of Municipal Administration, and the other three shall represent the Government Secretariat Departments dealing with Finance, Housing and Urban Development and Public Works;
- four Directors to represent the Local Authorities (generally defined in Section 2 of the Act as municipal corporations), each from a revenue division;
- eight other directors, of whom four shall be persons possessing wide experience in the field of public health engineering with reference to water supply or drainage or disposal of

industrial wastes, but not employed by the government, a Local Authority or a corporation owned or controlled by the Government.

Under Section 6, their term of office shall be at the pleasure of the State Government. Under Section 9, the Board shall appoint a Secretary, a Chief Engineer, an Accounts Officer and other officers as it considers necessary. Section 11 provides that the Managing Director shall be the Chief Executive Officer, subject to regulations framed by the Board.

Chapter V, Sections 16-18, of the Act sets the powers and functions of the Board. The function of the Board is to provide financial assistance by way of loans and advances to Local Authorities for assistance in providing water supply and drainage for urban areas, and carry out other activities entrusted to it by the State Government. (Section 16).

Under Section 17, at the instance of the State Government or of a Local Authority, it may investigate the nature and types of schemes that can be implemented in the area of any Local Authority for the provision of drinking water and drainage facilities. It may plan and prepare such schemes, including schemes for areas of more than one Local Authority. It may also execute such schemes under a phased programme. Further, the Board may provide technical assistance to Local Authorities for the execution and maintenance of urban water supply and drainage works, and maintain schemes for water testing and conduct research related to water supply. Also, it may operate and maintain drinking water supply and drainage undertakings either wholly or in part subject to terms and conditions set by the State Government. Finally it may levy and collect water rates, fees and other charges related to such undertakings as the Government may specify. Section 17(2) provides that no scheme estimated to cost more than Rs. 10 lakhs shall be carried out by the Board except with the prior approval of the State Government. Thus, though the main role of the Board, is to provide financial assistance to local urban bodies, it also has the authority to carry out water supply and drainage schemes.

Section 18 states that Board shall have the following general powers for the purpose of carrying out its functions under the Act:

- to acquire and hold movable and immovable property, and to lease, sell or transfer it related to its purposes, including the acquisition of land under the Land Acquisition Act, 1894;
- to undertake any work for the preparation and execution of such schemes, or to carry out other functions under the Act;
- to enter into any contract;
- all other things necessary to carry out the provisions of the Act.

Chapter VI, Sections 19-28, of the Act then contains detailed provisions regarding the Investigation, Preparation, Execution, and Maintenance of Schemes by the Board. Under Section 19, the cost of investigations undertaken by the Board of any scheme at the instance of either the State Government or the Local Authority concerned shall be borne by the concerned Local Authority. After such an investigation is completed, the Board shall prepare a draft scheme for Local Authority approval. (Section 20). That scheme shall then be approved by the State Government within a prescribed time (Section 21), and that approval shall be notified by publication in the Official Gazette. (Section 22). As soon as such notification is published, the Board shall execute the approved scheme in the concerned areas of the Local Authority. (Section 23). Under Section 24, the cost of such a scheme shall be borne by the Local Authority on whose behalf the Board is carrying out the scheme. Section 25 gives the State Government the power to direct the Board to prepare and execute any scheme, even where the Local Authority concerned is opposed to it. In addition, under Section 26, the Board can refuse to carry out any scheme offered by a Local Authority if it does not think that scheme is necessary and feasible. However, that Local Authority can appeal that decision to the State Government whose order shall be final.

Section 28 states that a Local Authority shall prepare or execute any water supply or drainage scheme without the approval of the Board. Schemes of over Rs.50,000 may not be approved by the Board unless also approved by the State Government. Sections 28-A to 28-G, added by amending Act No. 45 of 1981, permit the Government to set rules for such schemes. Section 28-A permits the Government in the public interest to order the Board to execute, operate and maintain works regarding any scheme. The costs related to the scheme shall be borne by the Board and it shall collect necessary water rates, fees and other charges to meet those expenses. All water and sewage works in such an area shall vest in the Board. Also, the State Government, by order, may transfer an water supply or drainage undertaking of any Local Authority to the Board. Section 28-C gives the Board the power to lay mains. Section 28-D gives the Board the power to provide meters at the expense of the owner of the premises. Section 28-E gives the Board the power to enter premises and cut off water supply where necessary, but not without a notice of three days to the owner.

Section 28-G then concerns the prohibition of certain acts, including wilfully or negligently breaking, turning off or obstructing water supply. Section 28-H prohibits private drainage from polluting a Board sewer, including industrial effluent. Expenses for repairing such offences shall be borne by the person responsible.

Chapter VII, Sections 29-43, of the Act concerns Finance, Accounts and Audit. Under Section 29, the Board shall have its own fund. It may accept loans, grants and gifts from individuals and organisations, as well as from the Central Government, the State Government or a Local Authority. Section 31 gives the Board the power to borrow and lend monies. Under Section 31-A, also added by Amending Act No. 45 of 1981, the Board has the power to levy rates and other charges. They may be varied from time to time to achieve the goal of providing sufficient revenue:

(a) to cover operating expenses, taxes and interest payments, and to provide for adequate maintenance and depreciation;

(b) to meet repayment of loans and other borrowings;

(c) to finance normal year to year improvements; and

(d) to provide for such other purposes beneficial to the promotion of water supply and sewerage.

Section 32 provides that the State Government may guarantee the principal and interest of any loan proposed to be raised by the Board or any loan to be given to the Board by a Local Authority to carry out schemes under the Act, as long as such guarantee is announced to the Legislature. Under Sections 33 and 34 the Board shall sanction annual estimates of income and expenditure which shall then be approved by the State Government. Further, the Board shall prepare an annual statement of accounts which shall be audited and forwarded to the Government to be placed before the State Legislature. (Sections 40-42).

Chapter VIII, Sections 44-49, of the Act concerns Penalties and Procedure. Section 44-A, also added in 1981, provides for the joint and several liability of owners and occupiers of premises for offences in relation to water supply. Section 45 concerns penalties of obstructing a contractor or removing a mark related to execution of works. That maximum penalty is set at Rs. 200. Under Section 46, the penalty for contravening any provisions of the Act shall be a fine of up to Rs. 100 with a daily fine for each continuing day of violation of Rs. 50 rupees. Under Section 66-G, the Board or an authorised Board officer, under a general order, may compound any offence where a notice or order has not been complied with. Section 47 provides that only the Board can take an offence under the Act to court and this must occur within six months of the date of the violation. No Court inferior to that of a Magistrate of the First Class shall try any offence punishable under the Act. Under Section 49, responsible persons in charge shall be liable when offences are committed by companies. Section 63 then grants the Board the power of entry on land or into premises to make inspection or for any other purpose under the Act subject to restrictions of the time and method of such entry.

Chapter IX, Sections 50-67, then contains a series of miscellaneous provisions. Section 50 provides for emergency powers to the Managing Director to carry out works necessary for the safety of the public, as long as he does not contravene a specific direction of the Board or State Government. He must report his action to the next meeting of the Board and also submit a copy of his report to the Government.

Under Section 52, the State Government may delegate any of its powers under the Act, by notification, to any authority or officer, except the Section 68 rulemaking authority. Section 53 gives the Government the power to issue orders and directions to the Board and to Local Authorities that are necessary to carry out the Act. Section 66-A then states that the Board shall be guided by policy directions from the State Government.

Section 55 states that the Government shall adjudicate any disputes between the Board and Local Authorities. Under Section 55-A, the Board shall not be liable where it must reduce or cut off a supply of water in case on unusual drought, unavoidable accident or where necessary for the relaying or repairing of pipes. Section 56 provides that the provisions of this Act shall be in addition to and not in derogation of any rules set by another existing Law. Section 57 states that the Board must receive 60 days' written notice of any suit against it. Section 64 gives officers and employees of the Board protection against a lawsuit where actions were taken in good faith.

Finally, Chapter X, Sections 68-71, of the Act concerns rules and regulations. Section 68 gives the State Government the power to make rules to carry out the Act. Section 69 then gives the Board the power to make regulations, by notification, as long as they are not inconsistent with the provisions of the Act or rules set by the State Government. Such regulations must be approved by the State Government. They may cover areas including:

- stopping the supply of water, prohibiting the sale and use of water for business purposes, taking charge of private connections, and providing water by hydrants;
- prohibiting the fraudulent and unauthorised use of water, tampering with meters, and throwing or emptying things into Board sewers;
- the provision and maintenance of meters;
- the regulation or prohibition of the construction or alteration and maintenance of sewage works;

No such regulation or its cancellation or modification shall have effect until approved by the State Government. By notification, the Government may rescind any regulation. In making any such regulation, the Board may provide a penalty of up to Rs. 100 for any violation plus an additional Rs.10 per day for continuing violation. Again, the size of the fine here and in other places in the Act may be too small to be a deterrent to offenders.

In practice, the KUWSB is primarily concerned with constructing water supply and drainage facilities and then transferring them to the concerned local urban body. In most cases, operation and maintenance is undertaken by that body. However, only about 25% of the urban local bodies have mains sewerage, including sewerage treatment plants. The remainder have septic tanks or no treatment.

Other Agencies Concerned With Water and Sewerage

There are several other agencies involved in the water and sewerage sectors in Karnataka. The **Karnataka Urban Development Department** has the power to regulate in the area, particularly with regard to the setting of tariffs. The **Karnataka State Pollution Control Board (KSPCB)** was established in 1974 as a State Board under Section 4 of the national Water (Prevention and Control of

Pollution) Act, 1974 (Act No. 6 of 1974), as amended. The Board is responsible for the implementation of both water and air pollution rules in the State.

Further, the **Karnataka Urban Infrastructure Development and Finance Corporation (KUIDFC)** was established in 1993 as a 100% State Government owned corporation under the Companies Act, 1956 to assist urban agencies in the State in the planning and financing of urban infrastructure, as well as providing expertise in its development. Its main objectives are:

- project formulation and appraisal of urban infrastructure development projects;
- providing financial and technical assistance to municipalities and development agencies;
- mobilising funds from different sources- the State Government, financial institutions like HUDCO, and international agencies like the ADB and World Bank- for infrastructure development projects;
- training and capacity building to enable the efficient implementation of urban development projects.

It is now responsible for two ADB-assisted projects. The Karnataka Urban Infrastructure Development Project (KUIDP) has the purpose of improving and developing basic infrastructure in Mysore, Tumkur, Ramanagaram and Channapatana. The works include augmentation and improvement of water systems, expansion and improvement of sewage systems and storm water drainage, solid waste management, and slum improvement and residential sites and services schemes. There are also urban road improvements. For Mysore that includes construction of an outer ring road and intermediate ring road, improvement of city roads, and the construction of two private bus terminals and a truck terminal. This Project was originally scheduled to be completed in 2002 but has been extended for two years to 2004. At present, 80% of the physical works have been completed and 70% of the project amount has been drawn down.

The Karnataka Urban Development & Coastal Environmental Management Project (KUDCEMP), also ADB-assisted is expected to be completed in 2006, assists ten towns in coastal Karnataka with capacity building, water supply rehabilitation and expansion, urban environmental improvement (storm drains, solid waste management, traffic management), street and bridge improvement, and coastal environmental management.

In addition, KUIDFC is the nodal agency for the Central Government-sponsored Bangalore Mega City Project to provide infrastructure for that city, and the World Bank-assisted Karnataka Water and Urban Management Project (KWUMP) for towns in Northern Karnataka. The terms of the latter project have not been finalized but it is expected to provide water supply to the towns of Gulbarga, Belgaum and Hubli-Dharwad through a management contract. Under the Mega City Project, the Corporation receives annual grants from both the Central Government and the Karnataka State Government that it then releases as loans to the implementing agencies.

KUIDFC does not have permanent staff of its own. Persons are hired on a need basis by deputation from other agencies or under a contract. Actual implementation is then done by the concerned line agencies and bodies, including the relevant Water Supply and Sewerage Board, the Urban Development Department and the concerned municipal council. It is a finance company whose primary purpose is to fund projects. At present, it primarily acts as an agency to route funds collected from external agencies rather than lending money on its own account. However, its future plans are to act as a full-fledged State Level Financial Institution as a facilitator and coordinator concentrating on the development of an urban infrastructure financial market for the State. Initially, it would concentrate on developing urban local body capacities for implementation of such projects and assist in the identification and development of bankable projects.

Appendix D – Madhya Pradesh

Table of Contents

1 Introduction

This Appendix summarizes the policies and legislative framework in the State of Madhya Pradesh with regard to private sector participation and privatisation in the relevant sectors of roads, power, ports, airports, urban mass transit, cyber parks and optical fibre, special economic zones (SEZs), and water and sewerage.

This background information is meant to provide a fuller description and analysis of these policies and legislation, which then can be referenced in the main text of the Working Paper. Throughout this discussion, reference is made to problems related to specific projects that are designated, or may be otherwise eligible, for assistance under the ADB PSI II Facility.

While some references are made to the regulatory framework for each of the mentioned sectors in the State of Madhya Pradesh, the detailed discussion of those matters is found in the companion Working Paper No. 2, Regulatory Framework.

2 General Policy and Framework

2.1 General Policy

MP has no comprehensive infrastructure policy or a private sector participation in infrastructure policy. The general orientation of the Government's thinking on these issues are set out in the State's five-year plans on a sector by sector basis. The current five-year plan, the tenth, covers the years 2002 to 2007. It will be referred to throughout this text when discussing sectors individually.

2.2 Implementing Agencies

Unlike the States of Gujarat and Andhra Pradesh, Madhya Pradesh has not yet created a nodal agency for private sector participation in the infrastructure sector. Responsibility for implementing and facilitation such participation is being exercised by the following two bodies: the MP Economic Development Board (MPEDB) and the MP Industrial Infrastructure Development Corporation (MPIIDC).

The Madhya Pradesh Economic Development Board (MPEDB) has responsibilities regarding both publicly funded and privately funded infrastructure projects. It was created in 2001 and is chaired by the Chief Minister. Its membership is comprised of some members of the Cabinet and officers of the rank of Principal Secretary. A Project Planning and Monitoring Unit (PPMU), headed by the Chief Secretary, was set up as part of the Board to plan and monitor project implementation for select large investment or critical public investment projects. Infrastructure projects identified by the various projects as showing potential for private involvement on a BOT model or similar model and with a minimum investment of Rs. 10 crores are referred to the EDB.

The MP Industrial Infrastructure Development Corporation (MPIIDC), formerly the Madhya Pradesh State Industrial Development Corporation Ltd (MPSIDC). That organization began its operations in 1965 with the goal of assisting industrial growth in the State by providing financial and other support as required. It was assigned infrastructure development work in 1981. Thus it is a parallel agency to such organizations as the Karnataka Industrial Areas Development Board (KIADB), the Andhra Pradesh Industrial Infrastructure Development Corporation (APIIC), and the Gujarat Infrastructure Development Board (GIDB). Six subsidiary companies under the Corporation were established at the time of its inception. They are known as the M.P/ Audhyogik KendraVilas Nigam (MPAKVN), and are located in Bhopal, Indore, Gwalior, Raipur, Jabalpur and Rewa. The Indore MPAKVN is the agency in charge of the Indore SEZ.

There has been discussion in government circles of establishing a nodal cell to co-ordinate the development of infrastructure projects for private sector participation or to expedite the privatisation of infrastructure facilities. An Infrastructure Privatisation Act was to be created to provide a better environment for private investments in infrastructure and to introduce a transparent process for project privatisation. However, to date, only road sector projects have been developed for private sector participation.

2.3 Relevant Legislation

Despite the absence of a specific Infrastructure Privatisation Act or Infrastructure Authority Act, MP has enacted a law fairly recently to raise and deploy funds for selected infrastructure projects. The law in question is the MP Infrastructure Fund Board Act, 2000 (MP Act No. 6 of 2000) ("the Act"), supplemented by the provisions of the Madhya Pradesh Infrastructure Investment Fund Scheme Act, 2001 (the "Scheme"). The latter was adopted by the GoMP pursuant to Section 15(1) of the Act.

The Act, as its full title implies, creates a "board', more specifically the MP Infrastructure Investment Fund Board constituted under Section 3. The Board is composed of 9 members: 6 principal secretaries of various interested government departments, "two person who have proven experience in development banking nominated by the State government" and finally the chief secretary to the GoMP, who is the chairman of the Board.

Additionally, the secretary for Institutional Finance (Finance Department), one of the 9 Board members, is made the Fund Manager of the Board. The Board may under Section 7 of the Act, with the approval of the GoMP, delegate to the Fund Manager "such of its powers and functions under this Act or the Scheme, as it may consider necessary for the efficient administration of the fund".

The two chief functions of the Board are (Section 5 of the Act): (a) to mobilize resources to create the fund; and (b) approve the disbursements from the fund.

The Fund – The monies in the Fund are mainly monies borrowed by the Board, subject to Governmental approval (Section 6(1)). Additionally, under Section 16 the State Legislature may contribute to the fund by grants, advances and loans. How much money can be borrowed by the Board to provide for the fund is not evident under the provisions of the Act itself. It merely states, at Section 7, that:

> "The State Government may guarantee, in such manner as it may deem fit, the payment of the principal and interest of any loan proposed to be raised by the Board under section 6. Provided that the total guarantee issued by the State Government under this Act shall not exceed a sum of Rupees one thousand crores."

However Section 4(1) of the Scheme makes it clear that the sum of 1,000 crores, "including principal and interest accrued thereon", is not only what the GoMP will guarantee, what the Board may borrow, but is the sum total of the monies that can be contained in the fund.

The fund may be used (Section 15(4)) to: (a) to finance investments in infrastructure projects in the State; and (b) to redeem the bonds and debentures used to raise resources for the fund.

> "Infrastructure Projects" are said (Section 2(e)) to:
>
> "Include projects in the sector of roads, irrigation, water supply, solid waste management and drainage or a multipurpose project in any one or more of these areas."

Despite the word "include", the above seems to spell out the totality of the infrastructure projects that can be financed under the fund. The entities that can obtain assistance from the fund are "undertakings", defined, in one form or another, to be government-owned companies.

While the borrowers are certainly not part of the private sector, this does not mean that the money cannot be used to promote private sector participation. This, while not stated expressly in neither the Act or the main body of the Scheme, is apparent when one considers for example, the Annexure to the Scheme ("Format for Putting Up the Proposal to the Board"). Under paragraph 4 of the Annexure, the proposal to be prepared by the undertaking which seeks financial assistance from the Board, must include various "details of the private developer selected".

3 Policies and Legislative Framework by Sector

3.1 Roads

3.1.1 Background

Roads play a vital role in the economic development of Madhya Pradesh as it is centrally located within the country. Most of the long haul road traffic in both the north-south and east-west direction has to pass through the State. Moreover, Madhya Pradesh, with its abundant mineral resources and high growth in agricultural and industrial production, needs a well-developed road network to cater to inter-state and regional traffic. There is an urgent need for improving the existing road infrastructure of the State, as its bad condition is hampering economic and social progress.

The total road length in the State is 68105.60 kms, with 18 national highways with a total length of 5070 kms. In addition, there are 6499.30 kms. of State highways, 31515.80 kms. of major district roads and 215368.20 kms. of village roads. The number of registered motor vehicles in the State was 29.55 lakhs in 2001 with a yearly growth of 10.9% per annum. The number of registered vehicles per thousand population of 35% is almost equal to the national average for 1995-1996 of 40% per thousand population.

3.1.2 State Road Policy

Under its Tenth Five Year Plan (2002-2007), the State has given road sector priority with regard to infrastructure development. In addition, the State Government has issued a State Road Policy. The basic aim of that policy, as of all development policies of the Government of Madhya Pradesh, is to work toward rapid economic and social upliftment of its population, while simultaneously ensuring balanced regional development and the spreading of the accrued benefits evenly over all sectors of the society. The road policy is framed for ten years aiming to provide an efficient road network across the State, so as to effectively meet the transportation needs of every sector, cost effectively. Connectivity and easy access being a basic need for all other development activities, a conscious effort has to be made to integrate the backward and far-flung areas of the State into the road network.

The objectives of the Road Policy are as follows:

- to provide connectivity to villages with a population of 1000 and above;
- for villages having a population of less than 500, to have an all weather road available at a distance of less than 3 kms. in a plains area and 5 kms. in a hilly areas to as to improve the quality of rural life in terms of quick access to health services, education, market and growth centers and social services;
- to improve the existing State Road Network System as per Indian Roads Congress (IRC) Standards to four lanes/two lanes to cater to the need of projected traffic for the next ten years so as to ensure smooth and uninterrupted flow of goods and passenger traffic both within the State and also on interstate routes;

- to improve the road infrastructure in towns and cities so as to avoid congestion on urban roads;

- to develop an efficient "Maintenance Management System" to make optimum use of available resources;

- to constantly upgrade highway technology by adopting modern techniques of construction and training of departmental officers;

- to ensure a high standard of road safety and travel comfort.

To meet these objectives, it is recognized that there is a paucity of Government funds and that it is essential to attract private participation. Madhya Pradesh was the first state in India to initiate private sector participation and investment in the construction of roads and bridges. It was the first State to give road maintenance under BOT. For this purpose, the State Government has initiated the following schemes:

(1) Build-Operate-Transfer (BOT);

(2) Maintenance-Operate-Transfer (MOT);

(3) Public-Private Partnership (PPP).

Viable projects will be offered to the private sector under a BOT scheme, especially projects for the construction of (i) new bridges, (ii) reconstruction of distressed and narrow bridges, (iii) bye-passes, (iv) widening of high density corridors and (v) strengthening and maintenance of economically viable sections of highways. The Guidelines for such private sector participation indicate that:

- there will be an advance action by the Government to acquire land, and to shift utilities such as water lines, sewer lines and electricity poles, for identified BOT projects;

- selection of entrepreneurs will be on the basis of open and transparent competitive bidding, with equal opportunity to all;

With regard to incentives, an appropriate combination will be considered to ensure the commercial viability of a given road project. Such incentives may include:

- support by the Government for preparatory works such as the feasibility study, land for right of way and roadside facilities, relocation of utility services, cutting of trees, removal of encroachments and the resettlement and rehabilitation of persons affected, and environmental clearances (depending upon financial viability of the project, the cost of those activities may be recouped from the project);

- in cases where the levy of the toll alone is not enough to ensure financial viability for the road project, then the Government may consider leasing additional land to the investor for commercial or real estate development for highway related facilities, such as restaurants, hotels/motels, rest/parking areas, loading/unloading terminals for cargo, warehouses, vehicle repair facilities, shops for vehicle components, insurance and medical facilities and commercial and residential complexes. These facilities shall be identified in the bidding documents. The entrepreneur will be free to license out such establishments to any person for a period limited to the concession period and he shall enjoy the revenue during the concession period;

- the entrepreneur would be permitted to allow the displaying of advertisements within the right of way and outside and enjoy that revenue during the concession period, in accordance with the policy of the State Government and as set in the bid documents;

- permission may be granted for the planting of trees on the road width and receiving revenue from them during the concession period;

- utilisation of Government quarries in the vicinity of the project;

- allowing construction in segments and the levying of toll on such completed segments so as to utilise that toll revenue to complete the remaining segments.

Finally, the Guidelines indicate that advance action shall be taken to ensure that the contract agency for maintenance of the road shall be fixed before the expiration of the concession period of the BOT operator.

State Road Maintenance Fund

In addition, the State Public Works Department is preparing a detailed scheme for the development of a State Road Maintenance Fund that would pool toll revenue and present road taxes, as well as levy an additional cess on fuel and taxes on vehicles. The objective of the fund is to pool available resources to award contracts to large professionally managed companies. It would also leverage its resources as equity participation to provide BOT operators with additional capital to be pooled with their own resources to bid for a pre-determined concession period. Thus a partnership with the private sector would both increase the available pool of funds and also enhance maintenance/reconstruction activities by the application of modern techniques.

The implementation of the Road Policy will be mandatory to all State Departments/Agencies. That implementation will be monitored by the State Public Works Department through a special Implementation Cell. The State Government will set up a high level committee headed by the Chief Secretary to review the progress of that implementation.

Results To Date

To date, the following projects have been taken up under various schemes:

- 17 major bridges completed under BOT;

- maintenance of the Bhopal-Dewas Road (SH-18) (143 km.) for a three year period (1997-2000) under MOT, with the contractor paying Rs. 146.00 lakhs per year to the State Government in quarterly instalments;

- Mandsaur Byepass (14 km.)- construction;

- Jaora-Ratlam-Badnagara-Nagda-Lebad road, including Ratlam Byepass (130.4 km.)- maintenance and construction;

- Indore-Ujjain Road (58 km) under MOT originally but now also calling for construction; and

- Shivpuri Byepass- construction.

In addition to the above, 27 roads and bridges are ready to be undertaken with private sector participation and bids are being invited. The work includes reconstruction of distressed bridges, culverts, and the strengthening of weak reaches and maintenance of roads.

3.1.3 Legislative Framework

Madhya Pradesh does not yet have a separate State Highway Law as does Karnataka. However, the Madhya Pradesh Highway Bill 2001 has been approved by the State Cabinet and sent to the Government of India for concurrence. That Bill was prepared based on guidelines for a Model Highway Act issued by the Government of India. Its salient features are:

- declaration of a State highway authority and its powers;
- fixing of highway boundaries, building lines and control lines, and the imposition of certain restrictions and regulations for the use of land within those lines;
- regulation or diversion of right of access to a highway;
- compulsory acquisition of land and payment of compensation therefore, including determination of the amount of compensation by agreement (if possible);
- provisions for prevention of unauthorised occupation and encroachment on a highway, including removal of encroachments;
- provisions for prevention of unbridled ribbon development;
- provisions to facilitate private partnership in highway projects;
- levying of betterment charges based on the increase in value of land due to construction of the highway;
- provisions to secure the safety of traffic and the prevention of damage to highways, including prohibition of the use of heavy vehicles on certain highways;
- details of penalties for violation of various provisions of the Act, and provision for appeals of such penalties to a competent Court Authority;
- powers and duties of Police and village officials in respect of highways;
- provisions for eviction of persons wrongfully occupying any land which is part of a highway or which occupation contravenes any provision of the Act.

In addition, the Indian Tolls Act, 18518, has been amended by the Madhya Pradesh Government to specifically permit the levying of tolls for new construction of roads and bridges, as well as for their improvement.

With the enactment of the State Highway Act and the establishment of the State Road Maintenance Fund, Madhya Pradesh will have in place the key elements of modern State road legislation.

3.2 Power

3.2.1 Background

The State of Madhya Pradesh was bifurcated into two states, Madhya Pradesh ("MP") and Chhattisgarh in November 2000, with MP comprising roughly two-thirds of the erstwhile state, in terms of land area and population. The bifurcation has had adverse implications for the power sector in MP. The vertically integrated Madhya Pradesh State Electricity Board ("MPSEB"), which, along with the Chhattisgarh State Electricity Board, is the successor to the Madhya Pradesh Electricity Board ("MPEB"), has had to assume 79% of the total long-term debt of MPEB and supply electricity to 94% of the agricultural consumers that remain in MP, whereas 32% of the generation capacity has been allocated to Chhattisgarh, together with many high profile industrial consumers.

Even prior to the bifurcation, the power sector in the State was beset with problems, as evidenced by the poor financial position of the MPEB and limited addition to generation capacity. The financial problems of the MPEB have been largely attributed to structural flaws in the organisation of the power sector, skewed tariff policies in favour of subsidised consumers resulting in non-recovery of costs, high system losses, large non-remunerative investments and absence of a robust legal and regulatory framework.

As mentioned earlier, the poor financial health of the State Electricity Boards led to a gradual shift in the focus of power reforms initiated by the Central Government in the year 1991 from generation to distribution. Some of the Centre-led reform initiatives have been discussed in brief in Appendix B, notable amongst which are the Common Minimum National Action Plan for Power and the Accelerated Power Development and Reform Programme. Further, following the conference of Chief Ministers/Power Ministers organised by the Ministry of Power in March 2001, the States have entered into several agreements with the Central Government, more fully described in Appendix B, for the furtherance of power sector reforms.

In the discussion below, the Power Policy contained in the Policy Thrust for the Economic Development of Madhya Pradesh ("Economic Development Policy") is examined in some detail, before reviewing other reform initiatives in the power sector. Thereafter, a brief overview of the progress to date is provided, followed by a summary of recent state legislation in the sector.

3.2.2 State Power Policy

The Government of Madhya Pradesh ("GoMP"), in 2001, declared its Economic Development Policy, which is geared towards combining high growth programmes with poverty reducing and equity-enhancing policies, to ensure progress in both economic as well as social spheres.

The Economic Development Policy recommends that the process of economic development should be managed through implementation of core public investment programme, followed by private investment, which can be facilitated by enacting appropriate legislation, and adoption of a programmatic approach to implement development initiatives expeditiously. Further, a nodal agency should be constituted to de-bottleneck and monitor the development process.

'Connectivity', including connecting of industry and services to infrastructure, has been identified as the cornerstone of the State's economic development strategy. In this context, the Power Policy seeks to connect the various categories of customers to reliable, superior quality power at reasonable rates, and further:

- To ensure reasonable and commercially viable tariff structure;
- To promote corporatisation of the State utilities so as to improve their functioning;

- To distance the State Government from power sector corporate entities so as to ensure functional autonomy;

- To ensure availability of legal and regulatory framework to support overall development in the power sector; and

- To gradually remove subsidy and reduce cross-subsidies.

The GoMP has adopted several policy initiatives for that purpose, including the following:

- MPSEB shall be reorganized on functional basis and new entities shall be incorporated under Indian Companies Act;

- Progressive divestment in different segments of power sector shall be made, if found necessary. The result of efforts being made in other States in this regard shall be monitored continuously and suitable decision shall be taken thereafter;

- State Government shall limit its role to policy directives only and distancing the Government from power sector entities shall be achieved gradually;

- State Government shall take a lead role in financial restructuring of successor entities of MPSEB;

- The transfer scheme from MPSEB to new corporation entities shall be designed in such a way that the balance sheets of the new entities are clean from day one;

- State Government shall provide all the support to power sector corporate entities for completion of the projects and 100% meterisation Programme;

- State Government has enacted Urja Adhiniyam 2001 to prevent theft of electricity and special drives shall be made to support distribution entities to reduce and gradually eradicate theft of electricity from the State;

- While corporatizing the distribution function, some areas may be given to private sector as pilot project. On review of performance report on the pilot project, privatization may be further extended to other areas;

- State Government shall encourage and support successor corporate entities of MPSEB to take up various projects as BOT, BOOT, BOO, Joint Venture, Management Contract etc.;

- State Government shall provide for speedy clearance for renovation and modernization projects for existing thermal power generating units;

- State Government shall monitor energy audit of MPSEB or its successor entities;

- State Government has already enacted and commenced Madhya Pradesh Vidyut Sudhar Abhiniyam 2000 in the State, which provides for recovery of 75% of cost of supply of electricity from all class of consumers within a period of five years. State Government shall provide all the support to MPSEB or its successor entities and MP Electricity Regulatory Commission ("MPERC") for implementation of the same;

- So far as captive power policy in the state is concerned, State Government shall emphasize the coexistence of the MPSEB and industries because both are going to be benefited by the survival of each other. So far as cess on captive power generation is concerned, State

Government shall review it every year and shall increase or decrease it as per the requirement at that point of time;

- State subsidies shall be reduced in a phased manner; however, the subsidies shall be made available to compensate for electricity supply to poor and needy consumers at affordable prices;

- State Government shall issue directives to the municipalities and legal bodies to make timely payment of current bills of MPSEB, failing which disconnections shall be made as per tariff order of MPERC;

- State Government shall assist MPSEB for settlement of dues owned to Central Sector Undertaking, Bond repayments;

- State Government shall make timely and adequate budgetary appropriation to meet its subsidy and subvention payments so as to ensure that all dues are paid in cash to MPSEB within not more than 6 months of the raising of the claim by MPSEB or such entities or in such other shorter time and manner as may be directed by MPERC; and

- GoMP shall make timely and adequate budgetary appropriation to meet MPSEB's balance of receivables from municipalities and other government bodies, which should not exceed the immediately preceding one-month, equivalent of sales at any time.

Amending its earlier captive power policies, the GoMP has announced a new, more liberal, Captive Power Policy as of January 2003. That Policy includes provisions concerning the purchase of surplus power from CPPs, withdrawal of conditions imposed on CPPs of drawing 50% minimum consumption, and exemptions from obtaining permission for up to 100 KVA.

The most recent pronouncement by the GoMP concerning private sector participation in the power sector is to be found in the "White Paper on the Status of Power Sector in Madhya Pradesh" (June 2003). The Plan covers the short-term (18 to 24 months) and the long term (2 to 7 years). Although the Paper includes "facilitating private sector participation in generation and distribution" amongst the major reform initiatives of the GoMP, nothing is provided in the short term for private sector participation in the power sector. Also, in the long term there is only a vague reference to "exploring viability of private sector participation".

The overall purpose of this Action Plan is to make the State self-sufficient in the power sector by the year 2007, through, for instance, the implementation of a realistic and viable Financial Restructuring Plan ("FRP"), which is currently under the approval process. The FRP would provide a roadmap to the MPSEB for future financial planning, loss reduction, efficiency improvements, capital investments, improved management practices etc. so as to ensure comprehensive revival of the power sector in the State.

The State has received assistance from several institutions, including the ADB, DFID and CIDA, for carrying out necessary reforms, such as financial restructuring of the MPSEB; metering, billing, collection and institutional capacity building in the MPSEB; providing support to the State Regulatory Commission (MPERC); tariff filing; and strengthening transmission and distribution systems, which will go a long way in reducing technical losses and improving the quality of power supply.

3.2.3 Progress To Date

The MPERC was constituted in August 1998 and is fully operational. The MPERC has issued two tariff orders so far.

Further, the GoMP has signed the Tripartite Agreement, Memorandum of Understanding and Memorandum of Agreement with the Central Government to implement the power reforms in a phased manner.

The State Government initiated the reorganisation of the MPSEB on July 1, 2002, through incorporation of five companies – one handling generation; one handling transmission and three handling distribution. The companies have shown consistent improvement in performance parameters such as Plant Load Factor, revenue collections, and reduction of losses through a number of measures, which mainly relate to meterisation, energy audit, and initiating innovative methods for controlling theft and pilferage. Further, major transmission works under the ADB loan are progressing ahead of schedule.

In terms of legislation, the State has enacted the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 for restructuring of the MPSEB, limiting the role of the State Government, increasing the scope and powers of the MPERC, rationalisation of tariff and other related matters, and the Madhya Pradesh Urja Adhiniyam, 2001 for controlling the theft of electricity in the State.

3.2.4 Legislative Framework

Electricity is one of the subject matters enumerated in the Concurrent List (i.e. Entry 38, List III), which means that both Parliament and the State legislatures have been empowered to legislate concurrently on the subject.

The State of Madhya Pradesh has enacted The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (MP Act No. 4 of 2001), which came into force on February 20, 2001, after having received the assent of the President. In addition, The Madhya Pradesh Urja Adhiniyam (MP Act No. 12 of 2001) has been passed with effect from April 17, 2001.

Subsequently, Parliament has enacted The Electricity Act, 2003 (Act No. 36 of 2003)[1], which seeks to create an enabling framework for the development of an efficient and competitive power sector. The Act replaces the three existing laws, i.e. The Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998.

The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (the "Reform Act")

Preamble

The Preamble to the Reform Act lists the principal purpose of the Act as follows:

- establishing the State Electricity Regulatory Commission;
- restructuring the Electricity Industry;
- rationalization of generation, transmission, sub-transmission, distribution and supply of electricity in the State;
- regulating the licensing of transmission and supply of electricity;

[1] The Electricity Act, 2003 has come into force with effect from June 10, 2003. Section 185 of the Act explicitly saves provisions of The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 that are not inconsistent with provisions of the Central Act.

- regulating the purchase, transmission, sub-transmission, distribution, and supply and utilization of electricity;

- providing quality of service and the tariff and other charges considering the interest of the consumers and utilities; and

- taking measures conductive to the development and management of the electricity industry in the State in an efficient, economic and competitive manner.

Composition of the Act

The Reform Act is divided into fourteen Chapters (61 sections), which cover the establishment and constitution of the Madhya Pradesh Electricity Regulatory Commission (the "Commission"); functions, powers and proceedings of the Commission, including its power to pass orders and enforce decisions; powers of the State Government; licensing of transmission and supply of electricity; reorganisation of the Madhya Pradesh Electricity Board; determination of tariffs; standards of performance to be maintained; arbitration and appeals in relation to disputes under the Act; accounts, audit and reports of the Commission; offences and penalties for contravention of the provisions of the Act; miscellaneous provisions regarding, *inter alia*, the recovery of fees, fines and charges due to the Commission, power of the State Government to give directions and make rules, and power of the Commission to make regulations; and the effect of the Act on existing central legislation.

Scope of the Act

The Reform Act extends to the whole of the State of Madhya Pradesh.

Definitions under the Act

Chapter I (Section 2) of the Act contains certain definitions, including that of Electricity Industry in Section 2(e), which is defined as "persons or assets engaged in the business or activities of generation, transmission, sub-transmission, distribution or supply of electricity, the operation of power system, the regulation of such businesses and activities and matters connected thereto". Further, Section 2(r) contemplates the activity of supply of electricity to include sub-transmission and distribution.

The Act, in Section 2(t), additionally provides that words and expressions used but not defined in this Act and defined in the Indian Electricity Act, 1910, or in the Electricity (Supply) Act, 1948 shall have the meanings respectively assigned to them in those Acts.

Establishment and Constitution of the Commission: Chapter II (Sections 3-8) contains provisions concerning the establishment and constitution of the Commission. Section 3 stipulates the establishment of the Commission at Bhopal by notification by the State Government. The Commission shall consist of a Chairperson and two other members, appointed whole time by the State Government on the recommendation of a Selection Committee constituted under Section 4. The said Section also states that the Commission set up under the Electricity Regulatory Commissions Act, 1998 shall be deemed to be the first Commission established under this Act.

Section 4 provides that the Selection Committee shall have, as its Chairman, the Chief Secretary of the State, and as its members, the Chairman of the Central Electricity Authority or a member thereof nominated by the Chairman and the Managing Director of a public financial institution or undertaking owned or controlled by the Government of India engaged in the electricity industry[2].

Section 5 details the conditions for appointment of any person as a member of the Commission and prohibits such person from undertaking certain activities upon his ceasing to be a member of the Commission, including being appointed in the service of the State Government or of any body corporate or institution or undertaking owned or controlled by the State Government.

Section 6 stipulates that a member shall hold office for a period of five years and shall not be eligible for re-appointment. In addition, the said Section provides that the salary and allowances and other conditions of service of the members shall be prescribed by rules made by the State Government. These shall not, however, be varied to the disadvantage of the members during their term of office.

Section 7 envisions the removal by the State Government - in certain cases only upon an inquiry by the High Court - of any member of the Commission on the grounds specified therein and the suspension of any member pending an inquiry by the High Court against such member. Any person who has been removed from the office of member of the Commission shall not eligible for re-appointment.

Section 8 provides for the appointment of the secretary, officers and other employees of the Commission and of consultants to assist the Commission in the discharge of its functions. It further stipulates that the expenses of the Commission shall be charged upon the consolidated funds of the State.

Functions, Powers and Proceedings of the Commission: Chapter III (Sections 9-11) deals with the functions and powers of the Commission and the manner in which its proceedings shall be conducted. Section 9 lists, amongst the functions of the Commission, the following:

- to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable, taking account of the interests of both the consumers and the electricity industry;
- to promote efficiency, economy and safety in the use of the electricity in the State;
- to determine the tariff for electricity: wholesale, bulk, grid or retail, in accordance with the provisions of this Act;
- to grant, revoke and amend licenses in accordance with the provisions of this Act and to determine the conditions to be included in the licenses;
- to regulate the working of the licensees and to ensure that the working of such licensees is efficient, economical and equitable;
- to set and enforce standards for the electricity industry in the State, including standards relating to safety, quality, continuity and reliability of service and the development of codes;
- to promote competitiveness in the electricity industry in the State;

[2] It may be noted that in contrast thereto, the Central Act ("TEA") provides for such Selection Committee to consist of a former Judge of the High Court as Chairperson, and as Members, the Chief Secretary of the State and the Chairperson of the Central Electricity Authority or of the Central Commission.

- to aid and advise the State Government on matters concerning generation, transmission, sub-transmission, distribution, supply and utilization of electricity in the State; and

- to adjudicate upon disputes and differences between the licensees and to refer matters to arbitration, if considered necessary.

Section 10 stipulates that the Commission shall, for the purposes of any inquiry or proceeding under this Act, have the powers of a civil court in respect of matters such as summoning and examining of witnesses, requiring the production of any document or other material object and receiving of evidence on affidavits. Under the said Section, the Commission also has the power to authorize entry, search and seizure of any books, accounts or documents, call for information and documents and consult persons likely to be affected by its decisions. Section 11 concerns the manner in which the proceedings of the Commission, which shall be open to public, are to be conducted and permits the taking of decisions on urgent matters by circulation. It further provides that all decisions and orders of the Commission shall be in writing, supported by reasons and, unless otherwise specified by the Commission, available for inspection by any person.

Power of the State Government: Chapter IV (Sections 12-13) refers to the power of the State Government to issue policy directives on matters concerning electricity. Section 12 states that such policy directives shall be in writing and shall not affect or interfere with the functions and powers of the Commission, which shall be consulted on any proposed legislation or on any policy directive proposed to be issued by the State Government. Section 13 stipulates that any dispute between the Commission and the State Government in this regard shall be referred to the CERC, whose decision on the matter shall be final and binding.

Licensing of Transmission and Supply of Electricity: Chapter V (Sections 14-22) covers the licensing of transmission and supply (including bulk supply, sub-transmission or distribution) of electricity and matters related thereto. Section 14 specifies the entities permitted to carry on the business of transmitting, distributing or supplying electricity in the State and provides for the grant of a provisional license by the State Government during a period of six months from the commencement of the Act. Section 15 deals with the grant of a license by the Commission for the transmission and supply of electricity and sets out the procedure therefor and terms and conditions to be included therein, such as evolving scheme for metering for all consumers and measures for reduction of T&D losses. Such license may allow the licensee to take actions in respect of metering, revenue realization, disconnection of electricity, prosecution for theft and other similar matters. The said Section further provides that the Commission may grant a license to more than one person within the same area of supply for a like purpose.

Section 16 entitles the Commission to exempt any person from the requirement to have a license, with the consent of the Central Government, the local authority concerned or an existing licensee, as the case may be. However, no such consent of the local authority or existing licensee shall be necessary if the Commission is satisfied that such consent has been unreasonably withheld. Section 17 empowers the Commission to make amendments to the terms and conditions of a license with the consent of the licensee, if the public interest so permits or requires, and prescribes the procedure to be followed for the same.

Section 18 deals with the revocation of license by the Commission. Section 19 stipulates provisions concerning the undertaking of any licensee whose license is revoked and further provides for orders of the Commission under the section to be duly implemented by such licensee. This includes the power of the Commission to direct that any amount due or outstanding from the licensee shall first be adjusted out of the amount deposited by the purchaser of such undertaking, before the amount is released to the licensee concerned. Section 20 contains general duties and powers of licensees and generating companies, while Section 21 imposes certain restrictions on them. Section 22 requires every licensee to prepare and submit to the Commission an up-to-date annual statement or statements of accounts of its undertaking and of each separate business unit.

Reorganisation of the Board: Chapter VI (Sections 23-25) provides for the reorganization of the State Electricity Board (MPSEB). Section 23 contemplates the transfer, first to the State Government and later to subsequent transferees (being any company, body corporate, person or authority), of the functions, duties, powers and obligations and such of the undertakings of MPSEB or such portion thereof in the manner and on the terms and conditions prescribed by the State Government in the transfer scheme, which shall be binding on all persons including third parties. The transfer scheme may provide that the licensee shall exercise the rights and powers of the MPSEB only with the approval of the Commission. Section 24 contains provisions relating to the transfer of personnel of the MPSEB, including any compensation or damage to which such personnel are entitled. Section 25 entitles the State Government to treat such transfers as provisional for a period of twelve months from the effective date of transfer and to make any variations in the terms thereof.

Tariffs: Chapter VII (Sections 26-27) covers tariffs. Section 26 provides for the determination by the Commission of the tariff for intra-State transmission of electricity and for sub-transmission, distribution and supply of electricity (grid, wholesale, bulk or retail, as the case may be) in the State. In so doing, the Commission shall be guided by certain factors mentioned therein. Further, the State Government shall compensate any person affected by the grant of subsidy to any category of consumer or class of consumers, as a condition for the licensee or any other person concerned to implement any such subsidy.

The said Section also lays downs the principles for the determination/implementation of retail tariffs, including the progressive reduction of existing cross-subsidy to the extent that within a period of five years from the commencement of this Act, the tariff to any class of consumer, other than financially weak consumers, shall reflect a minimum of seventy-five per cent of the licensee's average cost of supply of electricity to that class. The Commission is entitled to include in the tariff of the licensee an amount to be appropriated to Special Funds for implementing projects to enable supply of electricity to consumers in different places in the area of supply of the licensee. Further, no tariff or part of any tariff may generally be revised at the instance of the licensee more than once in any financial year. Section 27 provides for the making of subventions by the State Government to enable implementation of specific projects by the licensee.

Orders and Enforcement: Chapter VIII (Sections 28-32) concerns the power of the Commission to pass interim/final orders to prevent a licensee from contravening any relevant condition or requirement. Section 28 deals with interim orders, including the procedure to be followed in respect thereof, while Section 29 sets out the procedure for final orders and empowers the Commission to modify or revoke such orders in accordance with the provisions of the said Section. Section 30 entitles the Commission to give directions for vesting in any person the management and control of any undertaking of any licensee in certain cases. Section 31 stipulates that all orders passed and directions given by the Commission shall be enforced as if it were a decree of a civil court. The Section further provides for the imposition of fines and charges by the Commission for non-compliance with the provisions of the Act, regulations framed thereunder or the orders/directions of the Commission and requires the Commission to direct the payment of compensation to the person or persons affected by such non-compliance. Section 32 emphasizes the general control of the Commission over the electricity industry in the State, which shall be subject to the regulations framed by the Commission to achieve the objects and purposes of the Act.

Standard of Performance and Disclosure of Information by Licensees: Chapter IX (33-38) Under Section 33, the Commission shall constitute a State Advisory Committee in consultation with the State Government, with nine to fifteen members, appointed for a term of three years. The Chairperson and members of the Commission shall be Chairperson and members of the Committee, *ex-officio*. The Committee shall advise the Commission on major questions of policy relating to the electricity industry in the State and on any other matters requested by the Commission. Section 34 envisions the laying down of standards of performance, of power system operation codes and safety regulations by the Commission for the transmission, supply and use of electricity. Sections 35, 37 and 38 contain provisions concerning information with respect to standards of performance and include restrictions on disclosure of confidential information with respect to licensees, generating companies

or any other person. Section 36 saves the rights and privileges of consumers under laws including the Consumer Protection Act, 1986.

Arbitration and Appeals: Chapter X (Sections 39-41) concerns arbitration of disputes and appeals therefrom. Section 39 stipulates that disputes between licensees shall be referred to the Commission, which may arbitrate itself or nominate an arbitrator (s) to adjudicate and settle such dispute. Further, any award made by such arbitrator shall be filed before the Commission for confirmation and enforcement; setting aside or modifying; or remitting to the arbitrator for reconsideration. Any award made or order passed by the Commission under this Section shall be enforceable as if it were a decree of a civil court. Section 40 provides for an appeal to lie before the Commission from the decision of an Electrical Inspector, other than an Inspector of the Central Government or the Central Electricity Authority. Under Section 41, an appeal against any decision or order of the Commission shall lie before the High Court, on question of law arising out of such decision or order.

Accounts, Audit and Reports: Chapter XI (Sections 42-44) covers accounts, audit and reports of the Commission. Section 42 states that the Commission shall prepare its budget for each financial year and forward the same to the State Government for approval. Section 43 provides for the accounts for the Commission to be audited by the Comptroller and Auditor-General. The audit report and the annual report to be prepared by the Commission under Section 44 shall be laid before the State Legislature by the State Government, as soon as may be.

Other Provisions: Chapter XII (Sections 45-49) details the offences and penalties under the Act and provides that the proceedings and actions taken thereunder shall be in addition to and without prejudice to actions that may be initiated under other acts.

Chapter XIII (Sections 50-58) covers miscellaneous provisions. Section 50 provides that the fees, fines, charges and other sums due to the Commission shall be recoverable as if any such sum were a public demand as defined in the Madhya Pradesh Public Moneys (Recovery of Dues) Act, 1987. Section 51 asserts that no order or decision made under this Act or the rules or regulations framed thereunder shall be appealable except as provided in the Act, and further bars the jurisdiction of civil courts. Section 54 enables the State Government to remove any difficulty that may arise in giving effect to the provisions of this Act by order published in the Official Gazette. Sections 55 and 56, respectively, deal with the power of the Commission to make regulations and the State Government to make rules. Section 58 states that all proceedings before the Commission shall be deemed to be judicial proceedings.

Chapter XIV (Sections 59-61) refers to the effect of the Act on existing central legislation and details provisions of Central Acts that are to be saved and those that shall cease to apply, including the consequences of such cessation.

The Madhya Pradesh Urja Adhiniyam, 2003 (the "Electricity Theft Act")

The Electricity Theft Act has been passed to provide for the prohibition of unauthorised use of electrical energy in the State of Madhya Pradesh and for matters connected therewith or incidental thereto.

The Electricity Theft Act comprises of 10 sections. Section 2 contains certain definitions, including the following:

> "unauthorised use of energy" means any abstraction, consumption or use of energy not permitted under any law relating to electricity for the time being in force and includes any abstraction, consumption or use of energy not permitted by any Electricity Utility in any manner whatsoever;
>
> "electricity utility" means any person authorized to engage in generation, transmission, distribution, supply or sale, as the case may be, of energy.

As regards terms used but not defined in this Act and defined in the Indian Electricity Act, 1910 (Act 9 of 1910) and in the Electricity (Supply) Act, 1948 (Act 54 of 1948) shall have the meanings respectively assigned to them in those Acts.

Section 3 states that any person who indulges in the unauthorised use of energy, contrary to the prohibition contained in the Act, shall be liable to pay the amount assessed in accordance with the provisions of the Act, in addition to any other action under any law relating to electricity for the time being in force. The Section further provides that the Electricity Utility may disconnect supply of electricity to any such person. Section 4 contains provisions concerning the entry and search of any premises and seizure and removal of any equipment which has been, is being or is likely to be used for the unauthorized use of electrical energy by certain officers as may be notified by the State Government.

Section 5 covers the payment of electricity charges by any person indulging in the unauthorized use of energy or by any other person benefited by such use, as per the assessment made by the assessing officer. Such assessment shall be made at a rate equal to one-and-half times of the tariff rates applicable for the relevant category of services. Section 6 provides for the filing of an appeal by any person aggrieved by the final order of assessment made by such assessing officer before a superior officer appointed as appellate authority by the State Government, upon the deposit of one-third of the assessed amount, in cash or by way of bank draft with the Electricity Utility.

Section 7 stipulates the payment of interest at the rate of sixteen per cent per annum compounding every six months, in case of default by any person in making payment of the assessed amount. Section 8 then sets out the modes by which the assessing officer may recover the assessed amount, along with any other charges, due from any such defaulter. Section 9 protects acts that are done in good faith, while Section 10 states that the State Government may make rules, which shall be laid before the Legislative Assembly, to carry out the purposes of the Act.

3.3 Ports

Madhya Pradesh is a landlocked state. Thus it has no ports, and no need for a ports policy or specific ports legislation.

3.4 Airports

3.4.1 Background

The Airports Authority of India owns and operates five airports in Madhya Pradesh. They are:

- Indore- Domestic (a model airport which is defined as having a minimum runway length of 7500 feet and adequate terminal capacity to handle an Airbus 320. Thus they can cater to limited international traffic, if required);
- Bhopal- Domestic (Operational Airport);
- Khajuraho- Domestic (Operational Airport);
- Jabalpur- Domestic (Operational Airport);
- Gwalior- Civil Enclave in Defence Airport.

The Madhya Pradesh Public Works Department is currently responsible for the construction and maintenance of airstrips in the State. However, the State Government is considering the establishment of a separate Aviation Department to provide for the air travel requirements of State officials, to develop airstrips throughout the State (there are now 26), and to make arrangements for the training of pilots.

3.4.2 State Airport Policy

Civil aviation is a national responsibility and the State of Madhya Pradesh does not have a specific policy regarding airports or airport infrastructure. The subject is not mentioned in the State Tenth Five Year Plan (2002-2007). However, as noted above, there is a proposal to create a separate Aviation Department. In addition, there has been some discussion of the upgrading of Indore Airport from a Domestic Model Airport to an International Airport. It is not one of those indicated for such change under the national Policy on Airport Infrastructure, as are Bangalore, Hyderabad and Ahmedabad, among others. However, the State Government has indicated it will petition for such a change in status due to the creation of the SEZ there.

3.4.3 Legislative Framework

Civil aviation is covered by national legislation. There is no specific State legislation in this area.

3.5 Urban Mass Transit

3.5.1 Background

There is no current proposal for an urban mass transit system for any of the cities of Madhya Pradesh. However, a major effort is underway to privatise the bus system through the unbundling of the Madhya Pradesh State Road Transport Corporation (MPSRTC) into five road transport enterprises- one holding company and four subsidiaries organised on a regional basis. The intent is either to divest the subsidiaries to private operators or to invite such operators to participate in them. This reorganisation would require the consent of the Government of India under Section 17A of the Road Transport Corporation Act, 1950, as amended. The Government of Madhya Pradesh has taken the decision to proceed with the incorporation of the subsidiaries as joint stock companies and the State Legislature passed a resolution this year to that effect.

3.5.2 State Urban Mass Transit Policy

Madhya Pradesh has no current urban mass transit policy.

3.5.3 Legislative Framework

As with the other states, urban mass transit is a State matter in Madhya Pradesh based on item 13 of the State List in the Constitution. (Article 246, Seventh Schedule). In Madhya Pradesh, as in the other Project States, it has been granted to local municipalities under the Municipal Corporations Act. **(Check name and date).** In addition, national legislation, including the Indian Railways Act, 1989 governs where Indian Railways track is used and where the national Government is directly involved as with the Delhi and Hyderabad metros. (see discussion in main text).

With regard to privatisation of bus transport, as proposed and discussed above, the relevant legislation is Section 17A of the Road Transport Corporation Act, 1950, as amended. Under that Section, the Government of India is required to consent to the corporatisation and possible later privatisation of a State Road Transport Corporation and its division into subsidiaries. In addition, the national Motor Vehicles Act, 1988, as amended sets rules for all vehicles for all vehicles, including public vehicles which are implemented by both national and State rules on routes and other matters.

3.6 Cyber Parks/Information Technology (IT) Parks

(see main text)

3.7 Special Economic Zones (SEZs)

3.7.1 Background

Madhya Pradesh is one of the few states that have both a policy and legislation in relation to Special Economic Zones. The Indore SEZ is also reputedly the most efficiently organized in the country. In addition to legislation in relation to the Indore SEZ, the State has recently proposed amendments to labour laws in the State, in keeping with the its SEZ Policy.

3.7.2 State SEZ Policy

In light of the Union Government's Policy and in the context of guidelines laid down by it, the Government of Madhya Pradesh (GoMP) has come up with an SEZ Policy in 2000.[3] This Policy incorporates the Exim Policy definition of an SEZ and is declared to be the governing policy on issues concerned with SEZ. The Preamble to the Policy mandates that:

- The State Government will facilitate creation of linkages and social, economic and other infrastructure;

- The State Government shall undertake socio-economic and industrial development of the State through the SEZ, which shall lead to increased employment opportunities;

The salient features of the Policy are as follows:

- **Nodal Agency**: The Madhya Pradesh State Industrial Development Corporation (MPSIDC) has been declared the nodal agency for the development of the SEZ near Indore, and any SEZs to be established in the State in future.

- **Infrastructure Provision**: The Policy states that the State Government shall make available land required for the Zone through the acquisition of private land under the Land Acquisition Act and seek to provide direct air links for the Indore SEZ; the Indore SEZ is now governed by its own legislation.

- **Development Commissioner**: The Development Commissioner (DC) will be deemed as the competent authority for the Industrial Development Area for the notified SEZ and will provide sanctions under various statutes and regulations of the Central and State Governments. The DC will also advise the Government on issues requiring amendments or clarifications to facilitate sanctions to units in SEZ and facilitate marketing of the Zone.

- **Single Agency and Self-Certification System**: SEZ units will be eligible to avail of the single agency clearance system and facility of self-certification available to industries in the State. In this regard, the DC will be delegated appropriate powers under the single agency clearance system to grant clearances/approvals pertaining to various departments such as Energy, Commercial Taxes, Home Department (Foreigners' Registration), Food & Drug Administration, M.P. Pollution Control Board, Industries Department, and Industrial Health and Safety.

[3] Available at http://www.sezindore.com/policy_mp2.htm.

- **Environment**: With regard to Environment, the Policy envisages a simplified procedure for the grant of various NOCs, consents and other clearances through the DC and a Committee headed by him. A list of non-polluting industries in SEZ where no consent (or NOC) would be required is also to be notified.

- **Power**: SEZs will have various benefits in relation to power, such as provision of continuous and good quality power to all consumers in SEZ, exemption from electricity duty, cess and any other tax or levy on sale of electricity for self generated and purchased power, posting of MPSEB staff in the SEZ for the purpose of approvals and billing, freedom given to distribution companies to fix tariffs, no prior approval required for setting up captive power plants, subject to the fulfilment of specified conditions, and various other privileges regarding generation, transmission, distribution and procurement of power.

- **Taxes**: All SEZ units and SEZ developers are exempted from payment of Commercial Tax, Turnover Tax, VAT, Purchase Tax, Stamp Duty and other similar state taxes as well as taxes levied by local bodies. Further, units in the DTA will also be exempt from such taxes on sales made by them to SEZ units and SEZ developers.

- **Labour Regulations**: The DC will be delegated the powers of the Labour Commissioner as also of the State Government under various Labour Laws. Appropriate officials of the Zones will provide a single window service, and for inspections in relation to various Labour Laws, the State Government will use best international practices by permitting units to get such inspections done through accredited agencies notified by the Government. The Policy annexes a summary of the proposed simplifications under various Labour Laws for SEZs .[4]

- **Water**: The State Government is required to arrange supply of water for drinking, industrial and other use by SEZs. The rates of utility services availed from private services providers are subject to the DC's approval.

- **Management of SEZ**: The Policy contains various provisions for the management of the SEZ such as declaring it an Industrial Township to enable it to function as a Special Area Self-Governing Body, appointment of a Monitoring Committee under the Chairmanship of the Chief Secretary to resolve policy issues pertaining to the development and functioning of SEZs, delegation of powers to the DC to grant provisional/permanent registrations to Small Scale Industries and sanction/incentives/assistance to the Small, Medium and Large Scale Industries, making arrangements for maintenance of law and order and so on.

- **Financing the development of SEZs**: The SEZ project is to be implemented with private sector participation. The State is to contribute equity in the form of land. There is to be a nodal developer for the project, who will be selected through open bidding process, and who shall bring his own equity and shall be responsible for infrastructure development and management of the zone

3.7.3 Legislative Framework

Indore Special Economic Zone (Special Provisions) Act, 2003

In 2003, legislation has been passed in terms of the State SEZ Policy, specifically with regard to the Indore SEZ, called the Indore Special Economic Zone (Special Provisions) Act, 2003.[5]

[4] Available at http://www.sezindore.com/policy_mp3.htm.

[5] Available at http://www.sezindore.com/SEZ%20BILL.doc.

Preamble

The Preamble describes the legislation as an Act to provide for the development, operation, maintenance and administration of the Indore Special Economic Zone in the State of Madhya Pradesh and for matters connected therewith. This Preamble broadly corresponds to the Preamble of the proposed national law , though it omits the words "establishment" and "management ".

Composition of the Act

The Act is divided into seven Chapters (19 Sections), which include provisions concerning the powers and functions of the Development Commissioner (DC) and the Developer, the declaration of the Zone to be an Industrial Township, and exemption from State taxes and other levies

Definitions

The Act provides definitions of certain important terms in Section 2. Thus, it defines "Developer" to mean "a person who develops, builds, designs, organizes, promotes, finances, operates, maintains or manages a part or whole of the infrastructure and provides amenities in the Zone"; and "Domestic Tariff Area" for the purposes of this Act to mean "the geographical area of the state of Madhya Pradesh excluding the area of the Zone".

The Act further defines "infrastructure" to include "industrial, commercial, social or residential infrastructure or any facility for the development of the Special Economic Zone"; and "Unit" to mean "an enterprise, or part thereof, which occupies space within the Zone for carrying on business as approved by the Development Commissioner".

Powers of the Development Commissioner

Section 3 lays down the powers and functions of the DC as follows:

- The DC has the function of supervising, overseeing and coordinating the activities of agencies engaged in the development of the Zone and may exercise all other powers and functions that the State/ Central Government may vest in him from time to time.

- The DC shall also act as a single agency to grant all approvals, clearances, licences, permissions and other authorizations, as may be delegated by the State Government or its agencies, for the establishment and operation of Units in the Zone.

- The DC shall make regulations, with the prior approval of the State Government, in respect of town planning and urban development, including floor space index, ground coverage, green space and other usages of land, and shall approve the plan for the development of the Zone and oversee the compliance thereof.

- In addition, the DC shall supervise and monitor compliance of conditions of licences, permissions and clearances granted by it; call any information required therefore from the Unit; and take appropriate action under the relevant State law for non-compliance thereof .

Section 4 provides that the DC shall be the Chief Conciliator for the purposes of this Act in respect of the Zone. Section 5 further provides for the nomination by the State Government of officers and experts to assist the DC.

The Developer

Section 6 stipulates that the State Government shall appoint a Developer for the purposes of development of the Zone in accordance with the prescribed procedure. Section 7 provides for the State Government to transfer land, owned acquired or controlled by it, to the Developer. In addition to this, the Developer may acquire land independently from private parties by purchase, lease or otherwise.

Section 8 lays down functions of the Developer, which include the planned development of the Zone and provision for the establishment, operation, maintenance and management of the Zone infrastructure and amenities. In particular, the Developer shall:

- Prepare a plan for the development of the Zone in conformity with the regulations made by the DC and implement such plan after obtaining his approval;

- Demarcate and develop sites for industrial, commercial, residential and other purposes according to the plan;
- Allocate and transfer, either by way of sale or lease or otherwise, plots of land, building or installations for industrial, commercial, residential or other purposes subject to his own title in relation to such plots of land, building or installations;

- Regulate the erection of buildings and setting up of industries in accordance with the plan as approved by the Development Commissioner;

- Develop, construct, install, operate, manage and maintain infrastructure and amenities for providing services either by itself or through any other person authorized by it, on its behalf; an

- Demarcate the boundary of the Zone and any parts thereof, and construct and maintain demarcation structures, in such manner as may be prescribed.

Other Provisions

Section 9 empowers the Developer to fix rates for transfer of land, building or installations by way of sale, lease, or otherwise, and to levy charges in respect of any land, building, installations or other infrastructure from the occupier thereof, for the purpose of providing, maintaining or continuing any amenity and infrastructure. Section 10 provides that the developer may engage a co-developer, off-Zone supplier, operator, or any other person for the purposes of providing infrastructure or amenity.

Section 11 lays down provisions with regard to the generation, transmission, distribution, supply, sale and use of electricity in the SEZ, grants the DC regulatory powers in respect thereof and exempts the sale or supply of electricity to the Zone and generation, transmission, distribution and consumption within the Zone from the levy of electricity duty and cess under relevant State laws.

Section 12 provides for the SEZ to be notified as an Industrial Township and for the appointment of an Authority for the Zone.

Section 13 mandates the exemption from payment of any tax, duty, fees, cess or any other levies under any State law for the following:

- Any goods exported out of or imported into the Zone;

- Inter Unit transactions of goods within the Zone;

- Goods from the Zone sent for value addition to the Domestic tariff area and returned to the Zone thereafter; and

- Services that provide value addition to a product within the Zone.

Also, all transactions and transfers of immovable property or documents related thereto within the Zone shall be exempt from stamp duty.

Section 14 states that the Act shall override other State laws, Section 15 protects actions taken in good faith, and Section 16 enables the State Government to pass orders, within the time frame specified therein, to remove any difficulty in the implementation of the Act. Section 17 contemplates the making of rules by the State Government for the purposes of the Act, while Section 18 refers to the power of the DC to make regulations. Section 19 then saves the operation of other laws.

Other Legislation

- The SEZs have been accorded certain other benefits through notifications/ rules. In addition to the SEZ Policy, which annexes a number of simplifications to labour laws for operation in the SEZs, the MP Vidhan Sabha, on August 8, 2003, has also passed the Madhya Pradesh Labour Laws (Amendment) Bill, 2003. This Bill amends the Trade Unions Act, 1926, Industrial Disputes Act 1947, Employees State Insurance Act, 1948, Factories Act, 1948, Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the Contract Labour (Regulation and Abolition) Act, 1970, to give benefits to SEZs by restricting or excluding the operation of certain provisions of these laws in respect of SEZs.

- The MP Government has also notified certain industries located in SEZs to be public utility services.[6]

3.8 Water and Sewage

3.8.1 Background

Madhya Pradesh is the first of the Project States to actively devolve functions in the water sector to local bodies, as described below. It is the only Project State with a general water law, although that law is concerned primarily with irrigation.

3.8.2 State Water and Sewerage Policy

The Government of Madhya Pradesh is in the process of devolving operating and maintenance functions in the water sector to local bodies as part of the implementation of the 74th amendment to the Constitution regarding the transfer of functions to that level. In rural areas, there will be a three-tier structure consisting of water user associations (WUAs), Distributing Committees and Project Committees. Local urban bodies/municipalities will be empowered to take on operation and maintenance of water systems in urban areas, based on the MP Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam, 1999. That Act also delineates the areas of responsibility of water user associations (WUAs) and how such an association is established and constituted. Local urban bodies/municipalities are empowered to take on operation and maintenance of water systems in their area of jurisdiction based on the Madhya Pradesh Municipal Corporations Act. In addition, the "Policy Trust for Economic Development Report, 2001" expressly states that water supply and sanitation are infrastructure activities suitable for private sector participation, both in terms of investment and in terms of management contracts.

[6] Notification No. 279, dated 19 May 2003.

The new water system established under the 1999 Law does not specifically call for private sector participation. The loan presently being negotiated with the ADB for urban water supply projects does not include such participation. Also, there is consideration of a Public Regulatory Commission as a single regulator for utilities including water but the work on that proposed regulatory framework has not yet begun.

3.8.3 Legislative Framework

As mentioned above, water supply, sewerage and waste management are local responsibilities under the 74th Amendment to the Constitution, added in 1992. The Twelfth Schedule under Amended Article 243-W, added by Section 4 of that Amendment, lists "water supply for domestic, industrial and commercial purposes" (Item 5) and "public health, sanitation conservancy and solid waste management" (Item 6) as powers, authorities and responsibilities of municipalities where they are so established by a law enacted by the concerned State Legislature.

As previously noted, Madhya Pradesh is the only one of the four Project States without a State Water Supply and Sewerage Board Act. It is also the only Project State with a separate Water Act to implement the 74th Amendment and move control of water to the local level- the MP Sinchai Me Krishkan Ki Bhagidari Adhiniyam, 1999 (Act No. 23 of 1999), and its attendant rules. The Act covers farmers' participation in the management of the irrigation system and does not cover urban water. The definition of "water user" under the Act is broad and includes all kinds of uses of such irrigation water. The Act is under the management of the MP Water Resources Department, which is generally responsible for the construction of new water supply schemes. When completed, these schemes are then transferred to local bodies.

For urban drinking water and sewerage, the legal base is the Madhya Pradesh Municipal Corporations Act. The responsible authority is the Housing, Environment and Urban Administration Department (HEUAD). The Public Health and Engineering Department (PHED), formerly responsible also for urban water, is now responsible only for rural water but does still provide technical support to HEUAD for utility water in urban areas.

In addition, the MP Peya Jal Parirakshan Adhiniyam, 1986 (Act No. 3 of 1987) gives the District Collector concerned the power to declare water scarcity areas in case of emergency in order to maintain or increase the supply of water to the public or to secure its equitable distribution or secure water to meet the needs of the public. (Section 3). In such designated areas, the Collector must then give permission for the taking of water from a water source for any purpose, and may refuse the taking of water to preserve supply for domestic purposes. (Section 4). The Collector may set conditions for the taking of such water, including the rates to be paid by different classes of users, with preference to domestic users. Thus a possible private sector participant would not be ensured that they would receive water in case of emergency.

Thus the Madhya Pradesh legal framework regarding water supply is the beginnings of a model for other states. It is more comprehensive in scope and not limited to the establishment of a municipal water and sewerage board only.