WHITE & CASE

Investing in India

From challenges to solutions

Contents

Investing in India: From challenges to solutions

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What a difference a decade can make! Since the publication of our first report, "Navigating India: Lessons for Foreign Investors," in 2013, India has undergone a remarkable transformation. The country's population grew by 100 million. Fuelled by improved connectivity and digital infrastructure, the number of internet users has soared, with more than half of its citizens now connected to the internet—a significant increase from the mere 12 per cent recorded in 2013. India's GDP has more than doubled, rising from US$1.8 trillion in 2013 to US$3.7 trillion in 2023, underscoring the nation's robust growth trajectory. Per capita income has also improved, reaching US$2,450 in 2023 compared to US$1,400 in 2013.

The Indian government's ambitious programme of regulatory reforms, aimed at making the country an attractive option for international investors, is clearly bearing fruit. In the World Bank's 2020 "Ease of Doing Business" report, India rose to the 63rd position out of 190 countries, marking a significant improvement from its 134th place in 2013. In this compendium, we highlight opportunities for foreign investors and discuss some of challenges India faces today.

India is committed to achieving net-zero by 2070 and is pressing ahead with legislative reforms and investment into energy transition on an unprecedented scale, with renewables at the heart of this drive. India has the potential to increase its renewable energy production vastly—whether in solar, wind, hydro, hydrogen, or other forms of renewables—and it is making various incentives available in order to accelerate that process. Legislation and new schemes should make the country even more attractive to investors, and the efforts are already paying off with a significant number of large investments already being committed.

Technology is another growth sector. Several multibillion-dollar deals by companies such as Amazon and Apple emphasise the potential of the technology economy. Meanwhile, in infrastructure the introduction of products such as infrastructure investment trusts and real estate investment trusts make investment by foreign companies more attractive.

However successful an investment, there will come a time when an investor wishes to exit. In this issue, we examine two ways of exiting Indian investments: through general partner-led secondary transactions, and through the public market. Investors wishing to exit need to plan ahead and put the necessary protections in their documentation at an early stage to avoid potential pitfalls down the track.

India has also made significant strides in reforming its alternative dispute resolution (ADR) framework, aiming to position itself as a global hub for international arbitration. The 2021 Mediation Bill is another progressive step in making commercial disputes easier to handle, and the supportive stance of Indian courts has amplified positive effects of the legislative reforms.

Investing in India has never been more attractive for foreign investors, and we hope you will find this issue an insightful read.

Indian cross-border investment riding high in booming debt finance market

Against a challenging macro-economic environment worldwide, India has proven resilient and demonstrated its huge potential for growth. With an increasingly favourable regulatory regime and greater avenues of investment, India's attractiveness as a global market for investors will only continue, as partner **Alexander McMyn** highlights.

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Despite the COVID-19 pandemic, attractive market opportunities, favourable regulatory reforms and increased avenues for investment have resulted in a spike in deal activity and foreign investment in India.

The M&A market in India reached an all-time high of US$148 billion in the first nine months of 2022 alone. Foreign direct investment inflows into India reached a record US$84.8 billion in 2021/22, a significant increase from US$34.3 billion in 2012/13. While markets globally have cooled in 2023, it is undeniable that India has enjoyed considerable success in attracting at least its fair share of cross-border investments since the turn of the decade.

WHAT MAKES INDIA ATTRACTIVE?

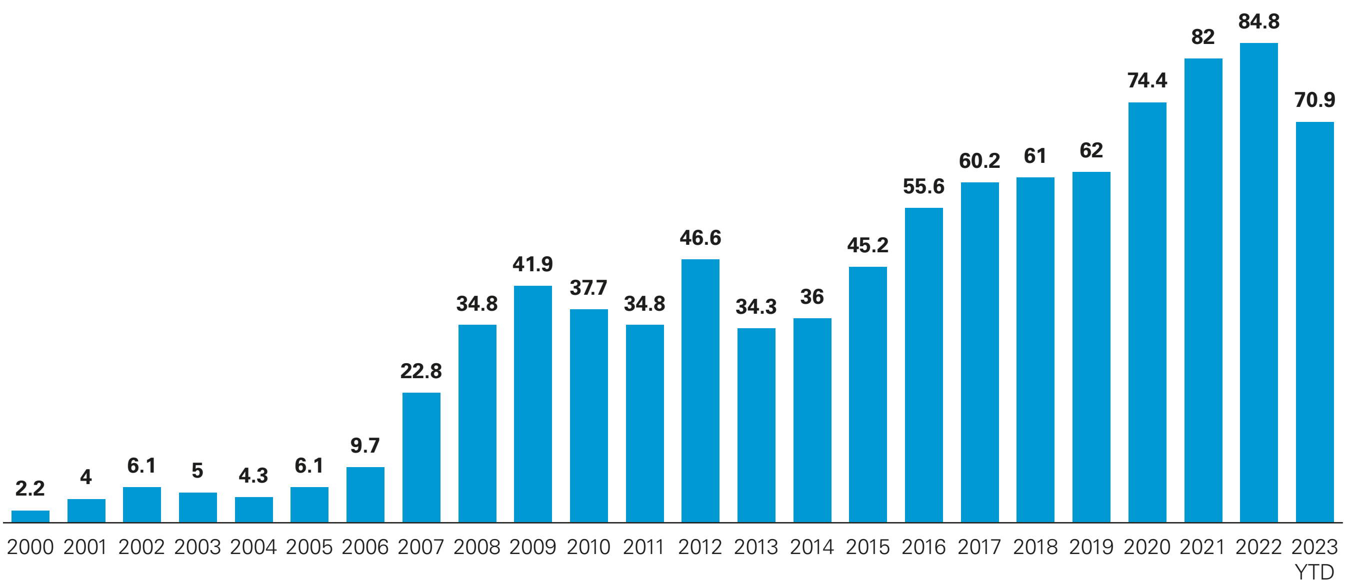
A number of India-specific factors have drawn the eye of international investors to the Indian market since 2020. A fall in interest rates during the COVID-19 pandemic, coupled with the Indian government's initiatives to encourage the growth and development of certain key sectors, has resulted in a notable uptick in investments in India, particularly in the infrastructure, energy and technology sectors.

US$148 billion

The M&A market in India reached an all-time high of US$148 billion in the first nine months of 2022

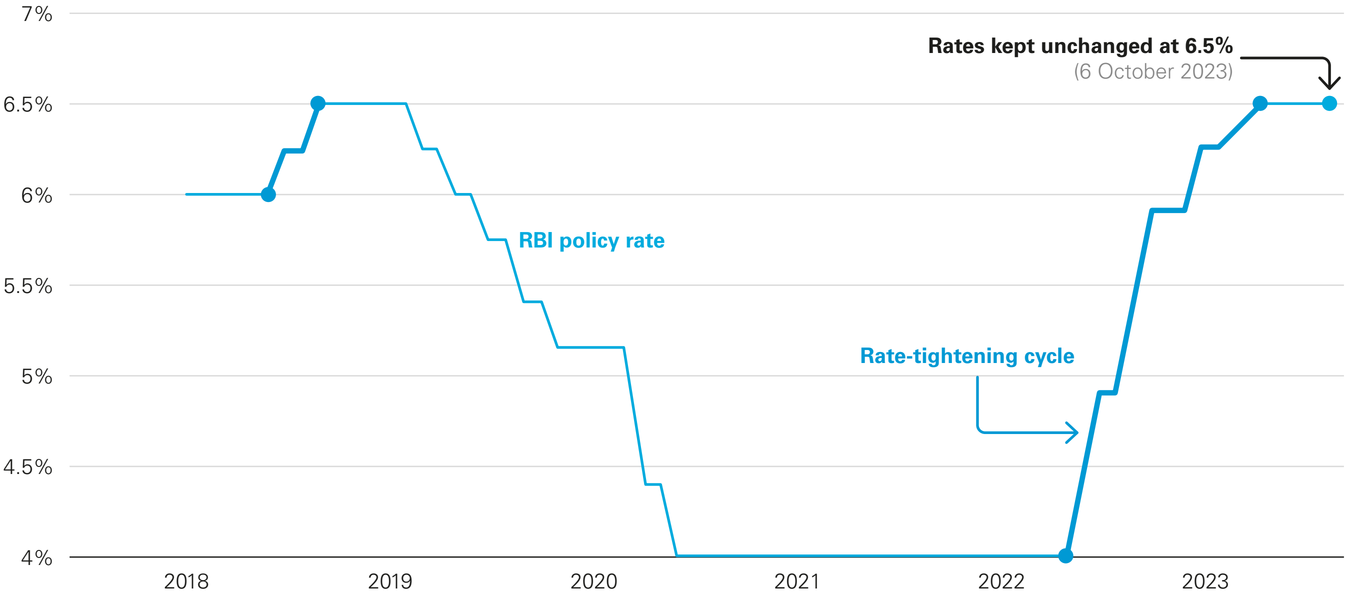
> **Despite the COVID-19 pandemic, attractive market opportunities, favourable regulatory reforms and increased avenues for investment have resulted in a spike in deal activity and foreign investment in India**

India foreign direct investment has surged since 2000 (US$ billion)



Source: Reserve Bank of India; S&P Global 2023

India's central bank keeps rates unchanged



Source: Refinitiv Datastream; *Reuters;* by Vineet Sachdev

The Reserve Bank of India's central bank policy rate fell to an all-time low of 4 per cent at the height of the COVID-19 pandemic, reducing borrowing costs and increasing the attractiveness of debt as a means of financing M&A transactions. Notably, US$32 billion was raised for acquisition finance in India in 2022, compared to US$10.9 billion in 2021, and approximately US$6.9 billion in 2020.

The energy sector has been particularly buoyant when it comes to international investment. Notably, India's renewable energy sector has benefitted markedly in recent years from the global shift towards clean energy. The National Green Hydrogen Mission, introduced by India's Ministry of New and Renewable Energy in January 2023, aims to make India a global hub for the production, usage and export of green hydrogen and its derivatives, opening numerous business opportunities and encouraging investment in renewables by conglomerates and traditional energy companies.

In response to these positive developments, there has been significant inbound M&A activity by multinational corporations and investments from Indian corporations in India's renewable energy sector. The sheer size of recent deals, such as Brookfield's US$1.07 billion investment to support Avaada Group's green hydrogen and green ammonia projects in India in April 2023, and Adani Green Energy's US$3.5 billion acquisition of SB Energy India to boost its renewables portfolio, demonstrates the increasing interest in this sector from both domestic and international players.

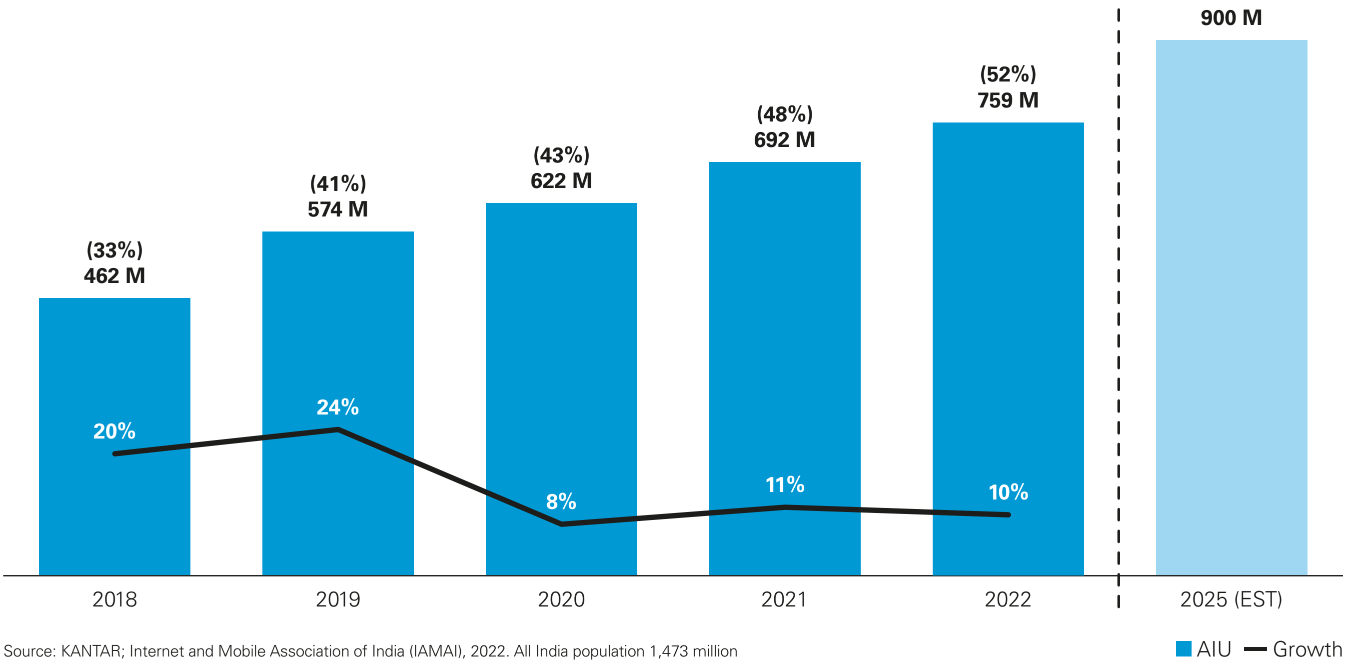
On the technology side, there is a mounting need for further digital investment in India as its digital population continues to grow: In 2022, India had 759 million internet users, and this is projected to reach 900 million in 2025. The Indian government's Digital India initiative aims to support India's digital transformation by, among other things, improving India's digital infrastructure and promoting electronic manufacturing in India.

Multinational corporations clearly see the potential in India's digital economy. Amazon Web Services has announced its intention to invest US$12.7 billion in cloud infrastructure in India by 2030, while Apple may shift more than 18 per cent of its iPhone production to India by the 2025 financial year, up from seven per cent in the 2023 financial year.

Infrastructure is also a focus for the Indian government, as it seeks to increase asset monetisation, making limited offers of public infrastructure to investors and other private sector investors to generate greater value from public infrastructure assets. For example, a primary aim of the Indian government's National Infrastructure Pipeline is the attraction of foreign capital investment into capital projects in India.

The development of infrastructure-specific investment products such as infrastructure investment trusts (InvITs) and real estate investment trusts (REITs) has been successful in encouraging investment by foreign investors in infrastructure projects in India. Non-banking financial companies and international finance corporations have overtaken commercial banks as the largest source of funds for infrastructure projects in India, contributing more than 60 per cent of infrastructure funding.

Active internet users: All India



Source: KANTAR; Internet and Mobile Association of India (IAMAI), 2022. All India population 1,473 million

GEOPOLITICS DRIVING GROWTH

India-specific factors aside, the jurisdiction has benefitted from wider difficulties in other Asia-Pacific economies and a series of geopolitical influences, which have nudged international investors towards the Indian market.

Global investment banks looked to India for M&A opportunities during the COVID-19 pandemic as neighbouring economies implemented extended periods of lockdown and shifted their focus to domestic markets. Evidence of this can be seen in the location of M&A fee revenue in a pointed reversal of a market norm, where foreign investment banks earned more in M&A fees from India than from China for the first time in 2022.

India has also looked to capitalise on the broader shift by western finance to find opportunities and growth in new markets across Asia-Pacific.

The global supply shock from the COVID-19 pandemic and resulting lockdowns worldwide encouraged global manufacturers to diversify their supply chains and reduce their reliance on a single manufacturing hub. A young labour force, together with the Indian government's push to encourage the shift of manufacturing operations to India through the introduction of tax incentives and production-linked incentive schemes, positioned India as an attractive alternative to existing manufacturing hubs.

This trend has been coupled with India's efforts to strengthen trade ties and deepen its international economic relations in a bid to boost its economy and encourage inbound investment. In June 2023, India and the US announced a series of technology, manufacturing and defence deals aimed at improving military and economic ties between the two countries. The deals come at an opportune time as India seeks to expand its capabilities in these sectors while the US adopts its 'friend-shoring' strategy of diversifying existing supply chain networks and exploring the potential of a number of Asia-Pacific countries.

India's participation in I2U2, a mini-lateral grouping comprising India, Israel, the US and the United Arab Emirates which is aimed at deepening technological and private sector collaboration in the region, has created new investment opportunities in India, such as the establishment of a US$300 million wind and solar energy storage project.

US$32 billion

was raised towards acquisition finance in India in 2022

The level of market activity in India during the COVID-19 pandemic and continued efforts of the Indian government to encourage investment in India are positive indicators of India's robustness and potential for further growth.

DIVERSIFICATION OF FUNDING SOURCES

An essential element of growth is the availability of capital, but diversification of the sources of that capital is also key to service investment opportunities.

The availability of new pools and providers of credit has been instrumental in contributing to the rapid growth of the Indian market, driven by growing international interest in India from foreign investors and demand from Indian companies for additional funding sources as they seek to expand.

The introduction of alternative investment products has created greater opportunities for foreign investors in India. Regulatory innovations have allowed global private equity funds to invest in India through structures such as

alternative investment funds (AIFs) and Infrastructure Investment Trusts (InvITs). AIFs are funds established or incorporated in India which pool money from sophisticated investors and invest on their behalf. InvITs are investment vehicles which invest in infrastructure projects, with investor returns generated from the InvIT's net distributable cash flows. The Securities and Exchange Board of India (SEBI) oversees the regulation and management of both structures.

AIFs have been growing rapidly, receiving close to US$22 billion in 2021 and US$24 billion in commitments from investors in 2022. A targeted investor pool and series of regulatory reforms have significantly contributed to the growth of AIFs. The minimum investment threshold of INR 1 crore (approximately US$120,000) and introduction of the accredited investor framework, which imposes lighter regulations for a class of investors with good understanding of the risks and returns of financial products and the ability to make informed investment decisions, has encouraged investment in AIFs by sophisticated investors.

While some challenges remain surrounding the lack of uniform practice and clarity in the tax treatment of AIFs, investors appear to be finding comfort in the SEBI's proactiveness in updating the AIF regulations to clarify the regulatory regime. The speculation that AIFs have the potential to exceed US$500 billion in investments by 2030 with an 18 to 25 per cent year-on-year growth in assets under management in the same period is a positive indicator of continued investment interest in AIFs.

Meanwhile, InvITs are particularly attractive due to their predictable cash flows: They are required to distribute at least 90 per cent of their net distributable cash flows to their unitholders at least once every six months (if listed) or once a year (if unlisted). Stringent requirements as to the assets that may be acquired and the key stakeholders of an InvIT provide additional comfort to investors.

Following profitable returns provided by InvITs in 2021, there has been an increased interest in InvITs from sophisticated global infrastructure investors such as the Canada Pension Plan Investment Board and the Ontario Teachers' Pension Plan. This alignment of policy support and investor appetite looks positive over the long term for India's infrastructure sector.

US$24 billion

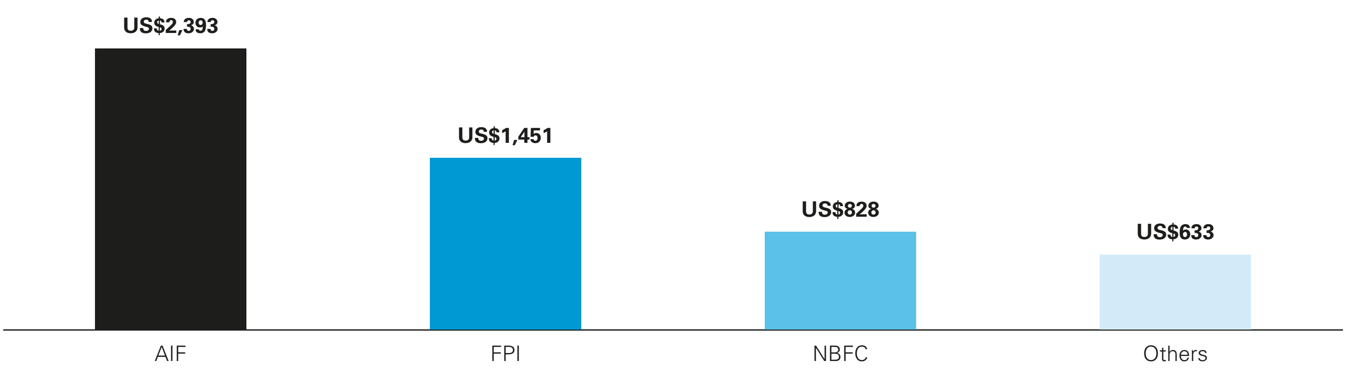
Alternative investment funds (AIFs) have been growing rapidly, receiving close to US$24 billion in 2022

EXPANDING THE POOL OF OFFSHORE INVESTORS

New structures aside, the Indian government has introduced a series of investor-friendly reforms to encourage foreign credit investment into India. The expansion of India's 'automatic route' permits greater flows of credit into the economy without the need for regulatory approval and has lifted caps on foreign investments in the insurance, defence and telecommunication sectors. This enables foreign players to make larger investments in these sectors without requiring governmental approval under Indian foreign exchange laws.

A relaxation of rules surrounding external commercial borrowings (ECBs)—commercial loans that eligible entities in India can raise

Private credit 2022 deal value (US$ billion) by investment route/vehicle used



Source: Private credit in India: H2 2022 update, EY

from foreign investors—has positioned ECBs as an increasingly attractive option for Indian entities seeking funding from foreign investors. Expanded end-use provisions for ECBs from recognised lenders allow Indian borrowers to raise funds from a wider pool of investors, diversifying their investor base via greater access to global markets.

The establishment of the Gujarat International Finance Tec-City (GIFT City) as India's first international financial services hub seeks to provide Indian corporations with easier access to global financial markets and open the Indian economy further to foreign capital. The imposition of a favourable tax regime, a flexible regulatory framework aimed at encouraging the relocation of funds from overseas jurisdictions to GIFT City, and a simplified registration regime for the setting up of new funds have resulted in GIFT City's growing prominence as a competitive financial hub globally.

GIFT City's attractiveness has been demonstrated by the Abu Dhabi Investment Authority's recent decision to establish a billion-dollar base there. This will likely encourage other sovereign wealth funds, banks and institutional investors to follow suit, deepening the pool of capital and expertise available onshore to Indian transactions.

ALTERNATIVE SOURCES OF FINANCE ALSO ON THE RISE

Increasing interest from foreign institutional investors in the Indian market and corresponding demand from Indian companies to access wider pools of capital have driven two further significant developments in the Indian credit markets.

The first of these is term loan Bs (TLBs). Since 2021, several Indian technology companies have looked to TLBs as an avenue to raise capital from institutional investors globally to support business growth, encouraged by low interest rates and high amounts of liquidity held by such investors. Increasing comfort with the Indian regulatory regime and a push from investors to deploy capital into new markets combined to open the gates to closing such transactions.

The oversubscription of these deals clearly demonstrated keen interest from such institutional investors to tap into the Indian market: Indian online hotel booking business Oyo's TLB was oversubscribed by 1.7 times, receiving commitments of close to US$1 billion from leading institutional investors; while taxi booking service Ola's TLB received interest worth US$1.5 billion from institutional investors for their proposed loan issuance.

Private credit is also a booming source of finance. Demand for private credit in India as an alternative source of funding is evidenced by the recent surge in transaction volumes, with more than US$5.3 billion in private credit deals closed in India in 2022.

Indian companies have looked to private credit as an attractive alternative to traditional sources of funding, such as equity raises and bank lending, in light of volatile equity markets, sub-optimal valuation levels and an overall slowdown in bank lending globally. Additionally, the flexibility in structures and repayment schedules offered by private credit providers is particularly appealing to companies with positive EBITDA seeking to serve their short-term liquidity needs.

US$ 500 billion

Alternative investment funds (AIFs) are expected to exceed US$500 billion in investments by 2030

Recognising the potential of India's private credit market, global funds headquartered outside India or with a multi-country presence transacted more than half of the private credit deals in India in 2022. With significant numbers of global players looking to enter India's private credit market, it is a fair assumption that this sector of the market will continue to grow.

Although the macro-economic environment has been challenging of late, India has proven resilient and demonstrated huge potential for growth, particularly against the backdrop of the global pandemic and Asia-Pacific's emergence from it.

The Indian government's focus on developing policies and initiatives to further India's growth, an increasingly favourable regulatory regime and greater avenues of investment will only continue to improve India's attractiveness as a global market for investors in the years to come.

The author would like to thank Elizabeth Tan for her contributions to the article.

India's thriving IPO market bucks the global trend

India stands out globally as a market with strong growth in IPO volume, thanks to its dynamic regulatory framework, robust domestic capital market and a large retail investor base. IPOs are also gaining popularity among foreign investors as one of the available exit options from their investments, as partner **Rahul Guptan** explains.

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While planning and executing investments into India, it is important for foreign investors to plan their exit options from their investments. Among the various choices available, public market exits through initial public offerings (IPOs) are gaining in popularity. This is largely due to a robust domestic capital market with a large retail investor base fuelled by a dynamic regulatory framework overseen by the Securities and Exchange Board of India (SEBI).

SEBI, formed in the wake of liberalisation of the Indian economy in the 1990s, has grown in strength with every passing decade. As a regulator with twin objectives of promoting Indian capital markets and regulating capital markets, it has over time managed to walk this tightrope and oversee the growth of the Indian market from lows of US$55 billion in 1993 to US$3.26 trillion in 2023.

Through regulation and oversight, SEBI has developed a robust regulatory framework for public market transactions. These include novel features for promoting retail participation while also protecting these investors. A balance of commercial interests and regulatory prudence has helped Indian issuers raise capital from domestic and foreign investors with increasing deal sizes.

This framework has also resulted in the public market exit becoming an increasingly popular option for foreign investors. This option allows foreign investors to release public market valuations and sell large stakes, while providing them with a liquid versatile stock exchange framework to sell any remaining holdings in their portfolios.

The popularity of public market exits has also brought with it a regulatory pivot from SEBI to ensure a level playing field. Some of these regulatory positions need to be evaluated and factored in by investors at the stage of their entry into an Indian investment to minimise issues that may arise while planning their exit with the passage of time.

SHAREHOLDER RIGHTS IN COMPANIES UNDERTAKING AN IPO

The basic structure for protection of contractual rights under shareholder agreements in India requires that the terms of the shareholder agreement are also included in the charter documents of the company. Once the decision to undertake a public offering of equity shares is made, pre-IPO investors with special rights need to get comfortable with the position that these special protections will fall away: These rights are not required once the company is publicly traded. All shareholders in a publicly traded company are afforded the same rights and protections under law, and there should be no special treatment for any constituency.

While pre-IPO investors have become used to this premise, the timing and the way these rights fall away are things that presents some issues. The process for completing an IPO is a long, drawn-out affair which may extend up to a year or longer, and accordingly pre-IPO investors want to ensure that they have the protections of special rights for as long as possible, up to the actual listing of the equity shares.

Market practice has evolved to allow for these rights and protections for pre-IPO shareholders to be retained up to the date of the 'red herring' prospectus; the rationale being that once the company files the 'red herring', the IPO is imminent, and the exit contemplated by pre-IPO investors is all but assured.

However, in recent regulatory pronouncements, SEBI has asked that all rights be removed from charter documents at the stage of filing of a draft prospectus with them for approval—some three to nine months prior to the 'red herring' prospectus stage. This creates a legal dilemma for pre-IPO investors, where they give up the legal safeguard of their rights, but the potential IPO is not yet a certainty.

> **IPOs are gaining in popularity due to a robust domestic capital market with a large retail investor base fuelled by a dynamic regulatory framework overseen by SEBI**

US$ 3.26 million

India's IPO market grew to US$3.26 trillion in 2023 US$22 billion in 2021

India tops the global stock exchange ranking by number of IPOs

YTD 2023

Rank		By number of IPOs	% of global IPOs
01	India (National and Bombay)	80	13%
02	Shenzen (SZSE and Chinext)	70	11%
03	Shanghai (SSE and STAR)	62	10%
04	US (Nasdaq)	53	9%
05	Indonesia (IDX)	45	7%
06	Beijing (BSE)	42	7%
07	Tokyo (Prime, Growth, Standard, REIT, Pro Market)	38	6%
08	Hong Kong (Main Board and GEM)	29	5%
09	South Korea (KRX and KOSDAQ)	26	4%
10	Saudi (Tadawul and Nomu Parallel Market)	20	3%
11	Malaysia (KLSE, ACE Market and LEAP Market)	16	3%
11	Australia (ASX)	16	3%
	Other exchanges	118	19%
	Global IPO activity	615	100%

Source: EY Global IPO Trends Q2 2023

Currently, a balance has been struck where the shareholder agreement subsists but the charter documents are amended to remove the special rights as of the date of filing with SEBI. This is not an ideal legal position for the company and pre-IPO investors if a dispute were to arise in relation to the management of the company. The conflict between the shareholders' agreement and the charter documents may only be settled using dispute resolution mechanisms and will certainly result in an erosion of value.

INFORMATION SHARING AND CONTINUOUS DISCLOSURE OBLIGATIONS

In an effort to bring more transparency to the initial public offering pricing process in India, SEBI introduced a requirement for mandatory disclosures of key performance indicators (KPIs) by issuers. This was largely prompted by the increase in the filings for IPOs by new-age technology companies that were generally loss-making, in the growth phase of their business and with differing standards of disclosure of financial information. This created a perception that there was no parity of information shared across categories of investors at different stages of a company's investment cycle, with early-stage investors or private equity investors having a different set of metrics from investors in the IPO.

SEBI mandates that an issuer is required to disclose all KPIs that have been disclosed to investors in the previous three years, along with an explanation on how they have been historically used to analyse, track, and monitor the company's business and financial performance. The comparison of these indicators over time must also be explained based on additions or dispositions to the business.

Typically, pre-IPO investors are provided a large amount of data under their contractual arrangements, which is in line with the risk adopted by an investor in the start-up or growth phase of a business. The kind of information shared includes business plans, projections and financial data.

The intended outcome of the SEBI position is that this information is included in the offering documents, so all investors have the same level of information to evaluate an investment decision in the issuer. This assumes that the information shared with pre-IPO investors is beyond the mandatory disclosures prescribed by law for an IPO. This additional data set of performance indicators will allow investors to better evaluate the pricing of shares

in an IPO and make an informed decision in relation to investing in the IPO and post-IPO trading performance.

SEBI requires the KPIs to be approved by the audit committee of an issuer and to be certified by the statutory auditors or peer-reviewed by independent chartered accountants (ICA). Often, the KPIs provided to pre-IPO investors in the three years preceding the IPO are not audited or reviewed by the statutory auditors or an ICA. Depending on the stage at which the issuer received the pre-IPO investment, information may have been culled out of internal management financial reports, internal estimates or even prepared with assumptions and may not have reflected the actual business and financial performance. The data may often have been presented without the rigor required for an independent audit.

Pre-IPO investors, being sophisticated investors, would have had the means to discern this information, fully understanding the risks with the data. However, when presenting this information in prospectus to public market investors, the KPIs must be subjected to audit procedures to ensure that the information is audited or derived from the restated and audited financial information. This presents practical challenges of differing magnitudes. For example, auditors may refuse to audit certain information or find themselves in a position where the data cannot be subjected to an audit. The jury is out on what happens when a pre-IPO investor sees significantly different information in an issuer company's offer document compared to what was shared with them historically.

THE ROLE OF A 'PROMOTER'

A unique feature of the IPO process in India is the requirement for an IPO-bound company to declare a major shareholder as a 'promoter'. The legal definition and concept are meant to capture an entity that, through shareholding and management, controls the company. The designation comes with a requirement to agree to a statutory lock-up of shareholding up to a prescribed per centage, as well as routine periodic reporting of specific information. The promoters have to provide specific information to be included in the prospectus, specifically relating to material litigations and provide underwriters with various linked confirmations. These disclosures carry the attendant liability risk for misstatements and omissions in the prospectus.

With an increasing number of private equity investors taking control positions in Indian companies, the designation of 'promoter' presents some challenges. Private equity fund structures that house their investments in special purpose vehicles are faced with the prospect of naming their global asset managers as promoters.

Investors may also, through dialogue with SEBI, get a determination of the company having no promoter and being professionally managed. In such scenarios, a major shareholder would need to step up to provide its shareholding to satisfy the statutory lock-in. Entities that are designated as promoters may also be asked to provide contractual representations and warranties in underwriting agreements.

When making investment decisions in relation to control or when assessing their partners in Indian ventures, investors should keep all these issues in mind. While none of them present regulatory dealbreakers, they do present issues to consider if an IPO is the preferred route of exit.

On the path to net-zero: Legislating for energy transition in India

The Indian government is pressing ahead with legislative reforms and investments on an unprecedented scale in the energy transition. However, to achieve India's ambitious goal of reaching net-zero by 2070, partner **Nandan Nelivigi** argues that significant investment from the private sector is essential.

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At the UN Climate Change Conference held in Glasgow (COP26) in 2021, India committed to reaching net-zero emissions by 2070. This commitment was backed with other near-term targets for 2030, including achieving about 50 per cent cumulative electric power-installed capacity from non-fossil fuel-based energy resources, reducing the emissions intensity of its GDP by 45 per cent from the 2005 level, and increasing its non-fossil electricity generation capacity to 500 GWs. India currently relies on fossil fuels to meet approximately 56 per cent of its energy needs. The International Energy Agency estimates that the investment required for achieving India's 2070 targets would be US$160 billion per year, on average, between now and 2030.

US$ 160 billion pa

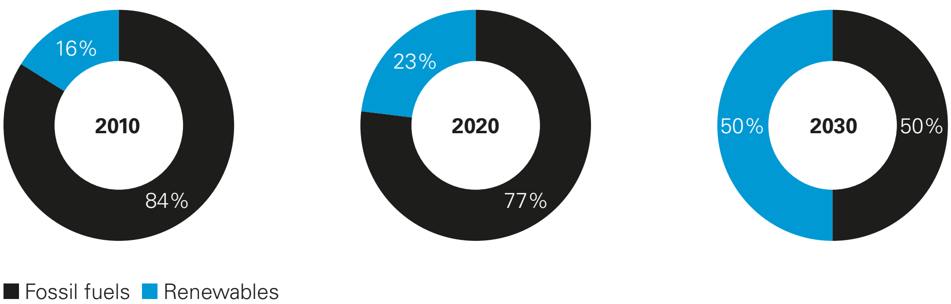
IEA estimates that the investment required for achieving India's 2070 targets would be approximately US$160 billion per year between now and 2030

LEGISLATING FOR ENERGY TRANSITION

In order to try and reach its energy transition goals, the Indian government has enacted the Energy Conservation Amendment Act 2022, which amended the Energy Conservation Act (ECA) 2001 and came into force on 1 January 2023. Among the key changes brought by the legislation was the introduction of a carbon credit trading scheme. Per the ECA Amendment, carbon credit certificates can be issued by the government or other authorised agencies to registered entities compliant with the scheme, which can then sell these certificates. The ECA Amendment has also given the government the right to specify a minimum share of consumption of non-fossil sources as energy or feedstock by certain designated

> **India is committed to reaching net-zero emissions by 2070 and achieving 50 per cent cumulative electric power-installed capacity from non-fossil fuel-based energy resources by 2030**

Electricity generation by source in India



Source: Statista; IEA

consumers, which include industries such as aluminium, fertilisers, iron and steel, cement, pulp and paper, textile, chemicals, railways, transport sector, petrochemicals, petroleum refineries, thermal power stations, hydro-power stations, electricity transmission companies and distribution companies, and commercial buildings or establishments. These changes have the potential to catalyse significant changes in India's energy landscape.

SUPPORTING GREEN HYDROGEN

In January 2023, India launched its National Green Hydrogen Mission to support production, use and exports of green hydrogen and its derivatives. The mission provides financial incentive mechanisms for domestic manufacturing of electrolysers and production of green hydrogen, and will support pilot projects in emerging end-use sectors and production pathways. Regions capable of supporting large-scale production or use of hydrogen will be identified and developed as green hydrogen hubs. The amount allocated to the mission is INR 197.4 billion (approximately US$2.4 billion), including an allocation of INR 174.9 billion (approximately US$2.1 billion) for the financial incentives, and the remaining for pilot projects, R&D and other mission objectives.

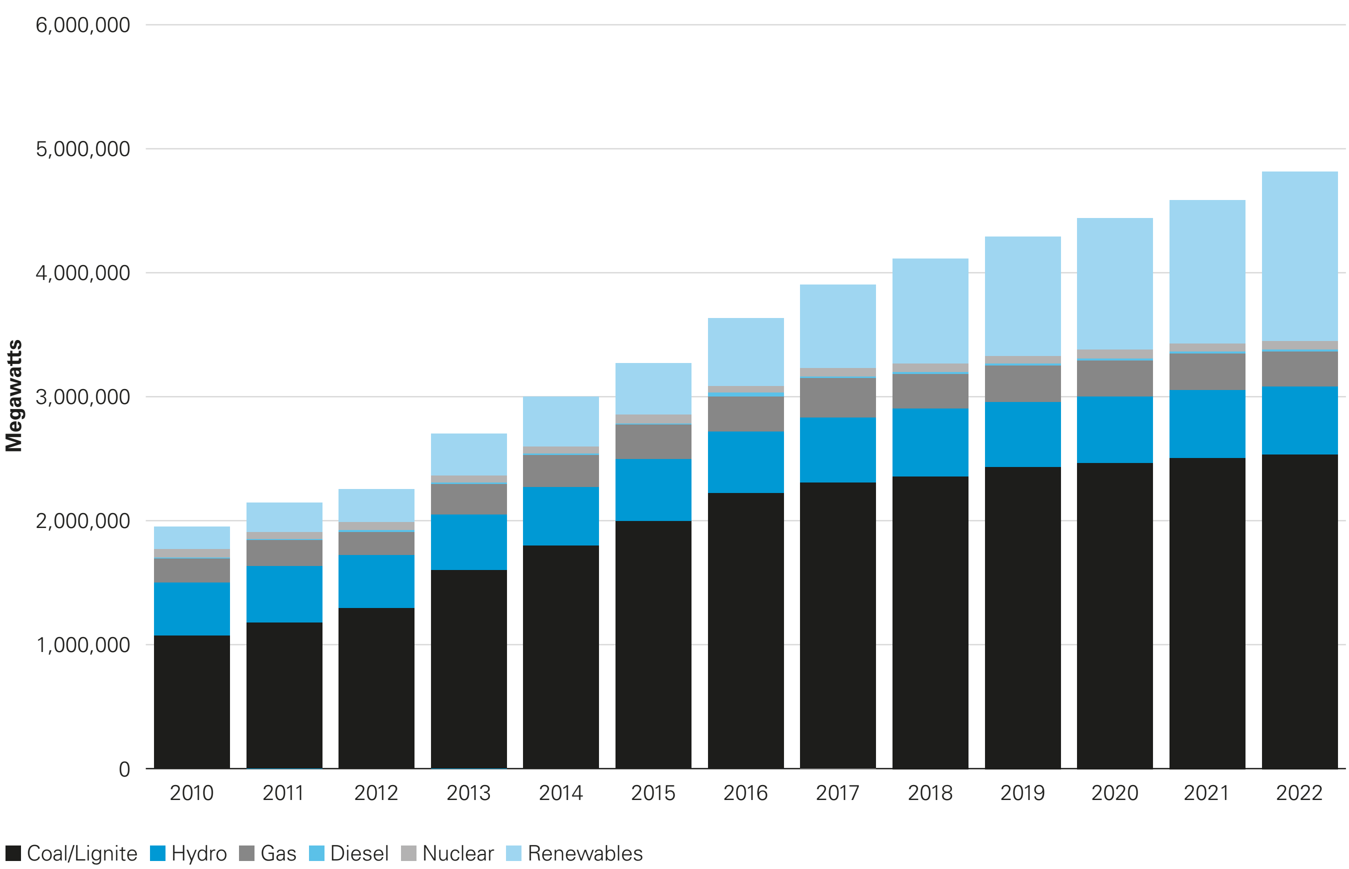
In June 2023, the Ministry of New and Renewable Energy (MNRE) released guidelines for two schemes implementing these financial incentives. The Incentive Scheme for Electrolyser Manufacturing will be implemented through the Solar Energy Corporation of India (SECI) through a competitive bidding process. Successful bidders are eligible for financial incentives for five years starting with a base incentive of INR 4,440/kW (approximately US$53.31/kW) in the first year from the date of commencement of manufacturing of electrolysers, which will gradually reduce on an annual basis. The calculation of incentives will factor in the specific energy consumption of electrolysers, as this impacts the cost of green hydrogen, and local value addition. The second scheme, the Incentive Scheme for Green Hydrogen Production (under Mode 1) is also implemented through SECI. 'Mode 1' anticipates bidding on least incentive demanded over a three-year period through a competitive selection process. Successful bidders are eligible for financial incentives in terms of INR/kg of green hydrogen production for a period of three years from the date of the start of production, with the incentives capped each year and reducing from INR 50/kg (US$0.6/kg) in the first year to INR 30/kg (US$0.36/kg) in the third year.

H_2

US$ 2.4 billion

India's government has allocated US$2.4 billion to the National Green Hydrogen Mission to support production, use and exports of green hydrogen

India's capacity of renewable energy has outpaced all other forms of capacity growth for six consecutive years



Source: *Reuters*

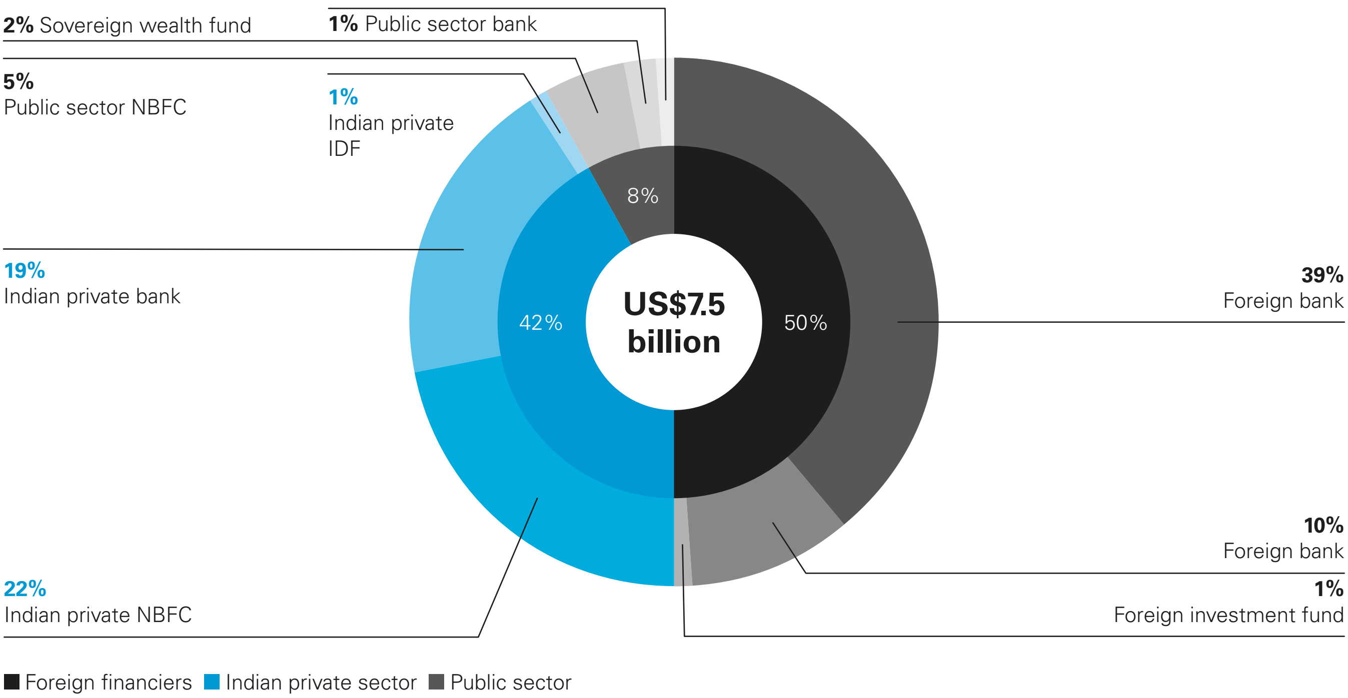
OTHER INCENTIVES FOR RENEWABLE ENERGY

The Indian government has also introduced several measures to enhance solar domestic manufacturing capacity for renewable projects. Recently, it concluded two tranches of allocations under the Production Linked Incentives (PLI) Scheme for high-efficiency solar photovoltaic (PV) modules. The winning bidders under this scheme will be paid financial incentives on an annual basis upon sales of high-efficiency solar PV modules for five years. A total capacity of approximately 48 GWs was awarded to various companies, and a portion will be eligible for financial incentives totalling approximately INR 185 billion (approximately US$2.2 billion). Some of the winning bidders in the recent tranche include Reliance, Indosol, First Solar, Waaree, ReNew and Tata Power Solar.

Another way in which the government has tried to address grid access challenges for renewable energy consumers is through the passage of the Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules 2022. The rules aim to promote the generation, purchase and consumption of green energy, including from waste-to-energy plants, through improving open access. Key features of the rules include the setting up of a nodal agency that streamlines the approval process for consumers seeking open access, with deemed approval after 15 days, providing certainty on the open access charges to be levied on green energy open access consumers, and allowing consumers to choose to receive green energy at their discretion. The Central Electricity Regulatory Commission has also announced the CERC (Connectivity and General Network Access to the Inter-State

> **The Indian government has introduced several measures to enhance solar domestic manufacturing capacity for renewables projects**

Sources of debt for new-build renewable energy projects in India (2019–2021)



Source: BloombergNEF

Transmission System) Regulations 2022, which aim to provide flexible, non-discriminatory open access to power producers, allowing them to withdraw and inject power without having to specify a transmission route, and to specify an offtaker when seeking connectivity.

Separately, the government announced in the recent National Framework for Promoting Energy Storage Systems a Viability Gap Funding (VGF) scheme worth INR 37.6 billion (approximately US$451 million) to boost the set-up of battery energy storage system (BESS) projects. The scheme will fund up to 40 per cent of the capital cost for private developers of BESS projects that are economically justified but not financially viable. The scheme envisages the development of 4000 MWh of BESS projects by 2030-31, with VGF being disbursed in five tranches linked to stages of implementation of the projects. To ensure that the scheme's benefits reach consumers, a minimum of 85 per cent of project capacity will be made available to distribution companies (DISCOMs). More details are awaited.

Another key development for energy storage is the passage of guidelines to promote the development of Pumped Storage Projects (PSPs). The guidelines include transparent criteria for allotting project sites to developers, the removal of the upfront premium for project allocation, market reforms for monetisation of ancillary services provided by PSPs, enabling government land to be made available at a concessionary rate to developers, the exemption of PSPs from free power obligation, the rationalisation of environmental clearances for off-river PSP sites and utilisation of exhausted mines for development of PSPs. Certain state-controlled financial institutions will be required to treat PSPs at par with other renewable energy projects per the guidelines while extending long-term loans of 20 to 25 years.

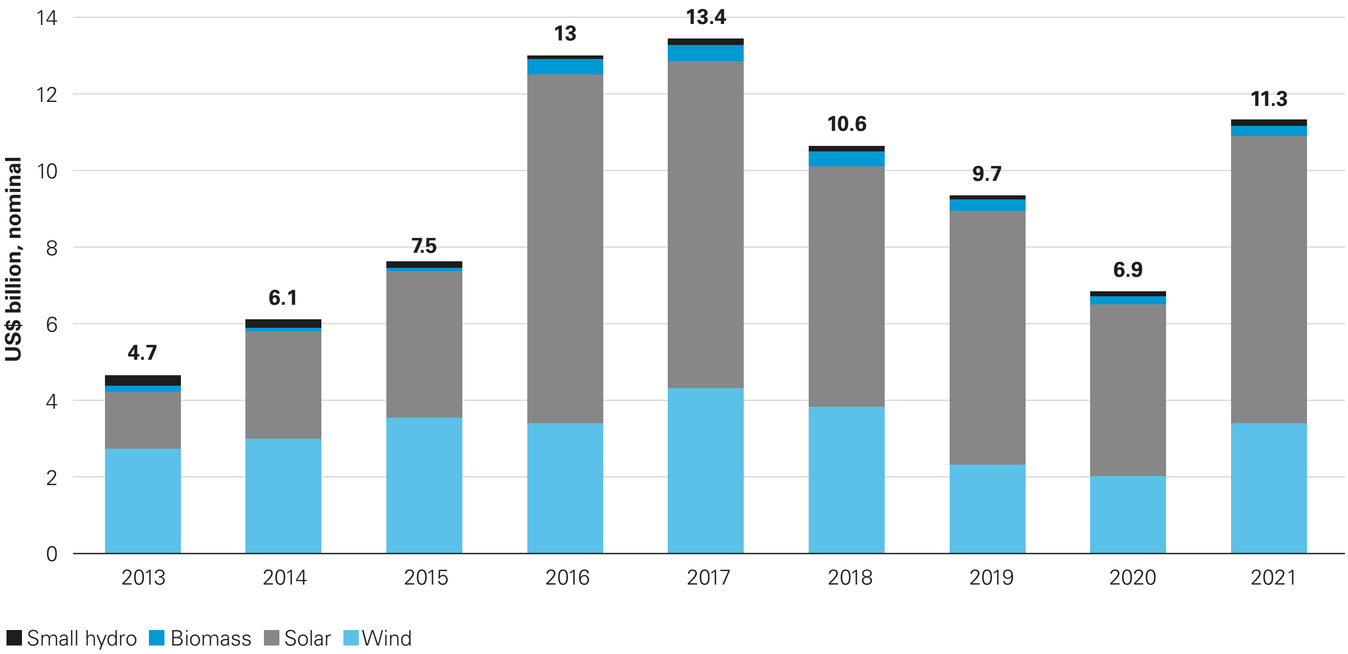
The government has also allocated INR 350 billion (approximately US$4.2 billion) in the national budget for 2023/24 towards energy transition, and announced a National Electricity Plan.

PRIVATE SECTOR IS KEY

The private sector will be key to the energy transition process, and the government is introducing various measures to promote private sector investment. Foreign investors are allowed to make 100 per cent investments in the renewable energy sector under the automatic route, without requiring prior government approval. The external commercial borrowing (ECB) limit set by the Reserve Bank of India under foreign exchange laws is US$750 million or equivalent per financial year per company, subject to satisfaction of additional requirements under ECB regulations. One increasingly common way for renewable energy companies, including government-backed entities, to raise money for energy transition through the ECB framework is the issuance of green bonds. Most recently, ReNew's subsidiary Diamond II Limited raised US$400 million through an oversubscribed high yield green bond issuance.

There are also several renewable energy auctions planned. In April 2023, MNRE announced bidding goals for renewable energy power projects from 2023/24 to

India annual new-build renewable asset finance by technology
Estimated debt and equity investments made for greenfield projects



Source: BloombergNEF

2027/28. For each of these years, the government intends to issue bids for 50 GWs of renewable energy, consisting of solar, wind, solar-wind hybrid, round-the-clock renewable energy power, with or without storage, or any other combination based on market assessment or government directions. The bids will be floated by state-appointed renewable energy-implementing agencies and in accordance with relevant standard bidding guidelines issued by the government and according to MNRE's advice. A number of the bidding guidelines have been recently updated, notably for wind, solar, hybrid power and renewable energy power projects with energy storage systems. Among other things, these guidelines set out streamlined processes for bidding and evaluation of bids, specify requirements for earnest money deposits and guarantees, include standard provisions to be included in each model PPA issued along with bids, set out promoter/sponsor shareholding restrictions, and address responsibility for transmission connectivity. MNRE also expects to auction 37 GWs of offshore wind capacity during fiscal years 2022 – 2030, with the initial 8 GWs being offered in the next two years. A total of eight offshore wind energy zones have been identified off the coasts of the states of Gujarat and Tamil Nadu for this purpose.

CHALLENGES TO ENERGY TRANSITION

Not unlike other nations, India's journey of transitioning to renewable energy is subject to several challenges, particularly expanding reliable energy access and use while maintaining consumer affordability and financial stability for DISCOMS; increasing the share of renewable energy sources in a reliable manner; and reducing carbon emissions to achieve ambitious climate objectives while meeting its social and economic goals.

A major limitation to reliable renewable energy access is India's grid infrastructure, which requires a significant upgrade to adapt to the intermittent nature of renewable power. Grids powered by renewable energy require a lot more effort to achieve stability in times of disruption than conventional energy sources, which can ramp up or down production as required. Other operational issues commonly attributed to this mismatch include the overloading of transmission lines at certain times, demand-supply disparities, frequency and voltage issues, losses of electricity transmission, a lack of coordination among state-level transmission planners and central planning agencies, and in the context of renewable power, varied concentrations of renewable power generation across regions. The Ministry of Power reported that in 2021/22, the total electricity lost in transformation, transmission and distribution systems and electricity unaccounted for represented 19.27 per cent of the total available electricity.

Grid infrastructure issues are further exacerbated by the weak financial health of DISCOMs. Payment delays by state-owned DISCOMs have been common, leading to a build-up of receivables from offtakers and an increase in debt for renewable energy companies. In addition, DISCOMs have not been able to cover their own costs due to outdated billing

systems, obsolete infrastructure, power loss and theft, and increases in energy costs. Although the performance of DISCOMs has been noted to be improving, they are still incurring heavy operational losses. These issues have in turn previously resulted in project delays, retendering or cancellations. A number of states, including Andhra Pradesh, Uttar Pradesh and Gujarat, have attempted to renegotiate power purchase agreements (PPAs) signed with independent power producers to lower tariffs, which were historically much higher than they are today. Although these attempts have so far been unsuccessful, legal action to remedy this is lengthy, and producers suffer from reduced or no payment during the process. The MNRE is trying to remedy common issues, for example by revising the dispute resolution mechanism for disputes between developers, contractors and renewable energy-implementing agencies like SECI and NTPC.

Another challenge is managing the economy of coal-dependent states to steady the increasing share of renewable energy of some states. In the past years, renewable energy installations have been concentrated —up to 78 per cent according to MNRE—in only a few states such as Karnataka, Gujarat, Rajasthan, Maharashtra, Tamil Nadu and Andhra Pradesh. On the other hand, certain states like Jharkhand, Chhattisgarh, Odisha, Telangana and West Bengal rely heavily on coal for their economic development. For the moment, India's focus has been to increase production on all fronts to ensure its energy security, but in the long run, it expects to gain significantly from its policy push supporting the domestic production of green hydrogen and other alternative fuels.

Energy transition also suffers from other challenges that are common to all infrastructure project development in India. Land acquisition for large-scale renewable projects is cost-intensive with limited government support. Even after being legally acquired, possession of land remains a challenge, and project companies have been dragged into legal battles over ownership. Finally, there are various permits to be obtained depending on the location of the site, including environment, wildlife, ceiling limits, government land allotment, ancestral property state laws, and so on. As all processes for permits and approvals are not effectively streamlined in states, these can take a lot of time to be obtained depending on the location.

LOOKING AHEAD

The government's efforts to promote energy transition have seen strong support from India's private sector.

The Reliance group recently increased its energy transition commitments and is aiming to install at least 100 GWs of renewable energy-generation capacity by 2030, with projects including a fully integrated solar giga factory in Jamnagar. With a population in excess of 1.4 billion to manage, India's demand for energy to run a growing economy is only expected to increase. At the same time, it has significant international commitments to uphold as far as its energy transition is concerned.

The government sees a solution in racing ahead with shifting India's energy landscape. That effort, however, will be admittedly inadequate without significant investments from the private sector, both domestic and international. In the coming years, one should expect to see sustained policy, regulatory and operational efforts by the government in powering India's effort to transition away from fossil fuels.

The author would like to thank Mallika Singh and Ramya Hari for their contributions to the article.

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The government's efforts to promote energy transition have seen strong support from India's private sector

The rise of single-asset GP-led secondaries in the Indian investment landscape

The market for private equity-led secondary transactions is growing, and India is steadily catching up with the global trend in embracing these innovative exit strategies, as partners **Sayak Maity** and **Anthony Wong** highlight.

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In India, one increasingly popular method for exiting investments involves a secondary transaction led by a general partner (GP) in a single-asset transaction. This represents a departure from the traditional use of secondary transactions. Historically, secondaries transactions were used as means of providing liquidity to otherwise illiquid interests held by limited partners (LPs) in private funds, in which buyers would purchase the fund interest—or a portfolio of fund interests—held by LPs.

The use of the secondaries market by GPs was limited primarily to fund restructurings, involving the sale of all or multiple assets held by the fund. However, over time, single-asset transactions, involving the sale of a specific asset held by the fund to a new fund managed by the same GP—a 'continuation fund'—in GP-led secondaries have become increasingly common, to the point that such single-asset transactions now form a majority of all GP-led secondaries.

The popularity of single-asset transactions is justified by several benefits they offer to both GPs and the LPs in the primary fund. The GP can hold 'high conviction assets' for longer periods, which may exceed the typical ten-year fund life.

Concentration limits and other guardrails in the primary fund may restrict follow-on investments in the asset, whereas similar restrictions do not apply in the case of single-asset continuation funds. In contrast, LPs in the continuation fund are often required to make additional unfunded commitments beyond the acquisition price of the asset.

LPs have the ability to cash out and lock in returns early, while, in most cases, also having an option to roll over, either fully or partially, into the continuation fund. GPs have the benefit of being able to make distributions, and crystallise carried interest, without reducing assets under management.

However, potential conflicts of interest in such GP-led secondaries require careful examination and mitigation as the GP controls both sides of the transaction. Typical mitigation measures include, depending on the transaction, obtaining third-party valuation reports and fairness opinions, and robust processes ensuring parity of information between LPs of the primary fund and the continuation fund.

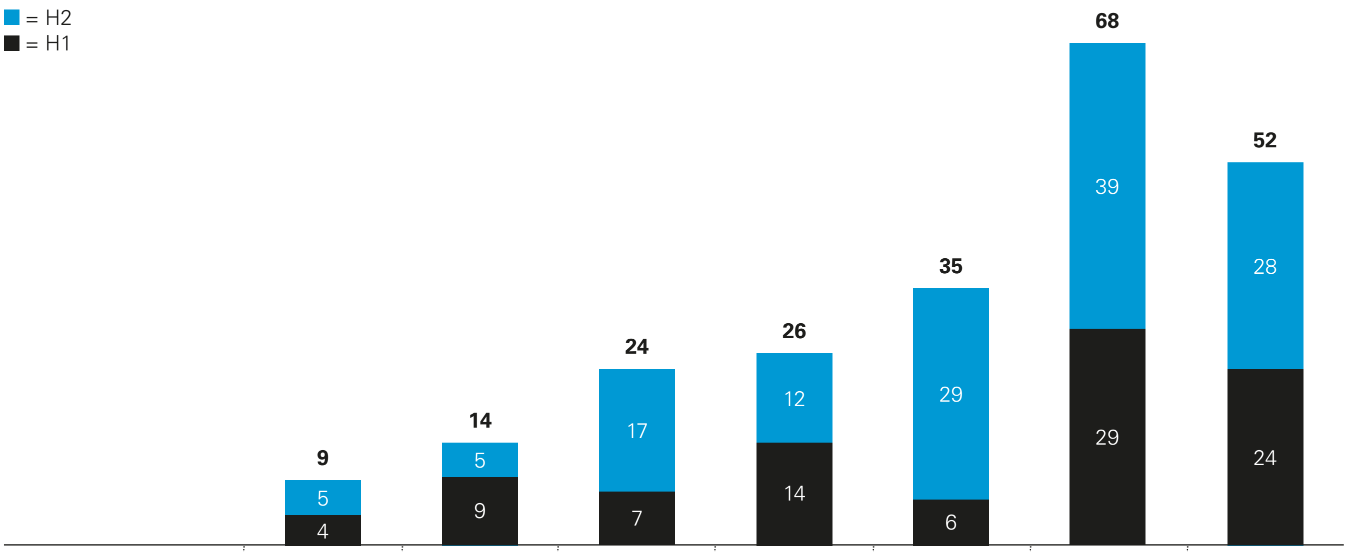
In most cases, such transactions are implemented with LP Advisory Committee consent or consultation, and fund documentation for recently formed funds often include specific provisions governing transactions involving the use of continuation funds.

THE IMPACT ON CO-INVESTORS

In addition to LPs of the primary fund, co-investors who participate in the investment alongside the primary fund are also stakeholders in exits to continuation funds. While in several single-asset transactions,

> **"The popularity of single-asset transactions is justified by several benefits they offer to both GPs and the LPs in the primary fund: The GP can hold 'high conviction assets' for longer periods, while LPs have the ability to cash out and lock in returns early**

GP-led annual transaction volume (US$ billion)



	2016	2017	2018	2019	2020	2021	2022
GP-led total volume	24%	24%	32%	30%	58%	52%	48%
GP-led growth	–	56%	71%	8%	35%	94%	(24%)

Source: Global Secondary Market Review, Jefferies, January 2023

co-investors have been offered the option to exit along with the LPs of the primary fund on the same terms, this is not always the case.

Co-investment documentation typically provides co-sale or tag-along rights for the co-investors to exit on the same terms as the primary fund in an exit event, but transfers to 'affiliates' of the primary fund—typically defined broadly to include funds managed by the same GP—are carved out from the scope of such co-sale or tag rights. Therefore, co-investors may be at risk of being exposed to an 'evergreen' structure.

Lately, some institutional investors participating in co-invests in India have been seeking additional exit rights in such scenarios involving transfers to continuation funds, although a clear trend is yet to emerge in this regard. Complexities often arise in addressing situations involving partial transfers, where the primary fund continues to retain a portion of its investment.

Additionally, in 'fund-style' co-invest arrangements, where co-investors often have limited information rights, co-investors have also asked for additional protections needed to ensure information and disclosures to co-investors are symmetrical to those provided to LPs of the primary fund and the continuation fund to ensure their ability to take informed decisions on participation in such 'exit.' Similar issues may also be faced by minority shareholders of underlying portfolio companies as well, since co-sale and tag-along rights in shareholders' agreements at the portfolio company level also typically exclude transfers to 'affiliates' of the primary fund—including other funds managed by the same GP.

WHEN TO CHOOSE A GP-LED SECONDARIES EXIT

The size of the secondaries market has grown rapidly, and the volume of GP-led transactions has grown even more rapidly during this period. In 2022, GP-led secondaries comprised approximately 48 per cent of the global secondaries market by transaction volume, according to Jefferies.

While the secondaries market in India is relatively undeveloped still, there have been several single-asset GP-led secondaries involving Indian assets in recent years—including some cases where the primary fund held minority positions in the portfolio company. Despite global macroeconomic headwinds, the continuing demand for Indian assets and the relatively strong performance of Indian capital markets has ensured that third-party exits, through public markets or private transactions, continue to be available, and even preferred.

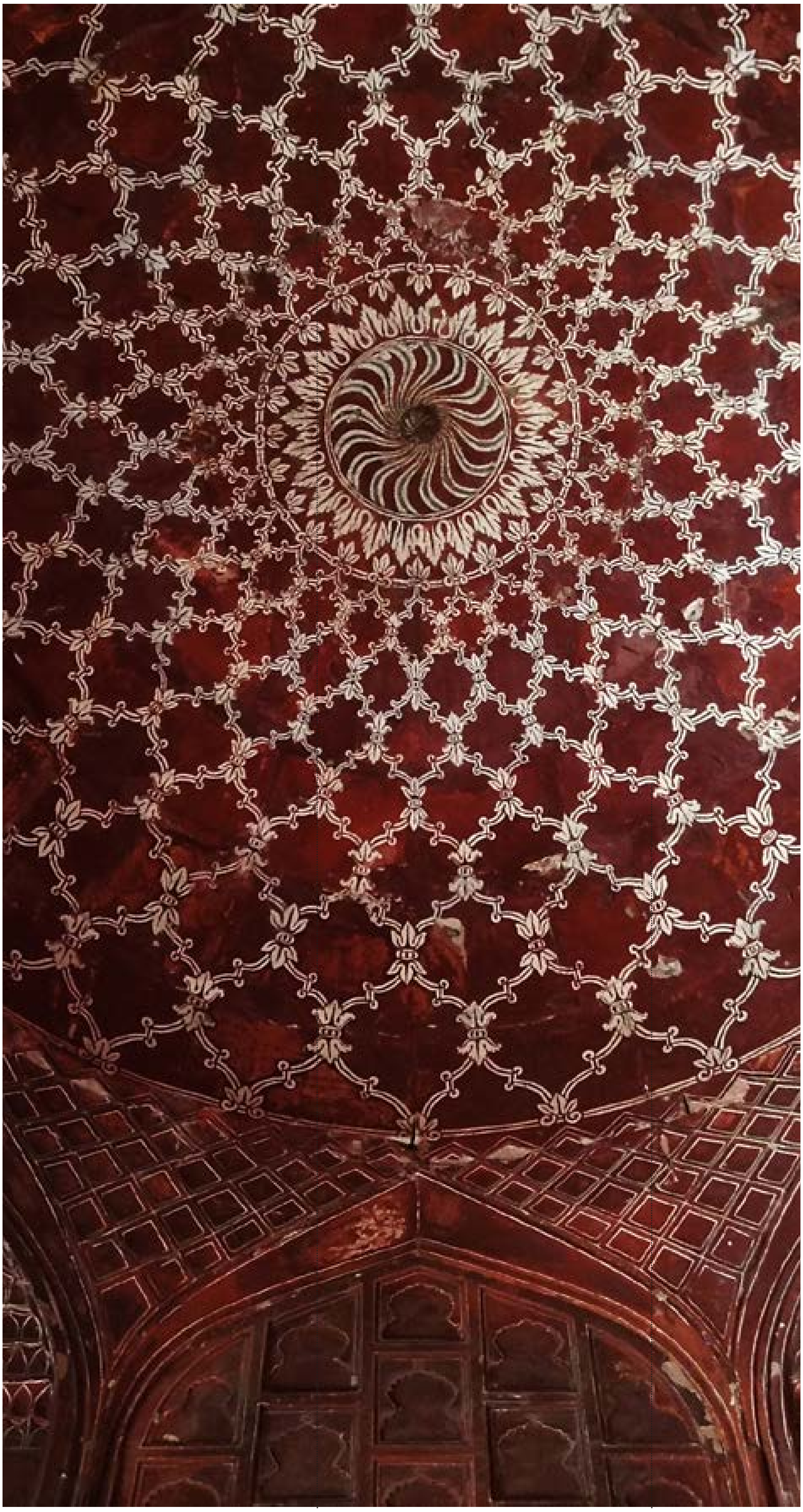
However, if high interest rates continue to persist and credit markets remain difficult to access, third-party exits may become more challenging, and the possibility of a growing need for alternative liquidity solutions in the near to medium term cannot be ruled out, especially considering the elevated investment activity in the past two to three years.

In any event, as the market continues to mature, there are likely to be a greater number of single-asset GP-led secondaries involving Indian portfolio companies. Institutional investors who are active participants in co-invests involving Indian assets and minority investors in such portfolio companies may

48%

In 2022, GP-led secondaries comprised approximately 48 per cent of the global secondaries market by transaction volume

Source: Jefferies



also increasingly seek rights and protections in their documentation to avoid potential exit hurdles in the future. It will be important to develop an appropriate framework in this regard that protects the interests of both the GP and co-investors.

In addition, onshore private funds in India may also consider gearing their fund documents to allow flexibility to undertake GP-led secondaries and develop policies to address conflicts of interest in such transactions. The Institutional Limited Partners Association issued new guidance on continuation funds in May 2023 to help manage this process.

At the same time, GP-led secondaries are under increasing scrutiny by regulators around the world. In May 2023, the US Securities and Exchange Commission (SEC) adopted amendments to quarterly reporting requirements of systemic risks by US-registered investment advisors to include "adviser-led secondary transactions." More recently, in August 2023, the SEC also adopted new rules—yet to come into force—which, among other things, provide additional guardrails on adviser-led secondary transactions that may be undertaken by US-registered investment advisers in their US funds.

While Indian regulators are yet to specifically address governance and conflicts issues concerning secondaries transactions involving onshore funds, regulatory changes in other markets may provide an indication on the approach that could be adopted in the future as this type of exit continues to grow in popularity.

India's legal reform in dispute resolution encourages foreign investment

In the past decade, India has made significant strides in reforming its alternative dispute resolution (ADR) framework, aiming to position itself as a global hub for international arbitration. The supportive stance of Indian courts towards arbitration has amplified the positive effects of these reforms. Partners **Dipen Sabharwal KC** and **Aditya Singh** discuss effective dispute resolution options for foreign companies.

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India continues to be an attractive destination for foreign investment, ranking as the world's eighth-largest recipient of foreign direct investment (FDI) in 2022.

With more foreign investors entering the Indian market, understanding how to create balanced contracts and build real relationships becomes fundamental to any business's success. Foreign companies need to consider a number of aspects to help them avoid, manage and resolve conflicts.

BALANCED CONTRACTS AND RELATIONSHIPS BASED ON DUE DILIGENCE

The most successful foreign companies in India are those that are committed to long-term, mutually advantageous arrangements with their Indian counterparts. Equal sharing of benefits among partners is essential, as any inequality could result in future complications. For instance, a partner with a minor financial interest might be more inclined to undertake risky bets, thereby opening the door to project delays, cost overruns, and other challenges tied to construction and project completion.

Including exclusivity and non-compete clauses in contracts also helps safeguard an investor's interest and ensures commitments are honoured, even if—or, more likely, when—tempting alternatives may be available. Similarly, the importance of rigorous compliance and accounting controls in all joint venture activities, including financial transactions and receivables, cannot be overstated. Independent auditors should be appointed for this purpose to verify the accuracy of accounts, and compliance with universally recognised accounting standards.

When feasible, contracts should be strengthened with collateral security, as unsecured commitments are inherently risky. In line with the norm in developing economies, a robust physical presence in India holds critical value throughout the investment's lifespan, starting with the due diligence phase.

Investors should therefore send credible analysts to investigate their prospective partners' financials, business operations, management style and cultural ethos. Foreign corporations should not settle for contractual arrangements in India that are lower than what they expect in developed markets.

Any good investment strategy also requires a robust exit strategy to curtail potential losses, mitigate conflicts and minimise disruption. Put options were historically a popular solution as they grant investors the ability to liquidate their investments by selling their stake at a prearranged price. However, in practice, this may create challenges in India as disputes can arise over whether the triggering conditions are met, or over price calculations. While no universal remedy exists, having multiple exit options and obtaining specialised advice would help minimise the risk of an investment becoming stranded.

USING ALTERNATIVE DISPUTE RESOLUTION IN INDIA

India has steadily reformed its alternative dispute resolution (ADR) regime in the past decade to transform itself into a global centre for international arbitration and to streamline the enforcement of contracts. To achieve this, a series of changes were introduced to the Indian Arbitration and Conciliation Act of 1996 in 2015, 2019 and 2020.

Additionally, the supportive stance of Indian courts towards arbitration has amplified the positive effects of these changes. With the recently approved Mediation Bill 2021, organised commercial mediation in India is also set to take off.

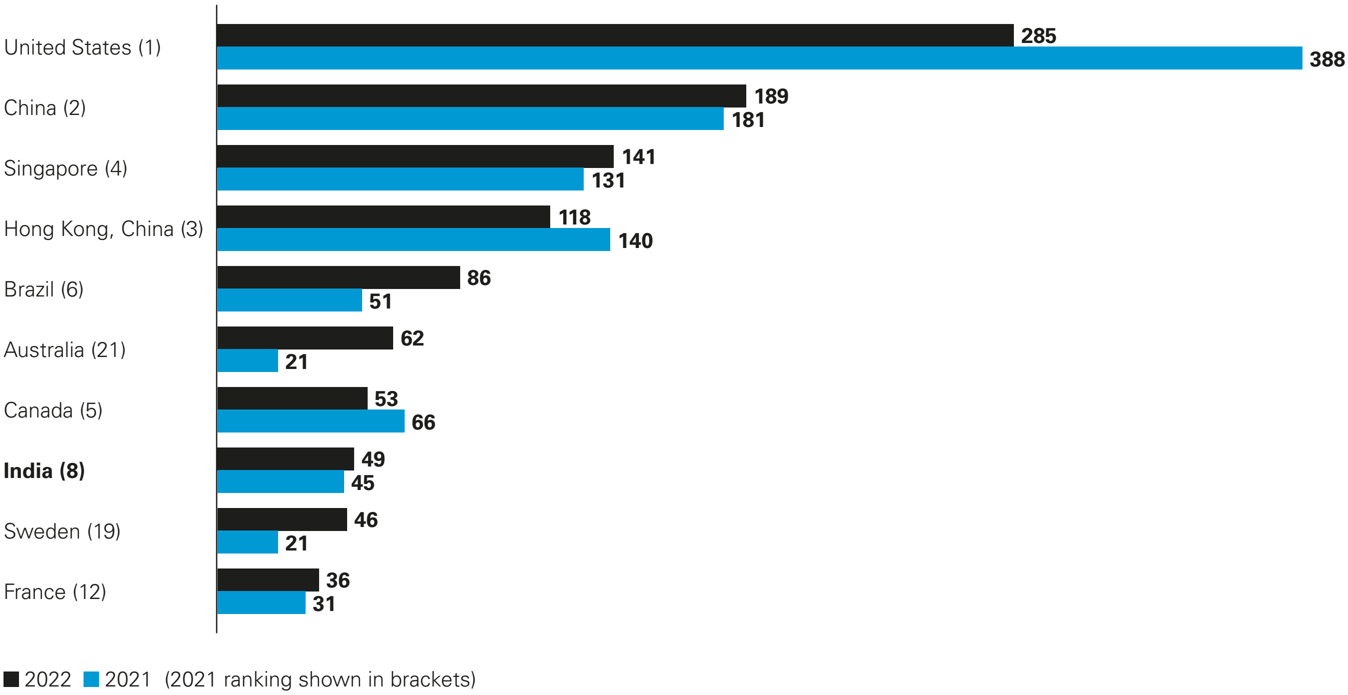
ARBITRATION

The revamped 1996 Arbitration Act aims at promoting a least-interventionist approach by Indian courts, thereby providing some relief to foreign companies who would otherwise be faced with court battles even before arbitration commences.

1 August 2023

The Mediation Bill passed by the Rajya Sabha

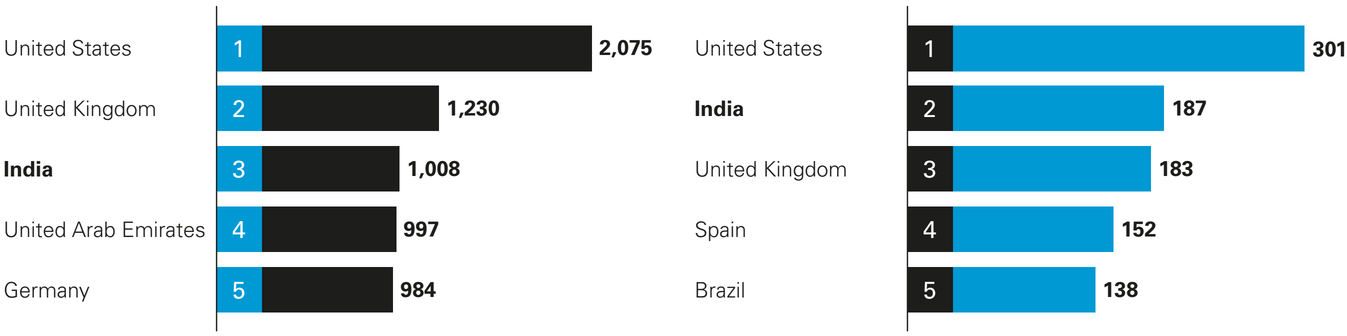
FDI inflows, top-ten host economies, 2021 and 2022 (US$ billion)



(2021 ranking shown in brackets)

Top-five recipients by number of projects

Greenfield investment announcements | **International project finance deals**



Source: World Investment Report 2023

If a valid arbitration agreement prima facie exists, courts will refer the matter to arbitration without further inquiry—as long as there are no specific non-arbitrable issues including insolvency, criminal offences, or those expressly falling within the domain of specialised courts.

Additionally, arbitral tribunals can now grant interim reliefs that are enforceable as Indian court orders, thus erasing the need to seek interim measures from courts once a tribunal is in place.

The reformed 1996 Arbitraton Act also aims to increase the efficiency of the arbitration process by mandating the parties to complete their written pleadings within six months from the date a tribunal is appointed, and for the tribunal to render an award within 12 months of having entered reference. This is extendable to a maximum of 18 months if the parties agree. In addressing fairness, the 1996 Arbitration Act disallows anyone with a direct or indirect stake in the dispute from acting as an arbitrator—a welcome shift from the earlier trend where it was not unusual for government officials to sit as arbitrators in disputes involving state-owned entities.

Indian courts are also embracing the realities of modern-day arbitration. For example, an Indian court recently held that third-party funding is essential to ensure access to justice, and that a third-party funder—who is neither a party to the arbitral proceedings nor the arbitral award—is not liable to pay any amounts awarded by the arbitral award. This should boost

confidence for third-party funders to constructively engage with foreign companies involved in complex, cross-border disputes in India.

MEDIATION

The 2021 Mediation Bill is another progressive step. Under its framework, parties will have to try and settle their commercial disputes first through mediation before commencing litigation. The mediation process would last 180 days, extendable by another 180 days if parties mutually agree, and any valid settlement agreement would be final and binding, and automatically enforceable.

To ensure its effectiveness, the 2021 Mediation Bill also safeguards the confidentiality of the process as a whole by expressly prohibiting the use of any material from mediation proceedings in any later court or arbitration proceeding. The setting up of a Mediation Council is also proposed to develop appropriate guidelines and lay down standards for professional and ethical conduct of mediators. While these are promising developments, it will have to be seen how these changes materialise in the future.

RESOLVING DISPUTES OFFSHORE

As resolving disputes in Indian courts can take more than a decade, foreign companies should opt for offshore arbitration with Indian counterparts. Although contracts are often via Indian subsidiaries, the recent Supreme Court case of *PASL Wind Solutions v. GE Power* confirmed that Indian parties can select an arbitration seat beyond India.

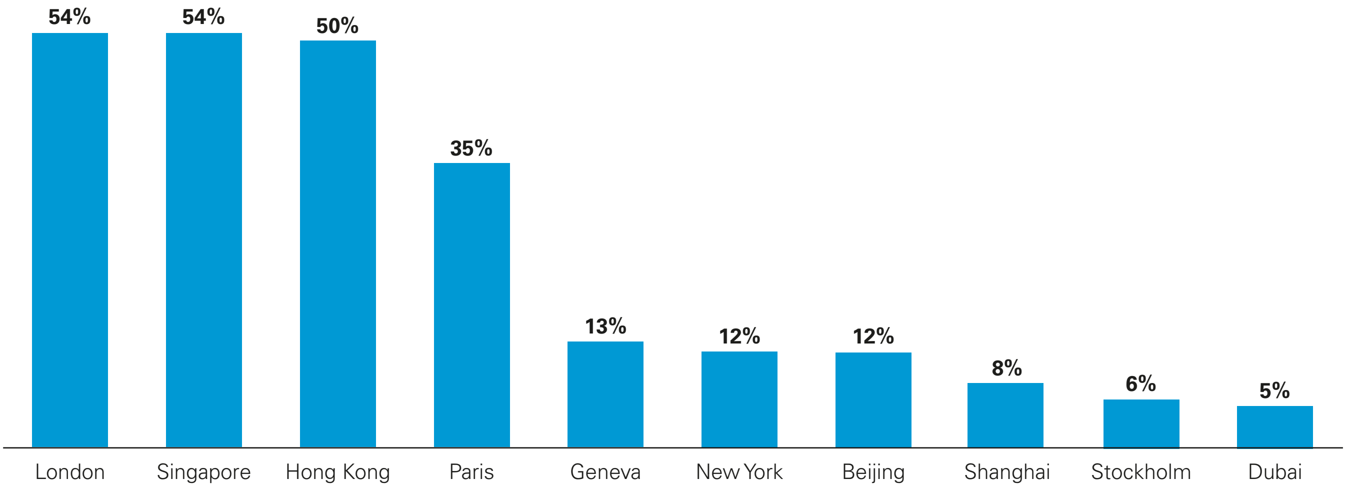
The 2021 survey jointly carried out by White & Case and Queen Mary University of London found Singapore and London were the most preferred arbitration hubs, and both could be attractive options for India-related disputes given the similarities between these jurisdictions' legal traditions and India.

In addition to selecting the seat of arbitration, foreign companies should also consider incorporating in their arbitration agreements the rules of some of the leading global arbitral institutions, such as the Singapore International Arbitration Centre, International Chamber of Commerce or the London Court of International Arbitration.

While institutional arbitration is set to grow in India, particularly with the establishment of the Mumbai Centre for International Arbitration, International Arbitration and Mediation Centre, Hyderabad, and the Delhi International Arbitration Centre, it is likely that global institutions with their longstanding reputations and well-established rules will have an edge over their Indian counterparts.

The previous decade has also witnessed foreign investors bringing disputes against India in relation to their investments under various bilateral investment treaties. Given India's non-membership in the International Centre for Settlement of Investment Disputes Convention, United Nations Commission on International Trade Law–based arbitrations under The Hague–based Permanent Court of Arbitration are common for India-related investment disputes.

What are your or your organisation's most preferred seats?



Source: 2021 International Arbitration Survey, White & Case and Queen Mary University of London

From a foreign investor's perspective, it is crucial that any investment complies with Indian laws and is not affected by any illegality. To that end, it would be sensible for foreign companies to seek advice from their legal and financial advisers to make sure that they hold realistic expectations regarding the protection of their investments. The importance of obtaining specialised legal advice cannot be overstated when foreign companies are planning to restructure investments in India to get access to investment treaty protection.

POSITIVE OUTLOOK FOR DISPUTE RESOLUTION IN INDIA

Investing in India is not without its risks, but the willingness of the courts and domestic companies to embrace modern dispute resolution methods means that foreign companies wanting to take advantage of Indian investment opportunities now have far more confidence than they may have previously that they can resolve disputes and protect their investments.

The Supreme Court has shown willingness to provide clarity on some of the areas of uncertainty which remain, and arbitration and mediation are much easier now than they were a few years ago.

The landscape will continue to evolve, and while proper professional advice is still absolutely critical, the risks can most certainly be mitigated to take advantage of India's opportunities.

India's evolving investment treaty regime

Since the opening-up of Indian markets to foreign investment in 1991, India has signed 86 publicly known bilateral investment treaties (BITs) to date. However, since 2016, India unilaterally terminated 76 BITs, with only eight BITs currently in force. India is not alone in this: In 2020, European Union Member States terminated approximately 130 intra-EU BITs; and in 2022 the European Parliament called for an immediate coordinated exit from the Energy Charter Treaty.

However, an existing foreign company having an investment protected by a terminated BIT is likely to continue benefitting from the terminated BITs by virtue of the 'sunset clause' in those treaties. A sunset clause survives the BIT and extends treaty-based protections to the investor and its investment for a period of, typically, ten to 15 years.

In the past couple of years, India has signed comprehensive economic partnership or cooperation agreements with Mauritius and the UAE, neither of which contains an investor-state dispute resolution clause. In fact, there is a clear shift towards dispute resolution through consultation, mediation and panel procedures, emulating the World Trade Organization–style dispute resolution mechanism.

That said, to make its existing BIT regime more robust, India consulted with Bangladesh and Colombia and issued joint interpretative statements in 2017 and 2018 respectively, in which detailed notes provide clarification of key provisions in those BITs and remove ambiguities that often arise from their interpretation. A sound legal understanding of these international agreements would be critical for foreign investors looking to structure their investments and to avoid exposure to risks in the longer term.

The authors would like to thank Subhiksh Vasudev for his contributions to the article.

"While investing in India is not without its risks, the courts' and domestic companies' readiness to adopt modern dispute resolution methods offer foreign investors greater comfort than before

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