The Project Finance Law Review

Third Edition

Editor
David F Asmus

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THE PROJECT FINANCE LAW REVIEW

THIRD EDITION

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PREFACE

I am pleased to introduce the third edition of *The Project Finance Law Review*, which now includes additional new chapters covering government investment agreements, commercial lenders, government funding and construction risk. This edition builds on the work from the first two editions, expanding both the scope and depth of the resource offered.

Recent years have seen many changes affecting the projects market, including enormous growth in capital directed toward renewable energy (and more novel projects such as carbon capture and storage, and hydrogen), the increasing impact of the regulatory environment on the viability of large projects and now, as the world gradually recovers from a covid-19-induced downturn, an abundance of government financing for selected projects as a part of various economic stimulus programmes. Project finance, unsurprisingly, continues to evolve with the markets it serves. The purpose of this volume is to provide a living guide to project finance that will be updated on a regular basis, while still tackling the core project finance concepts that every practitioner needs to understand.

This volume seeks to cover the most salient topics while leaving scope for expansion into other key areas (such as mezzanine financing, the effect of new technology risk on project financing and environmental, social and governance (ESG) issues) in future editions. As discussed briefly at the end of Chapter 1, all three of these areas have been in great flux, with newer funding sources (e.g., private equity, pension funds and sovereign wealth funds), changes in the nature of projects seeking finance (which now may involve new technologies such as carbon capture and even direct air capture of carbon dioxide) and more substantial environmental restrictions (particularly with respect to climate change concerns) in effect at key lending institutions all combining to change the complexion of the project finance market. The next several years should bring increased clarity to all of these subjects, including particularly the future of project finance in the oil and gas industry.

I would like to express my thanks to all of the authors of this third edition, and particularly those who have contributed new chapters or who undertook significant updates to their earlier work. Their efforts have allowed this volume to be more useful than ever as we enter a new decade facing increasing uncertainty in global politics and global markets, including the project finance market. It is the hope of all of the authors that this volume not only will be of use to all of its readers today, but also will continue to grow in scope and utility in the years ahead.

David F Asmus
Sidley Austin LLP
Houston
April 2021

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Part V

Selected Risk Considerations and Mitigation

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Chapter 16

SOCIAL RESPONSIBILITY RISK

Nacim Bounouara and Robert Cockburn[1]

I PROJECT FINANCE AND SOCIAL RESPONSIBILITY

i Social function of project finance

Social responsibility has now become one of the most important considerations for companies across the globe. Companies are under increased pressure to develop sustainable and responsible business models in light of heightened sensitivity and awareness by both clients and consumers of environmental, social and governance (ESG) issues. The same also applies to project finance stakeholders.

Through its objectives and functions, project finance has inherent social and development considerations that are lacking in many other financial activities. The objective of project finance is commonly associated with the financing of the development, construction and operation of new tangible assets (i.e., greenfield projects) or the expansion or upgrade of existing tangible assets (i.e., brownfield projects) that have a social or economic function, or both, aimed at the betterment of local communities and the development of countries. Projects such as roads and railways linking communities, economic and social centres, desalination and power plants providing stable and continuous access to water and electricity, and social infrastructure projects (e.g., hospitals and schools) are typically financed in this way. It is, therefore, not surprising to note that project finance has been the preferred tool of development banks and other institutions involved in growth and sustainable development to fund projects, particularly in developing markets. Project finance has been at the forefront of the ESG discussion for years and has, in many respects, contributed to its rise and development.

Project finance is a limited recourse financing that is designed to permit the repayment of lenders' funding (and sponsors' equity return) through the revenues generated by the project itself. Governments implementing infrastructure and energy projects are, therefore, not expected to issue guarantees or other credit support to funders (or sponsors) to cover their debt service (or equity return). This has an obvious advantage for governments: a limited use of their public finances, enabling countries to focus their (often) limited financial resources on other vital aspects of their operations and the development. In practice, however, it is not uncommon for governments to issue credit support (e.g., guarantees) to strengthen the revenue flow (e.g., to mitigate merchant risks associated with the proposed project) or backstop the creditworthiness of any public entity responsible for the payment of these

1 Nacim Bounouara is a partner and Robert Cockburn is a senior associate at DLA Piper UK LLP.

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revenues, or both. This is particularly the case in developing markets where large parts of the economy remain state-owned and the creditworthiness of state-owned entities is strongly linked to the government's own credit standing.

While project finance has an inherent ESG value in most cases, there is a need to balance benefit and detriment on a case-by-case basis. These – often critical – projects for local communities can sometimes have a negative impact: environmental damage may arise during construction or operation of the project, labour conditions may be akin to 'modern slavery' or local communities (including indigenous populations) may be adversely affected. It is clear, therefore, that the ends do not always justify the means.

ii A complex legal and compliance framework

The legal and compliance framework applicable to project finance has become more complex and comprehensive over the years.

As can be expected, the local laws of the country in which the project is to be developed will be particularly relevant, notably with respect to ESG and other social responsibility considerations. Sponsors and funders will need to assess the impact of local laws on the project and their own obligations, but also ensure that the project itself will comply with such laws. Local laws may be more or less stringent or sophisticated in certain areas, therefore allowing for a variable degree of flexibility.

Beyond the application of local law, sponsors and funders need to ensure compliance with the laws of their home jurisdictions as well as jurisdictions where they have substantial or critical operations or activities. For example, bribery and anti-corruption laws as well as sanctions which may be applied in their home jurisdictions are typical considerations for sponsors and funders in project finance, irrespective of the approach taken on these topics by local law. The extraterritorial nature of some laws needs to be accounted for when structuring a project financing. A certain number of high profile recent decisions by the United States Supreme Court and the United Kingdom Supreme Court (discussed below) are a compelling reminder of the role that home jurisdictions play with respect to accountability for environmental prejudice overseas.

Treaties such as the Paris Agreement (within the United Nations Framework Convention on Climate Change (UNFCCC)) adopted at the 21st session of the Conference of the Parties (COP 21) on 12 December 2015 also have an increasing role in the procurement and structuring of infrastructure and energy projects.

Alongside these legally-binding instruments, a set of standards or codes has been developed over the years with a recent emphasis on wider ESG considerations. The standards or codes have been developed by the industry and apply only on a voluntary basis alongside applicable laws (and in particular if these laws are less stringent on ESG issues). In addition to the Equator Principles, the IFC Performance Standards and other equivalent or derived environmental and social standards (which are discussed below), there is an emerging voluntary framework impacting project finance and its stakeholders to various degrees. For example, the United Nations Sustainable Development Goals set in September 2015 by the United Nations Assembly aim for a holistic approach to achieving sustainable development for all, and the United Nations Principles for Responsible Investment (PRI) (discussed below).

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iii Geographical and sectoral considerations

Some high profile financial institutions have recently ended their support for the funding of coal and other carbon intensive fossil fuels. This has generally been well received in more advanced economies such as in Western Europe but it may have limited benefits elsewhere, considering the needs faced by a number of developing countries coupled with their easier access to fossil fuels in many cases.

Certain types of fossil fuels, in particular gas, have a major role to play in the transition towards a universal sustainable energy model, and renewables projects are not necessarily as sustainable as they may initially seem (e.g., solar panels being manufactured with 'modern slavery').

The vast majority of project finance funders and sponsors generally take a nuanced and pragmatic approach to the eligibility of infrastructure and energy projects, balancing social responsibility considerations with wider socioeconomic benefits on a case-by-case basis.

II ENVIRONMENTAL AND SOCIAL IMPACT

i Risks at different stages of a project

As with most (if not all) aspects of a project, the environmental and social impact risks will vary with the different stages of a project.

Construction is considered the riskiest time for any project. Construction works can be disruptive to the environment and local populations, as the act of construction, by its very nature, requires the environment to be altered at the project site. Even a project with clear environmental benefits, such as renewable energy, can have a significant negative environmental impact. A hydroelectric project can involve the damming of rivers and filling of reservoirs; a wind farm may require woodland to be cleared, and will require trackways to be built and foundations to be dug. If not properly managed, these risks can jeopardise support for a project that might otherwise bring significant positive benefits.

On some projects, the ongoing environmental impact during operations may be obvious. For example, an opencast mine will involve the use of carbon emitting heavy plant and machinery, and will involve the blasting and digging of earth. On other projects, the impact may be less so, but complacency should be avoided due to risks such as maintenance vehicles not correctly following trackways and damaging protected habitats, or noise and light pollution disrupting wildlife.

At the end of a project's useful life, unless that life can be extended, it will be necessary to decommission the project and remediate the site, in order to avoid the risk of the decaying project assets contaminating the surrounding environment. Decommissioning a project is, however, not without its potential risks for environmental damage: decommissioning works themselves can involve similar risks to construction, and waste products and obsolete equipment will need to be recycled or otherwise disposed of safely.

ii Law and regulations

The project special purpose vehicle (the project SPV) and all parties operating at the project site will have to comply with local laws as mentioned above. In developed markets, these are likely to involve extensive regulations intended to protect the environment and avoid (and apportion liability for) contamination. The permits required to implement the project are also likely to impose obligations in respect of decommissioning, and may require the project SPV to post collateral as security for those decommissioning obligations. In developing

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markets this may not always be the case. Local laws and regulations may be less onerous, or their requirements could be less clear. Sponsors, contractors and funders should ensure that they take appropriate local law advice, in order to understand their legal obligations in respect of the project.

As seen above, it is not only local laws that will be relevant considerations for implementing a project. Recent cases have demonstrated a willingness on the part of courts in developed markets to make multinational groups accountable for the environmental actions of their subsidiaries in developing markets. In *Lungowe and others v Vedanta Resources plc and another (International Commission of Jurists and others intervening)* [2019] UKSC 20, the UK Supreme Court opened the possibility of claims being brought against a UK parent company for the actions of its Zambian subsidiary. The case related to the operation of a copper mine in Zambia by a Zambian subsidiary of Vedanta Resources plc, Konkola Copper Mines, which was accused of having polluted water sources in the Chingola region of Zambia. Notable points raised by the judgment include the following:

a maintaining group level policies in respect of environmental issues and management of environmental risks at group level can potentially create a duty of care upon which tortious claims against a parent company could be based by those suffering damage from the acts or omissions by a subsidiary;[2] and

b when assessing whether real risk that substantial justice will not be obtainable in another jurisdiction for the purposes of determining whether an English court should accept jurisdiction, when that other jurisdiction would otherwise be more appropriate, the English courts can take into account practical issues, such as the costs and complexity of bringing a claim in that other jurisdiction, and not simply questions about the independence or competence of the judiciary or fairness of process there.[3]

Although the appeal was in respect of preliminary jurisdiction points and not the substance of the case, it is clear that multinational sponsors cannot rely solely on the separate legal personality afforded by setting up subsidiaries (such as a project SPV) in a developing market jurisdiction to isolate all risks of liability for environmental issues, or to exploit the limitations of that jurisdiction's legal system to provide protection.

In *Jam et al. v. International Finance Corp* 586 U.S. ___ (2019), the US Supreme court held that the IFC does not have absolute immunity from suit, but can be sued in the US courts in respect of its commercial activities. The case concerned pollution from the Mundra coal-fired power project in Gujarat, India, financed by the IFC. The IFC is accused of failings in its assessment and monitoring of the environmental and social risks of the project. Although, in a similar way to *Vedanta*, the judgment relates to preliminary issues rather than the merits of the case, it represents another example of courts in developed market jurisdictions entertaining the possibility of claims in respect of environmental and social damage suffered in developing markets.

It will be interesting to see how this area of law develops, and particularly whether these decisions will in fact lead to successful claims against sponsors or lenders, or both, in respect of projects in developing markets. In the meantime, these represent further risks that multinational project participants will need to consider when preparing projects in developing markets.

2 Judgment of Lord Briggs JSC at [2020] AC 1045, paragraphs 42 to 62.

3 Judgment of Lord Briggs JSC at [2020] AC 1045, paragraphs 88 to 101.

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Regulatory developments in developed market jurisdictions also indicate an increasing desire on the part of governments to make corporate groups accountable for the environmental impact of their activities, even outside their home jurisdictions. At the present time, these obligations are generally based on disclosure and reporting of ESG matters, and are intended to influence investment towards sustainable use. Many of these regulatory efforts are based on or influenced by the Recommendations of the Task Force on Climate-related Financial Disclosures, set up by the Financial Stability Board. The European Union's Taxonomy Regulation (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020), the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019), the Non-Financial Reporting Directive (Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014), the UK Financial Conduct Authority's Listing Rule 9.8.6 and similar regulations will require the entities to which they apply to report on and disclose climate-related risks and how they are managed. Although not specific to project finance, sponsors and funders to which these regulations apply will need to consider them in connection with their projects. Given governments' commitments under the Paris Agreement and obligations undertaken by many governments to achieve net zero emissions, it is likely that such regulatory efforts will only increase and become more burdensome to sponsors and funders.

ii Standards: Equator Principles, IFC Performance Standards, Principles for Responsible Investments

A number of non-mandatory, voluntary, industry codes and standards have been developed to promote ESG considerations. Although they lack the force of law, they represent public commitments and policy decisions by major financial institutions. If a project fails to satisfy these standards, its access to funding could therefore be limited. Such standards include:

a the IFC Performance Standards;
b the Equator Principles; and
c the Principles for Responsible Investment.

The IFC Performance Standards. In 2006, the International Finance Corporation (the IFC) introduced its sustainability framework, incorporating a series of environmental and social performance standards (the IFC Performance Standards), building on its earlier safeguard policies. The sustainability framework and the IFC Performance Standards were substantially updated in 2012. The IFC uses the sustainability framework for its credit assessment and requires that its clients meet the IFC Performance Standards. Notwithstanding a single lender's policy requirement, the significant role of the IFC in funding projects in developing markets and the early adoption of such comprehensive requirements has meant that they have been highly influential as a framework for dealing with ESG risk. Notably, the IFC Performance Standards have influenced in various degrees other development banks' ESG policies and have formed the basis for the Equator Principles (discussed below).

The Equator Principles are produced by the Equator Principles Association, an unincorporated association of member Equator Principles Financial Institutions (EPFIs) established in 2010. At the time of writing, 116 EPFIs in 37 countries have signed up to the

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Equator Principles.[4] The Equator Principles draw heavily on the IFC Performance Standards (the IFC acted as technical adviser when the Equator Principles were first drawn up). The Equator Principles comprise 10 principles affecting ESG matters and operate as a risk analysis and mitigation framework. The Equator Principles categorise projects into three categories: Category A, where there are significant adverse environmental and social risks; Category B, where such risks are limited (e.g., by being site specific, reversible and readily mitigated); and Category C, with minimal or no adverse environmental and social risks.

The Principles for Responsible Investment are a series of investment principles in respect of ESG matters adopted by institutional investors and investment managers. They were developed by investors in partnership with the UN Environment Programme Finance Initiative and the UN Global Compact. Signatories agree to abide by the principles to the extent that they are consistent with their fiduciary duties. These principles include that the investor will incorporate ESG issues into its investment analysis and decision making, and act as an active owner and incorporate ESG issues into its ownership policies and practices.

Under the Equator Principles, an EPFI will assess Category A and Category B projects with applicable standards for ESG matters. Except for projects in certain high-income OECD countries designated for these purposes (the Designated Countries), a project will be assessed against the IFC Performance Standards and the World Bank Group's Environmental, Health and Safety Guidelines. In Designated Countries, the applicable standards are the relevant local law. The IFC Performance Standards cover a range of environmental issues, including resource efficiency and pollution prevention (Performance Standard 3) and biodiversity (Performance Standard 6).

The Equator Principles include a number of specific requirements for project SPVs in respect of analysis, assessment, monitoring and mitigation of environmental risk. Among other things, they require that the project SPV conduct a climate change risk assessment to identify and analyse potential adverse environmental and social risks for Category A and Category B projects and for all projects where combined scope 1 emissions (i.e., on-site emissions) and scope 2 emissions (i.e., emissions from generation of purchased energy) are expected to be more than 100,000 tonnes of CO_2 equivalent annually. The assessment is required to be aligned with the Recommendations of the Task Force on Climate-related Financial Disclosures. The requirements for the climate change risk assessment are set out in the Equator Principles, and include that the project SPV consider an alternatives analysis to evaluate options available to reduce project-related greenhouse gas emissions. The Equator Principles also require that the project SPV develop and maintain an Environmental and Social Management System to identify, assess and manage risks and impacts in respect of the project on an ongoing basis. If necessary, an Equator Principles Action Plan to bring the project into line with the applicable standards will also be required.

While such standards do not carry the force of law, they encourage compliance by restricting access to finance and equity investments for projects that do not meet their requirements. Projects that cannot be financed will not go ahead, and those with easier access to finance will have lower finance costs, offsetting the additional compliance costs. Even if none of the arrangers or original funders on a project financing are themselves EPIs, arrangers will need to consider Equator Principles issues to facilitate syndication of the credit facilities. As increasing numbers of funders sign up to the Equator Principles, this indirect effect will become increasingly material.

4 https://equator-principles.com/members-reporting/.

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Standards such as those described above have been criticised as 'green washing', and a way to cover up environmentally damaging activities by ticking a compliance box without tackling the underlying issues. Cases against the IFC, such as *Jam* show that even those institutions at the forefront of these developments can fall short of their ideals. However, these standards do provide a framework for governance against which project parties can be held accountable. This is particularly relevant where there is an absence of regulation, as is often the case in developing markets.

III HUMAN IMPACT CONSIDERATIONS

i Labour and HSE law and regulation

As a project SPV may not itself have any employees, it might be thought that working conditions, labour relations and HSE are not issues that sponsors and lenders need to consider. However, all projects will require personnel, usually employees of subcontractors, to be engaged, and those personnel will have needs. Laws and regulations in respect of health, safety and environment (HSE) and workforce conditions can impose vicarious liability or other obligations on project companies for the actions of their subcontractors. In addition to these potential liabilities, sponsors and lenders can suffer reputational damage from the failings of subcontractors.

In addition to on-site considerations, when planning and developing projects, sponsors need to consider issues associated with supply chains. Legislation, such the UK's Modern Slavery Act 2015, imposes obligations on businesses to take action to remove modern slavery from their supply chains globally. Sponsors will need to consider these when sourcing equipment and materiel.

The IFC Performance Standards include requirements as to labour and working conditions (Performance Standard 2), which the Equator Principles incorporate for projects (other than those in developed Designated Countries). The Equator Principles further require HSE and labour issues to be considered in the Environmental and Social Management System that they oblige borrowers to produce and follow.

Compliance with local law is therefore essential, but may not be sufficient. Sponsors should ensure best practice is followed irrespective of jurisdiction.

ii Local community and indigenous people concerns and human rights

Any project will have an impact on the people living on or around the site. Land acquisition for the purposes of a project can involve the displacement or dispossession of people living in the area, in some cases without the consent of the people affected. Less dramatically, neighbouring populations could be affected by construction traffic, noise and light pollution or the loss of a view. Cultural heritage can also be affected by a project. Sites of archaeological, historical, cultural, artistic or religious significance can be damaged or destroyed during construction or become inaccessible. The project may also affect minority groups of indigenous peoples, who can be particularly vulnerable to the adverse effects of a project.[5] The project may interfere with traditional lifestyles, such as interrupting migration routes for nomadic peoples, or impact sites of cultural significant to indigenous groups.

5 IFC Performance Standards, Performance Standard 7, paragraph 1.

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Local laws will impose obligations on projects for stakeholder engagement. Consultation with local communities and other stakeholders may be a condition of the permit or concession required for the project. Where there is compulsory purchase of land, compensation may have to be paid. In jurisdictions where there are indigenous population groups, it is likely that these groups will, to a greater or lesser extent, have rights that enjoy protection under local law.

Local laws may, however, offer incomplete protection in respect of these matters. This can particularly be the case with regard to engagement with indigenous populations. Often the nature of indigenous groups' customary rights and traditional uses of a given location means that they may not have full protection under the laws of the state in which the project is located.

Some of the most significant changes to the Equator Principles introduced by the fourth edition in July 2020 related to stakeholder engagement and the relationship with indigenous peoples. The provisions of the Equator Principles relating to indigenous peoples draw on, and to a large degree incorporate, Performance Standard 7 of the IFC Performance Standards. To satisfy the Equator Principles, the project must obtain the free, prior and informed consent (FPIC) of any affected indigenous peoples. This concept has its origins in the United Nations Declaration on the Rights of Indigenous Peoples[6] and is used by the IFC Performance Standards. The IFC Performance Standards acknowledge that there is no single definition of FPIC, but that it should be established through good faith negotiation with affected communities.[7] The Equator Principles' requirement applies globally, unlike under the previous version where in Designated Countries compliance with local laws was sufficient. This will have a particular impact in those jurisdictions, such as Australia, where local laws do not necessarily require this level of engagement with indigenous peoples.

The Equator Principles also require that the EPI's client conduct a human rights impact assessment, with reference to the UN Guiding Principles on Business and Human Rights. This should include analysis across the supply chain.

The IFC Performance Standards also include specific provisions relating to land acquisition and resettlement (Performance Standard 5) and cultural heritage (Performance Standard 8). Performance Standard 5 advises clients to avoid involuntary resettlement unless unavoidable and to mitigate its effects by, for example, offering fair compensation and improvements to living conditions where not.

6 United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295 of 13 September 2007, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

7 International Finance Corporation, Performance Standards on Environmental and Social Sustainability 1 January 2012, available at https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h, Performance Standard 7, paragraph 12.

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IV MITIGATION OF SOCIAL RESPONSIBILITY RISK

i Assessment and due diligence

As described above, the application of the Equator Principles, the IFC Performance Standards and other equivalent or derived environmental and social standards is in itself a way for funders to mitigate their social responsibility by ensuring that projects are assessed thoroughly and meet certain tests.

An environmental and social impact assessment (ESIA) may be required to assess and predict the potential impact of a proposed project on the environment (including biodiversity), and local communities (including cultural heritage and socioeconomic effects). An ESIA would typically apply to larger projects or those likely to have the most significant environmental and social impact. The scope and depth of the ESIA will also depend on the nature, size and complexity of the proposed project.

A key output of the ESIA process is the environmental and social management plan (ESMP) which is a strategy for managing risks and mitigating the impacts identified through the assessment. The ESMP is also important to enable an allocation of the risks, responsibilities and actions between the parties involved in the proposed project, and to build a consensus between them as to how the proposed project is to be developed, constructed and operated.

Stakeholders' consultation or prior consent, or both, may also be required as part of the ESIA process. Some countries (e.g., the United Kingdom, the United States and Canada) have also developed community benefit agreements for some significant projects whereby developers and community representatives relevant to a proposed project agree upon specific obligations on the developers to safeguard those communities' interests. Similar approaches can be taken to formalise agreement with groups of indigenous peoples. These agreements can help achieve or document the FPIC of the affected indigenous populations. Sponsors should, however, ensure that the negotiation and consultation process is adequately documented in order to demonstrate that the agreement was the product of fully informed consultation.

The ESIA and ESMP are carried out and finalised before the funding from lenders is released, and would typically be required as conditions precedent to signing the finance documentation or financial close. They are therefore an important milestone for sponsors (and governments) to securing funding for their projects.

Funders typically have internal policies covering these ESG aspects as well as access to ESG in-house expertise able to tackle the most challenging projects. External specialist ESG advisors (in addition to local and international legal counsel) may be involved in the assessment and due diligence of the environmental and social risks associated with the proposed project.

Even if an ESIA and ESMP are not required following an initial screening, sponsors should still expect funders to carry out ESG due diligence on the proposed project, although typically in a lighter fashion. The relevant funders' own in-house ESG teams will be involved to ensure that their internal policies are complied with.

Finally, as mentioned above, some financial institutions have specific lending criteria where certain types of projects, technologies and sectors are off-limits and cannot benefit from their funding (e.g., the financing of coal-fired power plants).

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ii Finance and project documentation

The ESG assessment made by the funders at the start of the process as described above is not the only requirement that a borrower or sponsor would need to satisfy on a proposed project financing.

The finance documents between the borrower and the funders would typically include a requirement on the borrower to comply with any agreed ESMP, the Equator Principles, the IFC Performance Standards and other equivalent or derived environmental and social standards (in addition to the requirement for the borrower to comply with applicable laws). This is also the case regarding bribery and anti-corruption considerations as well as sanctions. On large transactions involving multiple funders, more than one standard or requirement may apply. There may be overlap between the various standards and requirements, but the general rule is that all applicable standards and requirements are cumulative and should therefore be complied with by the borrower on an ongoing basis.

A decommissioning plan (agreed with the funders) may also be required before the end of the life of the project to retire the physical facilities of such project as mentioned above. A decommissioning plan will need to be complied with by the borrower, and adequate security (e.g., letter of credit or financial reserves) may be required to be put in place by the borrower.

Information and reporting requirements during construction and operation will also place certain obligations on the borrower in order to ensure that funders are kept informed of the occurrence or threat of adverse events or circumstances which are, or could lead to, a breach of any of these standards or requirements.

As mentioned above, the borrower would typically be a special purpose vehicle subcontracting most or all of its construction, operation and maintenance obligations to various subcontractors (which may or may not be the sponsors themselves). ESG and other standards and requirements imposed by the funders on the borrower would typically need to be passed down to these subcontractors under the various project agreements binding them to ensure that the actual works, services and other activities are carried out in compliance with the same.

The control and monitoring by the funders over the borrower's activities and the project itself therefore remain important throughout their involvement, namely until they have been repaid in full. A breach of these various obligations and undertakings would ultimately lead to an event of default or a policy trigger event with serious consequences for the borrower (and the sponsors), such as the acceleration of the loans and enforcement by the lenders of their security, thereby placing the sponsors at risk of losing their project and investments. These remedies available to the funders effectively allow them to exit a project with potential social responsibility liabilities or reputational consequences, or both, and distance themselves from a failure by the borrower to manage identified risks and implement agreed actions. This may, however, not be sufficient to unequivocally prevent funders from being sued in these cases.

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Appendix 1

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Nacim Bounouara is a partner at DLA Piper UK LLP where he advises on the full range of project development and finance-related matters, with extensive experience on 'first of a kind' and market-leading energy and infrastructure projects. Nacim advises sponsors, governments and lenders (including development banks and export credit agencies) on the development and financing of power generation projects (conventional, renewable and nuclear), oil and gas projects and transport and social infrastructure projects across Europe, the Middle-East and Africa.

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