A NEW FRONTIER IN INFRASTRUCTURE FINANCING

Analysis of Infrastructure Investment Trusts

A case study of Oriental Infra Trust

Anuradha Munshi, Gaurav Dwivedi & Kate Geary

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Executive summary: A new frontier in infrastructure finance

There has been a fundamental shift in infrastructure financing over the last two decades. Before the global financial crisis of 2008, it was more common for International Financial Institutions (IFIs), such as the World Bank and Asian Development Bank (ADB), to fund infrastructure projects such as roads and power plants directly. Since the 1990s, this has included facilitating an increasing role for the private sector through public-private partnerships (PPPs) to deliver projects the state used to provide.

In the wake of the global financial crisis, increasingly, IFIs began to channel their funds not directly to projects but indirectly via financial intermediaries (FIs), such as private equity funds or commercial banks. This move saw the advent of a trend for the creation of infrastructure as an asset class. The private sector became a more important actor in not only building and operating infrastructure, but also financing it.

In the decade from 2010, the ADB increased its FI lending tenfold;[1] at the European Investment Bank and European Bank for Reconstruction and Development, FI investing has grown to over a third of their total portfolios today;[2] while at the International Finance Corporation (IFC, the World Bank's private sector lending arm), FI lending comprises over half of total spending.[3] In India, private investment in infrastructure tripled from 2005 to 2009, reaching $159 billion,[4] and by 2012, the Indian government was predicting that 50% of its energy finance and 70% of transport infrastructure finance would come from the private sector.[5]

Now we are witnessing a further shift, adding a new layer to the investment chain that ends in roads, power, and other forms of infrastructure. This is the creation of 'infrastructure investment trusts'. Ratings agency, S&P Global, explains the definition of InvITs as follows: "infrastructure investment trusts (InvITs) are innovative vehicles that allow developers to monetise revenue-generating infrastructure assets.... Such monetisation benefits developers by allowing them to release capital for funding new infrastructure[6]... projects and provides liquidity to investors or unit holders as the units of the trust are listed on exchanges."[7] Essentially then, InvITs allow for the monetisation of existing infrastructure: they construct a bundle of infrastructure PPPs as an asset class (an asset class is a group of securities whose risk profile is held to be uncorrelated to that of other assets).

As a country which has relied on the PPP model for public infrastructure, such as schools and hospitals, the UK is home to many InvITs. In 2022, the trade press reports, British InvITs have raised more money than any other type of fund; since they are seen as a reliable revenue source in times of instability and inflation: "Infrastructure as an asset class is generally considered to be a good inflation hedge because demand in the sector is considered 'inelastic' – meaning that rising costs can generally be passed on to customers."[8]

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[1] ADB's support to financial intermediaries has grown more than tenfold in the years 2009 to 2017, from $678m to over $7 billion. https://56606927-2a85-4cfb-95b4-3f0439636792.filesusr.com/ugd/898604_df83d5499bfa4914b92e2213d0838fd0.pdf

[2] Roggenbuck, A. & Geary, K. (4 March 2021). Why is the EIB still hiding one-third of its lending? Accessed from: https://www.re-course.org/wp-content/uploads/2021/03/Submission-to-European-Investment-Bank-review-of-its-Transparency-Policy.pdf

[3] GermanWatch, World Resources Institute and the New Climate Institute (2021) 'Aligning Financial Intermediary Investments with the Paris Agreement' June 2021, https://www.germanwatch.org/en/20374

[4] "Infrastructure Investor India Country Briefing 2011", Infrastructure Investor, May 2011, p.34, http://www.infrastructureinvestor.com/resources/Infrastructure/II%20INDIA%20WEB.pdf

[5] Figures cited in Hildyard, Nicholas (2012) Infrastructure-as-asset-class: Financing development or developing finance? The Corner House: http://www.thecornerhouse.org.uk/resource/more-bricks-and-mortar

[6] The argument that InvITs allow for release of capital to fund new infrastructure is questionable, since some InvITs require 80% of funds raised to be used for existing infrastructure. Although the argument that InvITs allow for release of capital to fund new infrastructure is questionable, since some InvITs require 80% of funds raised to be used for existing infrastructure.

[7] https://www.crisil.com/en/home/our-businesses/ratings/new-products/reits-InvITs.html

[8] This is Money (2022) Are Infrastructure Investment Trusts the key to inflation-busting returns? Available at https://www.thisismoney.co.uk/money/investing/article-10911575/Are-infrastructure-trusts-key-inflation-busting-returns.html

Over the past decade, investment trusts have boomed around the world, particularly in the real estate sector. Real Estate Investment Trusts (REITS) which follow the same model as InvITs, for example, now number 500 across 22 countries, with Australia, the US, UK, Japan and France the top five markets.[9]

This latest shift – of IFIs funding infrastructure investment funds - could open yet another era in private finance mobilisation: that of monetising PPPs as investments – in other words, bundling existing projects together under a trust as a means to earn further revenue. This marks another step in the financialisation of aid, and a step further away from direct IFI project oversight, involvement and application of standards. (It must be noted here that even when IFIs fund projects directly, standards are often breached and communities left displaced and rivers and forests ruined. The risk with InvITs is that with an even longer investment chain, the chance of IFIs ensuring protections are applied is diluted yet further. This is in fact part of the model: to 'de-risk' private investments, transferring costs to the state, citizens and nature in order to maximise profit.)

This paper examines a recent example of an InvIT in India,[10] a country which has embraced the privatisation of public infrastructure through PPPs. It explores the role of three IFIs – the IFC, the Asian Infrastructure Investment Bank (AIIB) and the German Deutsche Investitions- und Entwicklungsgesellschaft (DEG) – in financing this new model of development. In 2018, these IFIs together funded the creation of an InvIT, called the Oriental Infrastructure Trust (OIT), which bundled together five existing road PPP projects in several Indian states.[11] The paper traces the environmental and social impacts of these road projects, detailing stories of loss of livelihood, inadequate compensation and consultation, impacts on indigenous peoples and on biodiversity-rich forests, home to tigers and pangolins. It also examines the financial model of the InvIT and the wider implications for accountability and transparency.

The paper argues that the OIT InvIT investment is not truly an investment in public works - intended to result in road construction that respects the rights and needs of local communities and nature - but in finance, in order to free up capital for further infrastructure investment. This indeed is the IFIs' stated aim; the AIIB says the investment's objective is "to mobilize long-term private institutional capital for financing roads and highways in India,"[12] while the IFC states, "Successful financing of the Project would demonstrate the feasibility and sustainability of large scale de-risked infrastructure assets in the country. The InvIT structure has a potential to be replicated in various other sectors in India and could help in attracting investments from large pension funds and insurance companies."[13]

The risks inherent in this model stem from its unusual nature. Normally, IFIs would be involved in road projects in two ways: either through direct finance or, as is increasingly the case since the financial crisis, via an intermediary such as a private equity infrastructure fund. In both cases, the IFIs would require their environmental and social standards be applied *before, during and after the project*. Under the new investment trust model, the IFIs only become involved when existing infrastructure assets are bundled, in other words *after projects have already been completed*. Whatever problems and harms were caused, happened before standards were in place since the project developers were not at the time required to uphold IFI protections.

To give the green light to IFI financing into an InvIT, such as OIT, the shareholders of the IFIs must believe a created fiction - that the standards to which the IFIs are committed can somehow be applied *in retrospect*. To do this, the IFIs commission a gap analysis through environmental and social due diligence (ESDD) reports, which identify which standards have not been met and how to mitigate that. The problems with this are twofold: first, the quality of the ESDD reports may be woefully inadequate,

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[9] https://www.pwc.com/sg/en/publications/assets/aprea-in-realestate-infra-trusts.pdf
[10] https://orientalinfratrust.com
[11] See: https://www.aiib.org/en/projects/details/2018/approved/India-OSE-InvIT.html; https://disclosures.ifc.org/project-detail/SII/39354/oriental-infratrust and https://deginvest-investments.de/portfolio/oriental-infratrust
[12] https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf
[13] https://disclosures.ifc.org/project-detail/SII/39354/oriental-infratrust

as in the OIT case[14] - with fundamental information missing and scant one-day visits to affected people; second, there are some standards that cannot be applied after the fact: for example, Free, Prior and Informed Consent for indigenous peoples must be given *before* (prior to) project construction as well as during project implementation. This is not something that can be tacked on afterwards.

If IFIs are to expand further into this mode of financing – their stated intention - they must be able to address this simple question: how can they guarantee that their standards will be applied in retrospect?

Linked to this issue of retroactive application of standards is the question of accountability. The IFC and AIIB are clear that in this project, the affected communities have the right to access their respective accountability mechanisms, the Compliance Advisor Ombudsman (CAO) and the Project affected People's Mechanism (PPM) respectively. The compliance functions of the accountability mechanisms investigate whether an IFI has abided by its own standards (or in the case of the AIIB and the OIT project, the delegated IFC Performance Standards) in the preparation and delivery of a project. Hypothetically, if a scheduled tribe community were to file a complaint to the CAO and PPM, alleging that their right to Free, Prior and Informed Consent had been violated, the project developer, IFC and AIIB could argue that standard (PS7) was not applicable when the road was built, and that therefore there is no violation. Even if non-compliance were established, how could a corrective action address this issue? It is not possible to gain someone's consent in retrospect for a project already constructed.

Such fundamental questions around accountability must be addressed by IFIs if they wish to expand their use of InvITs to deliver infrastructure.

Communities reported that there had been inadequate information disclosure at the time the road projects were constructed. However, beyond the immediate issue of project information disclosure – which should be assured under IFC Performance Standard 1 – the IFIs must address the critical issue of why disclosure about their decision to fund this project was *delayed for two years*. The Boards of both IFC and AIIB approved this investment in 2018 but did not inform the public about this until 2020. Why such a lag in disclosure? The access to information policies of both banks allow for such delayed disclosure in cases of commercial sensitivity. But to delay disclosure for two years on an investment which breaks new ground, where large, high risk infrastructure projects have caused harms to local communities, where there is allegedly post-facto application of environmental and social standards, where accountability is in question... this is unacceptable.

There are obvious dangers inherent in this new InvIT financing model. Civil society has already documented the heightened risks of 'outsourcing development' through FIs, where a longer investment chain can end up divorcing projects from the environmental and social protections IFIs are supposed to ensure.[15] In FI investing, the IFI delegates' responsibility for assessing and managing social and environmental impacts of sub-projects to FI clients, with often disastrous results. Researchers have linked FI investments to cases involving forced evictions and other human rights abuses, forest destruction, environmental pollution disasters and destructive coal mines and powerplants.[16] At the same time, the remodeling of infrastructure as an asset class has attracted concern and criticism from civil society groups. UK-based think tank, The Corner House, questions the new model as a "platform for profit-seeking":

> "Viewed as an asset class, infrastructure has political and economic consequences that go beyond the immediate social and environmental impacts of the projects that are built. The increased financialisation of the infrastructure sector has profound implications for what is

[14] https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

[15] https://www.inclusivedevelopment.net/policy-advocacy/outsourcing-development-campaigning-for-transparency-and-accountability-in-financial-intermediary-lending/

[16] Geary, Kate (2015) The Suffering of Others: The human cost of the International Finance Corporation's lending through financial intermediaries, Oxfam, April 2015. See: https://www.oxfam.org/en/research/suffering-others

> funded (and what is not) and who gets to benefit (and who does not). ....Strategies that civil society has developed to hold infrastructure developers to account and to ensure positive outcomes from specific projects – such as safeguards and standards – are not keeping up with these swiftly-evolving new realities."[17]

With investment trusts, IFIs and project sponsors are one step even further away from the ground-level reality of the project impacts, with new levels adding to the opportunity to extract profit. Only providing finance after the event, once the roads are already built and harms have already occurred, sees IFIs no longer "financing development", but rather "developing finance", as Nicholas Hildyard writes.[18]

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[17] Hildyard, Nicholas (2012) Infrastructure-as-asset-class: Financing development or developing finance? The Corner House: http://www.thecornerhouse.org.uk/resource/more-bricks-and-mortar
[18] Hildyard, Nicholas (2012) ibid

1. Introduction - Roads and highways in India

The total road network in India is 6.2 mn km comprising all categories of roads - national & state highways and urban & rural roads. National Highways (NH) account for 2% of the total road network and carry over 40% of total traffic. India has a well-developed framework for Public-Private-Partnerships (PPP) in the highway sector. Asian Development Bank ranked India at the first spot in PPP operational maturity and also designated India as a developed market for PPPs.[19]

National highway construction has been continuously expanding, with 13,327 km constructed in 2020-21, up from 4,410 kms in 2014-15. In the last seven years, the length of the national highways has increased by over 50%, from 91,287 km in April 2014 to almost 141,000 km today. From 12 kms per day in 2014-15 to 37 kms per day in 2020-21, construction speed has increased more than threefold. The Ministry of Roads and Highways constructed 34 km of National Highways per day in 2020-21. In India 100 % Foreign Direct Investment (FDI) is permitted in the road and highways sector, subject to applicable rules and regulations.[20]

In India's budget for 2022-23, the government set an ambitious goal of increasing the national highway network by 25,000 km throughout the fiscal year. By 2025, the Ministry of Roads and Highways aims to have built 200,000 kms of national highways.[21]

Major projects are being implemented under Bharatmala Pariyojana, a government initiative, launched in 2017. Under the initiative, the Ministry of Road Transport and Highways conducted a detailed review of the national highways network with the goal of improving road connectivity to border areas, developing coastal roads, including road connectivity for non-major ports, increasing the efficiency of national corridors, developing economic corridors, inter corridors, and feeder Routes.[22] The programme seeks to construct around 65,000 kms of national and economic corridors, border and coastal highways, and expressways in order to improve the efficiency of existing highway infrastructure. The programme is expected to provide four-lane connectivity to 550 districts, develop 50 economic corridors covering approximately 26,000 kms, increase vehicular speed by 20-25%, lower supply chain costs by 5-6%, and improve the national highway network to carry 70-80% of total road traffic.[23] Further, the programme has identified about 8,000 kms of inter corridors and about 7,500 km of feeder routes for improving the effectiveness of economic corridors, GQ and North/South-East/West corridors. The programme envisages development of ring roads/ bypasses and elevated corridors to decongest the traffic passing through cities and enhance logistic efficiency. 28 cities have been identified for ring roads; 125 choke points and 66 congestion points have been identified for their improvements. Moreover, in order to reduce congestion on proposed corridors, enhance logistic efficiency and reduce logistics costs of freight movements, 35 locations have been identified for development of Multimodal Logistics Parks.[24]

Further, the government has rolled out over 60 road projects in India worth over $10 bn based on the Hybrid Annuity Model (HAM). Asset recycling, through the toll-operate-transfer (ToT) model has been taken up by the National Highways Authority of India (NHAI) for 100 highways. The first two bundles of 9 highways each were monetized successfully for an investment of over $2 bn.[25]

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[19] https://www.investindia.gov.in/sector/roads-highways
[20] https://www.makeinindia.com/sector/roads-and-highways
[21] https://www.investindia.gov.in/sector/roads-highways#:~:text=National%20Highways%20(NH)%20account%20for,NH%20construction%20in%202014%2D15.
[22] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1606511#:~:text=The%20Ministry%20of%20Road%20Transport,Corridors%2C%20development%20of%20Economic%20Corridors%2C
[23] https://www.investindia.gov.in/sector/roads-highways#:~:text=National%20Highways%20(NH)%20account%20for,NH%20construction%20in%202014%2D15.
[24] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1606511#:~:text=The%20Ministry%20of%20Road%20Transport,Corridors%2C%20development%20of%20Economic%20Corridors%2C
[25] https://www.investindia.gov.in/sector/roads-highways#:~:text=National%20Highways%20(NH)%20account%20for,NH%20construction%20in%202014%2D15.

2. Role of the National Highways Authority of India (NHAI)

The National Highways Authority of India (NHAI) became operational in 1995. The functions of NHAI include development, maintenance, and management of national highways, collection of fees on national highways, monitoring and supervising vehicular traffic on National Highways, and managing them. NHAI's role is also to develop and deliver consulting and construction services in India and overseas, as well as do research on the creation, maintenance, and management of highways and other infrastructure. It also provides advice to the Central Government on highway issues.[26] In addition, the NHAI is in charge of implementing other national highways projects, particularly road links to India's major ports. The national highways are also developed by the State Public Works Departments (PWDs) and the Border Road Organisation (BRO).

Further, NHAI is responsible for implementing the different phases of the National Highways Development Project (NHDP), including developing, maintaining, and managing 50,329 kms of national highways, along with other minor projects.[27] [28]

An Asian Development Bank (ADB) project supported the establishment of the NHAI. As part of this project, in 2005 a decision was made to employ public-private partnerships (PPPs) in developing phase three to seven of the NHDPs, primarily through Build Operate Transfer (BOT) arrangements.[29]

[26] https://nhai.gov.in/#/about-nhai
[27] https://nhai.gov.in/#/about-nhai
[28]https://morth.nic.in/nhai-0#:~:text=National%20Highways%20Authority%20of%20India%20(NHAI)%20was%20constituted%20by%20an,by%20the%20Government%20of%20India.
[29] https://www.adb.org/sites/default/files/project-document/65288/23251-ind-pcr.pdf

3. Mechanisms used to build and operate road assets by NHAI

The national highways construction and operation by NHAI in India has been done through different models. In the earlier years the construction and operation of national highways was done through public procurement contracts and maintained by public departments. Post liberalisation and under influence of the IFI projects, the implementation of road construction and maintenance projects in India was gradually shifted to the private sector through PPPs. However, in the preceding years the PPP projects did not provide the desired result for the private sector, hence there was a policy shift from PPPs to EPC and HAM model to attract private investments and financing.

Under PPPs, BOT (toll) model was the preferred model for road projects, accounting for 96% of all projects awarded in 2011-12. But this progressively reduced to nil. When the interest in BOT projects started to wane, road construction shifted to the traditional EPC mode, with the HAM model being devised later. Under the EPC model, the government pays the entire cost, thereby insulating the contractor entirely from financial risk.[30]

InvITs are the latest mechanism to build roads in India and has seen a number of InvIT transactions over the last 4-5 years. The total Assets Under Management (AUM) across the 8 active InvITs is around Rs. ~1.4 lakh crore (USD 17.5 billion). Bulk of the assets are under toll roads (Rs. 47,500 crore, USD 5.9 billion)), followed by telecom (Rs. 42,000 crore, USD 5.25 billion), gas pipeline (Rs. 16,500 crore, USD 2.1 billion) and power transmission (Rs. 14,000 crore, USD 1.75 billion). Since the introduction of InvIT regulations, bulk of the InvIT's have been sponsored by private sector infrastructure developers. Recently, public sector asset owners such as Powergrid and NHAI have initiated greater adoption of the instrument.[31]

Engineering, Procurement and Construction (EPC)

Under the EPC model, NHAI pays private players to lay roads. The private player has no role in the road's ownership, toll collection or maintenance (it is taken care of by the government).

Build, Operate, Transfer (BOT)

Under the BOT model, private companies play an active role, building, operating, and maintaining the road for a certain period of agreement — like for 10-15 years — before returning the asset to the government at the end of the agreement. This is the classic Public Private Partnership (PPP) model. Under a BOT, the private player is expected to arrange all of the project's financing, while the government collects toll money or annuity fees based on the concession agreement. In the BOT-Annuity system, the government takes the toll revenue risk, while the private player gets paid a predetermined annuity for construction and maintenance. The BOT model hit stumbling blocks when private investors were unwilling to invest. The private players had to fully plan their finances, whether through equity or debt. Banks troubled by Non Performing Assets(NPAs) were wary of lending to these projects. Furthermore, if the compensation structure did not include a fixed compensation (such as an annuity), developers were required to assume the entire risk of low passenger traffic.

Hybrid-Annuity Model (HAM)

The HAM model combines the EPC and the BOT models. HAM combines EPC (40%) and BOT-Annuity (60 percent). NHAI releases 40% of the total project cost on behalf of the government. The remaining 60% is arranged by the developer.

[30] For new projects, NHAI back to build-operate-transfer model | India News,The Indian Express
[31] https://www.niti.gov.in/sites/default/files/2021-08/Vol_I_NATIONAL_MONETISATION_PIPELINE_23_Aug_2021.pdf

Toll Operate Transfer (ToT)

Under the Toll Operate Transfer (ToT) model, publicly funded projects that have been operational for two years are put up for bidding, with concessionaires (developers or investors) receiving the right of fee collection and appropriation for a predetermined concession period (30 years) in exchange for a lump sum payment to NHAI.[32]

Infrastructure Investment Trust (InvIT)

An infrastructure investment trust (InvIT) is a type of investment entity designed to hold income-generating and operational infrastructure assets, like highways, power transmission lines, and gas pipelines. These assets have long-term contracts with reliable counterparties that offer consistent cash flow over a lengthy period of time – typically 15-20 years. Long-term returns on road InvITs range from 9 to 12 %. Analysts estimate that InvITs have been able to reduce the debt of their road projects prior to forming InvITs by 25-30% on average.[33]

[32]https://www.business-standard.com/article/economy-policy/ham-tot-fastags-initiatives-by-govt-shift-focus-back-to-road-projects-118050801305_1.html
[33] https://www.livemint.com/industry/infrastructure/InvITs-the-next-big-infra-story-11597814096232.html

4. Budgetary allocations and investments in roads and highways

The budgetary allocation for the Ministry of Road Transport and Highways increased by 68% for the fiscal year (FY) 2022-23- from Rs 1,18,101 crore[34] (USD 14.7 billion) in last year's budget projection to Rs 1,99,107.71 crore (USD 24.9 billion). In absolute terms, this is the highest rise among all ministries in FY 2022-23 (from revised estimates of FY 2021-22). NHAI has been allocated nearly all of this increased funding. It will receive a substantial portion of the additional Rs 81,000 crore (USD 10.1 billion), with its allocation increasing by 133% (Rs 76,665 crore, USD 9.6 billion) to Rs 1,34,015 crore (USD 16.75 billion). Of the budgeted amount, 75% (Rs 1,00,100 crore, USD 12.5 billion) will come from the Central Road and Infrastructure Fund, 15% (Rs 20,000 crore, USD 2.5 billion) from the monetisation (through sale/lease of public sector assets to private sector) of the national highways, and the remaining 10% (Rs 13,915 crore, USD 1.74 billion) from the Permanent Bridge Fees Fund.[35] The government has also set a goal of increasing the country's national highways network by 25,000 km in FY 2022-2023, up from 12,000 km in FY 2021-2022.[36]

The allocation for roads and bridges in FY 2022-23 is Rs 64,573 crore (USD 8.1 billion). The Ministry has allocated Rs 2,586 crore (USD 323 million) for road and highway maintenance (including toll bridges). This is 7% less than the revised maintenance budget for FY 2021-22. Also Rs 20,000 crore (USD 2.5 billion) will be mobilised through innovative ways of financing (PPPs, lease, InviTs, bond markets, infrastructure Non-Banking Financial Institutions, etc) to complement public resources.[37]

According to the National Monetisation Plan[38], a total of 5,000 km of road worth Rs. 30,000 crore (USD 3.75 billion) will be monetised through Toll Operate Transfer (ToT) and InvIT during FY 2021-22. NHAI has monetised 390 km of highway under the InvIT mode during the FY 2020-2021. Through the ToT mechanism, an extra length of around 450 km has been bid out.[39] Through InvIT, NHAI plans to raise Rs 40,000 crore (USD 5.72 billion) to monetise its highway assets.[40]

Private sector investment in road construction in 2020-21 and 2019-20 was Rs 12,475.53 crore (USD 1.55 billion) and Rs 21,925.98 crore (USD 2.74 billion), respectively. Until November 2021, the private sector invested Rs 15,164.25 crore (USD 1.9 billion) in road construction.[41] In FY 2020-21, National Highways/Expressways cover 1,36,440 km, State Highways cover 1,76,818 km, and Other Roads cover 59,02,539 km. Total investment in roadways grew to Rs 1,72,767 crore (USD 21.6 billion) in FY 20 from Rs 51,935 crore (USD 6.5 billion) in FY 15.[42]

In FY 2020-2021, 13,298 kms of highway were constructed in India. The Ministry of Road Transport and Highways built 2,284 kms of national highways in June 2021, compared to 1,681 kms in June 2020. Between April 2000 and June 2021, the construction development sector attracted USD 26.1 billion in FDI, according to data supplied by the Department for Promotion of Industry and Internal Trade Policy (DPIIT). The government is working on policies to attract considerable investment

[34] 1 crore = 10 million, 1 USD = INR 80

[35] https://prsindia.org/budgets/parliament/demand-for-grants-2022-23-analysis-road-transport-and-highways#:~:text=In%202022%2D23%2C%20of%20the,%2C34%2C015%20crore%20(67%25).&text=This%20is%20followed%20by%20allocation,Rs%2064%2C573%20crore%20(32%25).

[36] https://www.thehindu.com/business/budget/union-budget-2022-national-highways-to-be-expanded-by-25000km-says-fm-sitharaman/article38357781.ece

[37] https://prsindia.org/budgets/parliament/demand-for-grants-2022-23-analysis-road-transport-and-highways#:~:text=In%202022%2D23%2C%20of%20the,%2C34%2C015%20crore%20(67%25).&text=This%20is%20followed%20by%20allocation,Rs%2064%2C573%20crore%20(32%25)

[38] Minister for Finance and Corporate Affairs, Government of India, launched the asset monetisation pipeline of Central ministries and public sector entities. India's central government policy institution, NITI Aayog has developed the pipeline, in consultation with infrastructure line ministries, based on the mandate for 'Asset Monetisation' under Union Budget 2021-22. NMP estimates aggregate monetisation potential of Rs 6.0 lakh crores through core assets of the Central Government, over a four-year period, from FY 2022 to FY 2025. Asset monetisation, based on the philosophy of Creation through Monetisation, is aimed at tapping private sector investment for new infrastructure creation. The NMP is co-terminus with the National Infrastructure Pipeline.

[39] https://morth.nic.in/sites/default/files/Annual%20Report_21-22-1.pdf

[40] https://www.ibef.org/download/Roads-June-2020.pdf

[41] https://economictimes.indiatimes.com/news/economy/infrastructure/private-sector-invests-rs-15164-25-crore-in-road-construction-till-november-this-fiscal/articleshow/88318430.cms?from=mdr

[42] https://www.makeinindia.com/sector/roads-and-highways

interest through a number of initiatives. NHAI forecasts that it would be able to raise Rs. 1 lakh crore (USD 14.30 billion) each year from tolls and other sources in the next five years.[43]

BOX on PPPs: Public Private Partnerships: panacea or problem?

In its examination of ten PPP projects, Eurodad uncovered a number of common problems. These included:

- high costs to the public purse and excessive risk to the public sector;
- a higher burden of risk on the public versus the private sector;
- impacts on the poorest and exacerbation of inequality;
- a lack of transparency and accountability to the public;
- a high degree of complexity in terms of negotiation and implementation

Another review of PPP research and case studies, carried out by Public Services International Research Unit (PSIRU), uncovered further concerns:

- PPPs add to the long-term debt of developing countries, given the higher costs of developing PPP projects.
- Private finance and PPPs focus on profitable projects at the expense of the needs of the poor.
- Citing examples from Ghana, Italy, Egypt and the USA, PSIRU notes that because private companies require PPPs to be commercially viable, this can distort policy decisions in favour of more profitable projects, rather than those that will be of most public benefit.
- PPPs are a comparatively expensive way of raising money, since loans to the private sector attract higher interest rates than those to governments.
- Countries have poor capacity to negotiate PPP contracts, expected impacts are unclear and monitoring weak. This can be especially true in developing countries, where ministries can lack the complex legal and financial knowledge to secure a good deal
- Many PPPs result in expensive failures to deliver the expected investments. The study finds this is the case not only in developing but also developed countries – for example, projects in France and Sweden which have ended up costing nearly twice the estimated budgets, resulting in cuts to services.

PSIRU concludes, based on evidence from international experience and studies of PPPs:

- The cost of capital is always cheaper without a PPP, for high income and developing countries alike. This is because governments can borrow more cheaply than the private sector, given the lower risks involved.
- The cost of construction is higher under a PPP, because the financiers require a turnkey contract, which is about 25 per cent more expensive. A study by the European Investment Bank, for example, compared the cost of PPP road projects across Europe with conventionally procured road projects, and found that the PPPs were on average 24 per cent more expensive than the public sector roads.
- The transaction costs of tendering and monitoring PPPs add 10-20 per cent to their costs. Because PPPs are so complex, very high legal and accountancy costs can be incurred, adding to the final project bill.
- The public sector faces real risks from PPPs, including incomplete contracts, the likelihood of renegotiations, and the potential public liabilities in case of bankruptcy or default by the private company. PSIRU cites the examples of Chile and Colombia, where more than three quarters of road PPP projects were renegotiated, resulting in cost increases of between 20% and 140%.

[43] https://www.ibef.org/industry/roads-india

PPP experiences in Indian context -

- Economic slowdown globally played a role in the slowdown of infrastructure investment through PPPs in India.
- PPPs have faced delays in land acquisition, shifting of utilities, right of way issues, leading to time and cost overruns.
- Proper due-diligence by project developers as well as project finance banks resulted in many bank loans being rendered as non performing.
- Indian capital markets are said to be inadequately developed with low appetite for infrastructure projects that are seen as risky assets.
- PPP projects in India were largely not able to deliver on the contractual promises like efficiency, reduced tariffs, better services, investments, etc.
- This lead private promoters asking for more guarantees, subsidies and public sector support leading to subsequent rehashing of earlier models into new ones.
- Mobilisation of private investments for the projects was not upto the expected levels and private promoters depended on public resources for financing operations.
- These factors also lead to social backlash for these projects not able to deliver better services with local citizens contesting these private projects.

5. Evolution of Infrastructure Investment Trusts (InvITs)

Infrastructure Investment Trusts, or InvITs are collective investment vehicles, similar to mutual funds that allow individual and institutional investors to invest directly in infrastructure projects in exchange for a small portion of the income as a return. By aggregating various assets under a single organisation, InvITs allow infrastructure asset developers to monetise their assets (trust structure).

Ratings agency, Standard and Poor's, explains the global definition of InvITs as follows:

"Infrastructure investment trusts (InvITs) are innovative vehicles that allow developers to monetise revenue-generating infrastructure assets... Such monetisation benefits developers by allowing them to release capital for funding new infrastructure ... projects[44], and provides liquidity to investors or unit holders as the units of the trust are listed on exchanges."[45] Essentially then, InvITs allow for the monetisation of existing infrastructure, including through PPPs - in effect constructing infrastructure PPPs as an asset class (an asset class is a group of securities whose risk profile is held to be uncorrelated to that of other assets).

As a country which has relied on the PPP model for public infrastructure, such as schools and hospitals, the UK is home to many InvITs. In 2022, the trade press reports, British InvITs have raised more money than any other type of fund; since they are seen as a reliable revenue source in times of instability and inflation: "Infrastructure as an asset class is generally considered to be a good inflation hedge because demand in the sector is considered 'inelastic' – meaning that rising costs can generally be passed on to customers."[46]

Over the past decade, investment trusts have boomed around the world, particularly in the real estate sector. Real Estate Investment Trusts (REITS) which follow the same model as InvITs, for example, now number 500 across 22 countries, with Australia, the US, UK, Japan and France the top five markets.[47]

The G20 group of countries also threw its weight behind the creation of infrastructure as an asset class in 2018 at the time of the Argentinean presidency[48] launching a Roadmap, which the European Network for Debt and Development challenged.[49]

[44] As some InvITs are required to invest 80% of funds into existing infrastructure, this argument that InvITs free up funds for new infrastructure is questionable.
[45] https://www.crisil.com/en/home/our-businesses/ratings/new-products/reits-InvITs.html
[46] This is Money (2022) Are Infrastructure Investment Trusts the key to inflation-busting returns? Available at https://www.thisismoney.co.uk/money/investing/article-10911575/Are-infrastructure-trusts-key-inflation-busting-returns.html
[47] https://www.pwc.com/sg/en/publications/assets/aprea-in-realestate-infra-trusts.pdf
[48] https://www.oecd.org/g20/roadmap_to_infrastructure_as_an_asset_class_argentina_presidency_1_0.pdf
[49] https://www.eurodad.org/asset-class-report

BOX on Infrastructure as an asset class: Concerns and Questions

The remodeling of infrastructure as an asset class attracted concern and criticism from many civil society groups. UK-based think tank, The Corner House, questions the new model as a "platform for profit-seeking":

"Viewed as an asset class, infrastructure has political and economic consequences that go beyond the immediate social and environmental impacts of the projects that are built. The increased financialisation of the infrastructure sector has profound implications for what is funded (and what is not) and who gets to benefit (and who does not). ... Strategies that civil society has developed to hold infrastructure developers to account and to ensure positive outcomes from specific projects -- such as safeguards and standards -- are not keeping up with these swiftly-evolving new realities."

To add to that there are also serious risks associated with financialisation of essential public services. In October 2021, a group of independent United Nations human rights experts in a joint statement, highlighted the serious negative impact that financialisation has had on the enjoyment of the human rights to safe drinking water and sanitation, as well as a range of other human rights, including the rights to food, adequate housing, development and a healthy and sustainable environment, among others.

In India, InvITs are registered and regulated by the Securities and Exchange Board of India, or SEBI. Private equity investors and infrastructure developers are increasingly turning to InvITs to hold functioning infrastructure assets and monetise their investments in these projects.

InvITs are a type of hybrid investment that combines the advantages of both equity and debt. The money acquired can only be used to purchase infrastructure assets, either in the form of equity or debt. While the operating business model, like debt, helps deliver stable, predictable, and relatively low-risk cash flows, equity provides growth potential because returns are not fixed with a range of movement in the unit price. InvITs enable enterprises to monetise their infrastructure assets and provide a mechanism for investors to buy an interest in infrastructure projects, facilitating infrastructure investment. The trust fund must invest at least 80% of the total assets purchased in a revenue-generating infrastructure asset. The remaining might be put into under-construction infrastructure assets or infrastructure company equities.

"The key laws applicable to InvITs include the InvIT Regulations, the InvIT, the Preferential Issue Guidelines, the Allotment and Trading Lot Guidelines, the Trusts Act, the Registration Act and the Income Tax Act, 1961, the Foreign Exchange Management Act, 1999 and the FEMA Regulations."[50]

"In order to enhance NHAI's resource mobilization, the Cabinet has accorded the approval (vide communication 39/CM/2019 (i) dated 13.12.2019) authorizing NHAI to set up Infrastructure Investment Trust(s) as per InvIT Guidelines issued by SEBI, to monetise completed National Highways that have a toll collection track record of at least one year and NHAI reserves the right to levy toll on the identified highway. NHAI is authorized to incorporate SPV(s) which are an essential and integral part of the entire InvIT structure. Present status of NHAI InvIT is as under:

[50] https://www.cyrilshroff.com/wp-content/uploads/2020/10/Deconstructing-InvITs-REITs-NEW-11-oct.pdf

(i) The InvIT Trust has been registered with Securities & Exchange Board of India ("SEBI") on October 28th, 2020.

(ii) Various advisors and intermediaries of NHAI InvIT such as Trustee, Investment Manager, Roads SPV, Auditor, Registrar, Tax Consultant, Lead Manager, Transaction advisor, Legal Counsel, Valuer, HR Consultant etc. have been appointed.

(iii) Following regulatory approvals for the "National Highways Infra Investment Managers Private Limited", Investment Manager Company of NHAI InvIT, are in place.

(a) Placement Memorandum (PM) dated Oct 26, 2021 and Final Placement Memorandum (FPM) dated Nov 03, 2021 filed with SEBI

(b) Listing completed on National Stock Exchange (NSE) and Bombay Stock Exchange on Nov 10, 2021

(iv) First round of InvIT issue was completed on November 2, 2021. An enterprise value of Rs. 8011 crore achieved in this round of InvIT issue funded through a combination of Units from investors and Debt from banks. Investment from two international pension funds, namely Canada Pension Plan Investment Board and Ontario Teachers' Pension Plan Board each holding 25% of the units has been made. Balance units placed with a diversified set of domestic institutional investors comprising pension funds, insurance companies, mutual funds, banks and financial institutions. NHAI has awarded the Letter of Award (LoA) to Oriental Insurance Company for insurance of project assets and payment done to them for issuance of policies." [51]

[51] https://morth.nic.in/sites/default/files/Annual%20Report_21-22-1.pdf

6. The Oriental InfraTrust

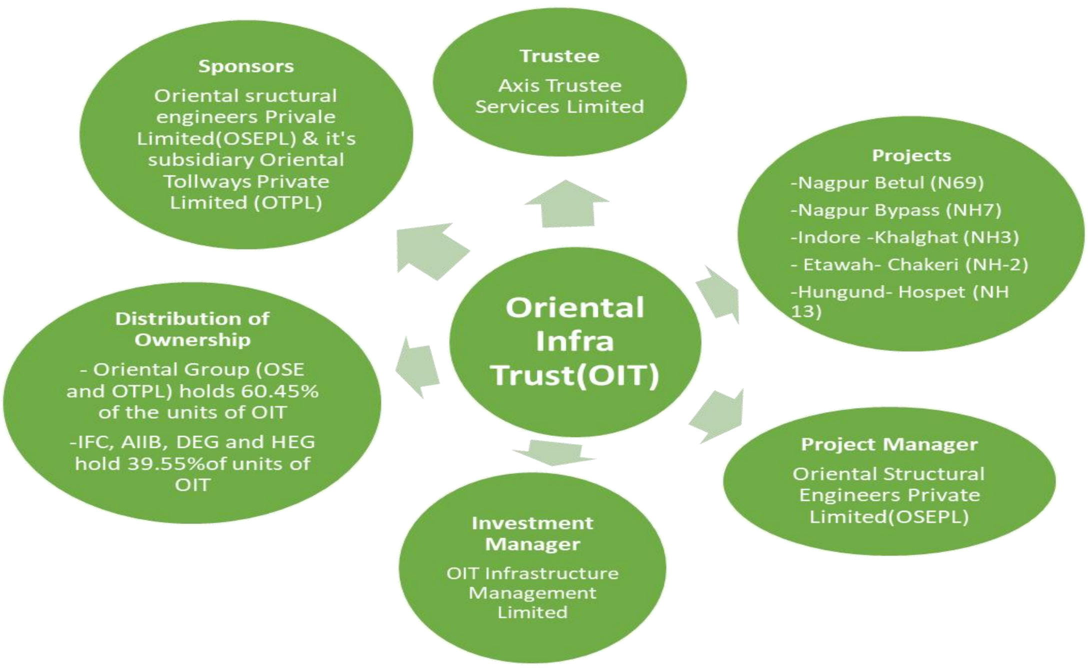
The NHAI awarded the highway construction contracts to the private company, Oriental Structural Engineers Private Limited (OSE) on PPP basis to be implemented as BOT or DFBOT projects. These projects included Nagpur Bypass, Indore Khalghat, Etawah Chakeri, Hungund - Hospet and Nagpur Betul highways. Under the PPP model all the projects were to be operated under BOT (Toll) except Nagpur Betul project which is to be operated on an annuity basis.

To implement these projects and to undertake operations and maintenance OSE formed separate Special Purpose Vehicle (SPV) companies for each project namely -

- Oriental Nagpur Bye Pass Construction Private Limited("ONBPCPL"),
- Oriental Pathways (Indore) Private Limited("OPIPL"),
- Etawah -Chakeri (Kanpur) Highway Private Limited("ECKHPL"),
- Oriental Nagpur Betul Highway Limited ("ONBHL"),
- OSE Hungund Hospet Highways Private Limited("HHPL")

A new investment vehicle, the Oriental InfraTrust (OIT) was set up by OSE and its wholly owned subsidiary, Oriental Tollways Private Limited (OTPL). The Sponsors have set up the Trust on June 15, 2018, as an irrevocable Trust under the provisions of the Indian Trusts Act, 1882. The Trust was registered as an Infrastructure Investment Trust under the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations as an infrastructure investment trust on March 26, 2019.[52] OSE also acts as the Project Manager for OIT.

Structure of Oriental Infra Trust



[52] https://orientalinfratrust.com/ as on 20 July 2022

In June 2019, OIT acquired a portfolio of above-mentioned five operating road assets from its sponsors (OSE and OTPL). It is now responsible for the operation and maintenance of these assets till the end of the remaining concession period[53] pursuant to the concession agreement. The road assets were initially awarded to the sponsors by the NHAI, the concessioning authority, under a BOT or design, build, finance, operate and transfer (DFBOT) model.

The five road assets are[54]:

- Nagpur Bypass project: an approximately 117 km section of national highway (NH)-7 including the Madhya Pradesh/Maharashtra border to Nagpur section and the Nagpur to Hyderabad section in Maharashtra;
- Indore - Khalghat project: an approximately 72 km section of NH-3 between Indore and Khalghat in Madhya Pradesh;
- Etawah - Chakeri project: an approximately 160 km section of NH-2 between Etawah and Chakeri in Uttar Pradesh;
- Hungund - Hospet project: an approximately 97 km section of NH-13 between Hungund and Hospet in Karnataka; and
- Nagpur - Betul project: an approximately 175 km section of NH-69 between Nagpur and Betul in Madhya Pradesh.

All the above road assets, other than the Nagpur Betul project, are operated on a toll basis. The Nagpur Betul project is operated on an annuity basis.

Sponsors of Oriental Infra Trust:

- **Oriental Structural Engineers (OSE) Private Limited** was incorporated in 1971. It is engaged in the Indian infrastructure sector, specialising in highways & airfields. For example, OSE has completed pavement works at 39 airports in India. OSE has grown to a Rs 27 billion business with two main verticals:
    1. Engineering, procurement, and construction (EPC)
    2. Development of Highway Assets on Build Operate and Transfer (BOT) through PPPs

- **Oriental Tollways Pvt Ltd (OTPL)** engages in the construction of roads and highways. The company was incorporated in 2008 and is based in New Delhi, India. OTPL operates as a subsidiary of OSE. It undertakes all road and highway related projects across the country on behalf of OSE. The company mainly works on projects from NHAI and the Ministry of Road Transport & Highways (MoRTH), Roads & Highway Department. Apart from the construction of roads, highways, and airfields, the sponsors also have expertise in building bridges, flyovers, and embankments. One of the most important roles of OTPL is to manage OMT (Operations Maintenance & Tolling) of 9 SPV's (special purpose vehicles).

[53] The concession agreement grants the concessionaire exclusive rights to operate their business in the facility for a stated time and under specified conditions.
[54] https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf

7. International Financing and Investment Objective -

As per the World Bank, the governments world over will need infrastructure to accelerate economic recovery, create jobs, and stimulate productive investment. There is a general consensus among international financial institutions on the need for more resources for infrastructure and developing countries need to invest around 4.5 percent of GDP to achieve infrastructure-related Sustainable Development Goals. Several studies confirm that the infrastructure financing gap is huge, standing in multiples of trillions per year. As per the Bank, most governments simply don't have the resources needed to fully finance their infrastructure needs, which makes private sector participation essential.[55] To implement this approach the World Bank came up with strategies such as Billions to Trillions followed by Maximising Finance for Development (MFD). Billions to trillions[56] strategy would mean - to go from billions in official assistance to trillions in investments, willingness to collaborate through creative partnerships, innovative financing solutions, knowledge, and convening power to catalyze and crowd-in trillions of public and private sector dollars.

Similarly, MFD[57] is conceptualised as the private sector playing a substantially bigger role, both as a financier and as a source of knowledge, expertise, and innovation that can yield transformative solutions. It aims to address binding constraints and unlock opportunities for the private sector to play a bigger role in development. Further, enhancing private sector involvement and prioritising commercial sources of financing; and enhancing the catalytic role of Multilateral Development Banks (MDBs) themselves. A joint report by MDBs and DFIs, 'Mobilization of Privative finance, 2019'[58] published in January 2021 states, "In 2019, MDBs mobilized $63.6 billion of private finance in operations in middle- and low-income countries".

Despite the World Bank's claims regarding the MFD approach of effectively using public funds to leverage private sector investment for development outcomes, research has demonstrated that its promises are exaggerated.[59] A report[60] in April 2019 from a UK-based think tank, the Overseas Development Institute, noted that, "blended finance is unlikely to meet the SDG financing gap and risks undermining the poverty eradication agenda in the poorest countries." UK-based CSO Stamp Out Poverty's report[61] in March 2019 similarly, questioned lofty projections of the ability of public money to leverage private sector finance for development and noted that, "The false promise may detract...from other useful policy measures, such as focusing more efforts on mobilising domestic tax revenues or fighting tax avoidance instead."

A 2018 open letter signed by over 110 academics detailed MFD's many structural flaws, stressing that its promotion of shadow banking to create investable opportunities in essential services such as water, health and infrastructure can have long-term negative consequences for equity in service provision.[62]

IFIs including the World Bank group and AIIB have followed this approach in developing countries like India through financing infrastructure projects in sectors like roads and highways, energy, water, agriculture, etc. One among several such projects include finance support to OSE for setting up an InviT for operations and maintenance of their road assets. Attracting international finance has been a crucial part of the OIT model. Post the private placement, Oriental Group (OSE and OTPL) holds 60.45% of the units of OIT while financial investors, including International Finance Corporation (the World Bank's private sector lending arm), the Asian Infrastructure Investment Bank (AIIB, another multilateral development bank), Deutsche Investitions- und Entwicklungsgesellschaft (DEG, a

[55] A simple way to close the multi-trillion-dollar infrastructure financing gap (worldbank.org)
[56] From billions to trillions : MDB contributions to financing for development (worldbank.org)
[57] Maximizing Finance for Development (MFD) (worldbank.org)
[58] https://www.ifc.org/wps/wcm/connect/8249bfb4-2ad0-498d-8673-90fe196cb411/2021-01-14-MDB-Joint-Report-2019.pdf?MOD=AJPERES&CVID=ns1zGNo
[59] https://www.brettonwoodsproject.org/2020/04/world-bank-continues-to-push-maximising-finance-for-development-agenda-exacerbating-global-economic-instability/
[60] https://odi.org/en/publications/blended-finance-in-the-poorest-countries-the-need-for-a-better-approach/
[61] https://www.stampoutpoverty.org/live2019/wp-content/uploads/2020/11/Billions_to_trillions_web.pdf
[62] https://criticalfinance.org/2018/10/10/the-world-banks-new-maximizing-finance-for-development-agenda-brings-shadow-banking-into-international-development-open-letter/

Development Finance Institution and subsidiary of KfW Group, Germany) and HEG (leading manufacturer and exporter of graphite electrodes) hold the balance of 39.55%.[63] This project is unusual since IFIs would usually invest in road projects before they are built and require their environmental and social standards be applied before, during and after the project. However, under the new investment trust model, the IFIs only become involved after projects have already been completed. This means project developers must uphold IFI protections in retrospect, after project construction is already completed.

Financing from international sources:

In 2018, OIT successfully attracted financing from two international financial institutions (IFIs): the AIIBand the IFC. The two IFIs together provided over USD150 million of financing to InvIT, in a mixture of equity and debt. Later, in 2019, DEG invested Euros 34 million in the project.

IFC invested a total of USD 101.15 million in OIT The financing package consists of up to Rs30,825 million, including a local currency A loan[64] / Non-Convertible Debentures[65] ("NCDs") investment of up to Rs 4,875 million for a tenor of up to 14 years, mobilisation of up to Rs 24,000 million of Parallel Loans, and up to Rs 1,950 million of equity According to the IFC, proceeds of the investment would go towards refinancing of the existing debt, fresh capital expenditure, reducing the existing leverage of the projects and repayment of shareholders' loan. The project was approved by the IFC Board in June 2018, but it was not disclosed until February 2020 - almost two years later.[66]

The IFC's objective with the investment is to create a demonstration effect which can then then replicated across India. The Summary of Investment Information document on the IFC website states: "Successful financing of the Project would demonstrate the feasibility and sustainability of large scale de-risked infrastructure assets in the country. The InvIT structure has a potential to be replicated in various other sectors in India and could help in attracting investments from large pension funds and insurance companies."[67]

In addition, the IFC points to severe constraints and regional imbalances in road infrastructure in India, which if overcome would promote its potential as a "regional logistics and distribution hub." The IFC specifically states, "New investments in transport infrastructure would heighten efficiency, productivity, quality and access and can have spillover effects on priority sectors in India, such as agriculture, manufacturing and tourism."

In terms of the importance of its own role, the IFC outlines three benefits: provision of a long tenor, fixed rate loan in the local currency, which has a repayment profile matching the cash flows of the project and the long-lived nature of the road assets; and a catalytic effect in attracting other finance: the IFC claims that its investment would help to mobilise around USD 370 million from other financial institutions. Finally, the IFC claims that its involvement in OIT will help to improve environmental and social standards, saying it will "help the InvIT incorporate the best practices on E&S" in line with the IFC Performance Standards.

This is not IFC's first venture into an InvIT: in 2015, IFC invested $100 million equity into Road Holdco, set up by New York-based I Squared Capital. Road Holdco acquired seven existing road projects in India.[68]

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[63] https://www.orientalindia.com/ose-InvIT/
[64] IFC offers innovative financial products to private sector projects in developing countries. These include loans for IFC's own account (also called A-loans)
[65] Non-convertible debentures (NCD) are those which cannot be converted into shares or equities. NCD interest rates depend on the company issuing the NCD.
[66] https://disclosures.ifc.org/project-detail/SII/39354/oriental-infratrust
[67] https://disclosures.ifc.org/project-detail/SII/39354/oriental-infratrust
[68] https://disclosures.ifc.org/project-detail/ESRS/34415/cube-highways

The AIIB's investment in OIT is USD50 million equity in Indian Rupee equivalent This project was approved by the AIIB Board in August 2018, but the bank did not disclose the project until March 2020. In the project summary document[69]AIIB states that the objective of the project is "to mobilize long-term private institutional capital for financing roads and highways in India."

Essentially, by investing equity in OIT, the AIIB (and the IFC, as co-investor) is taking over existing road projects, which were built over the past ten years. The intention is to free up the original project developer's capital, so it can invest in more road projects. According to the AIIB's project information, the private capital mobilised "will be invested in both greenfield infrastructure development and operational infrastructure assets." The expected results of the investment include; "demonstration of a proof-of-concept that infrastructure investment trusts are a new type of financing vehicle" and "redeployment of freed-up capital in development of the greenfield infrastructure sector including roads and highways."[70]

Interestingly, the Board approval for the IFC and the AIIB Investment came in June 2018, August 2018 respectively and the Oriental Infra Trust was registered as an InvIT only in March 2019. Subsequently, Oriental Infra Trust acquired a portfolio of five operating road assets from the ***sponsors (OSE and OTPL)*** and will now be responsible for the operation and maintenance of the five assets till the end of the remaining concession period pursuant to the concession agreement for each of them.

In June 2019, OIT received Euros **34 million from DEG**. According to DEG, they financed OIT partly to contribute to market and sector development through creation and funding of InvIT to broaden the investor base and to provide a signaling effect for other investors and contribute to "capital market development as well as to an accelerated development of India's constrained road infrastructure sector."[71]

[69] https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf
[70] https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf
[71] https://deginvest-investments.de/portfolio/oriental-infratrust

8. Environmental and social concerns with the OIT road projects:

In January and February 2022, an independent researcher visited villages along the route of the road projects - Nagpur Bypass project, Indore - Khalghat project and Nagpur - Betul project to assess residual social and environmental (E&S) concerns. The research, which involved interviews with individuals, focus groups, review of local media, and interviews, revealed a number of ongoing impacts which call into question whether E&S standards and laws were upheld.

Along the Nagpur Bypass highway (NH-7) the researcher visited 11 villages and held interviews with 58 affected families. On the Nagpur Betul highway (NH-69) interviews were held in 10 villages with 37 affected families and along the Indore Khalghat highway (NH-3) interviews were held in 10 villages with 33 families.

Through these interviews and discussions local people revealed several problems related to project implementation, such as issues with land acquisition and compensation, impacts on indigenous communities, impacts on livelihoods, biodiversity and wildlife, as well as safety risks to the local communities, and access to public services.

Socio economic concerns

Roads and highway projects are land intensive and often require acquisition of large tracts of land, which include agricultural land, and forest land belonging to indigenous and marginalised communities.

Land acquisition

For Nagpur Bypass highway, the total land requirement for the project was estimated to be 626.995 hectare (ha) out of which 243 ha was already available with NHAI. Fresh land acquired for the project was 384 ha, out of which 299.57 ha was private land, 52.93 ha is forest land and 31.50 ha was government land. Almost 51 villages were affected and 1,782 title holders were compensated by state government agencies.[72] For the Etawah Chakeri highway, 160km of road, a contract was awarded in March 2012 to transform it into a six lane road. Construction began March 2013 and continued to November 2016. Over 100 hectares were acquired for the project and 103 villages received compensation by the state government. Over 7,000 land title holders were affected.[73] For Nagpur Betul Highway, 723.59 ha of land was acquired of which approx 40 ha was forest land.[74] For the Indore Khalghat highway project a total of 520.03 ha of land was acquired of which 54.3 ha was forest Land. A total number of 1,278 households were displaced.[75]

Local people in the villages alongside the highway suggested that the land acquisition process was marred by violation of due process. In certain areas people were not given sufficient notice for land acquisition. There are people who came to know about their land being acquired only at the time of acquisition.

Inadequate compensation

During the interviews conducted at the time of field visits, local people alleged that compensation was highly inadequate and not comparable to prevailing market rates. The project developers did not value agricultural lands accurately, with irrigated lands valued at the same price as non-irrigated. People who lost their agricultural lands, houses and shops, were not provided with livelihood rehabilitation,

[72] ESDD Report Nagpur BypassNH-7;https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
[73] ESDD Report Etawah Chakeri NH-2;https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
[74] ESDD Report Nagpur Betul NH-69; https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
[75] ESDD Report Indore Khalghat; https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

nor were people compensated for loss of crops, trees, wells, etc. Among those whose land was partially acquired, top soil was illegally taken for construction of the highway for which they were not compensated. In many cases, people's land was not leveled and was left unfit for cultivation. People whose homes were partially or fully demolished were not adequately paid compensation for the loss of their houses and were left to fend for themselves. This also affected people who were self-employed and had informal livelihood vocations. These people are now forced to work as daily wage labourers.

Impacts on indigenous communities

The Nagpur Betul highway and Indore Khalghat highway are built in areas with a considerable tribal population (indigenous communities). Many people belonging to the tribal communities have lost their agricultural land and houses to highway construction. There are serious questions on the manner in which their land was acquired despite there being special legal requirements[76] as mentioned later, for land acquisition in the case of tribal communities.

Indore Khalghat highway land was acquired from two districts, Dhar and Khargone, which are so called Schedule V[77] areas. The project impacted two tribal communities in the area - Bhils and Bhilalas. Both communities are categorised as Scheduled Tribes (ST). No Resettlement Action Plan or Indigenous Peoples Development Plan were prepared for the project.[78] The Environmental and Social Due Diligence Report of the IFC clearly states, "The trigger for Free Prior Informed Consent in Indore-Khalghat section of the NH-3 was found relevant due to impact on 'charnoi' or 'pastureland'. However, as the concerned project of widening an existing road required lateral expansion of the existing Right of Way (RoW), the loss of grazing land was small in quantity and the net loss of total pastureland available in the village was a small percentage only. Therefore, the impact on the pastureland is assessed to be insignificant. ST families losing land were paid cash compensation, but the impact on livelihood of ST families who lost land for expansion of the road was not assessed. Hence, the significance of the residual impacts and vulnerability of these households is not known." Requirements for Free Prior Informed Consent (FPIC) have been clearly ignored on the grounds of insignificance of impact and absence of proper impact study.

The AIIB project documents claim that: "Interviews with the authorities, the NHAI and affected Scheduled Tribes, a review of land acquisition records and an assessment against the PS7[79] criteria have established that there are no significant residual impacts on the Scheduled Tribes from the land acquisition, resettlement, construction and operation of these two roads. It was established that the land acquired from the Scheduled Tribes did not reduce their access to resources or land under traditional ownership and customary use and the resettlement of a few households within their original village did not sever their access to any land or resources or alter the social structure of their communities."

There are many cases where indigenous people affected by construction and land acquisition for the Indore Khalghat Highway continue to suffer. Mahima devi *(name changed)*, a 62 years old resident of Dhar district who belongs to the Scheduled Tribe community, told the researcher that she has been living there with her two sons and daughter-in-law for 20 years. Her son had a tea shop on the road, but it was demolished during the construction of the road. She had the lease of the land where she lives. During the construction of the four lane road, her home and one *bigha* (12,000 sq ft) of land was acquired, but she said that she did not receive compensation. The road construction did not allow her to rebuild her house. With great effort and struggle she built a small hut. After the land acquisition, the forest department has given the lease of some other piece of land to her but the lease documents have not been provided as yet. She worries that when the construction of the six lane road will start,

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[76] https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1579747
[77] Fifth and Sixth Schedules of the Indian Constitution carve out a separate legal and administrative framework for certain designated tribal majority areas within the territory of India. The Fifth Schedule designates tribal majority areas in ten tribal minority states within peninsular India including, Andhra Pradesh, Telangana, Gujarat, Jharkhand, Chhattisgarh, Himachal Pradesh, Madhya Pradesh, Maharashtra, Odisha, and Rajasthan. The Sixth Schedule designates such tribal majority areas in north-eastern states, including Assam, Meghalaya, Mizoram, and Tripura. Of these, Meghalaya and Mizoram are tribal-majority states.
[78] ESDD Report Indore Khalghat; https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
[79] https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7

her home will be demolished again. Being on the side of the road, there is always a risk that a fast speeding vehicle may crash into the house. There is no electricity and water in the house. And water has to be brought from far away.

Another person (name not disclosed) who belongs to the Bhil-Scheduled Tribe of Dhar district stated that his one *bigha* land was acquired for the construction of the road, for which a compensation of Rs 18,454 given to him was insufficient compared to the prevailing market rates. On his remaining three *bighas* of land, he had to build a house again from his own expenses with the compensation amount given he was unable to build the house. He incurred a loss of Rs 40 to 50,000 per year from agricultural produce due to land being partially acquired.

Environmental concerns

Nagpur Bypass highway and Nagpur Betul highway pass through important biodiversity areas, including wildlife corridors important to tigers and pangolins.

The Nagpur Bypass road affects forest reserve land which is very important for critically endangered species, including tigers, pangolins and vultures. According to the IFC's Biodiversity Action Plan: "A 37.45 km historical stretch of the Nagpur Bypass road passes through the Reserve Forest land and is mostly contiguous (over 22 km) with the buffer zone of the Pench Tiger Reserve, screened as Critical Habitat for the presence of two IUCN critically endangered (CR) species of vultures (Gyps bengalensis and Gyps indicus), and three IUCN endangered (EN) species, i.e., tiger (Panthera tigris), wild dog (Cuon alpinus) and Indian pangolin (Manis crassicaudata). A total of about 49.2 ha of reserve land, which would be categorized as natural habitat, has been diverted for widening to 4-lanes."[80]

The AIIB's project document notes that all five roads have impacted forest land. It says that mitigation comprises compensation for felled trees, or replanting on areas double that taken for the roads: "The execution of these offsets rests with the forest department, while the NHAI is responsible for covering the associated costs and the identification of land suitable for planting trees."

Given their potentially serious impacts on wildlife habitats and forest land, their construction required clearance from the National Board for Wildlife (NBWL) and the Forest Advisory Committee (FAC). Both agencies raised objections to the construction of the highway. Despite not getting this required clearance, the developers went ahead with the construction work. After a long legal battle, FAC approved the construction with the recommendation to implement several mitigating measures in the sensitive part of the state.[81] This recommendation has still not been fully complied with. The construction of the highway and the increased traffic along with lack of proper mitigating measures, has resulted in an increase in the wildlife fatality, especially leopards and tigers.[82] [83]

Safety risks: accidents, fatalities, access

With heavy vehicular traffic on highways which cut across villages, there has been a considerable increase in road accidents, according to local sources. Absence of service lanes, overbridges and underpasses has added to the risk of accidents. A study commissioned for the IFC in 2018 found that fatalities on the section were very high: eg at the Nagpur Bypass 2015 there were 173 accidents, of which 18 fatal, in 2016 173, 24 fatal, and in 2017 171, 22 fatal.[84]

These are some of the concerns that were communicated by the local communities and authorities around the implementation of road projects. These need to be further investigated and adequately addressed by the implementation agencies and the financial institutions.

80 Biodiversity Action Plan (BAP) NH-7 Stretch; https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
81 https://indianexpress.com/article/explained/why-pench-road-project-is-stuck-for-8-yrs/
82 https://timesofindia.indiatimes.com/city/bhopal/tiger-found-dead-on-highway-in-madhya-pradeshs-seoni-district/articleshow/90554714.cms
83 https://planet.outlookindia.com/planet-nama/when-the-tiger-couldnt-cross-the-highway/763
84 ESDD Report Nagpur Bypass Section NH-7; https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

Image: Poorly constructed service roads

Image: Due to lack of waiting area, students have to wait on the highway(NH-69)

Impacts of COVID-19 pandemic

The local people who had already suffered due to the highway construction and the loss of land, houses and livelihoods, were again at the receiving end with the spread of the COVID-19 pandemic across the country. In common with many around the world, the people suffered loss of family members due to COVID-19. Reliable data on the impacts of Covid in the states is not available, so the scale of the impact is difficult to assess.

The local people said that the highways at many places are cutting across villages. This has resulted in villages being divided by the highways, affecting villagers' access to vital public services which are now spread on two sides of the highway. With no way to cross the highways which have heavy vehicular traffic, children's access to school and *Anganwadi* (government supported free nutritional centers for infants and their mothers) has been affected badly. Villagers find it difficult to allow children to cross the highways on their own. During COVID-19 these *Anganwadi* centers were providing primary health services as well. When the highways were constructed, they became barriers for people and *Anganwadi* workers, preventing them from accessing or providing services.

9. OIT project risks

As per analysis by the Investment Information and Credit Rating Agency (ICRA), OIT is exposed to toll road project related risks, which transfer risks and costs to the public in prioritising profit maximisation. These risks include low traffic growth, political acceptability of toll rate hikes over the concession period, the likelihood of toll leakages, development or improvement of alternative routes or alternate modes of transportation. The sensitivity of revenues to the overall economic growth and inflation (Wholesale Price Index) as well as user resistance to pay/accept any increase in toll rates are other risks.

OIT's current portfolio comprises five toll road projects across four states. However, the top two assets account for ~67% of the revenues, indicating the revenue concentration risk, which exposes the credit profile of the InvIT to the performance of these assets.

Further, one of the SPVs (ECKHPL) has to pay a sizable premium to the NHAI over the concession period and part of the premium has been deferred, which has increased the future cash outflow. The high back-ended payments may result in consolidated leverage remaining at a relatively higher level. There is a risk that the payments to be made to NHAI by OIT would remain at higher levels in the later operational period.

In addition, OIT's ability to manage routine and periodic maintenance expenses within the budgeted levels remains critical. The Trust may acquire additional projects in the future, which could materially impact its operational and financial risk profile.[85]

[85] https://www.icra.in/Rationale/ShowRationaleReport/?Id=113638

10. IFI Environmental and Social Standards applicable to the project

Though co-financed by both the AIIB and the IFC, the AIIB has agreed to apply the IFC's Performance Standards (PS), rather than its own Environmental and Social Framework (ESF) to this investment, reasoning that the IFC PS are "materially consistent" with the AIIB's own standards.[86]

For its part, the IFC classifies this project as Category A or high risk.[87] The reason for the high risk classification is not only that inherently roads have significant impacts, but that a study carried[88] out for the IFC ahead of its investment identified a number of outstanding risks from the road construction phase. This included problems with land acquisition, including economic displacement; impacts on communities and indigenous peoples; and effects on critical and natural habitats and cultural heritage. The IFC also notes that the impacts of future projects funded with the freed-up capital from the InvIT have not yet been assessed.

This assessment indicates that all of the IFC's Performance Standards are applicable to this project. The IFC's own project documents concur with this assessment and confirm that every Performance Standard is applicable to this investment. A brief summary of the IFC PS and what they cover follows.

BOX on What are the IFC Performance Standards?

The IFC has a set of rules that provide their client companies with guidance regarding how to identify, evaluate, avoid, mitigate and manage risk of harm from activities supported by the IFC.

PS 1 Assessment and Management of Environmental and Social Risks and Impacts: Establishes the importance of identifying the environmental and social impacts of a project, including cumulative impacts; engagement with local communities, including disclosure of information and consultation with women and vulnerable groups; and the management of environmental and social performance throughout the project.

PS 2 Labour and Working Conditions: Recognises the importance of protecting workers' rights, as well as promoting non-discrimination and equal opportunities in safe and healthy working conditions.

PS 3 Resource Efficiency and Pollution Prevention: Aims to avoid adverse impacts on health and the environment by minimising pollution from projects, promoting sustainable use of resources and reducing project-related greenhouse gases.

PS 4 Community Health, Safety and Security: Addresses the responsibility to avoid risks to community health, safety and security as a result of project activities. Ensures the safeguarding of personnel and property in accordance with human rights principles.

[86] "AIIB is satisfied that: (i) the IFC Policy and IFC PSs are consistent with AIIB's Articles of Agreement and are materially consistent with AIIB's Environmental and Social Policy (ESP) and relevant Environmental and Social Standards (ESSs) and (ii) the monitoring procedures that IFC has in place are appropriate for the Project. Consequently, as permitted by the ESP, AIIB will apply the IFC Policy and IFC PSs to this Project." AIIB project document: https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf
[87] https://disclosures.ifc.org/project-detail/SII/39354/oriental-infratrust
[88] https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

PS 5 Land Acquisition and Involuntary Resettlement: Stresses that involuntary resettlement should be avoided, and if it is unavoidable, it should be minimised and appropriate measures should be taken to mitigate adverse effects on affected individuals or communities. This refers to physical and economic displacement in which affected communities do not have the opportunity to refuse land acquisition. Displaced communities must either have their livelihoods improved by the project or at least restored.

PS 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources: Clients should avoid impacts on biodiversity and ecosystem services, and when impacts are unavoidable, they should implement measures to minimise impacts and restore biodiversity and ecosystem services. This includes direct and indirect impacts that are related to projects.

PS 7 Indigenous Peoples: Ensures that the development process respects the human rights, dignity, aspirations, culture and natural resource-based livelihoods of Indigenous Peoples. It also requires free, prior, informed consent of indigenous communities.

PS 8 Cultural Heritage: Recognises the importance of cultural heritage for current and future generations and requires that the client should identify and protect cultural heritage.

11. Environmental and Social due diligence concerns and questions

Before presenting this investment proposal to its Board for approval, the IFC undertook due diligence on the proposed client (OSE) and the five road projects InvIT would acquire. This - according to the IFC - involved reviewing the environmental and social impact assessments prepared for the road projects, E&S due diligence reports prepared by third-party consultants on the five roads, and an independent due diligence report on the critical habitat affected by the Nagpur Bypass. The third-party consultants who prepared the due diligence reports visited the five road projects as did IFC staff, and met with the developers, local authorities, forest department staff and local communities.

Issues with due diligence reports

The IFC hired consultants Mott MacDonald to provide a third party review of the five road projects. In March 2018, the consultants finished the first draft of their Environmental and Social Due Diligence (ESDD) reports on the road projects (with final drafts not ready until September 2018) - months *after* the IFC and the AIIB took the decisions to approve over $150 million in development finance for the InvIT.

A review of the ESDD report for the Etawah Chakeri road[89], one of the roads with the fewest environmental and social impacts – for example, reportedly no indigenous peoples were affected – reveals a disturbing lack of evidence on which the IFC's Board (and later the AIIB's) took the decision to approve finance for the InvIT.

Mott MacDonald reviewed project documents and talked to the developers, local authorities – including forestry department and NHAI staff – and undertook site visits. They visited two villages affected by the road, on 19 January 2018[90]. The 160km stretch of road was converted into a six-lane motorway, with construction starting in 2013 and completed November 2016. NHAI acquired over 100 hectares of land for the road, compensating 103 villages for impacts, and affecting 7,461 land title holders and most likely those without land titles remain undocumented.

The consultants concluded their review despite not having access to crucial information. Given their job was to determine whether the projects could comply with the IFC's Performance Standards, it is difficult to understand how the consultants could do this. **It appears that they did not review the following:**

- The Environmental Impact Assessment,
- The Resettlement Action Plan
- Traffic Accident data
- Land acquisition data
- Details of the number of people physically or economically displaced by the road
- Records of community consultations
- Details of compensation disbursed and received by project affected people
- Annual environmental monitoring reports.

Despite failing to obtain this crucial data, the consultants concluded that the project posed a "moderate risk" of non-compliance with the Performance Standards. A decision not to proceed with

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[89] Mott MacDonald (2019) Final Environmental and Social Due Diligence Report Etawah Chakeri Section, September 2019. https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

[90] In photographs of the site visits, no women can be seen so it is unclear whether impacts on women and children were even considered. See: Mott MacDonald (2019) ibid, pages 33-34. https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust

the investment can only be taken if the risk is categorised as high. Even without this critical information, the consultants did identify gaps in relation to the Performance Standards:

PS 1: No Environmental and Social Management Plan, no information on stakeholder engagement/consultation, no EHS staff

PS2: No provision to capture land or social grievances, no retrenchment policy

PS3: Environmental management plan does not cover noise or hazardous waste, no inventories of hazardous materials

PS4: Barriers at side of road missing 'at many locations' where houses are near the road; dividers missing so people crossing – raised risk of accidents, recommendation to provide adequate safe pedestrian crossings as in concession agreement

PS5: No findings of gaps as documentation not available – recommendation is to review the Resettlement Action Plan, Land Acquisition Plan and do a social impact assessment to see if it complies with PS5.

In order to bring the project into compliance with the necessary standards, the consultants list over 50 necessary actions. These include extremely basic requirements, such as an "information disclosure plan"; a "Grievance Redressal Mechanism"; the need to "formulate Stakeholder Engagement Plan and carry out stakeholder engagement systematically; "review the resettlement action plan"; and check if land acquisition complies with PS5".

The project's Environmental and Social Review Summary (ESRS) identifies which of the Performance Standards are yet to be met by the road projects. This includes fundamental provisions of PS1 and PS5, about which the ESRS states: "While the client will make all efforts to close gaps in compensation with respect to IFC PSs, residual gaps with PS 1 and PS 5 provisions on assessment, land compensation, livelihood restoration and compensation to non- titleholders may remain for land acquired prior to road transfer to the client, especially since most land related to road development would have been acquired several years before."[91] The report also notes that at one project alone, "Affected titleholders seek redress through this mechanism as is evidenced by the 823 cases that were filed for enhancement of compensation before the arbitrator in Hungund Hospet road. About half of these are yet to be disposed."

These are some of the most important requirements to ensure affected communities are consulted and informed about the road project, that land acquisition occurs fairly, and that people have a chance to complain about any harms. **That these basics were not in place before and during project construction, but rather are still being recommended after project completion, should have automatically ruled out development finance support.**

However, in its project document proposing the InvIT project to the Board in 2018, the AIIB highlights only one outstanding issue that remains to be resolved in this road project: "The Etawah - Chakeri road has been identified as one with residual land acquisition and/or recently acquired land. For this asset, a third-party retrospective Social Impact Assessment (SIA) will be undertaken, and a Livelihood Support Plan (LSP) will be prepared and implemented in accordance with PS5 and include provisions for informal settlers and other non- titleholders. The InvIT will make all efforts to ensure retroactive implementation of the LSP, work with the Governmental agencies on a best effort basis to provide adequate livelihood support and oversee the implementation of the LSP by a competent partner to close the gaps. This will be confirmed by a third-party completion audit."[92]

[91] https://disclosures.ifc.org/project-detail/ESRS/39354/oriental-infratrust
[92] https://www.aiib.org/en/projects/details/2018/approved/_download/India/PSI-000084-India-OSE-Invit-March-20-2020.pdf

As we have seen from the on the ground research carried out for this report, as detailed in Section 8, social and environmental impacts of the road projects are in fact far more extensive than noted in the AIIB and the IFC project documents, and harms continue to this day. The due diligence carried out for these investments by international funders including the AIIB and the IFC is clearly inadequate to have allowed for a green light.

Lack of Disclosure:

The AIIB Board approved the project in August 2018, just after its Annual Meeting held in Mumbai. The Board agreed to defer disclosure of the project "as a derogation to the ESP [Environmental and Social Policy] in effect in 2018, in order to avoid contravening the Security Exchange Board of India's regulatory requirements in effect when the financing was approved by the Board."

But in fact, disclosure was delayed by years: the project document disclosure is dated March 2020. For a Category A, high-risk project, this is unacceptable. In response to an information request by Recourse, the AIIB replied "Disclosure of the project was delayed because of regulatory filing requirements that prevented the AIIB from disclosing its involvement in the project."[93]

[93] Xiaobo Wu, AIIB, email to Kate Geary, Recourse 14 January 2022.

12. Accountability of IFIs in the context of the InvIT model

Accountability at AIIB and IFC

Infrastructure investments, by their very nature, can have significant impacts on people and the environment, both beneficial and, for local communities in particular, harmful. Whether large-scale displacement for hydropower projects; pollution of rivers and fisheries from mines and power plants; or destruction of forests for road construction, vulnerable communities can find that their lives and livelihoods are irreversibly damaged by infrastructure projects, while the benefits flow elsewhere. Women, who carry primary responsibility for managing natural resources and caring for people and ecosystems, based on the current gender division of labour, are particularly vulnerable to infrastructure investments' harmful impacts. The impacts endured by communities affected by the five road projects bundled into OIT reflect these experiences, including loss of land and livelihoods, loss of access to services, risks to community health and safety, inadequate compensation, and lack of consultation and disclosure.

Over the years, in response to campaigns by affected people and their supporters, multilateral development banks (MDBs) have set up independent accountability mechanisms (IAMs), to receive complaints from those who believe they have been harmed by the MDB's investments.

The world's newest MDB, the AIIB, is no exception. After its inception in 2016, the AIIB began to develop its own accountability mechanism, in accordance with the bank's Articles of Agreement, which envisaged an oversight mechanism.[94] After consultations with a range of stakeholders, the Project-affected People's Mechanism (PPM) was eventually approved in December 2018 and came into operation in February 2019. The AIIB adopted an Environmental and Social Policy (ESP)[95] in 2016 which provides safeguards to prevent harm in its investments.

In the three and a half years since its establishment in February 2019, the AIIB's PPM has received only one complaint – regarding the Bhola gas plant in Bangladesh – despite a portfolio totalling 190 projects worth over $36 billion (as of October 2022).[96] According to analysis by Recourse and German NGO Urgewald, the low complaint level results from numerous policy and practice barriers to filing: for example, most projects are ineligible for complaint (usually because they are co-financed with other MDBs), or because of a lack of transparency over which projects are supported (as is the case with financial intermediary investments).[97]

The PPM aims "to receive submissions from Project-affected people who believe they have been or are likely to be adversely affected by AIIB's failure to implement the ESP".[98] Based on the submissions, the PPM's core intentions are to verify whether AIIB management has adhered to its own ESP, or to solve problems through the Dispute Resolution or Project Processing Queries (PPQ) function.

In contrast, the IFC's accountability mechanism, the Compliance Advisor Ombudsman (CAO), is one of the most experienced IAMs. Set up in 1999, the CAO has handled 213 cases and has 52 active cases on its books at the time of writing.[99]

Unusually, despite the InvIT project being co-financed by both the AIIB and the IFC, the project is eligible for complaint to both the AIIB's PPM and the IFC's CAO. This is a rare exception to the AIIB's usual policy of excluding co-financed projects: the AIIB has memoranda of understanding (MoU) in

[94] See Article 26(iv) of the Articles of Agreement: https://www.aiib.org/en/about-aiib/basic-documents/articles-of-agreement/index.html
[95] https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf
[96] https://www.aiib.org/en/projects/summary/index.html
[97] Recourse and Urgewald (2021) The Accountability Deficit: How the AIIB's complaints mechanism falls short, October 2021 https://www.re-course.org/wp-content/uploads/2021/10/The-Accountability-Deficit-How-the-AIIB-complaints-mechanism-falls-short.pdf
[98] AIIB Policy on the Project Affected People's Mechanism, December 2018: https://www.aiib.org/en/policies-strategies/_download/project-affected/PPM-policy.pdf
[99] https://www.cao-ombudsman.org

place with MDBs, such as the World Bank, European Investment Bank, Asian Development Bank and European Bank for Reconstruction and Development, to say that in the case of complaint, affected communities must approach the IAM of the lead financier, not the AIIB. The exception is the IFC, which for unknown reasons does not have such an MoU with the AIIB. This means that, although the IFC is the lead financier, affected communities do have the right to file a complaint at both the CAO and the PPM.

This anomaly results in a curious situation for the AIIB. Although as the lead financier, the IFC's safeguards – the Performance Standards (PS) – apply to the project, the AIIB can nevertheless be held accountable for any failures in their implementation. Although the AIIB's standards are largely similar or equivalent to the IFC's, there are crucial differences. One of these relates to how the banks require their borrowers relate to indigenous peoples – or in the case of India, scheduled castes and tribes. The IFC recognises the right of indigenous peoples to give or withhold their Free, Prior and Informed Consent (FPIC) for a project (PS7) in line with international law. The AIIB's Environmental and Social Policy, however, dilutes this right to the weaker Free, Prior and informed Consultation (FPICon).

Such a distinction could be crucial for any complaint over the InvIT project, where Scheduled Tribes and Castes have potentially been severely affected, and whose consent was likely not gained for the acquisition of their land and property based on local people's testimonies.

As mentioned above, if the affected communities in the OIT case so choose, they have the right to access the complaints mechanisms of both the IFC (the CAO), the AIIB (the PPM) and also the DEG, which has its own body called the Independent Complaints Mechanism.[100]

As the analysis below explores, it would seem that affected communities have ample grounds on which to challenge the IFIs over whether their standards were upheld in the construction of the road projects. The question, however, remains - on how accountability can work in this case, given standards were applied retrospectively.

[100] https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/170101_Independent-Complaints-Mechanism_DEG.pdf

13. Analysis

The InvIT model is promoted as a new and innovative mechanism to finance long term infrastructure projects. However, an analysis of the above mentioned highway projects financed through the InvIT model demonstrates the following:

Risks -

It has been observed that there are significant risks associated with projects that have been used for the InvIT mode of financing. According to OIT's own assessment: "Any default under the re-financing arrangements by any of the Project SPVs / Trust could adversely impact the Trust's ability to continue to own a majority of each of the Project SPVs, its Cash Flows and its ability to make distributions to Unitholders. Further, shares of certain Project SPVs are pledged in favor of their lenders, who may exercise their rights under the respective share pledge agreements in the event of default under relevant financing agreements."[101]

In addition, the project SPVs are required to pay annual premiums in consideration for being granted the right to build and operate the highway projects. Failure to make such payments could result in the termination of the relevant concession agreement by the NHAI.[102]

Application of Performance Standards -

It is revealed from both the ground-level research carried out for this report, the content of the Environmental and Social Due Diligence reports and the Environmental and Social Review Summary that E&S standards equivalent to the IFC Performance Standards have not been applied and that serious gaps remain to this day.

There are questions to answer on all the Performance Standards, but in particular our research found egregious harms relating to the following:

PS1 on consultation, engagement with local communities and management of environmental and social risks: Our research indicates that affected communities did not receive adequate and timely information and consultation about the road projects and the impacts they would have on their lands and livelihoods.

PS4 on community safety: Road traffic accidents have increased dramatically and safe crossings and walkways are lacking with particularly severe implications for women and girls.

PS5 on land acquisition, resettlement and compensation: In one road project alone, more than half of compensation disputes remain unsettled, while our research uncovered common stories of inadequate or missing compensation.

PS6 on biodiversity impacts: The expansion of the road through critical habitat for endangered animals, such as tigers and pangolins, has had far-reaching impacts inadequately mitigated by the project developer.

PS7 on the rights of indigenous peoples: Impacts on scheduled tribes were downplayed by the project developers, despite many hundreds of people being affected adversely. We could find no instance in which Free, Prior and Informed Consent was given.

The reason for these gaps is simple: these IFI standards were not applied at the time the road projects were built, in some cases several years before the IFIs became involved.

[101] Page 153, https://orientalinfratrust.org/wp-content/uploads/2022/07/Annual-Report-Oriental-InfraTrust-2021-2022.pdf
[102] Page 155, point 28 https://orientalinfratrust.org/wp-content/uploads/2022/07/Annual-Report-Oriental-InfraTrust-2021-2022.pdf

Under the InvIT model, the IFIs only become involved after projects have already been completed. Retrospective application of standards to road projects is highly unusual. Normally, IFIs would be involved in road projects in two ways: either through direct finance or, as is increasingly the case since the financial crisis, via an intermediary such as a private equity infrastructure fund. In both cases, the IFIs would require their environmental and social standards be applied before, during and after the project.

In order to give the green light to IFI financing into the InvIT, the shareholders of the IFIs must believe a created fiction - that their standards can be applied somehow in retrospect. To do this, the IFIs commission a gap analysis through environmental and social due diligence (ESDD) reports which identify which standards have not been met and how to mitigate that. The problems with this are twofold: first, the quality of the ESDD reports as we have seen is woefully inadequate, with fundamental information missing and scant one-day visits to affected people; second, there are some standards that cannot be applied after the fact: for example, Free, Prior and Informed Consent for indigenous peoples must be given before (prior to) project construction as well as during project implementation. This is not something that can be tacked on afterwards.

If IFIs are to expand further into this mode of financing - as they state is their intention - they must be able to address this simple question: how can they guarantee that their standards will be applied in retrospect?

A question of accountability -

Linked to this issue of retroactive application of standards is the question of accountability. The IFC and the AIIB are clear that in this project, the affected communities have the right to access their respective accountability mechanisms, the CAO and the PPM.

The compliance functions of the accountability mechanisms investigate whether an IFI has abided by its own standards (or in the case of the AIIB, the delegated Performance Standards) in the preparation and delivery of a project.

Hypothetically, if a Scheduled Tribe community were to file a complaint to the CAO and PPM, alleging that their right to Free, Prior and Informed Consent had been violated, the project developer, IFC and AIIB could argue that as that standards (PS7) was not applicable when the road was built, and that therefore there is no violation. Even if non-compliance were established, how could a corrective action address this issue? It is not possible to gain someone's consent in retrospect for a project already constructed.

Such fundamental questions around accountability must be addressed by IFIs if they wish to expand their use of InvITs to deliver infrastructure.

Information disclosure -

As mentioned above, communities reported during our field visits that there had been inadequate information disclosure at the time the road projects were constructed. However, beyond the immediate issue of project information disclosure - which should be assured under PS1 - IFIs must address the critical issue of why disclosure about their decision to fund this project was delayed for almost two years. The Boards of both the IFC and the AIIB approved this investment in 2018, but did not inform the public about this until 2020.

Why such a delay? The access to information policies of both banks allow for such delayed disclosure in cases of commercial sensitivity. But to delay disclosure for two years on an investment which breaks new ground, where large, high risk infrastructure projects have caused harm to local communities, where there is allegedly post-facto application of environmental and social standards, where accountability is in question... this is unacceptable in public policy terms.

Institutional financing -

There has been a fundamental shift in infrastructure financing over the last two decades. Before the global financial crisis of 2008, it was more common for IFIs to fund infrastructure projects, such as roads and power plants, directly, urging an increasing role for the private sector through PPPs to deliver projects the state used to provide. With the advent of a trend for the creation of infrastructure as an asset class, the private sector became a more important actor in not only building and operating infrastructure, but also financing it. In the early years of the 21st century, for example, private investment in infrastructure in India tripled from 2005 to 2009 reaching $159 billion.[103] By 2012, the Indian government was predicting that 50% of its energy finance and 70% of transport infrastructure finance would come from the private sector.[104]

Increasingly, IFIs began to channel their funds not directly to projects but indirectly via financial intermediaries, such as private equity funds. In the decade from 2010, the AIIB increased its FI lending tenfold; at the European Investment Bank and European Bank for Reconstruction and Development, FI investing has grown to over a third of their total portfolios today; while at the IFC, FI lending comprises over half of total spending.

The latest shift - to funding infrastructure investment funds - could open yet another era in private finance mobilisation: that of monetising PPPs as investments – in other words, bundling existing projects together under a trust as a means to earn further revenue. This marks another step in the financialisation of aid, and a step further away from direct IFI project oversight, involvement and application of standards. The OIT investment, as we have seen, is not truly an investment in public works - intended to result in road construction that respects the rights and needs of local communities and nature - but in finance, in order to free up capital for further infrastructure investment.

There are obvious dangers inherent in such an approach. Already CSOs have documented the heightened risks of 'outsourcing development' through FIs, where a longer investment chain can end up divorcing projects from the environmental and social protections IFIs are supposed to ensure.[105] In FI investing, the IFI delegate's responsibility for assessing and managing social and environmental impacts of sub-projects to FI clients, with often disastrous results. Independent research groups have linked FI investments to cases involving forced evictions and other human rights abuses, forest destruction, environmental pollution disasters and destructive coal mines and powerplants. With investment trusts, IFIs are one step even further away from the ground-level reality of the project impacts. Only providing finance after the event, once the roads are already built and harms have already occurred, sees IFIs no longer "financing development", but rather "developing finance," as Nicholas Hildyard writes.[106]

Beyond immediate project impacts, there is the wider question of who development is for - who benefits and who loses? Writing about the so-called 'Wall Street Consensus', Daniela Gabor describes "an elaborate effort to reorganize development interventions around partnerships with global finance."[107] Global finance demands risks are transferred to the state, citizens and nature to maximise profit; as Gabor notes, "Making development investible requires a two-pronged strategy: enlist the state into risk-proofing development assets and accelerate the structural transformation of local financial systems towards market-based finance that better accommodates portfolio investors.

[103] "Infrastructure Investor India Country Briefing 2011", Infrastructure Investor, May 2011, p.34,http://www.infrastructureinvestor.com/resources/Infrastructure/II%20INDIA%20WEB.pdf
[104] Figures cited in Hildyard, Nicholas (2012) Infrastructure-as-asset-class: Financing development or developing finance? The Corner House: http://www.thecornerhouse.org.uk/resource/more-bricks-and-mortar
[105]https://www.inclusivedevelopment.net/policy-advocacy/outsourcing-development-campaigning-for-transparency-and-accountability-in-financial-intermediary-lending/
[106] Hildyard, Nicholas (2012) Infrastructure-as-asset-class: Financing development or developing finance? The Corner House: http://www.thecornerhouse.org.uk/resource/more-bricks-and-mortar
[107] Gabor, Daniela (2021) The Wall Street Consensus, Development and Change, Vo. 52, Issue 3, May 2021. See: https://onlinelibrary.wiley.com/doi/abs/10.1111/dech.12645

14. Recommendations

International financial institutions: the International Finance Corporation, Asian Infrastructure Investment Bank and the Deutsche Investitions- und Entwicklungsgesellschaft

The reason that IFIs, such as the IFC, DEG and AIIB, have environmental and social standards is to provide protections for local communities and the environment, in order to prevent harm from projects. Infrastructure projects in particular, such as road projects, can have devastating impacts on local communities and biodiversity.

In this extraordinary case, these standards were not applied when the projects were built, and evidence presented in this report suggests that huge gaps remain between what those standards promise and what communities on the ground have experienced. In light of this, we call on the IFIs involved to:

- **Suspend any further IFI investments into InvITs** while concerns about application of standards, monetisation of PPPs, balance of risks and benefits, and wider social and economic impacts are addressed.
- **Launch an immediate investigation** into the harms caused by the five road projects, identifying where gaps exist between the Performance Standards and impacts on the ground. This investigation must be of sufficient quality, including extensive consultations with affected communities, and published in full;
- **Ensure full and fair redress for affected communities** who have suffered harm as a result of the road construction;
- **Develop lessons learned to inform future investments**. This must include consultations with civil society and take into account not just the economic context of InvIT investments, but their social and environmental impacts as well;

Independent Accountability mechanisms: the Compliance Advisor Ombudsman, the Project-affected People's Mechanism and the Independent Complaints Mechanism

Given the unusual nature of this investment, where standards are applied in retrospect, accountability is called into question. As the IFIs involved see the InvIT model as a blueprint for future financing models for infrastructure, it is vital that issues of accountability are explored and addressed urgently. Therefore we call on the IAMs to:

- **Commission an advisory report looking into InvITs and the challenges they present to accountability.** This report should draw on the views and experiences of civil society and affected communities and issue guidance to the IFIs and their shareholders as to how accountability mandates can or cannot be delivered in InvIT investments.

Shareholders of AIIB, IFC and DEG

Ultimately, it is the shareholders in the IFIs and the Board members who represent them who decide both on whether an IFI's policies are delivering effective development and who approve individual investment proposals. We call on the IFIs' shareholders to:

- Ensure IFC, AIIB and DEG review the lessons learned from the OSE InvIT, provide adequate redress to affected communities, and suspend further activity as per the recommendations above;

- Reject any further InvIT project proposals until a wider policy review is carried out and the risks and challenges of InvITs fully understood and addressed;
- Share lessons on the risks of InvITs with other IFIs' shareholders;
- Reorient IFI policies and practices to deliver inclusive, sustainable and equitable investments that put people and planet at the heart of development.

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