



Back on track?

While investment inflows could fall well short of official predictions, investors are showing cautious optimism in the struggle to bring India's creaking infrastructure up to date

George W Russell reports from Bangalore

The cursing drivers on Bangalore's clogged roads won't believe it; nor might the frustrated captains awaiting a berth at the bottlenecked Jawaharlal Nehru Port near Mumbai; nor would the thousands of fans at Eden Gardens in Kolkata booing in the dark following a power outage during a recent India-Sri Lanka cricket match, but the Indian government says it is determined to catch up on the country's massive physical infrastructure deficit.

Prime Minister Manmohan Singh has made infrastructure improvement a key plank of his administration's second term in office. "The results are yet to be seen but the government appears to be more resolute than its predecessor in terms of initiatives and early actions," says Anoop Seth, co-head of Asian infrastructure at the Mumbai office of AMP Capital Investors, a Sydney-based investment manager with A\$110.2 billion (US\$96.9 billion) under management.

Lawyers agree that the second term of the Singh government is likely to see more activity. Many see his renewed mandate – expected to continue until 2014 – as the springboard to launch major projects. "The year 2009 was one of uncertainty – not only in light of the global financial crisis but also due to political uncertainty of elections and the formation of a new government," says Rajiv Luthra, managing partner of Luthra & Luthra in Delhi. "Now that things appear to be settling down, some measures and policies are taking shape."

Empty promises?

According to the Planning Commission of India, about US\$500 billion of funding has been earmarked for new roads, seaports, power stations, railways, airports, canals and other major infrastructure projects under India's 11th Five-Year Plan (2007-2012). This figure means total infrastructure

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Sanjeev Dhuna
Partner
Allen & Overy



spending should account for around 8% of gross domestic product (GDP) in 2007-2012, compared with 4.6% of GDP under the 10th Five-Year Plan (2002-2007).

More than halfway through the current plan, however, some observers believe the targets are unattainable. "The US\$500 billion announced to be spent on infrastructure projects by 2012 sounds impressive," admits Daniel Sharma, a partner in the Brussels office of Heuking Kühn Lüer Wojtek, a Düsseldorf-based firm. "However, in practice we seem to experience a certain gap between public announcements and real implementation of projects."

While the Planning Commission insists inflows are on track – a revised official figure is due in February or March – its respected deputy chairman Montek Singh Ahluwalia mentioned a lower figure of US\$400 billion at a conference in December 2009. Meanwhile, Vinayak Chatterjee,

chairman of Feedback Ventures, a Delhi infrastructure services company, and head of the Confederation of Indian Industry's National Council on Infrastructure, estimates that total investment in 2007-2012 could be as low as US\$280 billion.

The problem with private funding

Clients and law firms have underscored the difficulties facing those seeking to finance infrastructure projects in India. Private equity funds, for example, cite concerns such as the unavailability of fixed-rate financing over a long-term concession period. "Unlike other nations, where a vibrant bond market serves as an alternative avenue for financing and refinancing, the bond market in India has not grown substantially," notes Rajesh Narain Gupta, managing partner of SN Gupta & Co in Mumbai.

A lack of liquidity is only part of the problem that India needs to address, according to a recent analysis by international law firm Allen & Overy. "A more fundamental issue is the lack of legal and policy frameworks in these markets that provide certainty for investors looking to put up funding to secure these projects," London banking partner Sanjeev Dhuna noted.

Last year, union road transport and highways minister Kamal Nath took India's "infrastructure road show" to major cities in Europe, the Middle East and North America, seeking to raise investment. Unlike China, where state-owned enterprises have invested heavily in infrastructure, the Indian government

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Tanya Mehta

Advocate

PSA Legal Counsellors



expects that nearly a third of its infrastructure funding under the current plan will come from the private sector.

The ministry's original plan called for US\$20 billion in road construction tenders to be issued in the first quarter of 2010. However, most foreign investors balked at the government's proposed regulatory framework. Now Nath – who returned to London in early February for another round of talks with British officials and potential investors – hopes to attract that figure by June.

To some critics, the Ministry of Road Transport and Highways' programme to improve India's roads illustrates the ambition – and to some, an absence of realism – of the whole infrastructure agenda. According to the Five-Year Plan, India's construction crews should be able to build 7,000 kilometres of roads annually – that's 10 times the distance they managed as recently as 2006.

Recent Indian successes have been high profile but few and far between: politicians still point to the Metro rail network in Delhi as an exemplar of a new "can-do" attitude in India, despite the fact that its first line opened eight years ago. Meanwhile, the landmark Bandra-Worli Sea Link – an eye-catching cable-stayed suspension bridge designed to relieve Mumbai's notorious traffic snarls – was 46 years in development before it partially opened in 2009. Bangalore's Namma Metro network could open years behind schedule.

Calculated investments

The recent financial crisis did little to generate optimism among clients, according to law firms. "In the last year there was definitely scepticism among clients to start new projects," says Tanya Mehta, an advocate with PSA Legal Counsellors in Delhi. "The tendency was to follow the 'wait and watch' approach."

One recession-induced factor that is expected to have only a short-lived impact on investment is lower commodity prices. "Despite lower costs of raw materials, developers are apprehensive about borrowing huge amounts or launching new projects that require huge investments," says Raja Sujith, a partner at Majmudar & Co in Bangalore.

"With the upturn in the global economy and continuing support from the central and state governments, the confidence will return and we will see the kind of growth promised in the pre-recession days," Sujith adds. "We are

already witnessing greater enthusiasm by domestic and foreign investors in the infrastructure sector today."

Lawyers say many potential foreign investors were scared off by the roiling markets in their domestic territories during 2008 and 2009. However, some have made cautious forays into India despite the mood at home. Australia's Macquarie Group, State Bank of India (SBI) and International Finance Corporation – the private-sector-investment arm of the World Bank – launched an Indian infrastructure fund that raised more than US\$1 billion in 2009.

AMP Capital Investors is another bullish player. In 2008 the company launched its Asian Giants Infrastructure Fund, a private company designed to capture infrastructure investment opportunities in India and China. "There is opportunity in virtually every sector," says Seth.

Renewed confidence

International law firms report increased interest from clients. "There appears to be a genuine re-emergence of non-Indian corporate and project finance interest in the infrastructure sector," says Jeremy Sheldon, a partner with Fulbright & Jaworski in Hong Kong. "India needs to encourage this renewed interest principally by alleviating any unnecessary constraints on the investment process and generally by continuing to work toward further liberalization of its foreign investment laws and policies."



ALL ABOARD: Investors are returning to infrastructure projects.

The government is incentivizing investments in infrastructure through state support or financial and tax benefits

Prabjot Singh Bhullar
Partner
Khaitan & Co



Observers point out that, to its credit, the government has been able to tweak its road investment policies in response to market demands. “The prominent example has been the National Highways Authority of India, which has restructured almost all its projects in order to make them viable, and the Ministry of Road Transport and Highways, which has revised the [terms] for public-private partnership (PPP) projects,” says Manju Mohotra, chief

executive officer of Singhania & Partners in Noida.

As the impact of the crisis on India turned out to be more muted than originally expected, investors have become more open-minded. “Most of our clients do believe that the crisis had a short-term impact but they are optimistic that the current environment is conducive for not only completing projects but also starting new ones as the government is incentivizing investments in infrastructure through state support or financial and tax benefits,” says Prabjot Singh Bhullar, a partner with Khaitan & Co in Delhi.

Another reason for the renewed confidence is that India is one of the few countries showing an increase in project finance activity since 2008. The Indian government’s US\$20 billion in stimulus packages in the wake of the global downturn also had a marked effect on infrastructure investment. “The stimulus packages have boosted the growth of the infrastructure sector by removing the ceiling on external commercial borrowing, enabling borrowers to access funds from abroad, allowing aggressive rate cuts, and giving greater borrowing powers to IIFCL [India Infrastructure Finance Company] to infuse liquidity,” says Mohotra.

Other lawyers point to developments to promote alternative funding mechanisms. “One interesting development on this front is an initiative to evolve model documentation for PPP by the Planning Commission,” says Luthra. A number of law firms have been involved in formulating PPP policies: J Sagar Associates, for example, developed guidelines for PPP practices for the Union Ministry of Urban Development as a part of a World Bank team.

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- Bid Process Management – Due Diligence of the Bidders Constitution documents of Special Purpose Vehicle (SPV), performance security etc submitted by the concessionaires, evaluation of criteria, selection of the bidder, signing of the concession agreement/power purchase agreement.
- Dispute Resolution – Representing the client in various courts / arbitrations for disputes arising out of bid process or implementation of the contract.

The firm has acted for the developers, lenders, borrowers and central and state government authorities for various projects. Infrastructure group works in close coordination with the corporate & commercial group, project finance group and dispute resolution group to ensure that the contracts and documents drawn up reflect the clients’ interest at all times and provides services in drafting / negotiating various legal documents underlying the careful legal risk management approach in this sector.

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Luthra, meanwhile, adds that the Planning Commission is also leading an effort to evolve draft model legislation in areas which are in the legislative domain of the states. "This will particularly help states and a large number of local authorities that have lagged behind in establishing the contractual and legal framework for public-private participation," he says.

One of the likely factors behind any major resurgence is changes to the role of the state-owned IIFCL, the country's principal infrastructure finance vehicle. IIFCL, established only in 2006, provides equity and raises long-term debt from the domestic market, bilateral and multilateral institutions and through external commercial borrowings backed by sovereign guarantee.

IIFCL has prepared a take-out financing scheme – a method by which banks can manage their books by providing medium-term loans for longer-duration projects – to enable lending to infrastructure projects. "This is because most banks have resources with average tenure of three to four years while infrastructure loans usually have a 15-year repayment tenure," notes Sumanto Basu, a partner with J Sagar Associates in Delhi. "This leads to asset-liability mismatches."

The central government has also introduced a number of other initiatives, such as Viability Gap Funding, the National Urban Renewal Mission, and the Bharat Nirman Programme for Rural Infrastructure, as well as tax incentives in certain sectors such as airports and highways. "The central and state governments have established a 'single-window system' to accord all pre-project clearances at the state level," adds Shabbir Wakhariya, a partner at Kelley Drye & Warren.

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Shabbir Wakhariya
Partner

Kelley Drye & Warren



Barriers to completion

Lawyers and their clients are well aware that obstacles to significant infrastructure investment remain. "Land acquisition is the single most important reason for delays in project completion and consequent cost overruns," says Basu. "This is primarily because the resource is limited and the acquisition of land by government is often resisted due to inadequate compensation for the land as well as because of involuntary displacement of people and loss of their livelihood."

Going Green?

Environmentally friendly infrastructure projects take hold

Despite the collapse of a climate change accord at Copenhagen in December – an outcome partially blamed by some observers on India – the Manmohan Singh government has been surprisingly progressive with policies to develop infrastructure around renewable energy and other "green" technology.

Law firms have welcomed initiatives to foster non-fossil fuel technologies, such as biomass generation and solar power. Anand Desai, managing partner of DSK Legal in Mumbai, hopes the government will push through a policy shift in renewable energy sources.

DSK's clients include biomass generation players such as TFJ Partners and the Maharashtra Biomass Energy Developers Association. "We understand from our clients that the current prices being paid to them as per the fixed tariff have caused serious concerns," Desai adds. "Hopefully, with a lot of stress being put on green energy by the governments at the centre and the state level, things should be better for them."

Lawyers say India lacks regulation and policy covering newer technologies. "Interventions are required to mandate the procurement of larger quantities of green power

even though this may have an impact on aggregate costs of power," says Aparajit Bhattacharya, a Delhi-based partner at Hemant Sahai Associates. The firm has been retained by the Clinton Foundation in relation to the giant solar park projects proposed for Gujarat and Rajasthan.

International firms are also at the forefront of renewable energy projects in India. "The Indian governmental stimulus is helping to jump-start development in certain areas, such as the solar energy front," says Bob Nelson, a partner with Akin Gump Strauss Hauer & Feld in San Francisco, who was recently appointed head of the firm's worldwide renewable energy practice.

Akin Gump advises a consortium comprising India's Mahindra & Mahindra, Germany's Uhde and Spain's Sener on the development of a series of utility-scale solar thermal power projects. It is also working with clients in biomass and biofuels generation facilities and on a photovoltaic solar power joint venture.

A German firm, Heuking Kühn Lüer Wojtek, has been advising a private equity fund on the structuring of clean energy projects in India. Most firms, however, have concentrated on traditional infrastructure.

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Sumanto Basu

Partner

J Sagar Associates



Land-acquisition legislation is long overdue; current laws date back to the Raj. West Bengal used a Union law, the Land Acquisition Act of 1894, as the basis for its policy in 2007 and 2008 of enforcing compulsory expropriation of land for industrial projects. The languishing Land Acquisition (Amendment) Bill, 2007, and the Rehabilitation and Resettlement Bill, 2007 – designed to create a new framework – have been reintroduced to the current parliament.

Another issue is bottlenecks in the approval process. The government's draft foreign direct investment regulatory framework, expected to be in effect from April 2010, is expected to bring in more transparent, investor-friendly policies. At the sub-national level, notes Luthra, progressive states such as Gujarat, Karnataka and Tamil Nadu have made efforts towards streamlining project approvals.

Lawyers also point out that infrastructure projects can be affected by a host of issues unrelated to contracts, laws or regulations. "International investors must be aware that an infrastructure project will almost never remain unaffected by non-legal factors, such as local politics, cultural or emotional conflicts," says Sharma.

Manpower is another factor affecting project outcomes. India has exported vast numbers of its best engineers, technicians and project managers to North America, Europe and the Middle East, leaving a more limited pool at home. "Can they attract sufficiently skilled people to effectively manage large projects?" asks Valérie Demont, a partner at Pepper Hamilton in New York. "The engineers? The technicians?"

China faces ambivalence

Some countries are finding that even a willingness to invest in Indian infrastructure doesn't bring out the welcome mat. The government recently issued more restrictive guidelines for foreign direct investment, particularly

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concerning infrastructure projects undertaken by foreign companies. "There is a general belief in India that foreign companies engage in espionage," says Vijay Sakhuja, a director at the Indian Council of World Affairs, a Delhi think-tank.

The restrictions are directed mainly at Chinese state-owned corporations. Several infrastructure-related tenders by Chinese companies have been rejected in recent years. In 2009 a US\$6 billion tender by the Chinese telecommunications giant Huawei was rejected in favour of a competing bid by Sweden's Ericsson. "The Chinese have questioned the policy of imposing restrictions on Chinese products and infrastructure projects," Sakhuja adds.

For its part, Huawei says it will continue to tender for Indian projects. In January 2010 Huawei pledged US\$500 million to expanding its India operations, located in Bangalore, and said it would eventually triple its Indian workforce to 6,000 people. Indian developers are counting on that kind of confidence to shore up its creaking infrastructure. ■

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Daniel Sharma

Partner

Heuking Kühn Lüer Wojtek



Work in progress

Despite the economic slowdown, many of India's leading law firms have kept infrastructure projects moving

Over the past 12 months, Amarchand Mangaldas has advised lenders in relation to the US\$5.5 billion IOC Paradip refinery, the US\$2.6 billion Dahej ethylene cracker and the US\$1.7 billion Jharsuguda coal-fired power plant. The firm also advised the State Bank of India on the launch of its Indian infrastructure fund with Australia's Macquarie Group.

Meanwhile, Luthra & Luthra has been involved with the US\$3.8 billion Sasan power project, the Dahej project and the US\$1.8 billion Mundra power project.

India Law Services advised lenders on the US\$3.3 billion Vodafone Essar Seven Circles GSM network, the US\$1.3 billion Gondia power project and the US\$886 million widening of the Panipat-Jalandhar section of National Highway 1.

Singhania & Partners acted as legal counsel to the Ministry of Road, Transport and Highways for 20 national highway widening projects, advised Mormugao Port Trust for development of an iron ore export terminal in Goa and advised Power Finance Corporation on tariff-based bidding for four power projects in Rajasthan and two in Punjab.

DSK Legal advised Nandi Economic Corridor Enterprises in connection with raising Rs4.41 billion (US\$95 million) from a consortium of bankers and financial institutions for construction of 41 kilometres of peripheral road across Bangalore; Power Finance Corporation and the Ministry of Power with respect to power projects; and Maharashtra State Electricity Distribution Co in appointing distributors.

J Sagar Associates advised the Asian Development Bank on the feasibility of non-sovereign lending to

the Pimpri-Chinchwad Municipal Corporation for the US\$456 million rapid transit system in Pune; Isolux Corsan in relation to the development of the Panipat-Jalandhar section of National Highway 1 in Punjab and SNC Lavalin of Canada in its consortium arrangement with Reliance Infrastructure for the Mumbai Metro (Phase II) project.

Khaitan & Co advised NTT DoCoMo in relation to its acquisition of a 26% stake in Tata Teleservices for US\$2.7 billion; Blackstone on acquiring a stake in Gateway Rail Freight; Krishnapatnam Port on issues related to its port project in Andhra Pradesh; and Larsen & Toubro Power Development in a 1,320-megawatt power generation project in Punjab.

Majmudar & Co is representing Engineered Arresting Systems Corporation for an airport project in Kozhikode (Calicut), a Gujarat government entity on an oil pipeline sale agreement and Baktie Consultants (India) in a consortium on the Maharashtra State Road Development Corporation toll bridge project.

Hemant Sahai is advising Cidco on the development of the greenfield Navi Mumbai International Airport project and is also involved in a project initiated by Indian Railways for procurement of diesel locomotives.

PSA Legal represented a consortium in provision of supplies and services to the Delhi Metro Rail Corporation and advised another consortium in a Konkan Railways project.

SN Gupta & Co launched its infrastructure practice in 2010 with three mandates in the power and airport sectors, while Kanga & Co advised on a public offering by ARSS Infrastructure Projects.