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Responsible Business Conduct in Indian Infrastructure Sector: Experiences and Lessons for Policy

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I. Background

Current level of annual Gross Capital Formation in the Infrastructure sector in India is about 4.6% of the GDP. This needs to be ramped up to 8% during the course of the 11th Five Year Plan (2007-2012) if the country is to realise its ambition of double-digit growth. A significant scaling up of investment from the public as well as private sectors would be required for this. While public investment in infrastructure would continue to increase, the role of the private participation (both domestic and foreign) needs to expand significantly to address the deficit in infrastructure services.²

Infrastructure has often been considered the bottleneck holding up economic development in the country. Realising this the Indian Government has initiated several initiatives to improve infrastructure facilities in the country, to which certain sub-sectors have responded positively.

Some sub-sectors of the infrastructure sector in India have shown signs of growth, especially over the past few years. A recent estimate does predict that the sector would grow at a rate of 15 % per annum. Various factors can be attributed to the growth that has been witnessed in some of the segments of the Indian infrastructure sector, which includes³:

- ***Need:*** There is a felt-need for improvement of infrastructure facilities and services in the country in order for the benefits to accrue to a vast majority of its population, which is still beyond the coverage of basic infrastructure facilities. Experts believe that the relationship between infrastructure development and economic growth is mutually reinforcing – thereby suggesting that better infrastructure facilities would help improve economic growth which is a pre-requisite for eradication of poverty in a country like India⁴.
- ***Political Will:*** Indian government has initiated an ambitious reform programme, involving a shift from a controlled to an open market economy. Building further on the initiatives taken by the

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² Conference on 'Building Infrastructure: Challenges and Opportunities' October 7, 2006, India organized by Government of India and India Brand Equity Foundation (IBEF).

³ Collated from India Brand Equity Foundation (IBEF) report entitled, 'Infrastructure' for dissemination at the World Economic Forum, Davos, January 2006 and other sources

⁴ Provided appropriate measures are in place that take care of the 'distributional aspects'.

previous Government, the incumbent Government is undertaking several measures to enhance the quantum of investments in the infrastructure sectors

(Some of the measures that underscore the government's willingness to develop the sector include:

- i. Public-Private-Partnership (PPP) projects - there has been renewed interest towards public-private-partnership endeavours in infrastructure;
 - ii. Special Purpose Vehicles (SPV) – SPVs like the India Infrastructure Finance Company Limited have been mandated to facilitate long-term debts to promoters of infrastructure projects)
- Funding from Multilateral Agencies: Multilateral Agencies such as the World Bank and the Asian Development Bank (ADB) are funding various infrastructure projects on a large scale in India. Other agencies include the Japan Bank for International Cooperation (JBIC) that funded the Delhi Metro Railway (underground railway in Delhi) project. Various state governments are also mobilising funds from these agencies to support rural roads and sanitation programmes.
 - Increased private participation: To encourage private sector participation in the sector, the government has announced several tax breaks for investments. It is also devising return schemes that are attractive for the private investors like annuity payments and capital grants for road projects. Laws are being enacted to improve the finances of utilities and make their management for transparent, so as to improve returns on these investments.
 - Innovative modes of funding: The Government is tapping alternative sources of funds for infrastructure development. One of these is the cess on petrol and diesel, which is being used to fund road projects such as the Golden Quadrilateral and the North-South East-West corridor in the country. It is also contemplating levying a tonnage tax on ships (to fund development of ports), and a special tax on air travel (for airports development).

II. Foreign investment in India

The Indian government (at the centre and the state levels) has been consciously developing the enabling environment to attract private investment from foreign sources. India has emerged as one of the investment 'hot-spots' in the region and indeed the world, and its huge market has attracted the attention of various Multinational Enterprises (MNEs).

The country's FDI policy (2006) recognises the positive contribution that increased foreign investment would have on the country's long-term economic development and in strengthening its infrastructure services. India's attitude towards foreign investment has changed significantly during the past decade. Until the 1980s, foreign investment was permitted only in cases where the desired technology was not obtainable in any other terms. With the introduction of the Statement on Industrial Policy of 1991, the government began taking a more liberal attitude towards investment from outside. In 2000, the Foreign Direct Investment (FDI) policy was further liberalised and now foreign investment up to 100 per cent for new and existing companies/firms, is permitted under the automatic route (i.e., without requiring prior approval) for all items/activities except for a few specific sectors.

In addition, the government has embarked on an endeavour to develop a policy framework for infrastructure regulation, thereby harmonising the features of regulatory governance across various segments in infrastructure, in order to encourage private investment⁵. This is consistent with the new approach of the government that makes space for public-private-partnerships in provision of infrastructure services combined with extensive state regulation for safeguarding user and producer interests.

With increasing attempts to facilitate decentralisation and increased participation at all levels of the government in the reform process, the focus of the reform process in India has also encouraged state governments to create 'enabling environment' to attract increased private sector participation (both domestic and foreign) particularly for infrastructure development.

⁵ Planning Commission, Government of India, 'Approach to Regulation: Issues and Options', (*Consultation Paper*), August 2006.

Encouraging private investment for infrastructure development in India, being a priority of various multilateral agencies, especially Bretton Woods Institutions (BWIs) – the country has witnessed the entry of a large number of foreign Multinational Enterprises in various segments of infrastructure. Analysts assert that more than anything else, investment in infrastructure would help the nation progress towards achieving growth and eradicating poverty.

III. FDI and Development – is there a consensus?

There is a dichotomy of views among scholars and practitioners with regards contribution of Foreign Direct Investment towards development in the third world countries. The literature is replete with cases that show that FDI has both positive and negative impacts on socio-economic aspects in Developing countries.

The following table enlists some of the benefits and risks from foreign investment initiatives, especially from the perspective of economic well-being of the host country⁶:

Table: Benefits Vs Risks from FDI projects

Benefits	Risks
Overcoming domestic investment gap	Could lead to a reduction in domestic investment
Raising the productivity of labour and capital	Possible impact on domestic competition – when foreign companies engage in Mergers and Acquisitions thereby stifling competition in the domestic market
Generating employment	Impact on the balance of payments – when investors import more than they export
Easing the balance of payments constraints, with foreign investment constituting an inflow on the capital account	Instability – could result from swings in investors confidence
Raising exports – through investment by an export-oriented investment	Transfer pricing – true value of products entering and leaving the country may result in a drain of national resources
Access to technology (tangible and intangible)	
Access to new and lucrative markets	
Access to management skills and marketing resources	

Research has shown that FDI can and does make an important contribution to development in a number of ways, provided certain conditions are met, which relate to:

- The nature of projects undertaken
- The timing of a project
- Controlling the volume of capital flows

The impact of all investments including FDI is not only restricted to the socio-economic construct of a host country, but also pervade other elements of its society like environment, human rights etc. Effect of foreign investment, especially on environment in developing and least developed countries has been the topic of discussion in various fora at the national, regional and international levels (including at the 2002 OECD Global Forum on International Investment in Paris) and has been well documented.

Developing country governments including India are often confronted with situations when taking decisions on a foreign investment project, analysing the negative and positive outcomes from the initiative becomes

⁶ CUTS, 'Making Investment work for Developing Countries', 2001, pp. 5-7

difficult, due to several constraints. Often a trade-off arises between pure economic benefits from an investment and its long-term social and environmental impacts.

Experience indicates that factors stemming from the political economy sphere often determine decisions on infrastructure projects in developing countries. Sometimes, in zeal to earn valuable resources for governments, decision-makers overlook possible long-term impacts of foreign investments in host countries. This is also the case in India.

IV. Behaviour of Multinational Enterprises

Multinational Enterprises are expected to uphold the triple bottom line of 'economy-ecology-equity', as mandated by international codes of business conduct like the UN Global Compact, the OECD Guidelines for Multinational Enterprises (MNEs), etc for facilitating the process of sustainable development.

The present paper contributes to the debate on the impact of foreign investment to development, by taking a look at the contribution of Multinational Enterprises (MNEs) in certain segments of the infrastructure sector in India⁷. Specific analysis is made of two cases (projects) - assessing the behaviour of the MNEs engaged in those projects from the angle of the OECD Guidelines, particularly emphasising on the difficulties of observing the guidelines in a non-OECD territory like India. In the concluding section, the paper comes out with 'learnings' for national governments, inter-governmental organisations and multilateral agencies for operationalising the OECD Guidelines (and/or the Principles that form the bases of the guidelines) in a developing non-OECD country like India.

Regulation of the behaviour of multinational enterprises in host countries, especially those operating in the developing world remains a highly debatable issue. An issue that has to be addressed at various levels through the participation of all stakeholders if developing governments is to ensure that the benefits of foreign participation in their economies would lead to growth and equitable development. Multilateral agencies would have to facilitate this process by ensuring in-built monitoring and evaluation mechanisms in the projects they initiate.

V. Case Studies

This section has been carefully segregated into two parts. In the first part an account of certain segments of the Indian infrastructure sector (where participation of foreign investors have been appreciable) has been provided which demonstrate that foreign companies have facilitated growth of the sector while behaving responsibly; however some concerns regarding responsible business conduct still need to be addressed. In the second part - the account of two projects, which resulted in gross violation of various aspects of the OECD Guidelines is provided, and the weakness of observing these guidelines in a non-OECD territory like India, highlighted.

V.A Good News

Experiences in some of the segments in infrastructure sector have been encouraging. This section provides a brief overview of the telecom and highways sectors in the country, wherein increased participation by MNEs has resulted in enhanced growth in these sectors.

V.A.1 Telecom Sector

The telecommunication network in India is one of the largest in the world providing wide-ranging services such as basic, cellular, internet, radio paging, VSAT etc. Telecom is one of the fastest growing sectors of the economy, growing at an average of more than 20 percent over the last four years. The Indian telecommunication sector has undergone a major process of transformation because of significant policy

⁷ Keeping in view the vastness of the Indian infrastructure sector, it was not possible to undertake a detailed assessment of all the sectors, for the purpose of this paper. However, a brief analysis of select sectors and particular cases have been attempted through this paper, which would provide some idea of the existing issues regarding responsible business conduct of MNEs in Indian infrastructure.

reforms during recent times leading to increase in private investment (both domestic and foreign) in the sector, which in turn has increased the number of subscribers and lowered tariffs.⁸

Size of the market coupled with an enabling government policy (the ceiling on foreign direct investment was raised from 49 percent to 74 percent in 2005⁹) has attracted various foreign companies, ranging from Fortune 500 companies to small and medium enterprises, to the country's telecom sector. Global majors with a big presence in the country include Hutchison, Singapore Telecom, AT&T, France Telecom, etc.

According to estimates, the gross aggregate of foreign investments received over the period between 1991 and 2003 in the Indian telecom sector was worth INR 9,576.40 Crores (over US\$ 2 billion). In absolute terms this was the highest inflow of FDI into the telecom sector anywhere in the world. Of the total FDI flow in the sector, the lion's share (49%) has gone into investment in holding companies, followed by cellular services (27%) and manufacturing and consultancy (16%).¹⁰

Before 1984, telecom services and telecom manufacturing both were fully under the purview of Department of Telecommunications, Government of India. The decision to induct improved technologies came post-1991 (the period that marked the start of economic liberalisation in the country), when the volume of traffic led to the need for high capacity telephone exchanges. The Department of Telecom (DoT) identified technologies developed by Siemens, Ericsson, AT&T, Fujitsu, and Alcatel. According to the government regulations, these foreign companies had to set up manufacturing bases in India either directly or through technology tie-ups with Indian companies. Some of these identified companies established joint ventures with Indian manufacturers, thereby resulting in substantial transfer of technology and know-how to the Indian companies and enhancing the capacity of their employees/engineers. In the beginning of 1994, the government invited bids to operate cellular and basic telephone services from private operators. Private operators resorted to procuring telecom equipments from foreign sources on account of the ease of importing these equipments under the GATS regime. By 1997, Indian branches of foreign companies were allowed to carry out cash and carry wholesale trading, which enabled them to import and supply the equipment. This was an important landmark that set the future roadmap for the Indian telecom sector – many existing MNEs like Motorola, LG, Samsung, Nokia, Lucent, Alcatel, etc. became full-fledged traders.¹¹

The rise in the supply of telephone equipments and number of service providers (both private and foreign) in the country has had a dramatic effect on the telecom sector of the country. While about a decade ago owning a telephone was a matter of pride for an individual and far beyond the reach of an ordinary Indian, owning a telephone (especially mobile telephone) has become very common in the country and extremely affordable. The cost of telecom services in India has nose-dived over the years – something that could be attributed to the level of private participation in the sector and the ensuing competition.

However, with the rise in the number of subscribers especially in the cellular telephone service segment, reports regarding consumer complaints on excessive billing have also become frequent. Consumers often complain about excessive billing and the non-transparency of the billing system, issues that require immediate attention by companies as well as by the sector regulator (Telecom Regulatory Authority of India, TRAI¹²). Moreover, complaints have also been registered against some service providers who engaged in 'tele-shopping', thereby causing inconveniences to consumers and breaching their commitment to safeguard personal information of customers/subscribers.

⁸ Economic Times, 'India: A centre for excellence – a special report on infrastructure', 31st October 2006

⁹ Secretariat for Industrial Assistance, 'Press Note No. 5 (2005 Series)', Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

¹⁰ www.dotindia.com (Official website of the Department of Telecom, Government of India)

¹¹ Investment Policy Cell, 'Status Paper on Manufacture of Telecom Equipment in India', Department of Telecommunications, Government of India, 2004, pp. 1-4.

¹² Indian Government established TRAI to ensure orderly growth in the telecom services sector. TRAI is empowered to provide recommendations on various aspects related to the functioning of telecom services providers; discharge certain regulatory functions and fix tariffs for telecom services. TRAI was reconstituted following an amendment of the Act in 2000, which led to the creation of Telecom Dispute Settlement and Appellate Tribunal (TDSAT). TDSAT is responsible for adjudicating on disputes.

It could thus be inferred from the above account that MNEs engaged in the Indian telecom sector have upheld the OECD Guidelines in terms of – enhancing access to improved science and technology tools in host countries; making technology accessibility to consumers and promoting competitive outcomes in the Indian market. However, MNEs need to give extra attention to certain concerns especially pertaining to consumer interests, which have not been fully addressed. Further, on account of being a sector that has ‘security concerns’, it is expected that MNEs engaging in the telecom sector respect the internal security matters of India.

V.A.2 Highways Sector¹³

The National Highways Authority of India (NHAI) was constituted by an act of the Indian Parliament - the National Highways Authority of India Act, 1988. NHAI is responsible for the development, maintenance and management of National Highways entrusted to it, and on related matters. The Authority has been operational from 1995.

A flagship endeavour of the NHAI is the implementation of the National Highways Development Project (NHDP), which comprises of:

- Golden Quadrilateral – a plan of highways connecting the four metro cities of Delhi, Mumbai, Chennai and Kolkata; comprising of a length of 5,846 kms.
- North-South East-West Corridors – comprising of north-south connection between Kashmir and Kanyakumari (length - 4000 km) and east-west connection between Silchar and Porbandar (length - 3300 km).

The Total cost of NHDP has been estimated to be INR 54,000 Crores or US\$ 13.2 billion, and the project is being implemented in a phased manner. Resources required for the project is being raised from the following sources:

- Cess on Petrol and Diesel – US\$ 4.9 billion
- External Assistance – US\$ 4.9 billion
- Market borrowing – US\$ 2.4 billion
- Private sector participation – US\$ 1 billion

NHDP opened up the scope for engagement of several MNEs (currently from 27 countries) as contractors and supervision consultants¹⁴, helping implement various sections of the project. Further, the engagement of MNEs has also been facilitated through the involvement of World Bank and Asian Development Bank (ADB) - being the major external financiers for the project.

The implementation of NHDP is progressing well, with various sections of the project being successfully implemented, which has enabled the easy movement of people and goods across otherwise unfriendly routes. Effective communication networks is one of the pre-requisites of development for the movement of raw material and finished goods across the stretch of the country – this being particularly relevant for a country like India, where many parts still remain difficult to access. But, that doesn’t look like remaining the same with the NHDP, which the government is keen to conclude on schedule.

Both the World Bank and the Asian Development Bank are particularly insistent on undertaking Environmental Impact Assessment (EIA) for all the projects they funds under the NHDP and development of Resettlement and Rehabilitation Policy (R&R Policy) for projects that pose the threat of displacement of populations on account of construction/broadening of highways. This way they ensure that the projects they

¹³ This section has been prepared with information from the official website of the Ministry of Shipping, Road Transport and Highways (www.morth.nic.in), Government of India and the website of the National Highways Authority of India (www.nhai.org), and personal communication with some practitioners engaged with the National Highways Development Project (NHDP) in India

¹⁴ Ministry of Shipping, Road Transport and Highways, ‘Indian Highways: Emerging Opportunities for Profitable Partnership’, (Brochure), Government of India, 2006.

fund under the NHDP or otherwise in the highway sector doesn't adversely impact the lives and livelihoods of the local communities or cause irrecoverable damages to the local environmental resources. However, on some occasions EIA reports have been criticised for being biased and containing forged data. Companies implementing highway projects have sometimes also been alleged of not implementing Environmental Management Plans (EMPs), which lay down measures of ameliorating negative environmental aspects of such projects.

Quite often it is reported that foreign contractors appoint sub-contractors to carry out development of certain patches of highways. The treatment of labours engaged by these sub-contractors remains questionable, and has often been raised in the national media.

It is evident that engagement of MNEs in the highway sector has resulted in gains in terms of laying down the necessary communication network that enables easy movement of people and goods. In order to enhance observance of the guidelines better, the World Bank, ADB or other IFIs would need to ensure (by undertaking appropriate monitoring/feedback mechanisms) that MNEs engaged with implementation of specific projects execute the Environment Management Plans with equal commitment. Special attention would also need to be given on the plight of the casual and other labourers engaged in highway projects.

V.B. Sad News

This section takes a look at a few cases that raises concerns over the behaviour of foreign multinational companies engaged in the infrastructure sector in India, particularly when assessed from the perspective of the OECD Guidelines for Multinational Enterprises.

V.B.1 The Enron Saga

In 1992, Houston (Texas, USA) based Enron Corporation announced it would build a US\$ 3 billion natural-gas power plant in Dabhol, Maharashtra (located at a distance of about 180 kms. south of Bombay). The project was to be the poster child of economic liberalisation in the country – the single largest foreign direct investment deal in India's history.

Enron, made its first entry into the Indian electricity sector in June 1992 by signing a Memorandum of Understanding (MoU) with the power utility owned by the Government of Maharashtra (a state in the Western part of India), viz. the Maharashtra State Electricity Board (MSEB).

A first Power Purchase Agreement (PPA) was signed by the Dabhol Power Company (DPC), the Indian subsidiary of Enron and the MSEB, in 1993. This became controversial with allegations of corruptions in the deal¹⁵.

Enron started commercial operation of the first stage of the power project (with capacity of approximately 700 MW) from May 1999. Under the existing PPA, MSEB had to pay the DPC a minimum of US\$ 220 million a year for 20 years whether it needed the power produced or not¹⁶. MSEB was paying about INR 95 crores (nearly, US\$ 20 million at current exchange rate) per month to Enron as fixed capacity charges. There was enormous public outcry over this, responding to which the government appointed a High Power Expert Committee¹⁷ to 'review' the Enron deal.

In the report that the *Godbole Committee* submitted it was revealed that Enron joined hands with top political bosses, top-level bureaucrats to throw to the winds every legal provision that posed even the slightest hurdle for the project. The deal-making process was criticized for its haste, its lack of transparency and the absence of competitive bidding. This formed the basis for a widespread belief that corruption played a major part in the project's implementation.

¹⁵ India Infrastructure Report, 2002: Governance Issues and Commercialisation, 3i network, Oxford University Press, New Delhi, 2002, pp 179-185.

¹⁶ Asia Times, "Enron's eight year power struggle in India" (by Tony Allison), January 18, 2001

¹⁷ It was called the *Godbole Committee*, formed under the Chair of Madhav Godbole and comprising of experts in energy policy, infrastructure finance, international trade and public administration

Right from its inception, the Enron project had raised hackles on account of the following issues:

- There was no competitive bidding for the project and Enron colluded with the Maharashtra government;
- The project costs and power tariffs were higher than the other power projects in India, and the cost of electricity from the DPC project would significantly inflate prices in other areas;
- The MSEB agreed to buying all the high-priced power produced by Enron, whether there was demand or not, and if cheaper power was available from its own generating plants. These contracted annual payments to Enron would amount to Maharashtra's entire budget expenditure;
- The project authorities carried out no environmental impact assessment of the project;
- Enron paid US\$ 20 million as "educational gift". Critics considered this to be bribes to clear the project;

In January 1999, international watchdog organization *Human Rights Watch* published a report that alleged Enron's complicity with human rights abuses connected with DPC. The report recounted incidents of farmer's land stolen, water sources damaged, officials bribed and opponents of the project arrested on trumped-up charges. In 1997, the state police attacked a fishing village where many residents opposed the plant¹⁸. Dabhol project also raised concerns relating to land resettlement, compensation to affected fishermen and pollution to nearby water sources.

The power plant shut down operations in 2001, and since has been a cause of embarrassment for the Indian government, rather than the flagship endeavour that it had promised to be.

IVB. Story of Dahanu Port¹⁹

In December 1996, P&O Ports (Australia) a subsidiary of P&O, UK bid to construct a port at Alewadi (located in the state of Maharashtra in western India). P&O were the sole bidders for the site, one of six sites tendered for private port development by the Government of Maharashtra. P&O, however, used a clause in the tender agreement to request a shift of the port site from Alewadi to Vadhavan

P&O's justifications for requesting a shift to Vadhavan appear to have been primarily related to maximising the company's profits, with little genuine consideration of the potential social and environmental costs of their proposed investment, or indeed its legality.

Vadhavan, the proposed port site is located in Dahanu province in the State of Maharashtra, 120 km north of Mumbai (Bombay). Covering an area of 968 sq km and with over 45% forest cover, Dahanu was one of the last green belts along the heavily industrialised west coast of India. Dahanu's coastline of 35 km was considered to be the least disturbed along the entire north-western coast of India - and Vadhavan, the proposed port site, the biologically richest part of Dahanu's coast. The port was sited in a location that was rich in marine and terrestrial biodiversity, which supported some 2 million people in the region.

Highly endangered Olive Ridley turtle (*Lepidochelys olivacea*) was known to nest there occasionally. Vadhavan had over 5 sq. km of mangroves comprising the rare *Avicennia marina* species, while its rock shelf was one of the largest on the north-western coast of India and was the most important source of lobsters, prawns and crabs.

As early as November 1997, the BBC's Newsnight programme revealed that a socio-economic study commissioned by P&O was deeply critical of the port project. The results of the study indicated that the port would destroy the livelihoods of over 30,000 fisherfolk and their families, and would cause irrevocable environmental damages.

¹⁸ CorpWatch, "India: Enron's debacle at Dabhol" (by Sandip Roy), Pacific News Service, February 8th, 2002.

¹⁹ Sultana Bashir & Nick Mabey, "Can the OECD MNE Guidelines promote responsible corporate behaviour? An analysis of P&O's proposed port in Dahanu, India", WWF-UK, 1998.

Dahanu's economy revolved around its highly productive renewable natural resources. The major economic activities were fishing, horticulture, agriculture, animal husbandry and forestry and there was surplus employment available. Independent investigations revealed that the port would adversely affect various environmental resources of Dahanu and impact the lives and livelihoods majority of its tribal population adversely.

The People's Alliance for Implementation of Law (PAIL), a coalition of individuals and groups representing local fishers, farmers, tribal people and environmentalists had been leading an opposition to the proposed Dahanu port since 1997. PAIL received substantial amount of support from WWF, UK in its struggle against the Multinational Company.

Evidences suggested that P&O's proposal to build an industrial port at Vadhavan in Dahanu Taluka had breached several elements of the OECD Guidelines on Multinational Enterprises (MNEs), so WWF (UK) decided to try and use the Guidelines as a window and make P&O make amends to its proposals.

Since December 1997, WWF made several representations to the UK (National) Contact Point the OECD Guidelines for MNEs at the Department of Trade & Industry (DTI) regarding P&O's breaches of the Guidelines, as did some British MPs. While the DTI was always receptive, they were unable to take action against P&O on the basis of the existing Guidelines, which underscore some of the weaknesses of implementing the guidelines in a non-OECD territory.

P&O had hoped to sign the final agreement to construct the port in December 1997, but their feasibility studies were delayed. In the meanwhile, the Dahanu Taluka Environmental Protection Agency (DTEPA) issued a 12-page order in 1998, which concluded that the proposed port is "wholly impermissible" and "illegal".

P&O Australia announced their withdrawal from the project on 12th November 1998. However, they continued to be involved with port development elsewhere in India, including Maharashtra. Though P&O decided not to go ahead with the planned port in Dahanu, the company's decision to locate the port in Vadhavan (threatening the livelihoods of the local community and the rich biodiversity of the region) raises concerns about its commitment to responsible business conduct.

While pulling out, P&O had cited concerns about raising the necessary finance and the uncertainties arising from opposition to the project as some of the reasons for their withdrawal. However, it was clear that WWF's attempts to apply the OECD Guidelines in this case did not play any part in reversal of P&O's decision.

Although the proposed project breached many of the OECD Guidelines for MNEs, it was evident that applying the Guidelines in a non-OECD territory was difficult. The experience of the above case suggested that the Guidelines needed to be reviewed, and amended in order to:

- Clarify the scope and applicability of the Guidelines outside the OECD territory, and the potential to use diplomatic staff from the investor's home country to facilitate investigations of individual breaches;
- Clarify the role of the Contact Point and the actions to be taken when investigating alleged breaches of the Guidelines;
- Agree sanctions and other measures available to the Contact Point to address proven breaches of the Guidelines;
- Develop mechanisms for non-OECD citizens or groups to invoke the Guidelines effectively;
- Develop mechanisms for mediation of disputes between key stakeholders;
- Include mandatory safeguards against pressure from MNEs to lobby for the reduction of social and environmental standards;
- Include mandatory provisions regarding minimum legal, environmental and social standards to be observed which could be linked to existing BITs; such as abiding by existing standards specified by law in the country of investment.

VI. Emerging Lessons

Globalisation is a reality of the present times. National governments and multilateral agencies are constantly strategising to facilitate free movement of goods and services across borders. India has emerged as an 'investment hot spot' over the last few years on account of its economic stability and emergence of a large consumer market.

However, the eradication of poverty and provision of employment and basic services to a large section of its population still remains a big challenge for the Indian policymakers. Analysts are hopeful that this challenge can be addressed if the country continues to enhance its economic performance and ensure that the benefits of improved economic performance accrue to the section 'at the bottom of the pyramid' through a just distribution mechanism. Assistance from bilateral and multilateral sources would facilitate this process.

As has been indicated earlier in this paper, India's capacity to enhance its economic performance depends, among other factors, on its ability to improve infrastructure facilities. It has been recognised that an essential requirement for economic growth and sustainable development is the provision of efficient, reliable and affordable infrastructure services like water and sanitation, power, transport and telecommunications.

In the present era of economic reforms in addition to the public sector, the private sector has emerged as a major provider of infrastructure services. Taking advantage of the government's liberalisation policy a large number of foreign companies (Multinational Enterprises) have engaged in the Indian Infrastructure sectors (viz., energy, ports, highway, telecom, Special Economic Zones, to name a few) over the recent past, and it is anticipated that this trend would continue.

Engagement of MNEs in the Indian telecom and highway sectors as described above has resulted in specific gains. The nature of engagement of MNEs in these sectors have been in accordance with some of the principles of the OECD Guidelines, though certain issues related to consumer interests, labour welfare and environmental impact have sometimes been raised. An account of the two cases – Enron power project and Dahanu Port reminds us of certain concerns that surface from engagement of MNEs and particularly the difficulty faced in observing ECD Guidelines in non-OECD developing country like India.

Some 'concerns' that would require continuous attention to ensure that MNEs engaging in the Indian infrastructure sector, engage responsibly are:

- a) 'Siting' of infrastructure projects by MNEs - especially for a country like India, where the population density is very high. Inappropriate siting of infrastructure projects could affect the lives and livelihoods of local communities and also cause irrecoverable damages to environmental resources. Decisions regarding 'siting' needs to be carefully taken to ensure that the adverse impacts on the local community and environmental resources are minimal. Cost-benefit analysis might be necessary.
- b) Special attention needs to be given on the plight of labours engaged with infrastructure projects, and to see that they are properly compensated and treated by the contractors.
- c) Often there is lack of transparency in the process of approval of infrastructure projects, which needs to be addressed by involving stakeholders concerned in the process.
- d) Weakness in monitoring mechanisms of International Financial Institutions to ensure that infrastructure projects abide by domestic (host country) laws, home country legislations and international codes would need to be overcome.
- e) Lack of clarity with regards the observance of the OECD Guidelines for MNEs in a non-OECD territory like, India. If the OECD and its members want to ensure application of the Guidelines throughout the world, then the possibility of having 'National Contact Points' in Non-OECD countries (especially those, which are witnessing a heavy influx of foreign MNEs in their territories) should be explored.
- f) The OECD Guidelines cannot be applied in isolation. Its principles would need to corroborate domestic regulations, and vice versa. Moreover, the Guidelines should evolve and be part of a more comprehensive framework for international investment, globally. OECD's efforts in developing the, 'OECD Principles for International Investor Participation in Infrastructure' and integrating the guidelines as a part of this principle is laudable.

These concerns would need to be appropriately addressed, if infrastructure projects are expected to promote socio-economic and environmental progress of host countries.

VII. Recommendations and the way forward

Under the circumstances, and given its experiences (some of which has been recounted in the above section), there is a need to regulate behaviour of MNEs in India and to encourage them to perform abiding the country's laws and uphold international codes of conduct.

This could be done at two levels:

A. National Level:

A.1 Policy Framework for Infrastructure Regulation: Government of India has recently initiated a process for developing a policy framework for infrastructure regulation. A white paper (Approach to Regulation: Issues and Options, 2006) has been prepared by the Planning Commission, Government of India to act as the blueprint for developing a framework for infrastructure regulation in the country.

Development of an overarching framework for the sector was necessary as it was found that there was an absence of a common regulatory philosophy guiding the evolution of regulatory institutions in the various segments of infrastructure. The process of developing this paper has been participatory, involving the civil society and business organisations in the process, thereby, ensuring that the concerns of all stakeholders are incorporated.

The regulatory framework for the infrastructure sector should take into account the principles underlined in the OECD Guidelines for MNEs. Some of the principles are already covered in the framework that the government has proposed in its present form, and it would require a little more fine-tuning and better articulation to cover the others.

Assessment of investment flows to developing countries in infrastructure sector over the period 1990 to 2002 (Colin Kirkpatrick et al, 2006²⁰) shows that FDI in infrastructure is positively influenced by the quality of regulatory framework. Therefore, the evolution of a regulatory framework doesn't imply a reduction in the investment flows in infrastructure, in fact, it would be the reverse as indicated.

A2. Strengthening the EIA process and involving local stakeholder representatives in the process of approving a project: Environmental Impact Assessment should not remain a one-time affair in case of infrastructure projects, and a proper monitoring and evaluation mechanism need to be put in place to ensure that all aspects of the 'Environment Management Plan' are implemented by the project proprietor, after the project is initiated.

The process of involving local stakeholders in the process of evaluating an infrastructure project should be strengthened and made transparent.

A3. Domestic legislation and Transparency: Domestic laws pertaining to human rights and labour welfare would need to be strengthened and implemented following a transparent process.

A4. Role of Civil Society: The Civil society has emerged as a strong force to reckon with in India, and has established effective channels of dialogue with policymakers in the country. With their support, the government can ensure that MNEs operating in the infrastructure sector (or any other sector, for that matter) abides by domestic rules that help sustain the country's social, economic and environmental progress.

²⁰ Colin Kirkpatrick, David Parker and Yin-Fang Zhang, "Foreign Direct Investment in Infrastructure in Developing Countries: does regulation make a difference?", *Transnational Corporations*, Vol. 15, No.1 (April 2006), pp 143-171

B. International/ Multilateral Levels:

B1. International Cooperation: Developing country governments like that of India would require the support and cooperation from developed country governments (especially ‘Adhering Governments’), whose companies engage in infrastructure projects (or in any other sector, for that matter) in the country – in terms of a commitment from those governments of initiating action against MNEs who are found not adhering to the OECD Guidelines for MNEs.

B2. Responsibility of International Financial Institutions: In India, a major thrust of the World Bank and the Asian Development Bank’s activities has been focused on promoting private (foreign) investment in infrastructure sector. These organisations would have to ensure that MNEs engaging in projects they support, be in accordance with the principles of the OECD guidelines.

International Financial Institutions would also need to incorporate the guidelines into the core of their financial mechanism, to ensure that they too abide by the guidelines as envisaged.

B3. Responsibility of CIME, OECD: The Committee on International Investment and Multinational Enterprises (CIME) of the OECD should be empowered to ask for explanation from MNEs that violate the Guidelines. In addition to developing country governments, civil society organisations from developing countries should also be provided access to CIME, for the purpose of reporting gross violations of the guidelines.

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