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MOBILISING CAPITAL

A VIKSIT BHARAT INFRASTRUCTURE DEVELOPMENT ACT COULD CODIFY KEY PRINCIPLES ON CONTRACT, LAND USE

Ensuring infra momentum

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IN AN ECONOMY with infrastructure needs as vast and varied as India's, mobilising private capital at scale is key for inclusive development. In this context, contracts are not just legal instruments; they are integral to the overall regulatory environment on which long-term investments rest. When ambiguity seeps into this regulatory ecosystem, the resulting stress is not only legal but also financial, institutional, and global. The December 2024 judgment in *Noida Toll Bridge Company Ltd v. Federation of NOIDA RWAs* has sparked renewed debate about the underlying legal frameworks governing public-private partnerships (PPPs). The ripple effects of this judgment will have a significant impact across India's infrastructure investment. At the centre of this shift lies the idea that a private concessionaire's right to collect user charges may be curtailed once a "reasonable return" based on historic interest rates is recovered. While the judgment dealt with a specific case, it raises a broader question: are long-term investments still protected by the predictability they were once promised? The consequences are not hypothetical. Over the next five years, India hopes to mobilise ₹3.5 lakh crore through infrastructure investment trusts, particularly in the road sector. These are not minor financial instruments; they are fundamental vehicles for converting public infrastructure into investible assets. Their viability depends on long-term, enforceable revenue streams derived typically from user charges. If judicial interpretation now suggests that these streams can be truncated based on a retrospective assessment of "reasonable" returns, the trust underwriting these investments begins to erode.

Consider the real-world impact. Investors calibrate their bids based on cash flow models that span decades. If the tail-end of those models is no longer legally secure, they will either exit the market or demand significantly higher return. The cost of capital will rise. The pool of risk-taking capital will shrink. This affects not only the major national projects but also municipal and state-level infrastructure, where project structuring is often more fragile. Projects such as the upcoming Jewar airport where long-term revenue projections and land-based concessions are central to financial closure could experience investor caution if the legal treatment of user fees remains unsettled.

Adding to the complexity is a lack of alignment in judicial interpretations on the treatment of PPP contracts. Just weeks after the *NTBCL* ruling, in February, a different bench of the Supreme Court delivered a verdict in *Racing Promotions Pvt. Ltd v. Dr. Harish & Ors*, holding that PPP contractual arrangements fall outside the scope of public interest litigation (PIL) scrutiny. This judgment recognised the evolution of economic policy toward public-private collaboration and reaffirmed that courts should not interfere with commercial agreements under PIL. The juxtaposition of these two rulings within weeks of each other has created a situation where fundamental questions around legal risk in PPP projects remain unresolved. This divergence in interpretations, though reflective of the evolving legal discourse, has introduced new considerations for risk assessment in PPP financing. For lenders, developers, and policymakers alike, the uncertainty underscores the need for predictable jurisprudence, consistent regulatory guidance, and clear contractual frameworks that reduce ambiguity and reassure investors of long-term stability. It also complicates the task for institutions like the National Highways Authority of India, Airports Authority of India, or urban development authorities looking to attract private capital for long-gestation projects. In the absence of a clear and consistent legal baseline, private investors may increasingly seek judicial pre-clearance.

> **The *NTBCL* ruling may be a single node in a complex system, but it has lit up the vulnerabilities that exist within**

What, then, might a forward-looking response look like? One possibility is legislative. A dedicated law under the banner of a Viksit Bharat Infrastructure Development Act could codify key principles around contract enforcement, land use, and revenue mechanisms. Such a statute could also embed transparent dispute resolution mechanisms, define the respective roles of the Centre and states, and create predictable norms for risk-sharing that reduce transaction costs for both public and private partners. This would not diminish judicial scrutiny, but it would provide a clear framework within which such scrutiny can operate. Another option is procedural innovation. The Supreme Court could consider setting up a mechanism akin to an "advance ruling" process for PPP concessions. Just as advance tax rulings offer legal clarity for investors, such a mechanism could ensure that large, long-term PPP contracts are vetted at the outset for legal and public policy alignment. This would insulate projects against litigation risk but may require careful balancing to avoid project delays. In practice, such conditional vetting would operate less as a barrier and more as an enabling device, offering reassurance upfront while still allowing judicial review if fundamental concerns arise later. Meanwhile, project developers and lenders could begin including conditionality clauses that require the contracting authority to obtain judicial confirmation that the concession is aligned with public interest, if such doubts persist.

Ultimately, moving towards greater coherence may require deliberation at the judicial level. The Union of India may consider seeking a review of the *NTBCL* judgment and request that it be referred to a larger bench for clarity. Pending such review, temporary measures could be considered to minimise uncertainty and allow for informed stakeholder engagement. None of these solutions are quick fixes but they are necessary if India is to maintain its momentum as a destination for infrastructure capital. With rising interest in logistics, urban mobility, clean energy, and digital infrastructure, the country stands at a moment of immense opportunity. Yet this moment demands that its institutional machinery, especially legal and financial, operate in coordination and work in close synchrony, ensuring predictability, stability, and confidence for all stakeholders. The *NTBCL* ruling may be a single node in a complex system, but it has lit up the vulnerabilities that exist within. Whether India can close those gaps through law, practice, and institutional design will determine whether its infrastructure ambitions remain bankable. Investors are watching, and so are the projects yet to be built.

Series concludes

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● PPP LANDSCAPE

NTBCL CASE HIGHLIGHTS IMPORTANCE OF LEGAL ARCHITECTURE THAT KEEPS PACE WITH INFRA FINANCING NEEDS

A moment for reflection

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AS INDIA MOVES steadily toward its 2047 development goals, building resilient and modern infrastructure remains a critical foundation for inclusive economic growth. Given the sheer scale of investment required, this development hinges significantly on long-term financing outside of the public sector. Over the past two decades, public-private partnerships (PPPs) have emerged as a key instrument to mobilise such capital, enabling transformative projects across roads, airports, ports, and municipal infrastructure. A key ingredient supporting this momentum has been the legal and institutional consistency that underpins investor trust. This legal and institutional alignment has served to strengthen and reinforce the overall credibility of the PPP model.

In December 2024, the Supreme Court's judgment in *Noida Toll Bridge Company Ltd v. Federation of NOIDA Residents Welfare Association* brought fresh attention to the legal framework governing PPPs. The court held that where a private concessionaire builds infrastructure on land granted by a government agency, the developer is entitled to recover the cost of construction and a "reasonable return", understood with reference to prevailing bank interest rates at the time of signing contract. Beyond this point, toll collection or user fees must cease, irrespective of the original concession duration.

This interpretation invites a broader discussion. At its core, infrastructure financing requires a stable and predictable framework that assures investors and lenders of enforceable contracts, providing clarity on recovery of capital and sustainable returns over an extended project life. Such confidence is essential to mobilise both domestic and international capital at scale. For example, the National Highways Authority of India is pursuing an ambitious monetisation programme using infrastructure investment trusts, aiming to raise ₹3.5 lakh crore in the coming five years. These vehicles aggregate toll revenues across road assets, thereby enabling long-term investment based on anticipated user charges and traffic growth over the project lifespan. This structure is premised not only on recovery of construction costs, but also on the continued levy of user fees that remain competitive with returns from other financial instruments and alternative asset classes. Importantly, this principle is not confined to national highways; it equally applies to municipal and state-level infrastructure, including urban transport, water supply, and renewable energy. In this context, judicial observations that may be interpreted as suggesting user fees are limited merely to construction recovery plus nominal returns could inadvertently create uncertainty for investors. The key question, thus, is whether such interpretations adequately reflect the commercial models and financial assumptions on which infrastructure projects are designed, structured, and financed today.

> **There may be merit in exploring mechanisms that improve alignment across the judiciary, executive, and legislature**

It's also important to consider the implications for the broader PPP architecture. Special purpose vehicles (SPVs), often formed to implement infrastructure concessions, are central to how projects are structured, financed, and ring-fenced from broader risks. The court's observations on SPV formation without public tender may raise significant questions for ongoing and future projects, many of which follow similar models under established policy frameworks and government guidelines. This could, in practice, create hesitation among private developers and financial institutions who generally rely on a consistent interpretation of contractual norms when committing resources to large, multi-decade projects. It may be useful here to revisit how Indian jurisprudence has evolved in this domain. Since the 1990s, courts have recognised the distinct nature of PPP contracts involving private risk-taking, long-term financing, and investment. In the *Nandi Infrastructure Corridor* case (1998), the BOOT (build-own-operate-transfer) model was upheld as a valid mechanism, even where land was also provided for township development. In 2006, challenges to airport concessions were not entertained, with the court noting that judicial review does not extend to re-evaluating policy decisions taken by government committees with technical expertise. Similarly, courts have often acknowledged that the balance between public interest and commercial viability requires careful consideration, leaving space for executive agencies to frame flexible solutions tailored to sectoral requirements. In the *GIFT City* and *Production Sharing Contract* cases (2013), the court observed that economic policy decisions must be viewed in their administrative context and not judged solely through the lens of audit observations or procedural formality. This general trajectory of judicial deference to executive discretion in economic matters was reaffirmed in 2022, in the *Bullet Train Project* case, where the court noted that international funding arrangements, such as those by the Japan International Cooperation Agency, should not automatically trigger judicial interference. In this light, the Noida Toll Bridge Company Ltd (NTBCL) decision appears to take a somewhat different approach. It applies provisions of the 1851 Indian Tolls Act, a law designed for projects funded by the government to privately financed concessions. It frames the grant of land as a form of public largesse and characterises the collection of user fees as a quasi-fiscal act. These legal characterisations may not align with how PPPs function in practice, especially when the private partner bears substantial capital risk.

While judicial oversight remains a cornerstone of democratic accountability, given the scale of India's infrastructure ambition and the role of private capital in delivering it, there may be merit in exploring mechanisms that improve alignment across the judiciary, executive, and legislature. The *NTBCL* case presents an important opportunity for reflection. It underscores the importance of coherent and forward-looking legal architecture that keeps pace with India's infrastructure financing needs. While the judgment is now part of the legal landscape, it also opens space for constructive discussion on how best to support the long-term goals of Viksit Bharat. Its implications for investment, financing structures, and institutional reform merit deeper examination; questions that will likely continue to shape the discourse in the months ahead. This is particularly relevant for emerging mega-projects such as the Jewar airport, which hinge on robust revenue projections and land-based concessions. How such ventures navigate legal interpretations of risk, return, and public benefit will be watched closely.

This is the first of a two-part series