SUBSCRIBE

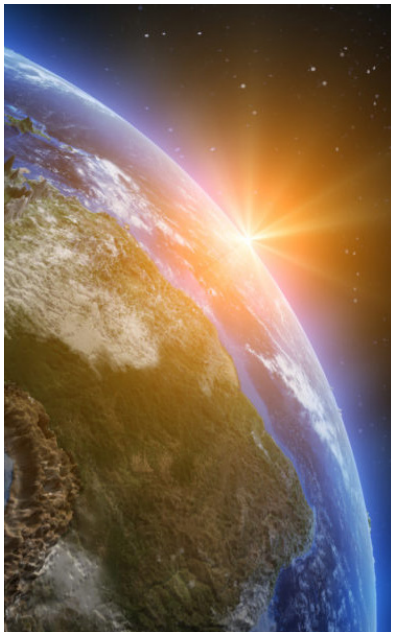
Milbank

ProjectsPlus+

WINTER 2021/2022

POWER & RENEWABLES | ENERGY | INFRASTRUCTURE | NATURAL RESOURCES

Welcome to the latest edition of *ProjectsPlus*, our magazine for clients and friends of Milbank's Global Project, Energy and Infrastructure Finance Group.



This issue of *ProjectsPlus* highlights myriad ways in which investments in energy and infrastructure are being shaped by sustainability concerns. We look at decarbonization and the energy transition, the evolution of ESG metrics, the latest scientific report from the UN's Intergovernmental Panel on Climate Change, and how battery metals and mining are impacted by the shift to electric vehicles and energy storage. We also look at legal changes affecting migratory birds and LIBOR replacement.

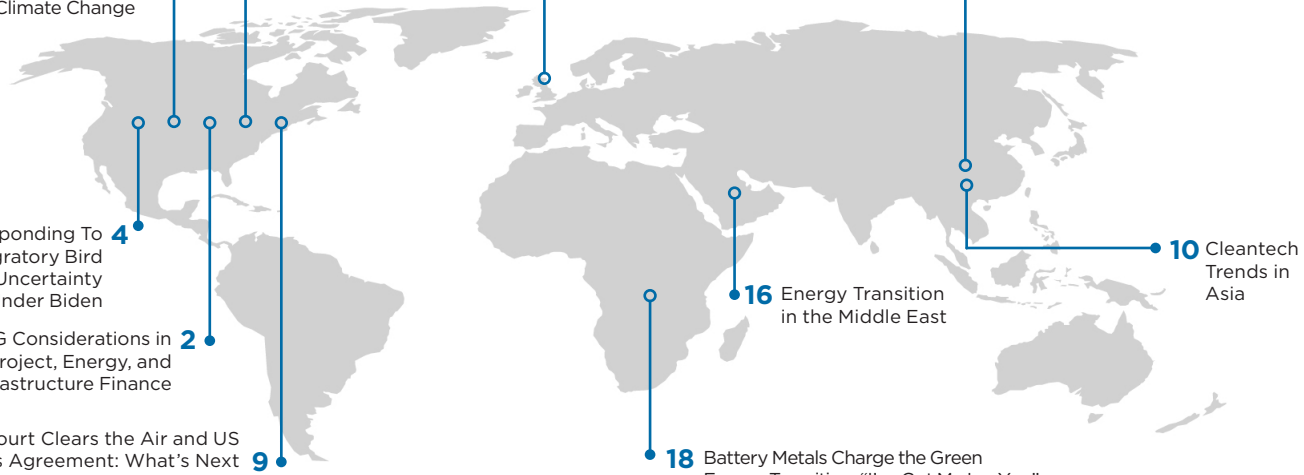
Some investors are driven by risk reduction. Others chase technologies that are innovative or will be favored by public policy. Some investors are driven by core values to be "clean and green" while others practice "greenwashing." The shape of these trends differs across markets from Asia/Pacific, the Middle East and Africa to Europe and the Americas.

As ever, we hope that the topics covered spur conversations and spark new ideas. Please share your comments and questions with us by email to **projectsplus@milbank.com** or call any of the partners listed on the inside back cover.

Read on.

SPECIAL REPORT ON ESG, SUSTAINABILITY & CLIMATE

WHAT'S INSIDE



UNITED STATES

ESG Considerations in Project, Energy, and Infrastructure Finance

Matthew Ahrens
Partner
mahrens@milbank.com
+1 212.530.5882

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

Pinky Mehta
Associate
pmehta@milbank.com
+1 202.835.7541

Allison Sloto
Associate
asloto@milbank.com
+1 212.530.5954

As excerpted from the chapter originally published in the International Comparative Legal Guide - Environmental, Social, & Governance Law 2022.

Long before Environmental, Social, and Governance ("ESG") entered the corporate world's vernacular, these principles were very much present in various aspects of project development and in the policies and procedures of owners and investors. ESG in project finance has always been key to understanding risk, due to the long-term nature of the investment. Now, the increased prominence of ESG presents a new dimension of investment, credit, and even reputational risk for a range of projects, from infrastructure to energy assets.

A report released by S&P Global Ratings in 2020 confirmed that lenders and investors financing projects face similar, and in some cases more pronounced, ESG risks as compared to traditional companies. With ESG at the forefront, companies bear responsibility not only to their shareholders, but also to the public and the planet. A focus simply on the "bottom line" of short-term profitability and shareholder returns is not tenable. Since projects are long-term investments in the infrastructure, industry, or public services of a community, investors must consider the long-term stability of a project and its effects on a broad set of stakeholders, including employees and local communities. Projects depend on buy-in from the local community and adaptability in light of pressing climate risks and changing regulatory environments. ESG risks are particularly pronounced for projects related to fossil fuels and coal power, where new and anticipated regulations could constrain operations and impact viability, ultimately undermining their long-term investment rationale.

> **"With ESG at the forefront, companies bear responsibility not only to their shareholders, but also to the public and the planet."**

Public policies increasingly favour investments in energy and infrastructure projects that further environmental and social justice goals by mitigating the impacts of climate change, decarbonising the energy and transportation sectors, and improving both clean drinking water supplies and digital broad-band connectivity in historically underserved or low-income communities. At the same time, investors and shareholders are demanding greater ESG transparency and accountability by means of ESG risk assessment, measurement, and reporting to better understand and address the impact of their investments. This is evidenced by the recent shakeup at Exxon, where an activist hedge fund proposed an alternative slate of Exxon directors and, with the aid of proxy advisors, institutional investors, and fund managers focused on ESG concerns, gathered enough votes to seat two directors who they expected to affect corporate policy to better mitigate and manage the climate change impacts facing the energy sector.

Project companies increasingly leverage interest in ESG to maximise opportunities to obtain financing or to obtain favourable financing terms. ESG is a key consideration and top of mind for investors, according to a study conducted by *Harvard Business Review* of 70 senior executives at 43 global institutional investing firms, including the three largest asset managers – BlackRock, Vanguard, and State Street. In fact, ESG investing has been seeing record growth in 2021, and the head of BlackRock's iShares has predicted that ESG-driven investing will grow to $1 trillion by 2030. To meet this investor interest, there has been a proliferation of green and sustainability bonds and other ESG financial instruments. Project companies and investors of these instruments should use tailored ESG reporting frameworks that take into consideration the risks and opportunities specific to their project.

Chapter continues here.

UN Panel Issues Scientific 'Reality Check' On Threat From Climate Change

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

Excerpted with permission from the Forbes article "UN Panel Issues Scientific 'Reality Check' On Threat From Climate Change". The full article may be found here.

In August 2021, the Intergovernmental Panel on Climate Change (IPCC) released the Working Group I contribution to the Sixth Assessment Report (AR6), *Climate Change 2021: The Physical Science Basis*. In the report, more than 200 authors from across the globe assess the state of climate change, warning that, without "large-scale reductions in greenhouse gas emissions," it will be nearly impossible to limit the rise of global temperatures.

The report analyzes the impact of rising temperatures on a regional basis, noting that rain, snow, drought and extreme storms will affect some environments more severely than other places. Coastal flooding, the melting of glaciers and polar ice, as well as changes in marine ecosystems will also impact certain regions disparately.

The report also looks at multiple scenarios (called Socioeconomic Shared Pathways or SSPs), calculating different projections of greenhouse gas emissions based on remediation or mitigation policies. These SSPs, which consider factors such as population, economic growth, education, urbanization and technology trends, can be broken down into five models: a world of sustainability-focused growth and equality (SSP1); a world that preserves the status quo, and trends follow their historical patterns (SSP2); a world of "resurgent nationalism" (SSP3); a world of ever-increasing inequality (SSP4); and a world of unconstrained economic growth and energy consumption (SSP5). Given the five models, the future is likely to fall somewhere between the best-case and worst-case scenarios, but that is an uncomfortably wide range.

> **"The scientific research shows how much we have learned – and how much more research is needed – to refine the dynamic, complex meteorological and geophysical models that will enable us to better understand, forecast and mitigate climate impacts on both natural systems and human societies."**

Despite this uncertainty, there is room for both hope and fear. One takeaway from the report is that taking action now is both urgent, and potentially highly effective. With proper mitigation measures, we may yet be able to fend off some of the threat of climate change. The only thing we have to fear is complacency itself.

Article continues here.

Responding To Migratory Bird Law Uncertainty Under Biden

Matthew Ahrens
Partner
mahrens@milbank.com
+1 212.530.5882

Allison Sloto
Associate
asloto@milbank.com
+1 212.530.5954

As expected, on Oct. 4, the US Fish and Wildlife Service ("FWS") published a final rule and issued a director's order formally revoking the rule then-President Donald Trump issued on Jan. 7 that had limited liability for incidental takes of migratory birds under the Migratory Bird Treaty Act ("MBTA"), and affirmatively stating that the MBTA prohibits incidental take.

However, the FWS didn't stop there. On the same date, the FWS published an advance notice of proposed rulemaking, or ANPR, to consider the creation of a new MBTA incidental take permitting program.

TRUMP'S MIGRATORY BIRD RULE FLIES AWAY, RESTORING PAST UNCERTAINTY

The applicability of the MBTA to incidental take remains uncertain given the conflict posed by past judicial and administrative activity.

The MBTA makes it unlawful to pursue, hunt, take, capture or kill any migratory bird, and protects virtually every North American bird species. Federal courts have long disagreed over whether the MBTA criminalizes incidental take of migratory birds.

Currently, there is a split among federal courts of appeal:

- The US Courts of Appeals for the Fifth, Eight, and Ninth Circuits have more narrowly interpreted the MBTA in a similar manner to the Trump administration, each essentially holding that only intentional killing of birds constitutes a taking and that inadvertent bird deaths, such as from habitat destruction, are not a taking.

- On the other hand, the US Courts of Appeals for the Second and Tenth Circuits have supported a broader view of the criminal enforcement provisions of the MBTA. The US Court of Appeals for the Second Circuit upheld the conviction of a pesticide manufacturer for bird deaths as a take under the MBTA in 1977 in US v. FMC Corp., and the US Court of Appeals for the Tenth Circuit held that all intentional or unintentional bird killings constitute a strict liability misdemeanor crime in 2010 in US v. Apollo Energies Inc.

As a result, liability for incidental take under the MBTA may differ depending on the federal circuit in which the violation occurs.

Further, past presidential administrations have differed in interpretation with respect to the applicability of the MBTA to incidental take:

- During President Barack Obama's tenure, the US Department of the Interior ("DOI") issued legal opinion number M-37041 on Jan. 10, 2017, which interpreted the MBTA to prohibit incidental takes.

- On Dec. 22, 2017, Trump reversed course and withdrew M-37041, and the DOI issued legal opinion number M-37050, which interpreted the MBTA to prohibit only intentional, directed takes.

- M-37050 was struck down by the US District Court for the Southern District of New York in an Aug. 11, 2020, decision. The DOI appealed. After President Joe Biden took office, the DOI filed a stipulation to dismiss the appeal on Feb. 25, and the deputy solicitor permanently withdrew M-37050 on March 8.

- In Trump's last days in office, the FWS published a rule that in effect

codified M-37050. Pursuant to the rule, the MBTA's prohibition on take of migratory birds related only to intentional, directed takes, such as hunting or poaching.

Although the Trump-era rule has now been formally revoked, we note that there are no rules currently in effect to codify whether incidental take is prohibited under the MBTA.

Pursuant to the ANPR, the FWS has started the rulemaking process to publish a rule that confirms its position that the MBTA prohibits incidental take.

A NEW PECKING ORDER: PRIORITY TO ENFORCEMENT FOR INCIDENTAL TAKE

Historically, the FWS has relied on enforcement discretion to apply the MBTA's take provision. Despite uncertainty over whether incidental take is a violation, the threat of enforcement as the result of incidental take remains real, especially given the Biden administration's publicly stated position.

This has prompted many companies, especially in the renewable energy project finance world, to voluntarily implement best management practices to assess, manage and lower the risk of adverse impacts to migratory birds.

The FWS has now confirmed that it plans to continue its use of discretion in the enforcement of incidental takes of migratory birds. Pursuant to the director's rule, the FWS presented guidance that provides some comfort for companies seeking to avoid liability under the MBTA.

The guidance demonstrates the continued value in companies implementing best management practices to assess, manage and lower the risk of adverse impacts to migratory birds, classifying companies that implement beneficial practices for avoiding and minimizing incidental take as not a priority for enforcement.

Instead, the following activities are considered a priority for enforcement:

- Incidental take that is the result of an otherwise illegal activity; or
- Incidental take that:
  - Results from activities by a public or private sector entity that are otherwise legal;
  - Is foreseeable; and
  - Occurs where known general or activity-specific beneficial practices were not implemented.

While this guidance is helpful to all industries, it is not clear whether in practice it will be equally applied.

The Biden administration's push for clean energy could result in leniency in terms of MBTA enforcement toward renewable energy projects — especially those that have taken active steps to avoid, minimize and mitigate risk for incidental take. This leniency would be particularly significant for wind energy projects that could otherwise face substantial risk of enforcement under a broad interpretation of liability for incidental take under the MBTA.

HATCHING A NEW PERMITTING SCHEME

In issuing the ANPR, the FWS has formally begun the process of considering an MBTA permitting scheme. Unlike the Endangered Species Act and the Bald and Golden Eagle Protection Act, permits authorizing the incidental take of protected species cannot currently be issued under the MBTA.

The FWS noted that the impetus for a formal permitting regime stems from concerns about severe population declines of migratory birds from both natural and human-caused sources, and fears that voluntarily implemented beneficial practices intended to avoid and minimize the take of migratory birds are not sufficient.

As a result, the FWS is considering authorizing incidental take by three primary mechanisms: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain types of activities; and (3) specific or individual permits.

From a high level, it appears that the FWS has taken steps to follow a permitting approach akin to that utilized by the US Army Corps of Engineers for permits that may be required pursuant to Section 404 of the Clean Water Act for the fill of wetlands.

Like the incidental take of migratory birds, the filling of wetlands is commonplace and could thus arguably require permits for each and every fill, which, in turn, would be overly burdensome and time-consuming for individuals, companies and the governmental agency.

As a result, the Corps has split CWA Section 404 permits into two types: general permits for certain categories of activities that have minimal individual or cumulative adverse environmental effects, and individual permits for activities with more material impacts, which are administratively more complex and could require comprehensive environmental reviews

> **"If prudent companies... implement best management practices to assess, manage and lower the risk of adverse impacts to migratory birds, they will not be considered a priority for enforcement."**

prior to issuance. Most projects seek to avoid material impacts and, as a result, can be eligible to not require any permit or use a general nationwide permit.

The FWS is considering exceptions to the prohibition on incidental take for activities such as: (1) noncommercial activities, including most activities by individuals, such as homeowners; and (2) certain activities where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take.

A general permit could be authorized through a registration system, where an entity would register, pay a fee, and agree to abide by general permit conditions and reporting requirements — similar to administration of the Corps' nationwide permit program with respect to wetlands. These permit conditions may be activity-specific and require certain beneficial practices.

The general permit would be effective upon submission of the request and would not require FWS review. The environmental review would be for the general permit system itself, rather than a site-specific review for each permit authorization.

For projects that do not meet the eligibility criteria for a general permit, the FWS is considering the development of regulations that describe eligibility criteria and procedures for applying for a specific permit to authorize incidental take of migratory birds, similar to current specific permit regulations for intentional takes under the MBTA.

In that scenario, FWS staff would review the application and develop customized permit applications. The FWS recognizes the administrative burden this would place on staff and the potential for project delays, and notes that if such an approach is developed, the agency will seek to minimize as much as possible the need for specific permits.

The FWS is likely trying to avoid similar difficulties to those that have plagued the Bald and Golden Eagle Protection Act permitting program. Despite having been in place since 2009, few incidental take permits have been issued. Because each eagle take permit is issued on an individual basis, the comprehensive review required has placed a significant strain on FWS staff and resulted in permitting delays with applications requiring several years of review.

The FWS is specifically considering developing general permit authorization regulations for certain categories of activities that have been identified as common sources of bird mortality or have well-developed, activity-specific beneficial practices, including:

- Communication towers;
- Electronic transmission and distribution infrastructure;
- Onshore wind power generation facilities;
- Solar power generation facilities;
- Methane and other gas burner pipes;
- Oil, gas and wastewater disposal pits;
- Marine fishery bycatch;
- Transportation infrastructure construction and maintenance; and
- Government agency activities — excluding military-readiness activities already covered under Title 50 of the Code of Federal Regulations, Section 21.15.

For each of these activities, the FWS may decide to establish a general permit, with certain types of required beneficial practices. For activities not contained in the initial list, the FWS is seeking input on how those activities should be treated, and what beneficial practices should be required for those activities.

The FWS is also considering whether to develop and implement a conservation fee structure to fund programs to benefit birds, and whether that structure should take the form of compensatory mitigation, where mitigation is developed and implemented specific to a given project, or general conservation fee structure, where the fee would go to a specific fund.

The FWS is receiving public comments to guide the drafting of the proposed rule until Dec. 3.

FLYING CAUTIOUSLY: HOW TO RESPOND TO THE CURRENT REGULATORY ENVIRONMENT

We are uncertain once again with respect to incidental take of migratory birds. While the Biden administration has restored the pre-Trump status quo and announced its position that the MBTA prohibits incidental take, no formal rules are currently in effect to codify whether incidental take is prohibited under the MBTA. Futhermore, liability for incidental take arguably again depends on the stance of the federal circuit in which the violation occurs.

Nonetheless, it seems fairly certain that Biden will put new rules in place. Similarly, it is very likely that any new rules will be challenged in court. The director's order provides some reassurance that if prudent companies adopt the approach of implementing best management practices to assess, manage and lower the risk of adverse impacts to migratory birds, they will not be considered a priority for enforcement.

Companies should pay close attention to the ANPR and take the opportunity to provide comments relevant to their respective industries and shape the new regulations. Incidental take permits could afford a level of protection to companies from liability due to incidental take, so long as measures are also taken to minimize bird injuries or deaths. Additionally, the introduction of compensatory mitigation projects or a conservation fee could help companies find the right balance between providing necessary services and infrastructure and complying with the MBTA.

However, if the new regulations are not crafted in a streamlined manner, companies could potentially find themselves worse off than before, expending significant costs and enduring administrative delays for permit approval. Companies, especially those in the renewable energy field, should continue to closely monitor these developments.

To print or share this article, click here.

OPINION

Fixing ESG: Will Mandatory ESG Disclosures Solve the Problem of Misleading Ratings?

Javier El-Hage
Associate
jelhage@milbank.com
+1 212.530.5000

The views expressed are the author's alone and do not reflect the views of Milbank LLP or its clients.

The COVID-19 pandemic has brought increased attention to the already hot topic of Environmental, Social, and Governance ("ESG") investing. And as ESG initiatives and metrics have gained popularity in the functioning of capital markets worldwide, the U.S. Securities and Exchange Commission ("SEC") has been pondering whether to make broad ESG disclosures mandatory.

The argument for mandating broad ESG disclosure centers on the need to promote accuracy and market-efficient standardization as an alternative to the currently costly and unreliable market-driven self-regulated ESG ratings system. As analyzed in a groundbreaking 2018 report by Timothy M. Doyle from the American Council for Capital Formation (ACCF), the market for ESG definitions and standards is heavily influenced by four market-leading rating companies that compete among themselves to provide ESG metrics: MSCI ESG, Sustainalytics, RepRisk, and ISS. Together, these companies rate over 100,000 companies across dozens of industries and sectors, and also rate more than 400,000 equity and fixed-income securities.

But the methodology and both quantity and quality of factors each of these four firms work with are disparate. As Doyle reported, "each rating agency has a customized scoring method which evaluates different non-financial metrics and frequently disagree about the components of ESG. Core ESG metrics vary from as few as 12 performance indicators to as many as 1,000 for other agencies." MSCI, for example, evaluates 37 key ESG issues it divides into three pillars (environmental, social, and governance) and ten themes (climate change, natural resources, pollution & waste, environmental opportunities, human capital, product liability, stakeholder opposition, social opportunities, corporate governance, and corporate behavior), while Sustainalytics examines at least 70 ESG indicators in each industry, and breaks them down into three distinct dimensions: preparedness, disclosure, and performance.

While these different approaches provide useful broad signals to the market, they lead to significant differences in results and this undermines the quality of information the market is relying on when making sustainable investment decisions. Compounding the problem, ESG rating agencies do not fully disclose their methodologies or material impact of selected indicators, apparently as a result of overprotectiveness of their proprietary methodologies. This, in turn, leads to an overall lack of transparency over ratings and the inexistence of rating firm-prompted agreements on best practices.

Many are skeptical that mandatory disclosure will be able to fix the inherent difficulties currently making ESG ratings unreliable and inefficient. Instead, they assert that mandatory disclosure would have the

> **"An incremental approach for mandatory disclosures… may be more advisable at this stage. This type of incremental approach… may take two forms. First, it can focus on discrete, specific factors. Second, it can focus on all factors while not settling on a detailed method of line-item disclosures, and allow investors to decide what material factors may be most relevant or "material" for investors in their specific industry."**

unintended effect of increasing costs of doing business across the board, of increasing the prospect of plaintiff-driven securities fraud litigation, and even of devaluing the significance of any material industry-specific and company-specific required disclosures.

To diminish these risks, an incremental approach for mandatory disclosures could be more advisable at this stage. First, it can focus on discrete, specific factors that many companies may increasingly find to be material—such as climate change. Second, it can focus on potentially all factors while not settling on a detailed method of line-item disclosures and allow investors to decide what factors may be most relevant or "material" for investors in their specific industry. For an example of the second approach for incremental regulation, University of Pennsylvania Prof. Jill E. Fisch proposes for the SEC to adopt an additional Regulation S-K requirement for mandating "Sustainability Discussion and Analysis" (SD&A), where companies may choose three issues within the wide ESG factors for mandatory discussion. Fisch's proposal is modeled after existing Management Discussion and Analysis (MD&A) and Compensation Discussion and Analysis (CD&A) regulations. The proposal addresses the flexibility that may be required as the SEC enters an area where agreement on details has proven difficult.

Prof. Fisch's proposal entails the promise to allow investors to decide what factors to address. This would have the additional benefit of providing the SEC with an opportunity to act now, but in a way that doesn't stifle experimentation or the ability to fine-tune the regulation as reporting practices on ESG continue to evolve.

To print or share this article, click here.

Appeals Court Clears the Air and US Rejoins Paris Agreement: What's Next for Biden's Climate Change Goals?

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

Excerpted with permission from the Forbes article "Court Decision Lets Biden Set New Emissions Rules To Meet Paris Agreement Climate Goals". The full article may be found here.

Shortly after his Inauguration, President Joseph R. Biden, Jr. signed an Executive Order recommitting the United States to the Paris Agreement on climate change. On January 19, 2021, in the latest major judicial decision on regulation of greenhouse gas emissions in the energy sector, the US Court of Appeals for the District of Columbia Circuit in *American Lung Association, et al. vs. EPA* vacated the Affordable Clean Energy Rule that the US Environmental Protection Agency (EPA) under the Trump Administration adopted in June 2019. The 2019 Rule had replaced the earlier Clean Power Plan adopted by the EPA under President Barack Obama. Under President Joseph R. Biden, Jr., the EPA will now have the opportunity to create a more aggressive plan to reduce greenhouse gas emissions from thermal power plants (especially coal-fired power plants) without going through the cumbersome regulatory process of repealing the Trump-era rule.

President Biden, who during the campaign promised to sign an Executive Order for the United States to rejoin the Paris Agreement promptly upon taking office, may find both the timing and the substance of the court's ruling fortuitous.

> **"The challenge for the EPA now, working together with the states, electric utilities, grid operators and other stakeholders, will be to implement new emissions guidelines that meet President Biden's ambitious climate goals and that can also withstand future legal challenges."**

Because the DC Circuit Court of Appeals' decision both vacated the Trump Administration's coal-friendly rules for power plant carbon emissions and found that the repeal of the Obama-era Clean Power Plan was legally improper, the EPA now starts with a clean slate to adopt new greenhouse gas emissions limits, giving President Biden a clearer path to meet his Paris Agreement climate change goals as the United States formally rejoins the treaty.

With the stroke of a pen on a new Executive Order, President Biden caused the United States to rejoin the Paris Agreement without Congressional action. The United States will again have a seat at the table in future rounds of international discussions on how to mitigate and adapt to climate change and how to assist poorer countries in paying for the necessary investments while maintaining economic growth. Fundamentally, US influence in that global effort depends not just on foreign policy or global treaties but on aligning domestic energy policy with shared international goals to reduce harmful greenhouse gas emissions. The chance to overhaul the EPA's emission rules for existing power plants will likely take on added urgency for the President's team.

Article continues here.

ASIA

Cleantech Trends in Asia

James Orme
Partner
jorme@milbank.com
+65 6428.2545

Rosaline Yusman
Associate
ryusman@milbank.com
+65 6428.2426

With urbanisation and industrialisation ramping up and its middle-class population growing rapidly, Asia's economic growth continues apace. Some countries – namely, India, China and Vietnam – are posting 5-7% or more GDP growth year over year. This economic growth translates into an increased demand for power which, coupled with a desire to decarbonize, makes the renewable energy (and cleantech) story in Asia compelling.

While countries in the Asia-Pacific still produce approximately 75% of the world's consumable coal, the tide of fossil fuel production and consumption in the region has turned. Due to geopolitical and other pressures, many Asian countries have now publicly announced a move away from fossil fuels and just this month President Xi Jinping of China pledged to cut funding for coal projects outside of China.

To both meet Asia's growing energy demand, and to provide an alternative energy source to fossil fuels, investment in renewable energy assets in the region has ballooned. While traditional forms of renewable energy – for example, hydro, geothermal and wind – have been obvious beneficiaries of this investment, "cleantech" energy has been a focus for many developers and investors in the region too. Against this backdrop, we survey the increased investment in the "cleantech" industry in Asia and the sub-sectors which are attracting most interest.

INVESTMENTS IN CLEANTECH ENERGY

Cleantech energy (often interchangeable with "greentech") is, in essence, any process or product that reduces negative environmental impacts through energy efficiency improvements or through the use of sustainable resources, or offers some level of environmental protection. According to published research, the top cleantech sectors in the region are currently (i) solar technology, (ii) waste management and recycling, (iii) carbon capture technology and (iv) batteries and energy storage.

Funding for these technologies comes from a variety of sources. Traditional sources of capital are reported to have made investments in the space: for example, ING Bank made a green loan to fund Cleantech Solar's expansion in Asia, and the multilateral agency, Asia Development Bank, announced two investments into an Indian electric vehicle manufacturer and an Indian energy efficiency service provider via its venture capital arm, ADB Ventures.

Private equity is also playing its part. Some of the demand is coming from the limited partners or institutional investors who want to allocate capital to fund managers who focus on, or who include, renewables as a key part of their investment strategy. The COVID-19 pandemic has helped to accelerate this trend. With "dry powder" to deploy, private equity players have been happy to fund technologies and developments that would otherwise have received government subsidies or incentives, had they been available.

All capital providers have also been encouraged by regional government announcements with respect to renewable energy targets and incentives. A 2021 study conducted by the Asia Development Bank found that feed-in tariffs ("FiT") – a policy designed to support the development of renewable (and cleantech) energy sources by providing a guaranteed, above-market price for producers – have had the greatest overall effect in Asia in driving capital into this sector. Some governments continue to rely on FiT schemes, with Vietnam having extended its FiTs for wind power projects until December 2023 – a fact that continues to drive investments. However, given falling prices (say, in solar power) and more countries shifting to auction systems in sectors such as solar and wind, the trends seem to demonstrate a move-away from FiT and an indication that, in Asia and globally, unsubsidized grid parity may be nearer than once expected.

CLEANTECH SECTORS TO WATCH

Solar

Solar is one of the most attractive sectors for cleantech. In addition to greenfield solar projects, investors have been active in the M&A space, with acquisitions of both solar panel manufacturers and photovoltaic (PV) projects reported. One example includes the acquisition of a stake in Singapore's Sunseap Group solar rooftop projects in Vietnam by a subsidiary of Malaysia's national electricity producer Tenaga Nasional Berhad.

Technology advancements have pushed costs down (and increased efficiency) for PV cells, leading solar power to become both cheaper and more reliable and, as a result, a more realistic option for industrial, commercial, and residential users across the region. With land procurement often a difficult issue for energy projects in Asia, floating solar PVs are gaining traction too - Indonesia has just procured the 145 MW Cirata floating solar project and Singapore has built a 60 MW floating solar farm at the Tengeh Reservoir.

Carbon Capture Technology

Carbon capture technology allows high carbon emitting industries to siphon off carbon dioxide before it is emitted into the atmosphere. The greenhouse gas is then either buried underground or used as a resource to create other products such as concrete, fertilizers and other fuels. Carbon capture technology is (currently) one of the few scalable and cost-competitive solutions available. Interest in carbon capture technology has been growing. Projects of this type, which are being explored across Indonesia, Malaysia, Singapore and Timor-Leste, require in excess of US$1 billion of investment a year until 2030.

Carbon capture technology may also be utilised for existing projects in the energy sector. Players in the LNG industry, for example, are reportedly looking at installing carbon capture storage facilities as a means for reducing emissions attributable to gas processing – so called "green" LNG. Australia has led the way with various projects either in advanced stages or in operational stages, including its Chevron's 4-mmtpa Gorgon carbon capture storage facility that is intended to reduce the emission intensity of the Gorgon project by around 30%. In Asia, carbon capture solutions are reportedly under consideration for a number of projects including BP's Tangguh project in Indonesia. With increased pressure on the reduction of emissions, carbon capture technology is likely to be heavily utilised going forward.

Waste Management and Recycling

Waste-to-Energy ("WTE") technologies convert non-recyclable waste into usable forms of energy.

Waste management is at the forefront of many large cities in the region as they are running out of landfill sites (typically the traditional method of disposing waste). With increasingly limited land availability as a result of urbanisation and industrialisation, WTE technologies have the dual advantage of reducing landfill requirements in urban environments, while replacing fossil fuel-based power sources (all while generating revenue for municipalities and governments).

Some commentators project that the Asia-Pacific WTE market is projected to grow at a rate of 5% or more for the next 5 years. The mix of capital providers in this technology space is varied and includes commercial banks, multilateral development banks and credit agencies, financial sponsors, and private equity firms. China and Japan have led the way in terms of WTE generation (domestically in the case of China, and in exporting its expertise in the case of Japan). However, the pipeline in Southeast Asia in countries such as Singapore, Thailand, Indonesia and Vietnam is extremely active and supported by strong government mandates.

Battery (and Energy Storage) Technology

Energy storage technologies are set to catalyse transitions to clean energy around the world. A joint study published in late 2020 by the International Energy Agency and European Patent Office titled "Innovation in batteries and electricity storage – a global analysis based on patent data" reported that batteries account for nearly 90% of all patenting activity in the area of electricity storage and that the rise in innovation is chiefly driven by advances in rechargeable lithium-ion batteries used in consumer electronic devices and electric cars. Japan and Korea, in particular, have established a strong lead in battery technology globally, and that technical progress and mass production have led to a significant drop in battery prices in recent years. The Asian Infrastructure Investment Bank (AIIB) has been making a number of investments in this sector too. Most recently, AIIB made loans to the Tata Cleantech Sustainable Infrastructure On-lend Facility in India which targets energy storage and to the SUSI Asia Energy Transition Fund which aims to provide equity finance to green energy solutions in Southeast Asia, including energy storage.

> **"Asia's development in the coming years will drive the demand for cleantech technology, and this demand will be compounded by the region's dominance in manufacturing, particularly in countries such as China, Korea and India where cleantech products manufacturing is its own industry."**

THE ROAD AHEAD

As Asia continues to grow, environmentally sustainable energy sources will be crucial to underpin the region's development in the coming years, which will drive the demand for cleantech technology. This demand will be compounded by the region's dominance in manufacturing, particularly in countries such as China, Korea and India where cleantech products manufacturing is its own industry.

Encouragingly, nearly all countries in the region have taken steps to adopt national and regional renewable energy targets and some have introduced governmental incentives aimed at promoting investment in cleantech (with hopefully more to come), signaling the region's firm commitment to the energy transition.

While some inherent risks remain with respect to uncertain or unfamiliar regulatory and legal landscape in some countries, we expect investors to continue to tap into the immense opportunity in Asia.

To print or share this article, click here.

UNITED KINGDOM & EUROPE

United Kingdom: Mining Laws and Regulation 2022

John Dewar
Partner
jdewar@milbank.com
+44 20.7615.3004

Emily Whittaker
Associate
ewhittaker@milbank.com
+44 20.7615.3148

As excerpted from the United Kingdom chapter in the ninth edition of International Comparative Legal Guide's: Mining Law

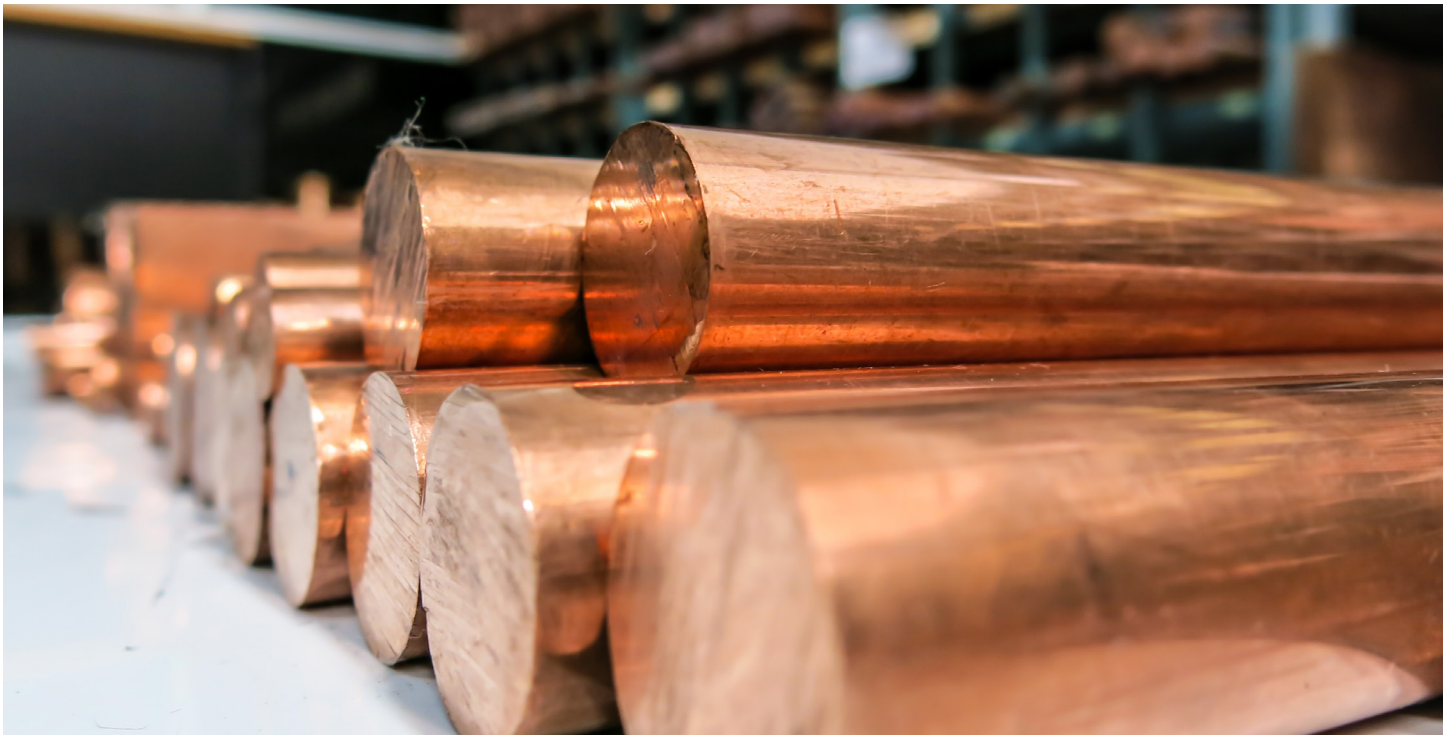
Despite predictions forecasting significant loses to the mining sector in 2020 due to the COVID-19 pandemic, mining is one of the few sectors that reported a strong year in 2020. Compared to 2019, net profit increased by 15%, revenue increased by 4% and market capitalisation increased by 64%, with copper as the largest contributor to these results. Positive forecasts for 2021 have so far been supported by Q1-2021 results, which show that the aggregate market capitalisation of mining companies reached a multi-year high of over $2 trillion, largely due to equity market support.

These metrics were reported notwithstanding the difficulties faced by the mining industry from shortage of supplies, lack of labour, governmental restrictions and additional requirements that mining operations must now follow in order to comply with COVID-19 guidance.

This article covers the UK Site Operating Procedures (SOP) published by the Government in light of the pandemic as well as common issues in UK mining laws and regulations–including the mechanics of acquisition of rights, ownership requirements and restrictions, taxes and royalties, environmental aspects and native title and land rights.

Article continues here.

> **"The UK's Industrial Strategy focuses on clean growth and a 10-point Green Industrial Revolution plan. The mining of critical minerals such as cobalt, graphite and lithium can be seen as part of this strategy, as can the Government's plans... to promote the use of electric vehicles."**



Transitioning Away From LIBOR: A Practical Guide To Project Financings

John Dewar
Partner
jdewar@milbank.com
+44 20.7615.3004

Olivia Anderson
Associate
oanderson@milbank.com
+44 20.7615.3125

Emily Whittaker
Associate
ewhittaker@milbank.com
+44 20.7615.3148

Suzanne Szczetnikowicz
Associate
sszczetnikowicz@milbank.com
+44 20.7615.3018

In 2019, the UK's Financial Conduct Authority ("FCA") announced that 35 of the London Inter-Bank Offer Rate ("LIBOR") settings would formally cease from 1 January 2022, with USD overnight and 12-month LIBOR continuing until the end of June 2023. Since such announcements, the market has been transitioning away from LIBOR, with preparations increasing in urgency as the deadlines for the cessation of LIBOR draw nearer and with the regulators having indicated that there should be no new USD loan origination using LIBOR as the interest rate going forward from the 2021 year-end.

In the project finance market in particular, the LIBOR transition has thrown up numerous ramifications that lenders and borrowers need to consider, including some that extend beyond the guidance provided by the Loan Market Association (the "LMA") owing to various project finance specific factors. Project finance loans are often provided in multiple currencies by numerous types of financing institution globally (each subject to different regulatory regimes and with varying institutional policy requirements). They typically feature long tenors and tend to reference floating interest rates that are commonly required to be hedged. In addition to the loan documentation, there are a number of project document and project specific non-LMA considerations to account for the introduction of a risk-free rate ("RFR"). LIBOR replacement is therefore a multi-faceted area for particular attention in project financings and we set out some of the sector specific considerations below.

CALCULATING THE MINIMUM DSRA BALANCE

The transition from LIBOR has a particular impact on those provisions that rely on benchmark interest rates being forward-looking rates. Project financing structures and cash waterfalls typically include an obligation of the borrower to accrue and maintain a minimum debt service reserve balance ("Minimum DSRA Balance") in a secured account, which is calculated as the amount projected to be payable by way of principal and interest on the next following payment date. This helps to ensure that there are sufficient funds held separately to provide for all debt service (i.e., interest and principal) to be paid on the next following payment date when due.

As LIBOR is a forward-looking rate, it is a relatively straightforward task for the agent to determine the Minimum DSRA Balance with near certainty prior to the start of the relevant interest period/ repayment period. However, as many RFRs, including the Secured Overnight Financing Rate ("SOFR") and Sterling Overnight Index Average ("SONIA"), are back-ward looking rates, which become known at the end of the corresponding application period, calculation of such rates by the agent for such periods is a more challenging task and parties must carefully consider the assumptions that should be applied for the calculation of such amounts. As a helpful point of reference, the Bank of England now publishes the SONIA Compounded Index and the Federal Reserve Bank of New York publishes the SOFR Index, each index simplifies the calculation

of interest rates by providing a standardised basis of reference to an official source. Consequently, we have seen agents apply such indexed rates as upfront estimates to calculate RFRs for the forthcoming interest period/repayment period and then compare such rates with the relevant backward-looking rate at the end of the relevant period. To mitigate the risk of a misalignment between the two calculations, some agents have adopted a process of monthly look-backs to capture historical data and some lenders are requiring a buffer of circa 5-10% to be added to the Minimum DSRA Balance to accommodate any discrepancies. As finance documents tend to provide for a definition of debt service reserve balance that refers to the payment of scheduled debt service generally, it will be interesting to see whether following the movement to RFRs this definition evolves to become more prescriptive.

Worth noting, however, that the sizing of the Minimum DSRA Balance can be less important in project financings of power projects and mines that are heavily hedged, as in such circumstances, the lenders will look to the fixed rate hedging in place when calculating the debt service reserve balance.

FINANCIAL MODEL

For new money deals, all financial models should, of course, reference the relevant RFR elected by the parties so that the modelling and cash flow needs of the project are properly understood. For legacy project financings, the borrower is likely to be sensitive to re-opening the economics of the project by issuing an updated financial model, particularly as given the long tenors of such projects, the day one assumptions set out therein could have been set years previous. It may be that the finance documentation already provides for updates to cashflow modelling which are triggered by the cessation of LIBOR, in which case, the choice as to whether to request a revised financial model would sit with the lenders. We have found, however, that even when presented with the option, the lenders may request that the change is captured in the financial model by re-labelling the LIBOR-related assumptions with the name of the rate adopted, only.

Parties must, however, take care that the relevant assumptions in the financial model are agreed and updated according to the stipulated process in the finance documentation.

FINANCIAL RATIO COMPLIANCE

New money deals should, of course, calculate financial ratios by reference to the RFR elected by the parties. With respect to updates to the financial model in legacy contracts, it may be that financial ratio compliance is largely unaffected by the LIBOR transition. We do, however, note that similar to the ramifications on determining appropriate debt service reserves (described above), forward-looking interest rates of the type traditionally used in project finance loans are important when calculating future cover ratios such as the projected or prospective debt service cover ratio ("DSCR") and the loan life cover ratio ("LLCR").

INTEREST RATE HEDGING REQUIREMENTS

Project financings typically include minimum interest rate hedging requirements to be complied with by each relevant borrower. From a hedging perspective, Milbank's recent experience is that corporate and investment manager clients are being encouraged to accede to the ISDA 2020 IBOR Fallbacks Protocol (the "ISDA IBOR Protocol") to ensure that their "legacy transactions" (i.e., those entered into before 25 January 2021) incorporate the RFR fallbacks and applicable spread adjustments recommended by ISDA following cessation of the LIBOR. Hedging contracts entered into on or after 25 January 2021 that incorporate the 2006 ISDA Definitions (e.g., interest rate transactions) automatically incorporate such RFR fallbacks pursuant to the ISDA IBOR Supplement.

PROJECT AGREEMENTS

Project agreements may also refer to LIBOR, perhaps most commonly, as a reference for calculating default interest on late payments. Parties should be mindful of the time it may take to agree any such changes with multiple project document counterparties, especially in less developed countries and particularly if the intention is to align such changes with any corresponding amendments to the finance documents.

A larger potential issue that arises from the replacement of LIBOR in project documents, is in connection with power purchase agreements and concession agreements. Under such documents, a

> **"In the project finance market in particular, the LIBOR transition has thrown up numerous ramifications that lenders and borrowers need to consider, including some that extend beyond the guidance provided by the Loan Market Association owing to various project finance specific factors."**

procuring authority may be obliged to pay a termination payment in certain circumstances. Such termination payments are often sized to cover "Senior Debt" (including principal, interest and hedging termination amounts). The definition of "Senior Debt" is usually fixed and based on the terms of the finance documents as at the signing date. It is sometimes the case that any amendment to such definition for the purpose the relevant project document, requires the consent of the relevant procuring authority, which may be difficult to obtain if transition from LIBOR to a RFR reduces the interest amount, with the consequence that the procuring authority's financial exposure is increased.

Local counsel will also need to be engaged to consider any local law specific ramifications of the move to RFRs in the non-English law governed project documents and to liaise with the relevant counterparties with respect to such issues.

DOCUMENTARY PROCESS FOR LEGACY CONTRACTS

Legacy contracts can be amended via long-form amendment and restatements effected by amendment and restatement agreements though, the more commonly adopted approach appears to be for such amendments to be set out in discrete amendment agreements. Notwithstanding the method adopted, lenders commonly request legal opinions which speak to the enforceability of the documents effecting the amendments/being amended as condition precedents to entering into such documents. This is particularly the case where any guarantees are amended as the lenders will require confirmation that these remain in full force and effect (which they will also seek from the guarantor itself).

In the context of transactions that are not yet signed, but in respect of which commitment letters are in issuance, lenders are keen to ensure that these are updated to make clear that going forward from the year end 2021, interest on the relevant loans will be calculated on the basis of a replacement rate to be determined between the lenders and the borrower prior to signing. Institutions differ in their approach to the level of detail required to be reflected, however, given uncertainties around availability of hedging products relating to SOFR and also recognising that the first few months of 2022 will help establish the new market for transactions moving forward.

NEXT STEPS

The transition from LIBOR continues to be a focal point for many of our clients, particularly as no market standard has yet been developed either in relation to current or future contemplated transactions. Financial institutions and borrowers will all have their own in-house policy considerations informing their documentary approach and, for practical reasons, will most likely want to achieve consistency across all of their new money, committed and legacy transactions to the extent possible.

As industry leading laws in the project finance market, with experience of the challenges faced by a multitude of institutions across multiple jurisdictions, we are available to assist with any questions you may have pertaining to the LIBOR transition and the implementation of RFRs. As the deadlines for effecting the LIBOR transition draw nearer, we urge market participants to prepare for the use of replacement benchmarks as soon as possible.

To print or share this article, click here.

MIDDLE EAST

Energy Transition in the Middle East

John Dewar
Partner
jdewar@milbank.com
+44 20.7615.3004

Sophie Lawrence
Associate
slawrence@milbank.com
+44 20.7615.3183

Suzanne Szczetnikowicz
Associate
sszczetnikowicz@milbank.com
+44 20.7615.3018

In the past year the Middle East has embraced the energy transition with new zeal, spurred on by an influx of investment for renewables, the continued price instability of conventional fossil fuels and the divestment by national oil companies of interests in hydrocarbon assets. Political influence also has had a large impact, with a flurry of announcements coming from the region in the run-up to COP26. Saudi Arabia and the UAE pledged to hit "net zero" by 2060 and 2050 respectively, each allocating over $150 billion to reach that goal and announcing ambitious initiatives in pursuit, such as the planting of 10 billion trees in Saudi.

In another clear indication of the changes underway, the Middle East Energy Transition reported this year that there were no contracts awarded for oil-powered or gas-fuelled power stations in the entire MENA region for H1 2021, while in the same period there were around $2.8 billion of contracts awarded for renewable energy projects in the region. However, fossil fuels are expected to remain a significant part of the region's energy production for years to come, with some of the commitments made to the energy transition contingent upon export of such fuels being maintained.

ENERGY TRANSITION

One key renewable source attracting significant investment and growth in the Middle East is solar. With an abundant supply, the region has been dramatically increasing capacity over recent years, achieving record low prices approaching an unprecedented 1 USDct/kWh. State-sponsored ACWA has been at the forefront of this, recently partnering with a subsidiary of Saudi Aramco on the Sudair Solar Plant. The plant is part of PIF's renewable energy programme and is set to be Saudi Arabia's largest single-contracted solar PV plant and one of the largest in the world.

In Abu Dhabi, Al Dhafra PV2 is set to become the world's largest single site photovoltaic plant upon completion, projected for next year. The plant is an innovative venture, utilising crystalline bifacial solar technology, which uses both sides of the solar panel to generate more energy. The project will help the UAE increase solar PV capacity fourfold by 2025, resulting in 94% of the country's renewables being sourced from solar.

Another key renewable resource in the Middle East is wind power, which Egypt in particular - especially through the high wind speeds of the Gulf of Suez - is quickly developing. Milbank continues to advise on multiple Egyptian wind farms in respect of which construction is underway, including, among others, Lekela's West Bakr Wind Project (250MW) and the Gulf of Suez Wind Project (500MW). Such projects are helping Egypt reach its goal of producing 42% of electricity from renewable sources by 2035.

Carbon capture and storage (CCS) is uniquely suited to the region due to emissions levels and established expertise on the technology used, and some facilities (such as Saudi Aramco's Uthmaniyah CCS) are already operational. This will no doubt be an area of growth as Middle Eastern countries seek to reduce their emissions, with Saudi Arabia already committing to establishing a fund specifically for carbon sequestration.

Another area of growth in energy production is waste-to-energy plants, to which the region is increasingly turning in order to reduce pollution and waste problems whilst producing electricity. This year it was announced that Dubai would be building one of the world's

largest waste-to-energy projects, the Dubai Centre for Waste Processing, set to generate 200MW of electricity from up to 45% of Dubai's municipal waste generation.

GREEN HYDROGEN AND AMMONIA

Green hydrogen, a cleaner alternative to the currently dominant "grey" hydrogen, is emerging as a key component of the energy transition in the Middle East. With their proliferation of renewable resources, large land mass and access to sea water, the GCC states are well-placed to be at the forefront of green hydrogen's development. In addition, the Middle East is well-placed for export of green hydrogen, ammonia and related products, which will be necessary as demand in both Europe and Asia is forecast to be high in the coming years.

A series of joint ventures and alliances have been borne out of this drive, such as the Abu Dhabi Hydrogen Alliance between Mubadala, the ADNOC and ADQ. The intention of this Alliance is not only to set out a roadmap to quicken the implementation of hydrogen technology in the UAE and its major industrial and transportation sectors but also to launch the UAE as an exporter of green and blue hydrogen. Another example in the region is the recently announced joint venture between Fertiglobe Partners (itself a partnership between OCI and ADNOC) with Scatec and the Sovereign Fund of Egypt to develop a 50-100 MW electrolysis plant at EBIC in Egypt to produce up to 90,000 metric tons green ammonia per annum.

Challenges remain in making green hydrogen cost effective yet hydrogen in general is attracting high levels of investment, with planned hydrogen projects currently estimated to bring $44 billion in total investment to the region. This has led to speculation that the "oil hub" of the world could transition to the "hydrogen hub," which will

doubtless lead to further investment in green hydrogen technology, research and development too.

INFRASTRUCTURE

Infrastructure investment in the Middle East is currently on the rise, with large scale projects such as the NEOM "megacity," Bahrain's "smart silk city" and Qatar's construction for hosting FIFA's World Cup in 2022 (estimated at over $200 billion) all contributing to this. NEOM in particular is set to be an economic cornerstone for Saudi Arabia and will involve a multitude of smaller projects to bring the vision to fruition: from desalination, to cloud seeding, to green hydrogen. AI will also be employed to collect data which will improve the city's functioning.

> **"In the past year the Middle East has embraced the energy transition with new zeal, spurred on by an influx of investment for renewables, the continued price instability of conventional fossil fuels and the divestment by national oil companies of interests in hydrocarbon assets."**

At the end of 2020, Apollo (advised by Milbank) led a consortium of investors in one the region's largest real estate transactions to date, acquiring a 49% stake in a wholly owned subsidiary of ADNOC for $5.5 billion. This was a clear indicator of growing confidence in the region, particularly following the effects of the pandemic. This deal is also indicative of a recent trend in the Middle East, namely the privatisation of key infrastructure and the opening up of national oil company balance sheets. In Saudi, the Privatization Program (part of Vision 2030) is estimated to bring in $16.5 billion of investments from public-private partnerships by 2025, with a further $38billion through asset sales of public utilities and services.

(Sources for this article include the *Financial Times*, Al Jazeera, arabnews.com, globalccsinstitute.com, gulfbusiness.com, power-technology.com, pv-magazine.com and others.)

To print or share this article, click here.

LAW, POLICY & MARKETS | Milbank Conversations

PODCAST

Battery Metals Charge the Green Energy Transition: "I've Got My Ion You"

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

Alexander Borisoff
Partner
aborisoff@milbank.com
+1 212.530.5518

Podcast episode with Milbank partners Allan Marks and Alec Borisoff, and guest speakers from Pala Investments, General Counsel Kate Southwell and Head Strategist Jessica Fung.

As the world transitions from fossil fuels to renewable power and other clean energy technologies, we are entering a "super cycle" of demand for new materials. The digitalization of the global economy also drives this demand, as power grids become smarter, sustainable and more resilient. What do all these green initiatives have in common? Batteries. The World Bank has forecasted that the production of metals such as lithium, cobalt, zinc and graphite will need to increase by as much as

500% by 2050 to meet the exploding demand for batteries in EVs, energy storage and electronic devices. In this episode, Global Project, Energy & Infrastructure Finance partners Allan Marks and Alec Borisoff take a deep dive into the world of battery metals with two guests from Swiss-based Pala Investments: General Counsel Kate Southwell and Head Strategist Jessica Fung.

About the Guest Speakers: Kate Southwell is General Counsel for Pala Investments, a private equity investment firm based in Zug, Switzerland. She provides legal, commercial and strategic advice to Pala's portfolio companies and specializes in the management of international M&A and joint ventures and the negotiation of complex construction and commercial contracts. She also advises on alternative finance structures, including streams, royalties and mezzanine finance.

Jessica Fung is Head Strategist at Pala Investments. She researches emerging technologies such as electric vehicles, renewables, recycling and blockchain and forecasts how these trends will impact commodity markets and how investors will finance the future economy.

Follow Law, Policy & Markets where you get your podcasts

Listen on Apple Podcasts
Listen on Spotify
Listen on amazon music
Listen on Google Podcasts

> **"The greatest reductions in greenhouse gas emissions that are needed to combat climate change are expected to come from the electrification of the transportation sector."**

LAW, POLICY & MARKETS | Milbank Conversations

PODCAST

Energy Transition in Asia-Pacific: "It's Gettin' Hot In Here"

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

James Murray
Partner
jmurray@milbank.com
+65 6428.2422

James Orme
Partner
jorme@milbank.com
+65 6428.2545

Podcast episode with Milbank partners Allan Marks, James Murray, and James Orme and guest speaker and former Milbank partner Cathy Marsh, now at the Asian Development Bank in Manila, to look at the energy transition in Asia and the Pacific.

Are climate goals and economic development on a collision course? At the outset of COP26 in Glasgow, the energy transition is top of mind. Shifting energy production away from coal, oil and natural gas toward greener energy sources like wind and solar power and renewable fuels is critical to cutting the greenhouse gas emissions that cause climate change. In the Asia-Pacific region, there is no clear consensus on the shape of the energy transition. And there is no path to meaningful reductions in global greenhouse gas emissions that does not lead through Asia, which accounts for 60% of the world's population and 75% of global carbon emissions.

Climate, capital and energy are truly global in reach. The choices being made today – in allocating capital and in shaping energy and industrial policies – could either reduce or increase

the most severe climate impacts around the world for at least the next century. It is a huge challenge to make development both rapid and sustainable. Asia is experiencing substantial population growth and massive economic development. Energy use per capita is rising fast along with the rise in GDP and the buildout of cities, industries and the critical infrastructure that sustains them. The opportunities to invest in new energy assets – whether sustainable or not – are plentiful. Innovative technologies like battery storage and green hydrogen are exciting for the future, but Asia is scaling up its energy sector now. What does that urgency mean for the current investment climate and for the future of the Earth's climate?

> **"Looking at where new capacity is being added, where new investment dollars are going, there's been a clear shift towards renewables. The drivers behind that phenomenon are decreasing costs, public policy, government incentives and investor interest, as well as strong economic growth and a popular desire to decarbonize."**

About the Guest Speaker: Catherine Marsh is Assistant General Counsel of Nonsovereign Operations at Asian Development Bank, which she joined in 2018. Cathy was a partner in Milbank's London office and previously an associate.

Follow Law, Policy & Markets where you get your podcasts

Listen on Apple Podcasts | Listen on Spotify | Listen on amazon music | Listen on Google Podcasts

Milbank's Project, Energy and Infrastructure Finance Group counsels clients on the financing and development of the world's most complex projects and cross-border deals.

Milbank's rankings and accolades reflect the firm's commitment to providing premier service to our clients and demonstrate our attorneys' success in executing complex project finance transactions around the globe.

In the project finance sector, Milbank has been recognized as a leading international law firm by industry publications such as *Chambers*, *IFLR* and *Project Finance International*. In the 2021 calendar year, we were recognized as "**Global Legal Adviser of the Year**," "**Latin America Legal Adviser of the Year**" and "**North America Legal Adviser of the Year**" by *IJGlobal*, the "**#1 Law Firm for Latin American Infrastructure**" by *Latin Finance* (four times total), "**Latin America Legal Advisor of the Year**" and "**North America Legal Advisor of the Year**" by *Proximo*, and "**Banking & Finance Legal Adviser of the Year**" by *Bonds & Loans Latin America & Caribbean*. We have also been named the "**US Law Firm of the Year**" by *Power Finance & Risk*, "**Global Project Finance and Energy Firm of the Year" by Chambers Global and "Global Law Firm of the Year**" by *Project Finance International*. The Milbank team was awarded the "**International Projects and Energy Law Firm of the Year**" by *Chambers Latin America* six times, and the "**Project Finance Team of the Year**" by *IFLR Asia*. *Chambers Global, Chambers Latin America, Chambers USA* and *Chambers UK* each rank us in the top tier of law firms for project finance, and we have been recognized as top tier by *Legal 500*, among many other honors.

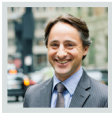
The firm's more than 125 talented Project, Energy and Infrastructure Finance lawyers across the US, UK, Asia and South America have enabled our clients to win "deal of the year" awards for projects around the world. The group's attorneys have experience advising on transactions in numerous industries, including renewables, power and energy, infrastructure, oil and gas, petrochemicals, telecommunications, space and satellites, waste disposal, mining and metals, natural resources, pulp and paper, transportation, water and shipping.

KEY CONTACTS

NEW YORK

Dan Bartfeld
Partner
dbartfeld@milbank.com
+1 212.530.5185

Bill Bice
Partner
wbice@milbank.com
+1 212.530.5622



Alec Borisoff
Partner
aborisoff@milbank.com
+1 212.530.5518

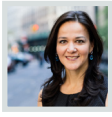
Roland Estevez
Partner
restevez@milbank.com
+1 212.530.5324

Jonathan J. Green
Partner
jgreen@milbank.com
+1 212.530.5056

Jeff Leider
Partner
jleider@milbank.com
+1 212.530.5640

Dan Michalchuk
Partner
dmichalchuk@milbank.com
+1 212.530.5079

Jaime Ramirez
Partner
jramirez@milbank.com
+1 212.530.5130



Carolina Walther-Meade
Partner
cwalther-meade@milbank.com
+1 212.530.5238

LOS ANGELES

Mike Duff
Partner
mduff@milbank.com
+1 424.386.4455

Allan Marks
Partner
atmarks@milbank.com
+1 424.386.4376

Henry Scott
Partner
hscott@milbank.com
+1 424.386.4378

Tim Wendling
Partner
twendling@milbank.com
+1 424.386.4581

LONDON

John Dewar
Partner
jdewar@milbank.com
+44 20.7615.3004

Matthew Hagopian
Partner
mhagopian@milbank.com
+44 20.7615.3271

Chris Taufatofua
Partner
ctaufatofua@milbank.com
+44 20.7615.3039

SINGAPORE

Jacqueline Chan
Partner
jchan@milbank.com
+65 6428.2433

James J. Murray
Partner
jmurray@milbank.com
+65 6428.2422

James Orme
Partner
jorme@milbank.com
+65 6428.2545

David Zemans
Partner
dzemans@milbank.com
+65 6428.2555

BEIJING

Shepard Liu
Partner
shepard.liu@milbank.com
+86 10.5969.2774

SEOUL

David Gartside
Partner
dgartside@milbank.com
+82 2.6137.2601

TOKYO

Aled Davies
Partner
adavies@milbank.com
+81 3.5410.2851