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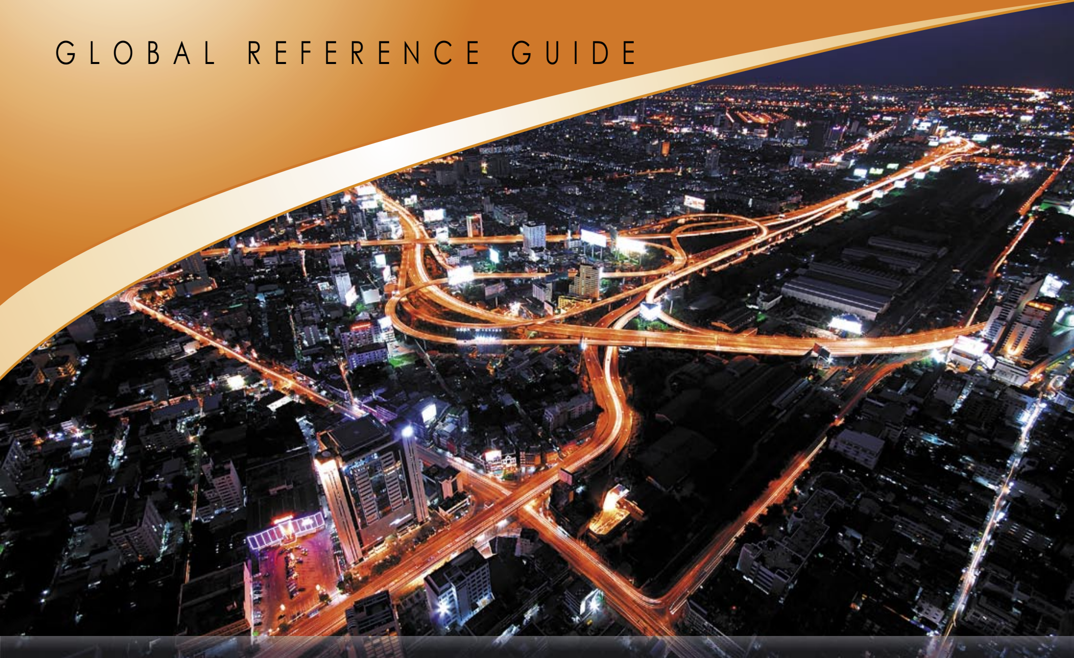

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CONTENTS

REGIONAL TRENDS

NORTH AMERICA

Renewed opportunities for infrastructure investment in the US 02
Critical capabilities required for large capital project delivery 04
Marketing and implementing emerging waste conversion technologies in the US 06

CENTRAL & SOUTH AMERICA

Right-of-way and infrastructure projects in Mexico 08
Brazilian infrastructure financing: developments and incentives 10

ASIA PACIFIC

Infrastructure: regulation and opportunities in India 12
Impact of the global economic crisis on infrastructure investment and development in India 14

MIDDLE EAST & AFRICA

The market for infrastructure private finance in the Middle East 16
Monetising utility infrastructure assets in difficult financial markets 18
Carriage of goods by sea – an overview 20

ADVISOR DIRECTORY

FIRMS 22
PROFESSIONALS 33

NORTH AMERICA

Renewed opportunities for infrastructure investment in the US

by Joseph Seliga, John Schmidt and Jeromy Cannon | Mayer Brown LLP

THE US PPP market has seen renewed momentum and focus in 2011 from investors and government sponsors. Activity has been seen across many asset classes including toll roads and airports. As a result, a sense of optimism exists in the PPP market. However, as with the economy as a whole, momentum can be fragile.

Following the groundbreaking 2005 concession and lease of the Chicago Skyway by the City of Chicago to Cintra-Macquarie for $1.83bn, public-private partnerships for existing US toll roads were on an upward trajectory. In 2006, Indiana leased the Indiana Toll Road for $3.8bn to the same Cintra-Macquarie team. Then, in 2007, the Northwest Parkway Public Highway Authority leased the Northwest Parkway to Brisa for $560m.

With the proposed 2008 leasing of the Pennsylvania Turnpike to Abertis-Citi Infrastructure for $12.8bn, the nascent US PPP market appeared to be booming. However, that trajectory halted abruptly in the face of fierce opposition from the existing Turnpike Commission. Moreover, Chicago's proposed 2008 concession and lease of Midway Airport for $2.5bn to a consortium of Citi Infrastructure, the Vancouver Airport Authority, and John Hancock Insurance Company failed to reach financial close in April 2009. Public-private partnerships for existing assets were in a holding pattern in the two years since, except for a failed effort by the state of Florida to lease its 'Alligator Alley' toll road that ended with no bids received in mid-2009. This inactivity appears to have ended in 2011 with a significant transaction in Puerto Rico, a new entrant in the PPP market.

In 2009, the Puerto Rico legislature created the Puerto Rico Public Private Partnerships Authority, a unique agency with jurisdiction to pursue PPP transactions over the whole range of infrastructure assets. As its first transaction the Puerto Rico PPP Authority undertook a 40-year concession of PR22, Puerto Rico's largest toll road, and PR5, an adjacent road. Likewise, Puerto Rico has helped to reignite the airport concession market. The Puerto Rico PPP Authority, working with the Puerto Rico Ports Authority which operates the San Juan Luis Munoz Marin Airport, filed a preliminary application in 2010 with the FAA to concession the airport. In July 2011, the PPP Authority announced that a Memorandum of Understanding had been entered into with over 65 percent of the airlines at the airport with respect to the terms of a proposed con-

cession. The Authority expects to conclude a bidding process in early 2012, followed by financial close later in the year.

While many factors will affect this drive, including factors that will be outside the control of public and private participants in the US PPP market, policy initiatives can be instituted to help sustain the renewed momentum. One such policy initiative is encouraging responsible reinvestment of PPP proceeds.

Properly structured, existing asset PPP transactions shift long-term operations, maintenance, construction, and financing risk to the private sector, while significant oversight and regulatory authority can be maintained by the public sector. At the same time, existing asset transactions can also result in significant payments to the governmental entity involved in the transaction.

As a result of the prospect of a large payment, existing asset public-private partnerships allow governmental entities the possibility to redeploy capital for other uses that can generate investment and long-term returns for the public. Legal requirements governing the use of proceeds adopted prior to the commencement of procurement, can result in many benefits, for instance, public officials can be less tempted to use proceeds for operating budget costs and other short-term purposes. As a legal matter, it is difficult for a governmental entity to obligate itself: a state statute or municipal ordinance imposing general use requirements for proceeds from a PPP transaction could always be amended. Nevertheless, in certain cases state governments can impose such mandates on local governments. Moreover, the federal government can impose such mandates on state and local governments.

Federal programs could be crafted to incentivise existing asset PPP transactions on the condition that proceeds are reinvested in infrastructure. For example, the Transportation Infrastructure Finance and Innovation Act (TIFIA) could be amended to provide that TIFIA assistance be made available to existing asset transactions so long as the proceeds are reinvested in infrastructure by the recipient public entity. If a National Infrastructure Bank is created, financing for an existing asset PPP could be conditioned on similar terms. Finally, federal law also could be changed to permit tax-exempt private activity bond financing for existing asset PPPs under similar terms. At the state level, states can enact legislation requiring that the proceeds of existing asset PPP transactions are reinvested in infrastructure projects.

The coming months will be telling about the continued trajectory of the US PPP market. Encouraging reinvestment of PPP proceeds into other infrastructure can help sustain the current momentum via greater public confidence and buy-in to proposed PPP transactions. ■

NORTH AMERICA

Critical capabilities required for large capital project delivery

by Christopher Dann and Owen Ward | Booz & Company

THE NEW SAN Francisco Bay Bridge is an architectural and engineering marvel, and one of the largest public works projects in US history. While the bridge design itself is unique, the project is, in many ways, emblematic of the many challenges to developing major infrastructure projects. The existing bridge was damaged and deemed seismically unsafe following the Loma Prieta earthquake in 1989. The bridge replacement project was originally sanctioned in 1990 but construction did not begin until 2002. Originally forecast to be complete by 2007 and expected to cost $1.3bn, the current expected cost is $6.3bn ($12bn including the costs of financing). The project is currently scheduled for completion in 2013 – 24 years after the earthquake.

As economies emerge from the global economic crisis, public policy decision makers are reminded of the imperative of rebuilding the aging infrastructure of the developed world. Meanwhile, in the developing world, the new infrastructure required to sustain growth remain staggering in scale and breadth. Given strained public finances, the private sector will increasingly be called upon to participate in this investment through public-private partnerships or directly. The central challenge will be executing large complex infrastructure projects on budget, on schedule, and with expected performance. However, studies of projects worldwide and across industries show that projects underperform nearly half the time.

There are, however, numerous examples of large infrastructure projects that have been completed successfully. From the construction of Heathrow's Terminal 5 to the largest refinery in the world at Jamnagar in India, successful large capital projects yield lessons learned about critical capabilities required to successfully execute infrastructure projects. A number of causes of mega-project underperformance are frequently blamed: resource scarcity, material price escalation, public and regulatory interference, and more. Addressing these challenges requires best in class capabilities in five major areas.

Advance planning & analysis. One area that clearly distinguishes successful from unsuccessful capital projects is the quantity and quality of advance planning and analysis. Advance planning and analysis includes, but is not limited to, rigorous initial project evaluation, cost and schedule risk analysis, and management, procurement planning, resource planning and allocation, stakeholder engagement, and simulations of project execution. Building an understanding of the critical drivers of risk to cost,

schedule and project performance, and developing a risk management plan around these drivers is essential to project success. Probabilistic simulation in which cost, schedule, and project economics are fully integrated can support decision making and resource allocation by effectively simulating project execution thousands of times.

Completion of detailed design engineering. Unfortunately, sufficient completion of detailed design engineering prior to the start of construction is a clear lesson that, while well cited, is still often overlooked. The experience of some new nuclear plant construction projects provides a stark contrast. The Olkiluoto nuclear project in Finland, on which construction was rushed prior to the completion of detail design engineering on the new reactor design, remains under construction at least three years behind its schedule and at least two times over budget.

Building a unified team. Coordination and alignment of incentives, including appropriate risk allocation between owner, contractor, and subcontractors, is critical to successful project execution. Good contracts obviously support this goal, but no contract, no matter how complex, is sufficient for foreseeing all of the circumstances and events that can occur on a large capital project.

Effective organisation and governance. Megaprojects present unique challenges in organisation and governance. Even within one entity, the projects are frequently extremely complex organisationally because they must pull a wide range of functional and technical resources together. Further, large capital projects frequently require multiple organisations to work together either in a consortium or joint venture structure. Organisation design for these projects must be as carefully engineered as the project itself with clearly defined accountability, roles and responsibilities, sufficient decision rights at the project level, strong functional support, and effective external and internal interfaces. Clear governance and efficient, high quality, decision making is essential to value and risk management.

Decision flexibility and change management. Megaprojects are executed over a long period of time and under significant uncertainty. Unexpected events and changes will occur. Risk management programs are responsible for building resiliency in the project through mitigation planning and contingency development, even for unpredictable risks. But the risk management program must be supported by decision making processes that can respond quickly to changes and can be flexible to circumstances (without compromising governance), and by a robust change management program that identifies and evaluates changes early, and communicates them effectively with decision makers, and other stakeholders.

Meeting the world's infrastructure requirements over the coming decades will be challenging. Utilising the lessons learned from both successful and unsuccessful large capital projects will enable owners and constructors to meet the challenge, and make the most of scarce capital. ■

NORTH AMERICA

Marketing and implementing emerging waste conversion technologies in the US

by Teno A. West | Pannone Lopes Devereaux & West LLC

IN RECENT YEARS, there has been a bourgeoning demand throughout the world for clean, affordable alternatives to landfilling and other traditional forms of waste disposal. This need has spawned a growing private industry focused on the development of waste conversion technologies such as gasification, anaerobic digestion, pyrolysis, and bio-mechanical treatment. Although companies proficient in these technologies have found success in marketing their products and services to certain local governments – mostly throughout Europe and Japan – the marketing and implementation of these technologies in the US has presented unique challenges.

In the US, the laws governing the implementation of waste conversion technologies vary greatly from state to state and even from municipality to municipality. These laws – which range from state procurement laws to local land use laws – can be difficult to navigate and tend to be slow in catching up with emerging technologies. In addition, other factors such as local acceptance, waste aggregation problems, and environmental group opposition, can stop a project in its infancy if not properly accounted for and addressed. Without a practical, working knowledge of how to deal with the unique issues facing the particular community involved, companies promoting conversion technologies will find difficulty in marketing their products and services to even the most well-intentioned local governments. This article highlights several considerations that are often overlooked when marketing and implementing emerging waste conversion technologies in the US.

First, with the array of emerging conversion technologies available in today's market it is imperative to thoroughly understand the various technologies that may be suitable for the needs of the subject community. Certain types of projects and locations may be better suited for one technology based on various factors, including the composition of the available feedstock, regulatory requirements restricting certain types of conversion processes, and the associated implementation costs.

In Massachusetts, for example, there has been a moratorium on new waste combustion facilities for over 20 years. The moratorium may prohibit the use of both gasification and pyrolysis technologies because they too closely resemble combustion. However, other types of conversion technologies, such as bio-mechanical treatment and anaerobic digestion may be more suitable for

implementation under Massachusetts' conditions. A comprehensive understanding of the conversion technologies available, therefore, maximises the potential for success and ensures a company promotes their products to a viable market.

Second, the success of a waste conversion project is contingent on both the quality and quantity of the waste stream. Even the most advanced conversion technology will not succeed without a suitable and constant supply of feedstock. However, there are various challenges involved with developing a sufficient and appropriate feedstock for these emerging technologies.

A desirable and effective option for maximising feedstock is to partner directly with a local government that can guarantee a certain tonnage of waste. Such a partnership can benefit both parties – the company can secure the necessary waste to ensure profitability and the local government can contract for competitive rates and discounts. In addition, the use of waste aggregation techniques such as the implementation of what is commonly referred to as 'flow control' can produce a consistent supply of feedstock. Under flow control, a local government mandates that all locally generated solid waste and recycling must be directed to a designated disposal facility, resulting in a dependable and constant waste stream.

Third, there are many legal and technical nuances and challenges presented by the permitting and procurement processes regarding conversion technology projects. With the multitude of local governments in the US, the path to approval for any type of infrastructure project can be chaotic. Companies proposing conversion technologies must navigate the requirements of local, state, and federal law. Procurement requirements differ significantly from state to state, and local zoning laws may substantially differ between municipalities, even within the same state.

Finally, permitting and land use considerations are often shaped by local environmental concerns – well-founded or not – and community attitudes and influences that may be difficult to grasp for outsiders. Accordingly, it is important to cultivate local networks of supporters who understand the culture, political structure, and concerns of the public. Local support and an understanding of the permitting and procurement requirements are essential to success.

There are many overlooked factors that must be considered when marketing waste conversion technologies. A comprehensive effort to account for the few issues raised in this article will drastically increase the likelihood of successfully implementing emerging waste conversion technologies in the US. ■

CENTRAL & SOUTH AMERICA

Right-of-way and infrastructure projects in Mexico

by Pedro Felix Castañeda | Jáuregui y Navarrete S.C.

IN MEXICO, THE concept of right-of-way is applied to the occupation of plots of land owned by one or more landowners for the development of large-scale infrastructure projects involving, *inter alia*, the conduction of energy, transportation, and the construction of general means of communication. Rights over plots of land for infrastructure projects can be acquired by obtaining an easement of right-of-way, the right to occupy a specific area of land, or through the purchase or expropriation of plots of land.

Likewise, Mexican law contemplates 'single-site' occupation rights for the development of infrastructure projects. Single-site occupation rights imply the occupation of specific areas for infrastructure projects not intended for energy, transportation and the construction of general means of communication.

The granting of a right-of-way for a specific project has both technical and legal implications. The legal framework applicable to the right-of-way and 'single-site' occupation rights is often intricate to the extent that different sets of rules may apply including federal, state or municipal laws and regulations, and also environmental rules. For example, in the case of infrastructure projects involving the construction of highways and bridges, numerous laws and regulations must be observed including, *inter alia*, the Highways, Bridges and Vehicle Transportation Law; the Regulations on Right-of-Way of Federal Highways and Adjacent Areas; and the Organic Law of the Ministry of Communications and Transportation. While these laws and regulations are specific to the construction of highway and bridge infrastructure projects, general requirements and guidelines of the Mexican Constitution, the Federal Organic Law of Public Administration and other laws concerning infrastructure projects must generally be observed. As a complement to these, the development of infrastructure projects must observe technical parameters set forth in manuals mandatory at the federal, state and municipal levels.

Typically the granting of a right-of-way and the implementation of infrastructure projects in Mexico is a cumbersome procedure due to: (i) lengthy legal procedures; (ii) a complicated process to obtain an appraisal of land; (iii) changes in the proposed project due to circumstances affecting its structure; (iv) the fact that landowners often seek to obtain a higher price for the land, vis-à-vis, the budget prepared by governmental authorities; and (v) the existence of archeological remains.

As a result, the majority of infrastructure tenders that are undertaken in Mexico suffer some type of delay in their execution.

Expropriation is one method to grant the right-of-way but has increasingly fallen out of favour due to the problems it creates. Therefore, in many projects the option to buy-out the landowners is chosen and the authorities negotiate the purchase price of the land directly with them, contrary to other countries where the land is paid for at a market price.

Several solutions to these problems are recommended, including using the resources available to the concessioner; combining the resources available to federal and state authorities to appraise and pay indemnities; as well as unifying criteria without necessarily having to enact special legislation due to the fact that every case is *sui generis* and depends on the project and the type of property involved.

Finally, the process to obtain the right-of-way can be improved by outsourcing many of the related activities to professional consultants to render advice on specific tasks for which government officials appear not to be prepared to undertake expeditiously. This may optimise the process, speeding up the issuing of permits, in addition to creating a more streamlined payment system for the benefit of landowners. ■

CENTRAL & SOUTH AMERICA

Brazilian infrastructure financing: developments and incentives

by Eduardo Soares, Christiano Chagas and Lea Futami Yassuda | Soares Bumachar Chagas Barros Sociedade de Advogados

Over the past two years, changes in Brazilian legislation and regulation regarding securities have turned debenture issuances into a more flexible and attractive option to infrastructure initial funding. One could say that three of the most relevant measures brought into effect in this respect were Instruction N. 476 issued by the Brazilian Security Exchange Commission – *the Comissão de Valores Mobiliários* (CVM) – on 16 January 2009 (Instruction 476/09), which regulates public offerings of securities with limited distribution efforts; the recent Federal Law N. 12,431 of 24 June 24 2011 (Law 12,431/11); and Decree N. 7,632, of 1 December 2011 (Decree 7,632/11).

Since, under Instruction 476/09, securities issuances are exclusively offered to a limited number of qualified investors, public offerings are automatically exempted from previous registration with the CVM. As a consequence, the costs and time to structure and close securities public offerings have been reduced, allowing issuers to benefit from market conditions more effectively. Being a straightforward way to raise funds, it has been increasingly used to provide bridge loans to project sponsors before the closing of a project finance transaction.

Among other topics addressed, Law 12,431/11 promoted changes to the Brazilian Corporate Law regarding the issuance of debentures and set forth tax benefits for bonds and securities investments. Changes to the Brazilian Corporate Law include: (i) the empowering of boards of directors to approve the issue of non-convertible debentures; and (ii) the elimination of restrictions on the maximum amount of debentures companies were allowed to issue.

Law 12,431/11 also provides that income paid to non-residents investing in bonds or securities issued by Brazilian non-financial institutions on or after 1 January 2011, and in order to obtain financing for project investments, will be subject to a zero rate of withholding income tax on the income paid to investors. This benefit, however, is subject to the following requirements: (i) the interest rate applicable to the bonds or securities must be a fixed interest rate linked to a pricing index or a reference rate known as taxa referencial (TR); (ii) the average weighted term of the bonds or securities must be greater than four years; (iii) the issuer must be prohibited from repurchasing the bond or security within the first two years of its issuance; (iv) there must be a prohi-

bition of repurchase commitment by the issuer; (v) in the event that the principal amount of the bond or security is to be repaid in periodic instalments, such instalments must be made at least every 180 days; (vi) there must be evidence that the bonds and securities have been negotiated on regulated securities markets; and (vii) there must be a simplified procedure that demonstrates that the funds received with the issuance will be allocated to the investment projects.

Furthermore, Law 12,431/11 provides that income derived from investments in debentures complying with the above mentioned requirements, issued by special purpose companies incorporated to invest in infrastructure projects in priority areas (logistics and transport, urban mobility, energy, telecommunications, broadcasting, basic sanitation and irrigation), will be subject to reduced withholding income tax rates as follows: (i) a rate of zero when income is paid to an individual resident or domiciled in Brazil; (ii) a rate of 15 percent, levied exclusively at the source and not subject to corporate income tax, when the income is earned by a Brazilian legal entity; or (iii) a rate of zero when the income is earned by a foreign investor.

More recently, Decree 7,632/11 reduced to zero, from 6 percent, the financial tax due on foreign exchange transactions (IOF/Exchange) levied on the inflow of funds into Brazil for investment in bonds and securities which make such investments more attractive.

Law 12,431/11 and Decree 7,632 reflect a noticeable effort on the part of the Brazilian government to stimulate long-term investments in infrastructure by private funds, thus meeting the increasing demand for investments in infrastructure that will not be met by public development institutions, currently responsible for almost 90 percent of investments with a maturity date of more than five years.

The increase in the number of debenture issuances has already been experienced by middle-market companies, which have profited from a low-cost fast offering procedure under Instruction 476/09. Law 12,431/11 and Decree 7,632 enhance these companies' willingness and flexibility to access private funding. All these incentives come at a very favourable time as, on 11 November 2011, Standard & Poor's Ratings Services increased the Brazilian sovereign rating from BBB- to BBB, and are especially important given that Brazil will be hosting the FIFA Federations Cup in 2013, the FIFA World Cup in 2014, and the Olympic Games in 2016. ■

ASIA PACIFIC

Infrastructure: regulation and opportunities in India

by Rupali Sharma | Kochhar & Co.

IN THE FACE of the global financial crisis, the infrastructure sector plays an important role to counterbalance slowing economic activity and lower consumption. With a somewhat slower rate of growth, the Indian economy is still expanding significantly and substantial investment in infrastructure is required to sustain economic progress. The Indian government recognises this, and, as part of the 11th Five Year Plan (XIth Plan), more than US$500bn of investment is planned to flow into India's infrastructure by 2012.

The government has taken steps to relax the regulatory environment and encourage foreign direct investment (FDI) in infrastructure. Substantial tax benefits are also provided for infrastructure projects. The government recognises that private sector participation is integral to the development of this sector. PPPs have been identified to be the most suited mode for the implementation of projects.

Roads & highways. Road development is a priority sector in India, recognised as essential to sustaining India's economic growth. Currently, India has an extensive road network of 3.3 million km, the second largest in the world. The XIth Plan envisages the construction of at least 20km of roads every day as a part of the National Highway Development Programme (NHDP), creating tremendous opportunities in this sector. Investment in the road sector during the XIth Plan is projected at US$78.5bn.

The National Highway Authority of India (NHAI) acts as the regulator and operator for the road sector. Steps have been taken for the restructuring and strengthening of the NHAI, and institutional mechanisms have been established to address delays in environmental clearances, land acquisition, and so on. Further, a model concession agreement for PPPs in the national highway has been mandated. To incentivise investment in the road sector, the government allows 100 percent Foreign Direct Investment (FDI) under the automatic route for all development projects. It also provides for 100 percent income tax exemption for a period of 10 years.

Power. The power sector in India is geared up for a major take-off as the XIth Plan has set up ambitious goals for expansion, with a commitment of generating over 20000 MW per annum.

The government has set physical targets including additional power generation capacity of about 78,577 MW, transmitting electricity to all un-electrified hamlets, and providing access to all rural households through various schemes. The opportunities in power generation are ample for coal-based plants at pithead and coastal locations, natural gas/CNG based turbines at load centres or near gas terminals, and hydel power plants. Over 150,000 MW of hydel power is yet to be tapped in India. There are also opportunities for renovation, modernisation, up-rating, and life extension of old thermal and hydro power plants.

Opportunities also exist in transmission network ventures as an additional 60,000 circuit km of transmission network is expected by 2012. In order to promote investments in the power sector, the government has provided many incentives such as 100 percent FDI in the power sector, removing import duty on any capital goods imported for mega-power projects, and a tax holiday of 10 years subject to certain conditions on generation.

Airports. A rapid increase in domestic passenger traffic and international traffic has created a great potential in the aviation sector and high demand for investment. The government has set targets for the modernisation and redevelopment of four metro and 35 non-metro airports, construction of three Greenfield airports in North East and seven other Greenfield airports. The XIth five year plan envisages an investment of INR 36,986 crores in the sector.

The government aims to attract private investment in aviation infrastructure and has put in place various policies to achieve this including the open sky policy. Currently 100 percent FDI is permitted in all existing airports – automatic up to 74 percent and beyond 74 percent with prior government approval, 100 percent FDI under automatic route for Greenfield airports, and up to 49 percent FDI under automatic route in domestic airlines, excluding foreign airline companies. There is a tax holiday for airport projects for a period of 10 years.

Conclusion. In addition to these sectors, the government has also been promoting similar investments in telecommunications, railways, irrigation, water supply, ports, and oil and gas. However, despite rapid growth, there are various challenges including a shortage of skilled labour, lack of good equipment, corruption, a long gestation period for project completion, and financial difficulties. It is important that growth in infrastructure is managed in a sustainable way. This can be achieved through prudent government policies. On the whole, the opportunities for development of a significant business in India are exceptionally promising for infrastructure companies, if they carefully select strong local partners, structure their contracts sensibly to maximise tax benefits, and take a long-term perspective. ■

ASIA PACIFIC

Impact of the global economic crisis on infrastructure investment and development in India

by Munish Sharma | Dua Associates

PAST TRENDS SUGGESTED that the global economic crisis had no significant impact on investment in the infrastructure sector in India. Active government support and regulatory reforms in the sector played a role, to some extent, in its insulation from the global downturn. As a result of these measures, foreign direct investment in the power sector attracted around $2.5bn in the two fiscal years ending 31 March 2011 and has already reached $1.15bn in the nine months thereafter. Foreign direct investment in construction activities has reduced by almost half to $1.12bn for the fiscal year ending 31 March 2011 compared to 2010.

Recent global economic events, however, have had an adverse affect on the Indian infrastructure sector. The Eurozone crisis has led to dysfunctional financial markets. Many developed countries need to make urgent progress in making sure that the Eurozone banks have adequate capital to withstand any further turmoil, and be able to offer credit again. There is no sign of enhanced liquidity that could help avoid a deeper downward trend and ease funding constraints. India is not a capital rich country. It needs infrastructure and substantial funding for growth from the overseas markets.

The Indian infrastructure sector has seen an inflow of private equity investments, perhaps the result of a lack of options from traditional sources and capital markets. There have been 28 recorded private equity investments in the infrastructure sector amounting to $1.6bn in 2011, up to 1 June. Private equity investors see an opportunity to fill in the gap. The anticipated percentage of private investment under the 12th Five Year Plan is 40-50 percent of a total estimated investment of $750bn in the infrastructure sector, and with a standard debt-equity ratio of 2.5 to 1, private equity investments would total around $80bn worth of equity with borrowings of $220bn to $295bn making up the balance.

The private equity route in this sector comes at a significant cost and is usually not entirely risk-free capital for investors who desire assured return in excess of 18 percent. Promoters are made to guarantee exits to the investor. This creates limits on the ability of the promoters to leverage their assets for initiating new projects. Private equity funding cannot be a substitute for the traditional project finance required for infrastructure.

In 2008-09, the fallout of the financial crisis was cushioned by the government offering financial

assistance to keep the economy going. Presently, rising inflation is one of the primary reasons that India faces another economic crisis-like situation. Fiscal slippage continues, and it will be difficult to stick to the current year's target of keeping the fiscal deficit at 4.6 percent of GDP in 2011/12. Fiscal slippage means there is no space left for a stimulus. It also means a drag on growth.

One solution could have been to re-orient India's spending towards creating adequate infrastructure, which would have led to easing of supply constraints. But infrastructure financing is getting increasingly difficult.

Inflation, high fiscal deficit, and the slowdown in economic growth, bring their own risks on credit quality and that has started to reflect on banks that are largely owned by the government. Public sector banks urgently need capital but, given the fact that the government has overshot its borrowing target for 2012 by more than $10.6bn, the capital infusion is most unlikely to happen. Infrastructure financing in the country has therefore been led by Indian commercial banks.

Some of the leading banks have already been downgraded by the rating agencies. There is a serious risk of an increase in non-performing assets in the next few quarters. Some of the projects, especially those in the power sector would require restructuring/refinancing. The government, on its part, did initiate certain steps to ease access to international sources of finance, especially for the industrial and infrastructure sectors. The external commercial borrowing limit for such companies has been raised to $500m and Indian companies have also been permitted to borrow up to $1bn in Chinese Renminbi.

To what extent the above policy initiative will ease the pressure on infrastructure financing is difficult to gauge, given the present financial conditions of the international banks. Also, the Renminbi is not a freely convertible currency. It is largely pegged to the US dollar. Given the global imbalances, the direction of capital flows, and international pressures, it is quite likely that Renminbi will have to float freely at some time in the near future. Indian borrowers may not therefore benefit, given the possible appreciation of the Renminbi.

Given the present climate, both local and international, the infrastructure sector will continue to face head-winds, at least in the short-term. The government can perhaps continue to evolve and support innovative means for infrastructure funding, and at the same time address multilevel policy issues and regulatory complexities. ■

MIDDLE EAST & AFRICA

The market for infrastructure private finance in the Middle East

by Charles Lloyd | PwC

A LEADING INFRASTRUCTURE publication reported recently that only three PPP transactions closed across the Middle East and Africa in the first half of 2011. That is significantly less, by both volume and value, than in the equivalent period in 2009 and contrasts with a rising trend globally. So what is happening in the region? And what should we expect from 2012 and beyond?

Healthy IPP/IWPP market

Perhaps the first point to make is that in many parts of the Middle East, particularly the Gulf, PPP technology is well understood and has been widely used in some sectors. Many UK and US project financiers cut their teeth on refinery, IPP, IWPP, and refinery projects in Oman, Abu Dhabi, Bahrain, or Saudi Arabia. These programmes continue and we estimate there are some 25 IPP and IWPP transactions announced or in the market. These are generally well managed and well understood by governments and the market. But they are never going to create the broad PPP deal flow that has been seen in Western Europe and parts of Asia Pacific and North America.

Few high quality broader PPP programmes

Given that track record, one might have thought that PPPs would take wider root in other sectors across the region, but there the story is much more mixed. A few countries, notably Kuwait and Egypt, have developed well-structured PPP programmes underpinned by legislation. Kuwait's programme is now off the drawing board and well into implementation. Serious interest has been shown in its first project, the Az-Zour North IWPP, and other projects are expected to come to market shortly. These include a first hospital PPP for the region, and rail, metro, and real estate based PPPs. Egypt's programme saw two deals successfully reach financial close in 2010, but has been on hold pending the outcomes of the recent parliamentary and forthcoming presidential elections.

Beyond IPPs/IWPPs and those few countries pursuing programmatic approaches to PPPs, the market is mixed. In the Gulf, Abu Dhabi has seen the successful close of three Mubadala-led projects in the university sector but has recently halted the procurement process for its largest

PPP, the Mafraq highway project. It looks unlikely that there will be new government procurements on a PPP basis in the short term, but some semi state delivery bodies may choose to pursue PPPs, not least in response to tightening capital budgets. Dubai is expected to come forward with PPPs in the transport and health sectors, but their timing is unclear. Saudi Arabia has a respectable portfolio of early-stage projects, principally in the transport sector, but shows no sign of adopting a centrally co-ordinated approach to PPPs. Bahrain has pathfinder transactions underway including for social housing and Qatar is considering its policy but currently seems unlikely to use private finance in core economic infrastructure sectors.

Further north in the region, Jordan has closed several transactions including for the Queen Alia airport, now well into construction, and Lebanon has expressed firm interest in PPPs. However, neither country yet has the sort of clear programme and centrally managed delivery capability that the market would ideally like to see. Elsewhere, including in Libya and Syria, PPP programmes are awaiting greater political, social, and financial stability.

Where now?

The drivers for PPPs are interestingly balanced across the region. On the one hand, the events of the Arab Spring have clearly accelerated demand for infrastructure. This applies equally to the social assets – in health, education, and housing – needed to meet citizens' immediate demands, and to the economic assets, particularly in transport, power, and communications, required to create a platform for long-term economic growth.

On the other hand, those same events may well cause political leaders to take the view that they cannot afford the timescales often associated with private finance. And they have undoubtedly impacted the credit status of some countries, hampering their ability to structure bankable deals without complex multilateral or other credit enhancement.

On balance we remain optimistic that private finance will have a significant part to play in the ongoing development of infrastructure and the economies of countries across the Middle East. But given the events of the past year, investors will, more than ever, need patience, understanding, and good project selection to reap rewards. ■

MIDDLE EAST & AFRICA

Monetising utility infrastructure assets in difficult financial markets

by Tim Burbury | King & Spalding LLP

DESPITE THE DIFFICULTIES in the current global finance market, there is a steady stream of greenfield infrastructure projects coming online in the Middle East. Master developers are bundling and integrating their utilities infrastructure, tapping into local debt and/or investor equity, and structuring their deals through private infrastructure concessions. In some cases, they are taking advantage of opportunities to 'monetise' these infrastructure assets. Revenue streams are therefore starting to trickle where previous thinking had the money flow going completely upstream – without a paddle.

How did we get here? We got here because stakeholders had to come up with alternative ways to procure their essential infrastructure projects during the 'Arab Spring' and gloomy global markets. Petro-dollars financed a massive boom in infrastructure in parts of the Middle East in the early 2000s, and it seemed that there was no end in sight to the scale of development. Dubai came to a screeching halt, but Abu Dhabi, Saudi Arabia, and Qatar have pressed ahead, albeit at a slower scale than pre-GFC. 'Fiscal responsibility' has taken over the 'starchitects playground'. As a result, non-essential infrastructure is being either scaled back, suspended, or withdrawn. However, essential infrastructure is proceeding.

Where are we now? Seeking private finance to fund infrastructure is not new. PPPs, P3s and project finance are well known globally. PPPs are politically driven, so if a particular government is not 'for' PPPs and private financing, or is not in favour of the private sector operating 'core' government services, then traditional procurement models involving the expenditure of public funds usually, but not always, win the day.

Private infrastructure concessions need not involve governments contracting for assets and services. There is a trend in the Middle East, particularly in the Kingdom of Saudi Arabia, Qatar, and the UAE, where, subject to regulatory and other considerations, master developers grant infrastructure concessions to private parties to deliver and fund, in whole or in part, their utility infrastructure projects. Funding may come partly from the private party and third party debt, or from the private party and end user revenues generated from the infrastructure project. 'Monetisation'

occurs when a master developer participates in one or more opportunities to exploit their interests.

Monetisation opportunities for utilities. The ways in which a master developer can participate in the revenues generated by utilities infrastructure and services may include one or a combination of the following: (i) revenue sharing – through a concession, or royalty, payment from the private sector to the master developer based on a fixed fee or a percentage of revenue earned by the private sector in selling the utility service to ultimate end users; (ii) land payments – through lease payments payable under a property agreement, between the private sector lessee and the master developer lessor, to lease the land upon which the utility infrastructure sits; (iii) profit generation – where the master developer charges a premium to the ultimate end users of the utility services over and above the cost the master developer pays to the private sector for the same utility services; and (iv) equity investment – where the master developer takes equity in the private sector SPV that is created to deliver the infrastructure assets and services and then receives dividend payments from the SPV. The master developer could also have an option to buy shares in the SPV towards the end of construction of the utility infrastructure and then either sell the shares at a premium or continue to retain its interest and receive dividends. Another trend in the Middle East is to co-locate utilities infrastructure and services to generate greater energy efficiencies and lower operating and maintenance costs.

While the prospect of revenue generation is attractive for any master developer, the commercial, financial and legal issues for each deal need to be carefully considered at the early stages of project development. In addition, monetisation can potentially increase the project economics, so financial advice is critical at the early stages. The other critical analysis at the early stage of planning relates to project structuring, debt and equity options, risk allocation, and sector specific issues within the relevant political and regulatory environment.

Conclusion. There is a growing trend of using private concessions to execute and deliver utility infrastructure assets. Government backed PPPs and project finance models are not new, but the use of 'end user' and 'single off-take' private infrastructure concession models, particularly for unregulated utilities, is taking shape throughout the Middle East. With the benefit of experienced financial, technical and legal advisers, these models can be a viable – and potentially profitable – option to deliver essential utilities infrastructure. ■

MIDDLE EAST & AFRICA

Carriage of goods by sea – an overview

by Sahar Saad | El-Khoury & Partners Legal Counsel in association with Squire Sanders & Dempsey

TOTAL SEABORNE TRADE has increased exponentially over the past 50 years, today accounting for 90 percent of goods produced and consumed worldwide. Indeed, shipping has become the backbone of international trade and a key component of the global economy. Conventions on the carriage of goods by sea provide a legal framework to regulate this vital means of transportation and represent a major strategic tool of governments around the world.

Over the last century, international maritime shipping has been governed by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, August 1924); the United Nations Convention on the Carriage of Goods by Sea (Hamburg, March 1978); and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, December 2008).

The 1924 rules, commonly known as the Hague Convention, were the first codification on international maritime shipping. They were adopted to redress the imbalance between the dominant position of ship-owners and the fragile situation of shippers. In 1968, liability limits, which had become outdated and inadequate, mainly due to currency depreciation and the onset of containerisation techniques, led to the amendment of the Hague Convention. The new rules became known as the Hague/Visby Rules. Eleven years later, the SDR Protocol modified the provisions related to liability limits and the unit used to measure damages.

The Hague Rules, which some countries still use, apply to what is known as the 'maritime phase', beginning with the loading of goods to the ship and ending when they are unloaded, and excluding the transportation of live animals and deck cargo. It imposes a presumption of liability on the carrier for any loss or damage to the goods, but also sets 17 grounds exempting a carrier from liability on a cargo claim. The Hague Rules tend to protect the interests of carriers rather than shippers and consignees. The resultant pressure from developing countries in response to this imbalance led to the adoption of the Hamburg Rules in 1978.

According to these new rules, the maritime phase is no longer limited to the period of transport from 'tackle to tackle', but commences the moment the carrier takes charge of the goods until the time of delivery or 'port to port'. The applicable rules regarding a carrier's liability were therefore changed to a system based on a presumption of fault or negligence on the part of the carrier for

any loss or damage to the cargo, and for any delay in delivery, unless the carrier proves that it and its agents took all measures that could be reasonably required to avoid the loss or damage.

The Hamburg Rules also eliminate the long list of liability exemptions provided by the Hague Convention. Only two situations remain where a carrier may be exempted from liability, fire, and assistance to another vessel. Notably, the most prominent difference lies in the removal of the concept of nautical fault, which prevented carriers and crewmen from being held liable for negligence relating to a ship's management and navigation.

Although in force since 1992, the Hamburg Rules have not been received with enthusiasm by the major shipping companies around the world. The basic concern is that these rules tend to increase a carrier's liability, negatively affecting the cost of insurance and the overall cost of shipping. As a result of these concerns, a number of states have unilaterally adopted a hybrid of the Hague/Visby-Hamburg Rules. In an attempt to prevent further fragmentation among maritime nations, the Rotterdam Rules were promulgated to provide a legal framework that takes into account the many technological and commercial developments in the maritime transport industry, namely the growth of containerisation, the development of electronic transport documents, and the desire for door-to-door carriage that includes an international sea leg under a single contract.

The Rotterdam Rules combine the principles of a presumption of liability and responsibility and the request that fault be proven with at least 15 clear exemptions of carrier liability. Unlike the Hague-Visby Rules and the Hamburg Rules, whose provisions are strictly applied and cannot be removed or overridden by a contrary clause, the Rotterdam Rules allow parties to certain 'volume' contracts to opt-out of some liability rules set in the Rotterdam Rules. Having obtained the approvals of major maritime countries such as the US and France, only the political and economical interests of non-signatory countries remain to determine the fate of this convention.

Maritime transportation offers many advantages, including safety and reliability at a low cost. With an approximate contribution of $380bn in freight rates within the global economy, the adoption of clear and uniform rules regulating maritime transport is a key pillar of a stable global economy. ■

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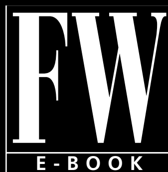

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