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Foreword by
Shri Yashwant Sinha
Union Finance Minister

Indian Highways

A framework for commercialisation

by

Gajendra Haldea

A must have document for :

- prospective investors (domestic and foreign)
- lenders (domestic and foreign)
- lawyers
- financial consultants
- technical advisors
- stakeholders in power, telecom, highways, civil aviation, urban infrastructure etc.
- professionals in project finance
- government organisations dealing with infrastructure.

Contains comprehensive:

- Concession Agreement for Highway projects; and
- accompanying agreements.

These Model Agreements form an excellent base for negotiating and finalising BOT projects in the Highways sector. Many parts of the Agreement and Schedules are equally relevant to power, telecom, ports, airports and urban infrastructure projects.

The Model Agreements:

- have been drafted after extensive interaction with leading international experts, Indian financial institutions, prospective investors, legal consultants, technical experts and relevant Government officials;
- are based on international best practices (and would, therefore, be acceptable to foreign investors and lenders); and
- incorporate the principles of project finance.

PREFACE

For India, the decade of 1990s will be noted for the transition from a command economy to an open, competitive and globalised economy. This liberalisation has envisaged opening up of infrastructure sectors such as power, telecom, civil aviation, ports and highways for private participation. Though a surge of investors' interest has followed, the actual flow of investment has been far short of expectations.

Transformation of not only the rules but also of the mindset prevailing in a controlled economy is a pre-requisite for addressing the complexities of public-private partnerships, especially in the infrastructure sectors. Inadequate focus on this transformation seems to have constrained the potential capital inflows. Management of this change would require greater attention than hitherto since the prospects of economic growth in India are getting increasingly linked to the pace of infrastructure development.

In the highways sector, the Government had invited private participation in 1995 for conducting feasibility studies and building expressways across the country on BOT (Build, Operate & Transfer) basis. However, given the costs of such expressways and the difficulties associated with acquisition of land, it was soon recognised that the better option would be to add two lanes to the existing two-lane national highways, to be later augmented by two more lanes. The policy for privatisation of the existing national highways was announced in early 1997 and this approach was reinforced in late 1998 when the Prime Minister announced a major initiative for development of about 13,000 km of national highways. However, a precise policy and legal framework that would attract and sustain private capital is yet to be evolved.

While serving in the Ministry of Finance until late 1998, I was closely involved in developing the model framework. In this process several concepts were intensely discussed with officials of the Ministries of Surface Transport, Finance and Law, National Highways Authority of India (NHAI), leading financial institutions prospective investors, and other stakeholders. Following further research and consultations, I had submitted a Draft Model Concession Agreement in November 1998 that was acknowledged by the financial institutions to be of bankable standards and the Government also found it acceptable. Subsequently, I took time off from my official duties for undertaking further research and analysis that has led to the revision and rewriting of the Model Concession Agreement which is now also in line with international best practices. Moreover, as the November Draft did not include the Schedules that determine several important aspects of the framework, I have since written these Schedules also. The document is now comprehensive; only project specific details would need to be incorporated before operationalising this framework for any given project.

In addition to setting out a legal and regulatory framework, this Model Agreement defines a detailed policy framework and a strategy for privatising national highways on BOT basis in a phased manner, making optimum use of the available resources. In particular, it addresses the issues which are critical for limited recourse financing of infrastructure projects such as, mitigation and unbundling of risks; allocation of risks and rewards; symmetry of obligations between the principal parties; precision and predictability of costs and obligations; user protection; transparent and fair procedures; force majeure; termination; and financial support from NHAI.

As an effective programme of privatisation would also require reforms and restructuring of the institutional framework, the book defines the role of the Government, regulators and NHAI. Finally, I have taken this opportunity to outline my blueprint for highway development in the form of 'Vision 2020'.

The policy and regulatory framework as contained in the Model Concession Agreement should, I believe, provide the enabling environment necessary for a sustainable programme of commercialisation and modernisation of highways in India. This work should also be useful for other countries that are planning to commercialise their highways. In addition, this would also be relevant across other infrastructure sectors such as power, telecom, ports, airports and water supply that face similar issues.

I dedicate this work to the nation in the hope that it would accelerate the growth and development of India.

September 2000

Gajendra Haldea

A COMPREHENSIVE COVERAGE

This book addresses all issues and concerns relating to privatisation of highway projects.

Provisions of the Concession Agreement include:

- The Concession, scope of project, conditions precedent, obligations and warranties
- Right of way and title
- Construction, its monitoring and tests
- Change of scope
- Operation and maintenance
- Safety requirements
- Traffic regulation, emergency operations etc.
- Independent consultant
- Concession fee
- User fee
- Financial close
- Grant and revenue shortfall loan
- Effect of GDP growth on concession
- Competing roads
- Escrow account
- State support
- Sovereign guarantee
- Insurance, accounts and audit
- Force majeure and termination
- Compensation for breach
- Assignment, change in law, dispute resolution
- Other provisions typical of such agreements

The Schedules include :

- Site of the project
- Phased development of the Project Highway
- Project facilities
- Standards and specifications
- Performance security
- Drawings, applicable permits etc.
- Project completion schedule
- Tests
- Completion certificate
- Maintenance requirements
- Safety requirements
- Traffic census and sampling
- Selection and TOR of Independent Consultant
- Fee Notification
- Escrow Agreement
- State Support Agreement
- Tripartite Agreement
- Sovereign Guarantee
- Substitution Agreement
- Panel of chartered accountants
- Guiding principles for augmentation of national highways

FOREWORDS

“Shri Gajendra Haldea... had been actively associated in policy formulation relating to various infrastructure sectors. His contribution in this area, especially insofar as it concerns the power sector, is widely recognised... Shri Haldea played an important role in the evolution of a policy and regulatory framework for commercialisation of highways... with his wide experience in legal and economic matters pertaining to infrastructure... refined the model framework addressing all relevant issues in minute detail and in accordance with international best practices. I am extremely pleased with the impressive outcome of Shri Haldea’s effort in the shape of this thorough analysis and conceptual framework for attracting private investment ... It is comprehensive, well-designed and practicable. I am confident that the Government as well as other stakeholders will find this document of immense value.”

Shri Yashwant Sinha
Finance Minister of India

“The legal framework evolved by Mr.Gajendra Haldea... is indeed very comprehensive, and it addresses equitably the concerns of all principal stakeholders such as the Government, investors, lenders and above all the common citizen. It underlines transparency, fairness and disclosure, besides providing stringent obligations for ensuring the specified level of service for the users... As a contract... the agreement mitigates the risks of investors and lenders, which should enable them to price their services lower... unbundles the risks and allocates the same to parties best suited to manage them. It provides an effective interplay between risks and rewards throughout... The present contribution of Mr.Haldea will go a long way in the evolution of a BOT framework not only for the highways sector but also for other infrastructure services. The document is very cogent, well drafted and thought through. It should form an excellent base... will, undoubtedly, be of great assistance to all concerned.”

Justice B.N.Kirpal
Judge, Supreme Court of India

“Gajendra Haldea has produced a very valuable and detailed guide... to ensure success in commercialising road projects. He provides a comprehensive discussion of the technical aspects of road design, legal issues, economic considerations and regulatory issues... Few people are better qualified than Gajendra Haldea to undertake this task. During his tenure in the Finance Ministry... he had direct personal experience in dealing with private sector power projects. Later, he was also involved in the government's efforts to desire a suitable framework for private investment in the road sector. This volume bears testimony to his deep understanding of these problems and also his commitment to furthering ways of making private investment in infrastructure possible in a manner that would create public confidence which is so important if this effort is to succeed... I am sure this volume will be of great help to practitioners in this area, not only in India but also in developing countries in general.”

Dr. Montek Singh Ahluwalia
Member, Planning Commission, India

“The Private Finance Initiative is the United Kingdom’s programme for developing and financing public infrastructure with private management and private capital. Projects to a capital value of some \$14 billion (Rs.98,000 crore) have been successfully financed... against the background of our experience in the United Kingdom, I welcome and applaud Mr.Gajendra Haldea’s important contribution to establishing a framework for commercialisation of Indian Highways. I have had the great privilege of working on projects in India... and know how important it is, in India as in the United Kingdom, for Government officials to feel secure that the contracts they are negotiating do as much as is reasonably required to provide a reasonable framework for introduction of private capital, and yet both amply protect the public interest and achieve the best possible value-for-money for the tax payer. Gajendra Haldea’s Model Concession Agreement adopts and builds on many of the concepts and principles that underpin successful infrastructure financing programmes elsewhere in the world and will provide an invaluable touchstone for those immersed in the cut-and-thrust of negotiation. He is to be warmly congratulated on producing such a helpful framework.”

Mr. Adrian Montague
Deputy Chairman, H.M.Task Force on PFI
H.M.Treasury, London

“...*Indian Highways: A framework...* by Gajendra Haldea is particularly welcome and is to be commended. Mr.Haldea has been a senior participant in Government of India studies and deliberations about the introduction of private investment into the power sector and highways sector and has supplemented that work with substantial personal research and analysis. The presentation of a Model Concession Agreement... increases the prospect of private sector highways projects being implemented successfully in India. It increases the prospects that such projects will benefit from a full and dispassionate consideration of differing stakeholder interests, relevant commercial and financing requirements, the public policy dimensions of private investment and management of such projects, and international best practice. The full consideration of such factors maximises the likelihood of well-designed projects and well-designed government policies... and avoid many of the problems, controversies and delays.”

Mr. Barry Metzger
Consul General Emeritus, Asian Development Bank

REVIEWS

"Gajendra Haldea's work constitutes an excellent overview of this complex but fascinating subject in its proper political, social, geographical and financial context. Mr. Haldea has succeeded in establishing an ideal documentary basis... He has clearly had close regard to the various toll road structures adopted with varying degrees of success in other parts of the world such as the U.S., Latin America, Thailand, Indonesia, China, Malaysia and parts of Western Europe including the U.K., France and Greece. The production of this work is encouraging at a time when investment climate in India... has been given a significant boost... Mr. Haldea's work will be a boon to all prospective participants in toll road and highway development in India."

*Mr. Clive Ransome
Partner, Linklaters & Alliance
London*

"There is probably no one more qualified to apply lessons from the power sector and establish a framework for private sector involvement in the highway sector... Mr. Haldea spent several years heading the Ministry of Finance's effort to review and improve upon a number of high-profile power projects seeking Central Government support. His intense and intelligent efforts... helped to move those projects on a sound financial basis and to establish principles for this sector throughout the country... Mr. Haldea's Model Concession Agreement reflects the same insight and balancing of interests that he brought to the power sector... The Agreement seeks to address the needs of each of the parties.... He has included concepts from many international deals and adapted these to the unique features of the Indian landscape... The Model Agreement also serves as an excellent resource for anyone seeking to understand how toll road projects may be structured. I recommend this Model as both a teaching tool and a base document for any transaction. The country's efforts to attract private investment ... will be greatly advanced ... and Mr. Haldea should be commended for his fine effort."

*Mr. Gregory Ullman
Partner, White and Case
U.S.A.*

"Mr. Haldea has created a framework that will help those interested in project financing bridge the gaps of all interested participants... it provides a comprehensive and well thought-out framework... which will incentivise to build and operate roads. Mr. Haldea has written a model concession agreement that government officials and the private sector will likely draw on for many years to come... juggles the disparate interests of investors, users and the Government deftly and successfully... it recognises the central principle that it must be fair to all parties and be consistent with international financing practice ... it provides the level of detail which sophisticated lenders and investors require. It may be daunting to the uninitiated but for those who have successfully raised project finance capital... it will be quite familiar and easy to use. The work will be useful to lawyers, technical advisors, government officials, lenders and investors. Unlike many contracts issued by interested parties (either governments or developers), the model agreement is not a one-sided draft. Most importantly, this model recognises the special needs of lenders..."

*Mr. Garry S. Wigmore
Head of Asian Project Finance & Partner
Milbank, Tweed, Headly and McCloy
Singapore*

ABOUT THE AUTHOR

Gajendra Haldea studied Economics and Law at the University of Rajasthan and later went for a Fellowship at the London School of Economics. He is an officer of the Indian Administrative Service (1973).

Among a wide array of assignments, he has spent 10 years with the Union Finance Ministry where he was last posted as Joint Secretary (Infrastructure) until November 1998.

The combination of law, economics and finance coupled with his extensive experience in several sectors of the economy have placed him in a unique position for contributing to the evolution of the framework and policies for privatisation of several infrastructure sectors.

His work in the power sector, particularly in the evaluation and approval of Power Purchase Agreements in India is widely recognised.

While serving in the Finance Ministry, the author also drafted the Foreign Exchange Management Bill which has since been enacted by the Parliament. He has also presented several reports of far-reaching significance.

He is currently drafting the Electricity Bill, 2000 for the Government of India as a part of the restructuring and modernisation of the electricity industry in India.

He has been invited to join the National Council of Applied Economic Research, New Delhi as Principal Advisor and Head of the Centre for Infrastructure and Regulation.

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National Council of Applied Economic Research
Publications Division
11, Indraprastha Estate
New Delhi - 110002
Phone : (91-11) 3721338, 3317860, 3317861
Fax : (91-11) 3327164
E-mail : ncaer.org
Author's e-mail: ghaldea@ncaer.org