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## Dispute Resolution in Government Infrastructure Projects and Land Acquisitions

Advani & Co. Articles      June 19, 2011

### Case Study: Dedicated Freight Corridor Project

The present term of government has been marked by a commitment towards building India's infrastructure. This most notably includes the *Dedicated Freight Corridor Project* (hereinafter, "DFCP") linking the four metropolitan cities of Delhi, Mumbai, Chennai and Howrah, commonly known as the Golden Quadrilateral. The present report using the DFCP as a case study, proceeds to study probable dispute resolution that the project may face.

The DFCP is an immense project and it presents its unique legal risks of legal compliances and litigatory challenges which may cause interruptions and even build onerous liabilities. These dangers are clear and present, in specific reference to the process of land acquisi-

tion and requisition. Even after the determination of the status, ownership of the land and its subsequent transfer the Indian regulatory state presents a labyrinth of environmental clearances and compliances. A lapse in obtaining an environmental clearance or a breach of condition may jeopardize the entire project.

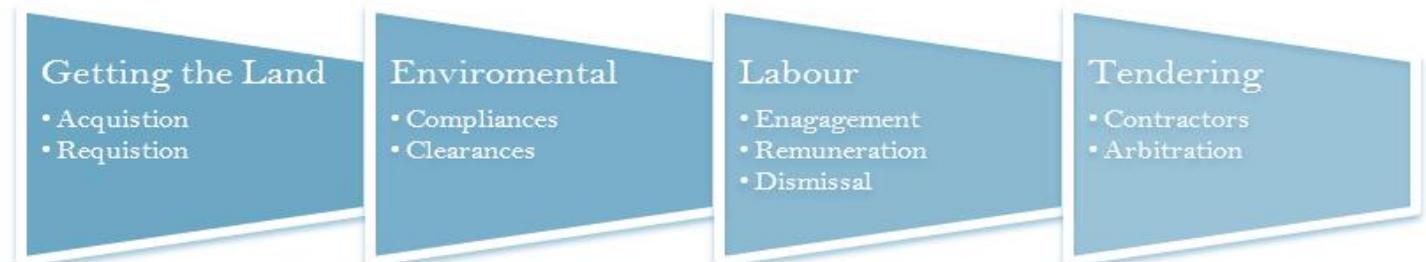
Depending on the mode of operation, as to either the government entity acting as an employer or it awarding contract for the construction, unique legal issues relating to contract labour will emerge. These risks are present even when appointing independent contractors, where tendering processes are challenged and applications are made to courts to order re-

tendering. With the tremendous growth in the Indian economy there is also a growing realization of the social and economic equity issues which are arising due to the acquisition of land. Beyond the black letter of the statutes, Public Interest Litigations are an appreciable risk to any project involving deprivation of land to the socially and economically vulnerable sections of society. Public Interest Litigations are more likely than any other form of litigation to cause a virtual impasse due to the wide jurisdiction enjoyed by courts in passing a status-quo order during the pendency of the petition. The present case study aims to give an insight into the potential litigation challenges faced by projects such as the DFCP and the strategies adopted to mitigate them.



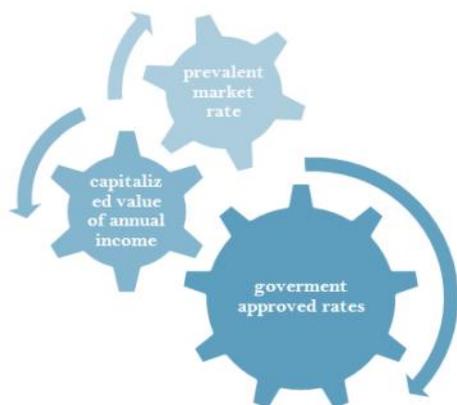
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## Getting the land

The first step in an infrastructure project is the acquisition of land, which is governed by the Land Acquisition Act, 1984. Under the enactment the development authorities are dependent on the relevant state government revenue departments for acquiring the land. The District Collector holds the power of appointments of an authority, termed as the Special Land Acquisition Officer who proceeds with the process of the acquisition of land for public purposes.



The procedures under the act include: (i) Preliminary notification (Section 4); (ii) Declaration of Notification (Section 6); (iii) Notice to persons interested (Section 9); (iv) Enquiry and award (Section 11); and (v) Possession (Section 16). Courts have traditionally shown reluctance interfering in land acquisition projects on pleas of lack of a public purpose. However, there is a large pendency of disputes pertaining to (a) the adequacy of the compensation; (b) delays in payment of compensation.

For the determination of compensation, the statute provides for three methods of computation. Basis of the computation is, (a) government-approved rates; (b) capitalized value of average annual income from the land; (c) prevalent market rate based on the average price paid in land transactions in the locality in recent times. Legal challenges are preferred throughout the process of land acquisition most popularly by filing writ petitions in State High Courts. An-

other complication may arise when land may be acquired under the urgency provisions contained in Land Acquisition Act which dispenses of the requirement of an enquiry envisaged under Section 5A. Such urgent acquisitions often lead to a flood of litigation on the basis of procedural lapses.

There may even be a requirement for the temporary use of land for the use of construction facilities and accommodation of laborers giving rise to a requirement of requisition of land. The act terms, the temporary displacement of a person from the possession of his property for a public purpose as requisition. The legal issues involved in requisition center on the payment of compensation for the period of requisition and occupation of the property. The usual defense against the payment for requisition is a lack of title of the claimant to the land requisitioned.

## Railways (Amendment) Act, 2008

The DFCP has a special enactment to acquire land over and above the Land Acquisition Act. The recently passed, Railways (Amendment) Act, 2008 has been legislated with the specific purpose of removing impediments in the acquisition of land for the DFCP. A prerequisite for the acquisition of land under the statute is a notification from the central government classifying the project as a 'special railway project'. The persons who may object and may be heard for the land acquisition proceedings under the enactment include not only people who may receive compensation for land acquisition but also, tribal's and traditional forest dwellers.

The enactment contains several provisions aimed towards the expedited ac-

quisition of land. The method for the computation of the compensation to be paid in lieu of acquisition is provided under Sec. 20G of the enactment. Section 20G provides that the computation will be based on the, (a) minimum land value determined by the registration of sale deeds in the area; (b) the average sale price for similar type of land situated in the village or vicinity evidenced from not less than 50% of the sale deed registered in the preceding three years.

The section also provides that the use and the type of the land will also be taken into account when determining the compensation which is to be paid. An important provision reflecting the realisation of socio-economic concerns is Sec. 20M which provides for the

sharing with landowners the difference in price of a land when transferred for a higher consideration to another person.

Beyond Section 20M the government has formulated a National Policy on Rehabilitation and Resettlement. The policy establishes a framework for extending additional assistance to project-affected families, over and above the compensation for affected assets provided under the Land Acquisition Act. It requires the preparation of a Social Impact Assessment (SIA) Report to be prescribed. A non-compliance with this policy will most certainly lead challenges by way of public interest litigations.

## Environmental, Clearances and Compliances

As stated before, India has a labyrinth of environmental laws which apply with respect to infrastructure projects. What complicates the task further is the constant and effective monitoring of infrastructure projects having environmental impacts by the Hon'ble Supreme Court. The Hon'ble Supreme Court under the aegis of the *T.N. Godavarman* petition, popularly referred to as the forest bench, hears applications by parties who wish to conduct activities in areas falling under the Forest Conservation Act, 1980 and refers them to the CEC. To make sense of the layers of environmental regulations a table of these laws, along with the compliances and authorities formed under them are presented below:

No.	Act / Rules	Purpose	Applicability to DFCP	Authority
1.	Environment Protection Act, 1986	To protect and improve overall environment	The project activities should maintain emission standards	MoEF, GoI; DoE, State Gov. CPCB; SPCB
2.	Environmental Impact Assessment Notification 14th Sep., 2006 and its amendment till 2009	To provide environmental clearance to new development activities following environmental impact assessment	Railway projects are not included in the Notification	MoEF
3.	Notification for use of fly ash	Reuse large quantity of fly ash discharged from thermal power plant to minimize land use for disposal	Depends on use of fly ash in Engg. designs	MoEF
4.	Coastal Regulation Zone(CRZ) Notification 1991 (2002)	Protection of fragile coastal belt	Depends whether route touches coastal areas	MoEF
5.	National Environment Appellate Authority Act, 1997	Address grievances regarding the process of environmental clearance.	Not Applicable	NEAA
6.	The Forest (Conservation) Act, 1980 and the Forest (Conservation), Rules 1981	To check deforestation by restricting conversion of forested areas into non-forested areas	Depends whether forest land is involved	Forest Department, Appropriate State Government
7.	MoEF circular on linear Plantation on roadside, canals and railway lines modifying the applicability of provisions of forest (Conservation) Act, to linear Plantation (1998)	Protection/planting roadside strip as avenue/strip plantations as these are declared protected forest areas.	Depends whether forest land is involved	MoEF
8.	Wildlife Protection Act, 1972	To protect wildlife through certain of National Parks and Sanctuaries	Depends whether routes is goes through or is adjacent wildlife sanctuaries or national parks	Chief Conservator Wildlife, Wildlife Forest Department, State Govt.
9.	Air (Prevention and Control of Pollution) Act, 1981	To control air pollution	Emissions from construction machinery and vehicle should be checked time to time.	State Pollution Control Board
10.	Water Prevention and Control of Pollution) Act, 1974	To control water pollution by controlling discharge of pollutants as per the prescribed standards	Various parameters in Effluents from construction sites and workshops are to be kept below the prescribed standards	State Pollution Control Board
11.	Noise Pollution (Regulation and Control Act) 1990	The standards for noise for day and night have been promulgated by the MoEF for various land uses.	DG sets at construction sites and workshops should be provided with acoustics enclosures.	State Pollution Control Board
12.	Ancient Monuments and Archaeological Sites and Remains Act 1958 and its amendment up to 1992	Conservation of cultural and historical remains found in India	Depends on the route of the corridor passing through a protected monument	Archaeological Dept GoI, Indian Heritage
13.	Public Liability and Insurance Act 1991	Protection form hazardous materials and accidents	Should be taken as per requirements	State Pollution Control Board
14.	Explosive Act 1984	Safe transportation, storage and use of explosive material	Respective Authorization shall be obtained from CCE	Chief Controller of Explosives
15.	Minor Mineral and concession Rules	For opening new quarry.	Quarry Licenses shall be obtained by Contractors.	District Collector
16.	Central Motor Vehicle Act 1988 and Central Motor Vehicle Rules 1989	To check vehicular air and noise pollution.	All vehicles in Use shall obtain Pollution Control Check certificates	Motor Vehicle Department
17.	National Forest Policy, 1952 and National Forest Policy (Revised), 1988	To maintain ecological stability through preservation and restoration of biological diversity.	Depends on whether Forest land is involved in the project.	Forest Department, GoI and State Govt.
19.	The Mining Act	The mining act has been notified for safe and sound mining activity.	Quarry Licenses shall be obtained by Contractors.	Department of mining, State Govt.

## Dealing with Labour Laws

Government infrastructure projects though with the stated goal of a public purpose often fall foul of labour laws. The tendency to ignore labour regulations in government infrastructure projects has been criticized by the Supreme Court of India in the Asiad Games Case.

When rendering its decision in the Asiad Games case the Supreme Court in unequivocal terms held the state liable for labour irregularities followed by contractors appointed to construct stadiums and sports facilities for the Asiad Games to be hosted in New Delhi.

The judgment held even when independent contractors are appointed by the government, action will be taken against government in cases of mass non-compliance with labour regulations by the contractors.

Two specific instances where non-compliance was found were, a disparity of pay between male and female labourers which is prohibited under the Equal Remuneration Act, 1946 and second, the non-issuance of pay slips by contractors is a violation under Contract Labour (Prohibition and Regulation) Act 1970.

Recently, the Delhi High Court acted on a petition filed by the Peoples Union for Democratic Rights for non-compliance of labour regulations in the ongoing construction for the Commonwealth Games.

The Hon'ble Court ruled that registration must be followed by the workers being given insurance cover, minimum wages under the law, pay slips, medical facilities and amenities like clean drinking water, electricity and proper sanitation where they are being housed.

## Tendering Disputes

Tendering disputes often occur in Infrastructure and Public Procurement Projects and the DFCP will not be a stranger to it. The policy of procurement is broadly stated in the leading case of *Erusian Equipment and Chemicals* wherein, the Supreme Court laid down that equal treatment should be meted to persons who offer tender or quotations for the purchase of goods.

Due to the public interest at stake in Public Procurement Projects the tendering process is multi-stage. The first stage in the bidding process for these projects is generally referred to as Request for Qualification (RFQ) or Expression of Interest (EOI) and the second stage is generally referred to as Request for Proposal (RFP) or Invitation of Financial Bids.

In the RFQ process qualified applicants would be selected and short listed to submit financial bids after which shortlisted persons will be notified. After this a RFP or a financial bid is invited wherein financial quotes are solicited based on the detailed project terms. Any deviation from these practices leads to litigation in Courts.

## Government Arbitration

Often, disputes will arise with contractors with respect to timelines, cost as well issues of quality of construction. The tender documents and subsequent agreement should provide for an exclusive method of adjudication through arbitration. This is in keeping with the stated government policy of a clear preference towards arbitration to settle claims. The Ministry of Commerce (MOC) vides OM No.37 (I) 98-TPD dtd. 1-6-99 has recommended that the ICA arbitration clause may be used in the commercial contracts of the PSUs Department of Public Enterprises (DPE) has recommended that all dis-

putes between PSU's inter se or between PSU and a government department should be resolved by arbitration by permanent machinery of arbitration.

When drafting the arbitration clause care should be taken, making its ambit wide with respect to claims which may arise. Along with the platitude in the arbitration clause there should be a focus towards having determinacy in the terms of the clause. If there is a preference for a departmental arbitration, care should be taken in the appointment and the specification of the arbitrator.

On the commencement of arbitration

proceedings there should be a focus towards the speedy resolution of disputes. The reason for this will be readily divulged by an arbitral practitioner to be the tendency of courts to correct the amount of interest awarded post-dispute. The amount of awarded by an arbitral tribunal is often found inflated by court when it neatly divides the award into an award on the principal claim and the interest accruing thereon. Even on a contract providing for a high rate of interest to be awarded post-dispute courts may strike it down in the absence of any supporting circumstances recorded in the award.

# Advani & Co.

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