

Projects Plus⁺

WINTER 2020

POWER & RENEWABLES | INFRASTRUCTURE | OIL & GAS | 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.

Despite a global pandemic, volatile financial markets and political uncertainty, our clients have continued to keep us busy, and for that we remain grateful.

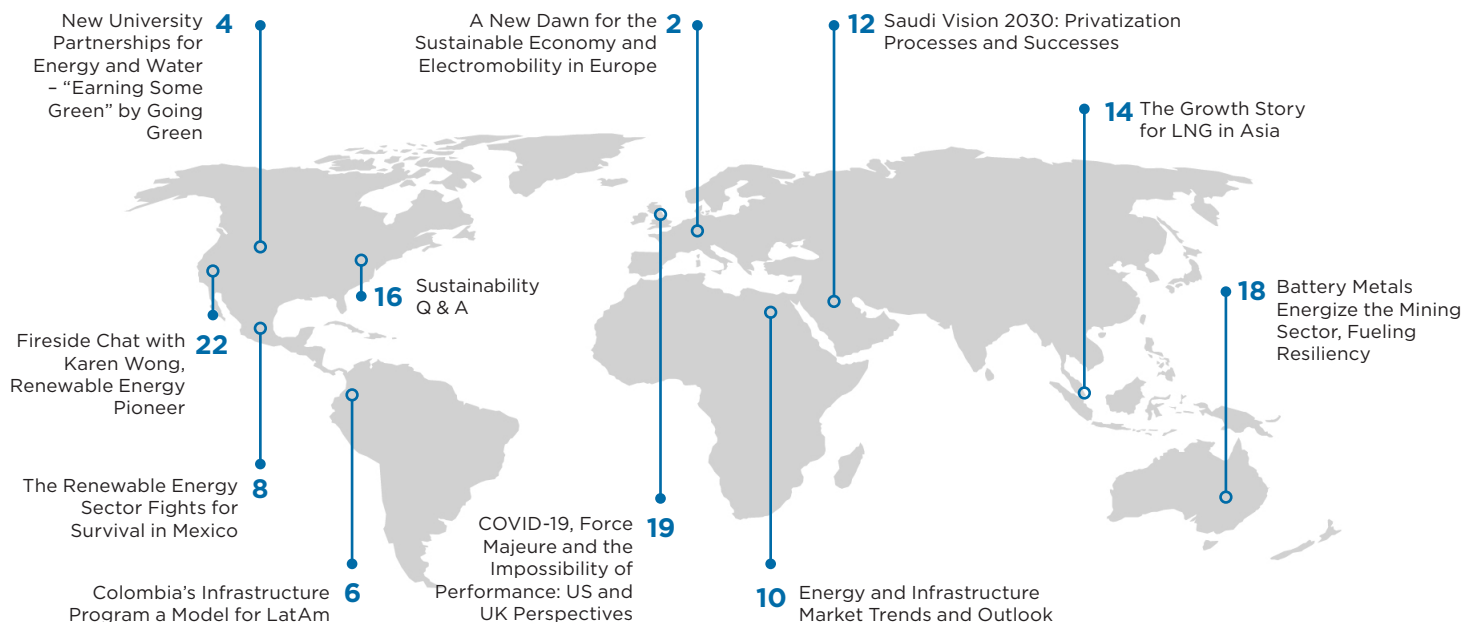
This issue of *ProjectsPlus* covers renewable energy and sustainability, electromobility in Europe and global demand for battery metals. Our authors also weigh prospects for toll roads and wind farms in Latin America and LNG in Asia. We explore public-private partnerships for new infrastructure in the Middle East and for district energy at Midwestern universities. And we delve into the hot topic of whether the impacts of COVID-19 constitute force majeure events or an excuse for contractual non-performance, comparing US law and English law.

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.



WHAT’S INSIDE



EUROPE

A New Dawn for the Sustainable Economy and Electromobility in Europe



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In September 2020, the European Commission proposed to raise the greenhouse gases (GHGs) emissions reduction target to at least 55% in comparison to those GHG levels that existed in 1990. The prior 2030 Climate and Energy Framework had established three key targets: the reduction by 40% of GHGs as compared to 1990; a 32% renewable energy share; and 32.5% energy efficiency improvement. This was to be achieved by virtue of the EU Trading Emissions Scheme and a combination of regulations across a number of sectors.

These targets have been particularly challenging for the transport sector, which accounts for approximately one quarter of the GHGs emissions in the European Union. Within that quarter, the road sector is responsible for over 70% of emissions. It is therefore not surprising that the shift towards low emission mobility has been an area of particular focus and investment for governments, local authorities and industry alike. The key elements for encouraging this shift include improving the efficiency of the transport system, facilitating the shift towards low-emission, alternative energy for transport, and encouraging the uptake of zero-emission vehicles.

In considering the impact of electric vehicles (EVs) on the environment, the European Environmental Agency (EEA)

has placed significant focus on the full life cycle of the battery manufacturing process since, whilst the actual use of the batteries is efficient, there are significant environmental considerations relating to, in particular, the sourcing and extraction of the constituent critical raw materials, the power required for the EV battery production process, and the eventual recycling and reuse capabilities.

“ **The focus is on extending battery life and on applications for batteries on expiry of their useful life to maximize efficiency. Northvolt has completed a raise of \$600M to support the development of a full-scale recycling facility that aims to secure 50 percent of the raw materials from recycled batteries.** ”

Set against this wider European strategy, it is fitting that Northvolt was established back in 2016 with “the mission to build the world’s greenest battery to enable the European transition to renewable energy.” Led by former senior executives from Tesla and TODA-BASF, Northvolt closed its initial funding round of \$12M in January of the following year, and in October announced the construction of its gigafactory, Northvolt Ett, in Skellefteå, Sweden alongside a demonstration factory and research facility, Northvolt Labs. It was not until June 2018, when Northvolt received

the environmental permit for Northvolt Ett, however, ground preparations and construction for the 16GWh factories commenced. The factory will have a potential annual output capacity of more than 20 GWh and is expected to start production in 2021. Northvolt is targeting a 25% market share in Europe by 2030, with 50% of raw material secured from recycled batteries.

A further \$1B of equity was raised in June 2019, by which time work had also begun on raising and structuring the \$1.6B multi-sourced project financing for the development, construction and operation of this electric vehicle battery manufacturing facility. This involved a large number of global financing institutions, including ECAs, pension funds and commercial banks, who entered into financing agreements with Northvolt Ett in July 2020. Equity investment was sourced from, amongst other financial and industry investors, Volkswagen, BMW and Goldman Sachs.

As would be expected from such a vertically integrated project in this sector, there has been significant focus on extending battery life and the possible applications for such batteries on expiry of their useful life, in order to attain maximum efficiency. To this end, Northvolt has also completed a further equity raise of \$600M to support, amongst other initiatives, the development of a full-scale recycling facility to aid in their goal of securing 50% of the raw materials from recycled batteries. BMW, an equity investor and one of the factory’s customers, entered into a long-term supply contract for the battery cells as part of their strategy to have 25 electrified models on the roads by 2023. Another key equity provider and customer, Volkswagen (VW), has also formed a joint venture with Northvolt to start building a further production facility in Lower Saxony in 2020. VW has also stated that it is committing more than €30B to the electrification of their vehicles by 2023, with almost 70 new electric models planned to be brought into the fleet over the next decade.

After a particularly busy first half of 2020 spent progressing and executing the documentation for the bespoke project financing, and in spite of the economic and physical challenges presented by the COVID-19 pandemic, the very end of July saw the execution of the finance documents for a US\$1.6B financing involving KEXIM, NEXI, the European Investment Bank, Euler-Hermes, BPI France, commercial banks led by ING, various pension funds and other public financial institutions. This increases the amount raised by Northvolt Ett for Europe's first home-grown Gigafactory for lithium-ion batteries to more than \$3B. The fact that such a broad range of high profile institutions have committed to the terms of the financing for this new industry is a clear signal of their growing support for sustainable energy businesses. The Gigafactory will be operated using renewable energy from wind and hydro sources, resulting in a further reduction in carbon emissions from the EV

“ **The EEA has placed significant focus on the full life cycle of the battery manufacturing process since there are significant environmental considerations relating to the sourcing and extraction of the constituent critical raw materials and the power required for the EV battery production process.** ”

life cycle. Production is expected to commence in 2021 with full completion of the factory by 2024.

Milbank's role in this landmark financing involved advising, amongst others, Denmark's largest commercial pension company, PFA Pension, and another of their largest pension providers, Danica Pension, on the structuring and negotiation of a subordinated loan agreement

which formed an important part of the US\$1.6B complex, multi-sourced, first-of-its-kind financing structure. The team was led by London partner John Dewar and senior associate Suzanne Szczetnikowicz, with associate Yi Ming Chan and assistance from German Leveraged Finance partner Thomas Ingenhoven and associate Odilo Wallner.

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UNITED STATES

New University Partnerships for Energy and Water – “Earning Some Green” by Going Green



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Excerpted with permission from the Forbes article “As Ohio Goes, So Goes The Nation – From Ohio to Iowa to Idaho, New University Partnerships Bolster Finances and Sustainability”. The full article may be found [here](#).

Colleges and universities are turning to public-private partnerships (P3s) to upgrade campus energy systems, bolstering schools’ financial and environmental resilience. Higher education institutions face pressures to stabilize budgets, boost endowments, and optimize facilities usage. Many public universities also face shrinking state financial support, aging infrastructure, and projected declines in enrollment due to changing demographics. The COVID-19 pandemic has exacerbated these challenges. In response, some universities are trying creative ways to unlock the value embedded in their existing utility systems and enlisting private partners to make their physical operations and energy use more sustainable and efficient.

THE “BIG TEN” MODEL

The latest public university to embrace this emerging P3 trend is the University of Idaho, which on November 2, 2020 announced a 50-year concession with a private company to take over the university’s centralized district energy system. The new concession shows how budget-strapped universities and colleges can optimize critical utility systems and access significant funds for endowments and other purposes without incurring new debt or losing control of capital improvement programs.



Idaho is adopting the P3 model successfully implemented by two other Big Ten schools: the University of Iowa, which transferred its utility plant to a private concessionaire on March 11, 2020, and The Ohio State University, which created the P3 template and launched its concession on July 6, 2017, having previously used a P3 for its parking operations. In each of these cases, the concession contract was awarded after a transparent competitive bid process, and the jobs of existing university employees working on the utility plant were protected.

“Universities are trying creative ways to unlock the value embedded in their existing utility systems and enlisting private partners to make their physical operations and energy use more sustainable and efficient.”

UNLOCKING ECONOMIC VALUE, INVESTING IN SUSTAINABILITY

Even before the COVID-19 pandemic, rising costs and declining levels of state support have pinched the budgets of major public universities. Raising funds for top faculty, innovative research centers, student programs, and financial aid has become more critical than ever. It is harder to find donors wanting to carve their name on a new power plant or steam tunnel. This situation makes it challenging for colleges and universities to fund capital improvements to campus systems that are essential to academic operations, medical centers and laboratories. The first driver for schools like Idaho, Iowa and Ohio State is economic. Through these P3 concessions, the universities have been able to monetize existing non-core assets, creating new funds for endowments and special programs, while shifting operating risks to private partners who bring expertise and access to long-term capital to fund needed improvements.

In effect, the universities have converted illiquid, depreciating physical assets into pools of investable capital that should appreciate in value, creating an income stream for decades. In exchange, the universities agree to make regular payments, consisting of a minimum fixed fee plus variable cost recovery, to the concessionaire providing the energy

services and upgrading the facilities. The capital improvement plans are reviewed regularly by all parties to ensure alignment with evolving university needs, system capacity and efficiency, and affordability.

RISK TRANSFER & PERFORMANCE INCENTIVES

Risk transfer is another goal of these P3 arrangements. The universities retain ownership of the physical assets but, through a long-term lease, transfer rights and responsibilities for maintaining and operating the systems to the private concession company. The concession contracts create accountability by requiring the private concessionaire to meet stringent performance standards for reliability, efficiency and sustainability. The performance standards require the concessionaire to operate and maintain the utility system to at least the same standards as the university previously achieved. In addition, the concessionaire must meet key performance indicators (KPIs), which are negotiated as part of the concession, covering specific quantitative metrics, such as unplanned outages, emergency response times, energy use intensity, and smart meter deployment.

PROSPECTS FOR INNOVATION

In long-term concessions, the parties have to balance predictability of cash flows with the need for flexibility. Experimental technology may be discouraged if the question is “*does the system work?*”. But innovative solutions should be encouraged under P3 concessions to address “*how well does the system work?*”

By incentivizing the concessionaire economically to innovate, to adapt and adopt new ideas learned from other projects, and to experiment with possibly better solutions, P3 concession agreements can spur improvements in efficiency, operational flexibility and cost reduction that can be shared between the schools and the private operators. Both partners gain from improvements that might not be tried under a more conservative contractual risk allocation framework like those implemented so far.

Technical innovation is less welcome to the extent that continuity of service is placed at risk. Universities, especially those with hospitals or sensitive laboratory experiments, demand reliable utility services so that their academic buildings and medical centers can operate without interruption. Indeed, increased resilience and reliability are key goals of public infrastructure projects, beyond efficiency, life-cycle cost optimization, and sustainability.

Likewise, private sector partners depend on their projects operating without unplanned interruptions in service or technical surprises. These P3 projects can obtain long-term debt financing at a low cost – boosting equity investors’ returns through leverage while keeping costs to the university host low – only because the risks of penalties, default or termination under the concession agreements are extremely low.

THE ONLY CONSTANT IS CHANGE

The future creates opportunities for innovation in contracting models, technology and energy management systems as schools adapt to changing circumstances. It remains to be seen how economic cycles, state and national politics, the COVID-19 pandemic and its aftermath, and demographic trends will affect university utility systems and patterns of energy usage.

P3 structures may be an important part of the solution. More schools will likely copy the utility-style, cost-recovery models used to date by the Big Ten schools. Other schools, including well-endowed private colleges and universities, may experiment with alternative contractual structures that transfer more flexibility to P3 concessionaires in lieu of upfront payments, incentivizing innovation and risk sharing to improve utility systems’ performance and to reduce energy usage more aggressively.

In the short term, restrictions limiting classes and other on-campus activities during the 2020 pandemic have enabled schools to reduce operating costs and cut energy usage. Enrollments and funding may be jeopardized, however, by a longer

economic recovery. Over time, it is possible that schools will reconfigure space on campus to accommodate different activity patterns, whether in classrooms, laboratories, dining and residence halls, or athletic and arts facilities. Increased physical distance in classrooms and improved HVAC and air filtration systems may require greater capital expenditures, further stressing school budgets.

“ **The future creates opportunities for innovation in contracting models, technology and energy management systems.** ”

Demands for power, cooling and connectivity may increase with the additional digital infrastructure needed for online education, cloud computing, wireless networks and advanced telecommunications. Shifting climate patterns may increase demands for heating and cooling or tools to deal with extreme weather. Technological improvements (including adaptive building systems, thermal design, energy storage, microgrids, and smart energy management systems and software) may facilitate operational efficiencies and cost reductions and may make intermittent renewable energy sources like wind and solar power more available at times of peak demand and more affordable.

There are ample opportunities to reimagine how P3 collaboration between universities and private partners can make schools more robust and stimulate research and development, with schools serving as both research centers and test beds for innovation by engineers, designers, financial investors and commercial parties alike. The key is to align interests around shared goals with a clear and fair allocation of risks and rewards.

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LATIN AMERICA

Colombia's Infrastructure Program a Model for LatAm



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Colombia has attracted diverse sources of private capital for its 4G toll road program and is now forging ahead with its new 5G transportation infrastructure program. Milbank has served as international counsel to either the borrower or the financing sources in nearly half of the 4G concessions that have closed so far. Colombia's program is a model of success for the region.

THE 4G PROGRAM

The 4G (Fourth Generation) program, one of the latest infrastructure development initiatives in Colombia, was unveiled by the Colombian government in 2012 to reduce the infrastructure investment gap and modernize the country's aging road infrastructure. Under the auspices of the *Agencia Nacional de Infraestructura* (ANI) and using a public-private partnership structure, the 4G program sought to inject approximately USD\$24 billion into the construction or rehabilitation of over 7,000 kilometers of roads. Road development is significantly important in Colombia given that its roads handle around 80 percent of the country's internal transport. Upon completion of all the planned 4G projects, transportation costs are expected to be reduced by 28 percent. The 4G program is expected to increase the country's GDP by close to 3 percent per year during construction and around 1.5 percent per year afterward. As of February 2020, construction work was ongoing in 22 out of the 29 concessions awarded in the 4G program and there were 1,450 active construction fronts.

The 4G concessions include noteworthy risk mitigation features that have made them attractive to both local and international sponsors and to diverse sources of financing. Unlike other concessions that might require cash advances by the government to mitigate the sponsor's risk during construction, the 4G concessions mitigate construction risk by means of cost-sharing with respect to land acquisition, environmental permitting, utility relocation and force majeure cost overruns. Moreover, the 4G concession agreement template includes a termination payment feature pursuant to which, in the event of an early termination of the concession, ANI would be required to compensate the concessionaire for capital expenditures and operation and maintenance expenses already incurred net of project revenues already received and penalties (up to specified caps) that may have been imposed on the concessionaire. Furthermore, during the operational period, the concession agreement mitigates the sponsor's risk with availability payments from ANI and guaranteed minimum toll revenues (adjusted for inflation) at certain predetermined intervals during the term of the concession.

DIVERSE SOURCES OF FINANCING

Financing sources for the 4G concessions evolved over time and demonstrated these concessions were not only bankable, but quite attractive to a wide variety of finance providers. The initial concessions, such as the Pacifico 3 toll road and the Costera toll road, were financed principally through bond issuances in the capital markets. Soon thereafter, projects such as Conexión Norte grew to include financings consisting principally of a tranche of U.S. dollar-denominated debt provided by international commercial banks. A subsequent wave of 4G concessions, including the Pasto Rumichaca toll road, the Alto Magdalena toll road and the Ruta del Cacão toll road were financed by development finance institutions or export credit agencies (ECAs), including US DFC (formerly known as OPIC), Central American Bank for Economic Integration (CABEI) and IDB Invest (a member of the Inter-American Development Bank). In many of these 4G transactions, the bond, bank or ECA financing sat alongside a tranche of Colombian peso-denominated debt provided by local Colombian banks or, less frequently, a U.S. dollar-denominated local bank tranche. Several infrastructure funds



joined the local commercial bank tranche. In many cases, these finance providers also extended interest rate and currency hedges to the concessionaire as part of the financing. Many of the 4G concession financings also benefited from a liquidity line, most frequently provided by Financiera Nacional de Desarrollo (FDN), the Colombian development bank, with its own set of terms and conditions. In more recent projects, FDN has participated in the commercial bank tranche as a senior lender, further validating the attractiveness of the 4G concessions and inviting traditional sources of financing to participate in novel and creative structures.

Despite the unexpected challenges of COVID 19 and the effects of the pandemic, the 4G concessions have continued to move forward with construction and financing and, in the case of the Pasto Rumichaca toll road, have even successfully reached financial close.

4G CONCESSIONS EVOLVE - THE NEW 5G PROGRAM

The 4G concessions have now moved into a more mature phase. Construction is advancing and several projects are on track to reach completion with minimal overall project disruption, notwithstanding the pandemic. Milbank has advised both the sell-side and the buy-side of various 4G concessions which have already been the subject of trades at the sponsor level, including in relation to the Costera and Perimetral Oriental de Cundinamarca toll roads, with a majority or all of their interests in the projects being sold by the initial sponsors and acquired by existing or new entrants in the Colombian market. We are presently supporting potential buyers and sellers in future trades and expect to see more M&A activity with respect to the 4G projects, particularly as the 4G concessions near completion of construction and with the launch of the 5G (Fifth Generation) program.

In addition, many of the 4G projects are reaching a refinancing phase for which interest from financial institutions remains strong, including from banks that were not involved in the construc-



tion financings. We are currently advising two such projects in their refinancing efforts and expect several more to come to market in the near future.

“ **Colombia’s 4G program sought to inject approximately US \$24 billion into the construction or rehabilitation of over 7,000 kilometers of roads.** ”

As of April 2020, 18 of the 29 projects in the 4G program had reached financial close, with seven projects moving toward that goal on a delayed basis. Earlier this year, ANI announced that

it would proceed to launch the 5G program, only slightly delayed due to the pandemic. Unlike the 4G program which focused on toll roads, the 5G program will be a multimodal program including toll roads, river navigation projects, railways and airports. The first wave of tenders is expected to consist of 12 projects with a total cost of approximately US\$5 billion, while the second wave is expected to consist of 11 concessions with a total cost of approximately US\$8 billion (likely to be implemented in the subsequent administration). ANI has issued the template for the 5G concession agreement, which is intended to improve on the 4G concession template. As more 4G projects become operational and with the introduction of the 5G program (with the Cali-Palmira toll road being the first 5G concession being put out to bid), Colombia is well positioned to enjoy continued success with its bold and comprehensive infrastructure renewal plan.

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The Renewable Energy Sector Fights for Survival in Mexico



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After the implementation of the long-awaited reform of Mexico's energy sector in 2013-14, which opened the door to private investment and created a wholesale electricity market, the country's renewable energy sector experienced a period of significant growth. Investment interest, however, almost came to a halt in late 2018 following Andrés Manuel López Obrador's victory in Mexico's presidential election. The new administration immediately started taking steps (such as the cancellation of a clean energy auction within days of taking office) to slow down—or even reverse—the liberalization of the energy sector. Regulatory activity against the sector intensified throughout 2020, leading to a large number of legal challenges brought not only by affected industry participants, but also by non-governmental organizations concerned with the effects of Mexico's energy policies on the environment.

The latest round of attacks against renewable energy generation started on April 29, 2020 with the issuance of a resolution by the National Center of Energy Control (*Centro Nacional de Control de Energía* or CENACE) in response to the COVID-19 pandemic. The CENACE resolution included a suspension of commissioning tests for new wind and solar power plants (restricting the access of new generators to the power grid) and proposed to give conventional (non-intermittent) generation resources priority of access to the power grid over renewable (intermittent) generation resources. While the proposed measures were presented as a contingency plan to maintain the stability of the electricity supply



during the pandemic, the CENACE resolution did not include a termination date or even clarify that the rules were intended to be applied temporarily. The CENACE resolution was followed on May 15, 2020 by the publication

“ **Regulatory activity intensified throughout 2020, leading to an avalanche of legal challenges brought by affected industry participants as well as by NGOs troubled by the effects of Mexico's energy policies on the environment.** ”

by the Ministry of Energy (*Secretaría de Energía* or SENER) of a new policy regarding power grid reliability, safety, continuity and quality, which included multiple measures disadvantaging renewable energy generation sources.

The CENACE resolution and the SENER policy were promptly challenged in court both on procedural and substantive grounds, and their implementation is currently precluded by nationwide injunctions. The first ruling on the merits with respect to the SENER policy was issued in November 2020, resulting in a general revocation of the policy that is currently being appealed by SENER.

On May 28, 2020, the Energy Regulatory Commission (*Comisión Reguladora de Energía* or CRE) issued a resolution increasing the transmission charges applicable to certain renewable energy projects that entered into transmission contracts prior to the reform of the energy sector. The new charges, which would in effect override binding contractual provisions, represent a percentage increase that ranges between 400% and almost 800%. Numerous affected generators have filed *amparo* complaints to dispute the validity of the new charges and it has been reported that a majority of them have been able to obtain injunctions preventing the application of the new charges while the resolution on the merits of each case is still pending.

More recently, on October 7, 2020 CRE published a new resolution restricting amendments to generation or

supply permits issued prior to, and expressly recognized and preserved as part of, the energy sector reform. The new restrictions would eliminate the generator's ability to replace load points for existing offtakers and, more significantly, to replace an offtaker under the generation permit. While this latest CRE resolution might not immediately affect renewable energy generators that currently benefit from long-term offtake contracts, the new restrictions imposed on such "grandfathered" generation permits are expected to reduce meaningfully the residual investment value in those generators. Numerous legal challenges to this latest action by CRE are already ongoing or expected to be raised.

While the renewable energy sector has so far been able to prevent an immediate direct impact from these regu-

latory actions, there is no clear end in sight. Ordinarily, a resolution of an

“ **Although the renewable energy sector has so far been able to prevent an immediate direct impact from these regulatory actions, there is no clear end in sight.** ”

amparo complaint on the merits takes between 4 and 6 months and appeals tend to be resolved 3 to 5 months later. In this instance, however, the process is expected to be protracted. Some

delays have been caused by governmental responses to the COVID-19 pandemic, and in addition, given the large number of cases by similarly situated aggrieved parties raising similar issues, some courts seem reluctant to move quickly while expecting a potential ruling by a higher court in any of the cases, which could ensure consistent results in other outstanding cases.

Beyond the immediate direct effects on renewable energy generators, what is perhaps more important is the near-term uncertainty given that there are 4 years remaining in the term of Mr. López Obrador's administration, and the long-term chilling effect on private investment, which may have severe consequences on the future of the renewable energy sector in Mexico.

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MIDDLE EAST

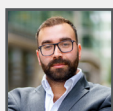
Energy and Infrastructure Market Trends and Outlook



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The unprecedented combination of the COVID-19 pandemic and the current depressed state of oil prices – indeed, the COVID-19 pandemic has exacerbated the lower oil price environment in certain respects – has accelerated the momentum of the Middle East’s ongoing energy transition and increased the region’s focus on the need to attract inward investment into infrastructure investments. The privatisation of infrastructure assets (whether through the procurement of public-private partnerships to build and operate new infrastructure projects or by disposing of a minority interest in a key infrastructure asset) has been galvanised by the current oil price and by governments’ inabilities, especially within the Gulf Cooperation Council (GCC) countries, to support generous subsidies and large budgets by relying upon a once dominant oil industry. These unprecedented developments have made the Middle East a particularly appealing investment destination for investors that are hungry for long-term, stable yield assets.



ENERGY TRANSITION – A NEW DAWN?

While the belief persists that the GCC, and, more acutely, the Middle East, remains in the nascent stages of the global energy transition, the region is expected to invest approximately US\$180B in renewable energy and the wider energy transition in the run-up to 2025, an increase of up to eighteen times current spending. This investment occurs alongside the addition of up to 57GW of solar and wind capacity up to that date, the advent of robotics and artificial intelligence as key elements of the region’s new “smart cities” (e.g., the

“ **The Middle East could potentially invest US\$180B—an increase of 1800%—in renewable energy and the wider energy transition in the run-up to 2025.** ”

Saudi NEOM project), the development of green hydrogen – the potential of which remains, on a global level, relatively untapped – increased grid integration, and the development of battery storage projects, which are included as part of combined generation/storage projects.

GREEN HYDROGEN’S UNTAPPED POTENTIAL

Created using renewable power, green hydrogen (and its revolutionary potential to help the world meet the ever increasing challenges of climate change) have been a hot topic of discussion concerning 2020 technology and the energy transition. With its relatively untapped potential on the global scale, the Middle East has undertaken considerable strides in embracing the potential of green hydrogen as the new oil. It is currently anticipated that demand for green hydrogen will account for up to 37% of global oil production in 2050. The biggest promoter for the potential of green hydrogen in the Middle East has been NEOM in Saudi Arabia. In 2020, NEOM signed an agreement with ACWA Power and Air Products to develop the world’s largest green hydrogen project, which, once operational, is expected to supply 650 tonnes of green hydrogen per day.

Oman and the UAE are similarly engaged in studying the technical and commercial potential of utilising green hydrogen to diversify their economies away from oil dependency. The UAE recently announced that Masdar, Abu Dhabi’s renewable energy development company, is collaborating with the Abu Dhabi National Oil Company and Air Liquide, among others, to develop hydrogen mobility solutions, including the installation of solar-powered hydrogen fuelling stations.

Given the potential for green hydrogen to displace reliance on hydrocarbon products,

it is expected that many more similar projects will be developed and financed in the Middle East over the coming years.

LARGER PROJECTS; LOWER TARIFFS

As of 2020, a number of large, utility-scale wind and solar power projects have come to market at hitherto unparalleled low tariffs. In April 2020, the Al Dhafra Project received the world's lowest solar tariff at 1.35¢/kWh. This represents nearly a 40% drop on the tariff set by the Noor Abu Dhabi project in 2017.

Increased competition between a number of investors in the Middle East's renewable energy projects has led to some of the lowest tariffs in the world, and this trend is set to continue with new projects anticipated to be even larger and, in defiance of common convention, to receive even lower tariffs. This has contributed to a large number of new projects in the renewable energy sector, including new large, utility-scale wind and solar projects anticipated in 2020 and 2021 in Saudi Arabia, Qatar and the UAE.

RENEWED FOCUS ON INFRASTRUCTURE

COVID-19 and the depressed oil prices have highlighted that the Middle East's economic outlook is contingent on the increased development and privatisation of infrastructure assets. Q1 2020 saw the GCC achieve 6,722 active projects with a combined value of more than US\$3.1 trillion, with expectations of an increased emphasis on infrastructure spending over the coming years. Promising public-private partnership legislations across the region, as well as the long-term stable returns on offer through infrastructure investments, continue to increase investors' confidence in Middle East infrastructure as an investment destination.

PRIVATISATION OF KEY INFRASTRUCTURE

This increased emphasis on attracting a diverse mix of investors has been demonstrated by a number of privatisations of state infrastructure assets, such as the Abu Dhabi National Oil Company's disposal of a 49% stake in its gas pipelines for US\$20.7B in June 2020 to an interna-

tional consortium comprised of Global Infrastructure Partners, Brookfield Asset Management, Ontario Teachers' Pension Plan Board, Singapore's sovereign wealth fund GIC, and NH Investment & Securities.

More recently, Abu Dhabi National Oil Company sold a 49% interest in its real estate business to an Apollo-led Consortium that was advised by Milbank. Furthermore, Saudi Arabia has, after much anticipation, unveiled the first of its many privatisations that will be coming to market under the umbrella of "Vision 2030."

GRAND PROJECTS AND SMART CITIES

Beyond infrastructure privatisations, the region's ambitions in building the cities of the future seem to remain unchanged: development on the Saudi NEOM project is already largely underway, with Kuwait's Silk City, Bahrain's Bahrain Bay and Oman's Duqm Port in close pursuit. Qatar's hosting of the 2022 FIFA World Cup continues to strengthen its construction sector, with the market's value expected to surpass US\$40B by 2024.

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Saudi Vision 2030: Privatization Processes and Successes



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In 2016, the Kingdom of Saudi Arabia's (KSA) Crown Prince announced a new strategic roadmap for KSA's economic, social, and structural transformation up to 2030: KSA's "Vision 2030" (the Vision).

The Vision's unveiling was motivated by a sustained drop in oil prices beginning in 2014, confronting KSA with a fiscal challenge similar to that faced by the UAE in 2008. At its heart, the Vision is therefore aimed at reducing the KSA's economic dependence on oil revenues, by developing and then maintaining a confident and effective private sector.

PRIVATIZATION AS PART OF VISION 2030

In 2018, as one part of the Vision specifically conceived in order to establish a robust private sector, the KSA set in motion a large-scale privatization programme of state-owned-assets. According to the [Vision 2030: Delivery Plan 2020](#), "privatization" meant *"the transfer of ownership of specified assets or services from the government to the private sector. The transfer of ownership can be done in several forms, e.g. (not exhaustive) full/partial assets sale, IPO, management buy-out, PPP (BOT), concessions or outsourcing."*

The programme has significant legal implications, including: the development of a legal and regulatory basis for

privatization transactions; the development of the legislative and regulatory framework of certain sectors intended for privatizations (i.e. making the regu-

private entities to act autonomously and effectively.

HIGHLIGHTS OF THE PRIVATIZATION PROGRAMME

The privatization programme was additionally designed to raise revenue. When announced, the KSA targeted the generation of US\$9 billion – US\$11 billion by 2020 and an additional 14 public-private-partnership initiatives worth US\$6 billion – US\$8 billion. Overall, the headline figure projected by the KSA was the generation of US\$200 billion from the programme. The programme would also contribute to the development of a "vibrant society" (and create an estimated 12,000 jobs in the process).

Further intended benefits included the freeing up of government assets and resources to improve the quality of the services themselves and reduce running costs incurred by the government. Vitality, as well, the programme hoped to attract foreign direct investment and augment KSA's balance of payments.

ANTICIPATED PRIVATIZATIONS, AND COVID-19

In 2019, KSA raised nearly US\$30 billion from the initial public offering of Saudi Aramco, and it reportedly has plans to sell even more of its remaining stake.

“ **The KSA's Vision of privatization will have momentous legal implications—from the development of a legal and regulatory basis for privatization transactions to the establishment of new mechanisms that protect both the interests of government and the autonomy of private entities.** ”

latory landscape amenable to private investment); and the establishment of mechanisms that protect government interests and stakes while also enabling



Other sectors identified as intended to be subject to privatizations include education, healthcare, water, and transport. However, there have been delays to the privatization programme, for reasons that are unclear. As such, there are currently no electricity generation and cogeneration plants up for sale, however, power sector privatizations are expected in the future.

Nevertheless, one notable public-private partnership (PPP) is the selection of GE to provide gas turbine technology and services for four Saudi Electricity Company expansions. The total value of the agreements with GE is estimated to be worth US\$500 million.

The effect of COVID-19 on the programme remains unclear. On the one hand, according to *Vision 2030: The Impact of COVID-19 on Saudi Arabia's*

“ Ras al-Khair is a high-value asset that is expected to attract significant interest from utility players, Japanese trading houses and private equity funds, and is of immense strategic importance to the Kingdom of Saudi Arabia, the region, and to key Saudi stakeholders. ”

Diversification Programme, global demand for oil has been predicted to fall by a record of 9.3 mb/day year-on-year in 2020. The plunge in prices has taken a toll on KSA's fiscal management: Moody's has downgraded its outlook from "Stable" to "Negative," creating an extra hurdle to the KSA's plans to borrow US\$58 billion, and resulting in a US\$8 billion reduction in its budget for the Vision (the Vision was based on a budget

of US\$65/bl). However, because a significant side-effect of the privatization process is revenue generation, it may be that while some parts of the Vision are delayed, the privatization programme will be accelerated to offset the pandemic's effects. The ultimate impacts of the pandemic remain to be seen.

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ASIA

The Growth Story for LNG in Asia



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As part of the clean energy transition taking place in Asia, liquified natural gas (LNG) is increasingly being looked at as a key fuel source for power generation. Notwithstanding the COVID-19 pandemic, governments are taking steps to promote significant projects for the import and consumption of LNG for power generation, LNG producers and financiers are looking to take advantage of new markets in fast-growing Asian economies.

The Oxford Institute for Energy Studies projects that LNG import demand across key Asian markets will increase from 44 billion cubic metres in 2020 to over 200 billion cubic metres by 2050. A significant portion of this demand will continue to be driven by China and the two other core (although perhaps shrinking) markets of Japan and South Korea (which, together with China, form the traditional “big three” import markets). It is expected that other Asian countries, such as Bangladesh, the Philippines, Thailand and Vietnam, will become increasingly active too. Indonesia, which was once one of the world’s biggest exporters of LNG, is expected to become a net gas importer in the coming years.

There are multiple factors driving this increased demand. Many governments in the aforementioned countries have committed to adding power generation capacity to meet the forecasted growth in electricity demand from increasingly mobile populations. Vietnam,

for example, recently published a revised National Power Development Plan (known as PDP7R), which targets growth in natural gas consumption to 21 billion cubic metres by 2030. In addition, there continues to be broad public, economic and political support to drive investment toward renewable or cleaner energy sources (including gas). Finally, with an abundance of natural gas available for export in markets such as Australia, Qatar and the United States, energy-hungry Asian

“ **Governments are promoting significant projects for the import and consumption of LNG.** ”

countries are keen to facilitate import terminals, regasification facilities and other infrastructure to take advantage of cheap gas prices.

These factors have combined to create a healthy deal pipeline across the region. In Vietnam alone, there are at least 13GW of LNG-to-power projects in development with an aggregate value of over US\$14 billion. This includes the proposed US\$2.8 billion 2.25GW Son

My LNG-to-power project in Binh Thuan being developed by AES Corp and PetroVietnam, the US\$3 billion 3.2GW LNG-to-power project in Bac Lieu province being developed by Delta Offshore Energy, the US\$5 billion LNG-to-power project in Hai Phong City being developed by ExxonMobil and JERA and, finally, Energy Capital Vietnam’s 3.2 GW LNG-to-power project in Mui Ke Ga in the Binh Thuan province.

A number of new deals have been announced in the Philippines too. First Gen Corporation and Tokyo Gas are reported to be in the advanced stages of developing a floating storage and regasification unit to be located in Batangas, where LNG imports are being targeted as a replacement for the vast Malampaya gas field. The Malampaya gas field currently delivers fuel for up to 20% of the country’s power requirements but is projected to be depleted by 2027. Another government approval was recently awarded to Excelerate Energy of the United States, which is developing a terminal in Batangas that will become the Philippines’ first open access LNG import terminal. There are reports of LNG-to-power developments in other Asian markets too.

These developments all come at a time when the industry is also experiencing other significant changes – including the entry of non-traditional funding sources such as infrastructure funds,





“ **Pricing will remain a key consideration in the analysis of large-scale LNG projects. We continue to see the general trend moving away from oil-linked long-term supply agreements towards a much greater adoption of gas-on-gas pricing benchmarked to spot price indices.** ”

new ownership models and disaggregation – which also creates increased deal activity. For example, supermajor ExxonMobil is looking to monetise certain interests by divesting up to US\$2-3 billion of upstream oil and gas assets in Malaysia with a diverse group of bidders reportedly having submitted bids. ENI SpA, Shell and Chevron are all running sale processes of gas or LNG assets in Asia Pacific, each of which is receiving a lot of attention.

As has long been the case, however, pricing will remain a key consideration in the analysis of large-scale LNG projects (and any M&A processes around them). In the LNG space, we continue to see the general trend moving away from oil-linked long-term supply agreements – typically including a crude-linked ‘S’ curve pricing model – towards a much greater adoption of gas-on-gas pricing benchmarked to spot price indices, such as Platts JKM. The move to a more liquid and transparent LNG

market has generally been welcomed. From a long-term infrastructure financing perspective, however, this shift in reference pricing presents challenges with regards to financial diligence and modelling and the potential for lenders to be asked to take on greater market risk where project sponsors may wish to preserve flexibility in sourcing LNG on the spot market.

Ultimately, it remains to be seen how many of the current developments and opportunities will progress. It is likely that a combination of the ever-expanding electricity demand requirements, the growing realisation of LNG’s role in the clean energy transition, and the ongoing existence of the fundamental characteristics that led to Asia’s growth as the key import market for LNG globally will provide a healthy environment for well-structured investments in new or expanded LNG projects.

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GLOBAL

Sustainability Q & A



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Excerpted with permission from “Sustainability: Roadmap, Performance and Communication” round table in the October - December 2020 issue of Risk & Compliance Magazine. The full article may be found [here](#).

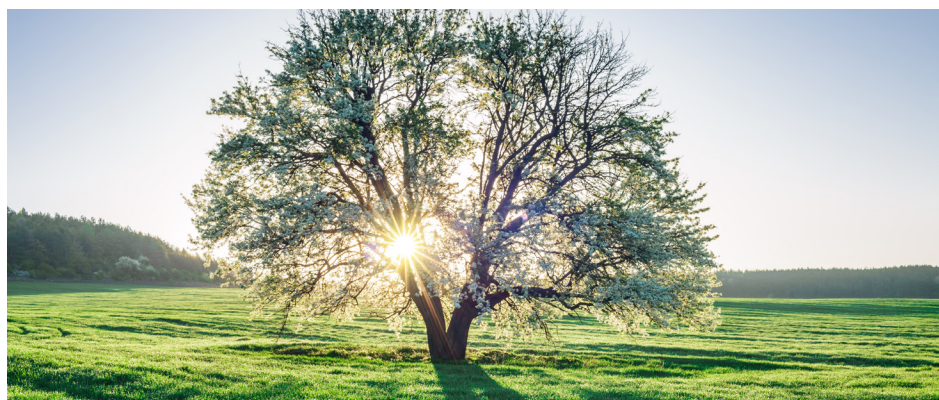
R&C: Could you provide an overview of the rising importance of sustainability? To what extent is this issue becoming a key agenda item for companies?

Marks: Sustainability has been a critical focus for companies and investors alike, especially of late. For example, sustainable funds or other investment vehicles that market an awareness of ESG issues have experienced record inflows of capital in 2020. This trend is notable against the backdrop of the global recession and market volatility. The idea that creating value for investors and shareholders need not come at the expense of other stakeholders is no longer novel. Indeed, in the longer run, investments in companies and products that are sustainable may be both more resilient and more successful in attracting risk capital.

Public policy has also historically been a key driver for sustainability efforts. As a result, sustainability is becoming central to the way businesses plan for the future of their operations and strategy – whether the emphasis on sustainability is being driven internally or in response to external pressures. Companies are now finding opportunities to attract capital, bolster innovation and improve financial performance as a result of their sustainability efforts.

R&C: To what extent are investors growing increasingly interested in companies’ sustainability efforts? Are there growing calls for increased reporting on sustainability performance?

Marks: Sustainability reporting is certainly garnering increased attention from investors



and other stakeholders. Any inconsistency in the standards against which sustainability efforts and programmes are compared makes it challenging for investors to be able to interpret this information effectively. As investors take sustainability issues more seriously, we will likely see increased emphasis on reporting and verification so that investors can have greater confidence that corporate or fund investments are actually aligned with sustainability goals.

“ Investors, and thus companies, will increasingly focus on sustainability and ESG considerations in the wake of the pandemic. ”

For instance, the US Securities and Exchange Commission (SEC) issued a request for comment in March 2020 under the so-called Names Rule – rule 35d-1 under the Investment Company Act of 1940 – noting that many investment funds use ESG terms in their names or state sustainability as an investment strategy without substantively deploying sufficient capital in line with those terms. According to the SEC, the number of funds, excluding unit investment trusts, including the terms ‘ESG,’ ‘clean,’ ‘environmental,’ ‘impact,’ ‘responsible,’ ‘social,’ or ‘sustainable’ in their names increased from 65 as of 31 December 2007 to 291 as of 31 December 2019.

Similarly, at the urging of US senator Bob Menendez of New Jersey, the US Treasury Inspector General for Tax Administration issued a report in April 2020 that found fossil fuel companies may have improperly claimed nearly \$1B in clean air tax credits under Section 45Q of the Internal Revenue Code. The tax credits were made available to companies to trap, sequester and store carbon emissions, preventing them from entering the atmosphere, but the recipients may not have complied with the Environmental Protection Agency’s (EPA’s) monitoring, reporting, and verification (MRV) requirements. In another example, in the project finance space, scrutiny of sustainability performance and other ESG metrics is no longer limited to development finance institutions.

An important consideration for both equity investors and lenders, especially institutional investors providing long-term financing for operating projects, is not just the availability of sustainability reporting, but the extent to which this information is useful more broadly in benchmarking and value creation analyses. I would expect to see activist investors, including large public pension funds, and government agencies alike, take a heightened interest in reporting and verification to combat ‘greenwashing’ by corporations or investment fund managers.

R&C: What considerations should companies take into account when drawing up a roadmap to embed sustainability into their agenda?

Marks: Companies can approach sustainability issues on two levels. The first step is to review products and processes to see how sustainable practices align with the company’s commercial goals, from flexible and resilient supply chains to branding and

customer expectations, always with an eye on costs, return on capital and productivity. Next, at a deeper level, senior company management should instill sustainability into the firm's culture, inviting employees, customers and suppliers to innovate and collaborate toward meeting those goals and to create transparent ways to measure and reward success.

From my perspective, the most important consideration in preparing any strategy is to ensure that the approach is long term and able to withstand the tests of the fluctuating market. Investors expect companies to demonstrate that sustainability is more than a buzzword used in marketing materials. The key question to consider is, how will this figure into our strategy three, five, 10 years down the line? I would also urge companies to consider the sources they are consulting and the voices at the table when preparing an agenda for the business's sustainability efforts – that is, who are the right stakeholders to engage in these conversations, and what efforts really move the needle in substance with more than a one-off headline?

R&C: In your opinion, what are the implications of the COVID-19 pandemic for companies' long-term sustainability plans?

Marks: Sustainability means maintaining current living standards without jeopardizing the quality of life for future generations. That definition applies to the environment and also to social equity. So, in a sense, the pandemic has been a sort of stress test revealing vulnerabilities and inequities in systems and institutions. To the extent that the pandemic and resulting economic strain present companies, investors and lenders with an opportunity to reevaluate the viability of long-term strategies, including with respect to sustainability, these challenges can lead to better outcomes.

We are seeing, without a doubt, increased pressure on companies to reduce their financial losses, which may at first appear to be at odds in the short term with investments in sustainability. However, I would expect investors and consumers to reward companies that commit to sustainability in the years to come. We know that focusing on sustainability has a tremendous potential to spur innovation – now is the time to tap into that innovation to address unprecedented challenges to companies' long-term financial health and to make them more resilient in every respect.

R&C: What sustainability strategies should companies look to deploy in the

COVID-19 era as part of their recovery and growth? What advice would you offer on revisiting their business model, capturing opportunities and managing risks to shape a sustainable future?

Marks: Sometimes external shocks are a valuable wakeup call, spurring renewed attention to both risks and opportunities. I would advise companies to remember that sustainability is not limited to checking compliance boxes. For so many of us, the pandemic has been an opportunity to reset and re-evaluate priorities, and the same should be true for every business as we plan for a post-COVID-19 future.

“ ESG considerations continue to be significant. ”

Risk management is becoming more valued, and appropriately so. Managing risk in the face of uncertainty presents challenges for valuations, liquidity and investment. Those challenges can be met with coordinated action, vigilance and creativity. As just a small example, many companies are experimenting with new ways of connecting with employees and customers digitally, given social distancing, which results in less wasted time and energy than was previously spent traveling and commuting. Those new tools will likely survive the pandemic, with resulting cost savings, increased workforce flexibility and environmental benefits. We have yet to see how companies will respond to the acceleration of trends in office space utilization and working from home, transportation and communications networks, e-commerce, digital networking, and cyber security wrought by the pandemic and the economic and public policy responses to it.

R&C: What frameworks, ratings and standards can companies utilize to ensure coherent, consistent and comparable sustainability reporting?

Marks: A challenge of sustainability reporting is that the frameworks of analysis are numerous and varied. Information provided to investors is of limited significance if data collected and weighted using standardized metrics is not readily available to enable companies, investors and lenders to effectively compare performance. I

would urge companies to consider which frameworks are most widely accepted in their space, and which rubrics their investors and other sources of capital are most likely to be familiar with.

Compliance with the Equator Principles framework is a baseline in global debt finance, and there are a number of other standards that companies may wish to consider, among them the GRI Standards, the SASB framework and the United Nations Sustainable Development Goals (SDGs), to name a few. Reporting should facilitate comparisons both between companies and within each company over time, quantitatively and qualitatively, and as measured against stated sustainability goals or metrics. Investors should also pay attention to the bigger picture. Company policies may have unintended consequences or impacts – positive or negative – for other parties along the value chain. Sustainability goals should not be analyzed in a vacuum but rather in the context of larger systemic impacts.

R&C: Going forward, to what extent do you believe sustainability will be a core focus as companies rebound from the COVID-19 pandemic? What are your long-term predictions for this trend?

Marks: I would expect sustainability and ESG considerations to continue to be a significant focus for companies and investors alike in the wake of the COVID-19 pandemic. Many sustainable industries are also more resilient. As impacts of global climate change become more apparent – in extreme heat and severe weather events, droughts and sea-level rise – businesses that emphasize both sustainability and resilience should hold more promise for investors for the foreseeable future.

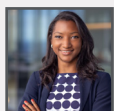
Market trends emerging in 2020 so far illustrate that sustainability has remained a focus for investors. In many ways, the pandemic provides a test case for how to deal with a crisis. Some industry segments will naturally benefit more than others. For example, historically, we have seen that renewable energy provides stable cash flows and predictable returns and is a sustainable sector that should see significant growth in the long term despite economic volatility. Adjusting to the current challenging economic environment while bolstering long term sustainability and resilience may, in fact, be complementary goals.

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Battery Metals Energize the Mining Sector, Fueling Resiliency



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When the world's economies began shutting down at the end of the first quarter, the impact on the mining sector was immediate. From March to early May 2020, commodity prices plummeted, mine site operations came to a halt across the world, supply chains were disrupted and global demand for metals, notably from China, declined. Despite this, the mining industry has remained remarkably resilient.

As of the beginning of the third quarter, most metal prices have returned to pre-pandemic levels. Copper – generally known to be a barometer for the global economy – has not only risen to pre-pandemic levels but also to its highest levels in more than two years (above \$7,000 a ton) and gold prices have skyrocketed this summer, rising above \$2,000 an ounce. Recent market updates seem to confirm this trend: copper prices are expected to remain high given China's recovery and even surged again this month following the successive reports by Pfizer and Moderna Inc. of a possible COVID-19 vaccine, and analysts are predicting that gold prices will stabilize and supply will rise starting in 2021.

The outlook is equally optimistic for battery metals (e.g., lithium, cobalt, zinc and graphite). The market for such commodities is principally driven by the demand for batteries in electric vehicles (EV), energy storage and electronic devices. Notwithstanding this year's continuing lithium price drop, the expected 20 to 25% decline in global electric vehicles' sales from pre-pandemic forecasts, and the disruption

in battery manufacturing capacity in China, demand for battery metals is expected to rise exponentially in the future. In fact, in a report published this year, the World Bank forecasted that, as more countries move towards a large-scale clean energy transition, demand for battery metals will be so high that production of metals such as cobalt, lithium and graphite will have to increase by up to nearly 500% by 2050 from 2018 levels in order to meet it.

Battery metals projects, like other mining projects, are typically financed by capital markets, institutional investors, project finance debt from commercial banks, export credit agencies and multilateral agencies and stream or royalty alternatives pursuant to which investors will provide upfront payments to mining projects in exchange for future payment in revenue or assets. The gradual overlap of the battery metals sectors with the sectors relying most heavily on these raw minerals is expected to usher in new participants in the battery metals space (at the mining project level or at different stages of the supply chain).

“ Private equity funds and institutional investors that are not typically focused on the mining industry are increasingly seeking opportunities in battery metal projects. ”

In the case of renewable energy, battery storage is now more frequently integrated with renewable energy projects. For example, battery storage allows energy generated on wind and solar farms to be stored prior to distribution. Traditional renewable energy investors are likely to seek to diversify their portfolios to

include battery metals that will ultimately be used in renewable projects. This shift has already begun, with private equity funds and institutional investors that are not typically focused on the mining industry increasingly seeking opportunities in battery metal projects by way of royalty or stream investments – two financing options historically dominated by majors and specialist funds that have traditionally limited their investment targets to the metals sector. Certain private equity investors are also seeing a buying opportunity in the historically low lithium prices. One high-profile example of a non-traditional investor seeking exposure in the upstream battery metal space is Tesla. The company first sought to ensure its battery supply by buying cobalt directly from Glencore's mines in the Democratic Republic of Congo, instead of relying on external battery producers like other carmakers. Subsequently, as announced on Tesla's most recent “battery day,” the company turned to mining its own lithium in Nevada. It is too early to conclude that Tesla's novel approach to lithium and cobalt supply is a trend of the future, but it certainly underscores the increased demand for these minerals and the relevance of their supply chain for EV carmakers.

The COVID-19 pandemic has not significantly disrupted the forecast for battery metals. In fact, some of the world's largest economies have reaffirmed commitments to the energy transition. In the US, the election of Joe Biden is expected to boost the country's renewable energy sector; in the UK, the prime minister's decision to ban the sale of new gas and diesel vehicles by 2030 is promising for electronic vehicles; and in China, the largest battery manufacturer in the world, the government has maintained subsidies and incentives in favor of electronic vehicles. It is reasonable to expect that the battery metals market will continue to expand, offering opportunities (and rewards) for traditional and non-traditional players alike.

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HOT TOPIC

COVID-19, *Force Majeure* and the Impossibility of Performance: US and UK Perspectives



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In managing the volatility and uncertainty caused by the COVID-19 pandemic, industries have continued to grapple with complex legal and commercial challenges, from manufacturing shut-downs, interrupted supply chains and quarantines, to dislocated labor markets and restrictions on trade and movement, including the practical shutdown, or near shutdown, of substantial portions of the world economy.

Moreover, governments have intervened to provide liquidity and emergency relief to credit markets and vulnerable industries and to preserve

“ **Force majeure seeks to protect parties to a contract from being held to performance obligations which, due to events outside of their own control and expectation, they cannot fulfill.** ”

payrolls. Nonetheless, pandemic-induced economic uncertainty has led many companies, lenders and investors to seek guidance on their rights with respect to contractual obligations, especially in the key area of *force majeure* provisions.

FORCE MAJEURE IN THE UNITED STATES

The concept of *force majeure* seeks to protect parties to a contract from being held to performance obligations which, due to events outside of their own control and expectation, they cannot fulfill. An assessment of a party's right to invoke a *force majeure* clause requires a review of the contract at issue. However, *force majeure* clauses

are interpreted narrowly and often are difficult to invoke.

Courts generally assess the following criteria when assessing a party's reliance on *force majeure*: (i) whether the event is *force majeure* under the contract; (ii) whether nonperformance was foreseeable and could be mitigated; and (iii) whether performance is impossible. Courts narrowly apply *force majeure* to the events enumerated in the contract. *Force majeure* clauses often list the specific events (e.g., floods, fires, and earthquakes) and/or categories of events (e.g., natural disasters, terrorism, and government actions) that can potentially excuse performance under the contract.

Even if the event giving rise to nonperformance is within the scope of the *force majeure* clause, a party generally must also demonstrate that (i) the event was unforeseeable, and nonperformance could not be mitigated, and (ii) performance is impossible, not simply economically challenging.

FORCE MAJEURE CLAUSES

As with all contractual disputes, courts generally begin their analysis of *force majeure* clauses by looking at the terms of the agreement and the intent of the drafting parties. Courts construe *force majeure* clauses narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically enumerated. When an event is not specifically enumerated in the *force majeure* clause, but there is a general catchall provision in the clause, the catchall provision is “not to be given expansive meaning.” Instead, it is “confined to those things of the same kind or nature as the particular matters mentioned.” Generally, courts also require that the event must be unforeseeable.

Even if an event in question fits within the delineated events that could potentially excuse performance under the *force majeure* clause, the nonperforming party still must establish that the event in question actually prevented, hindered and/or delayed its performance under



the contract. *Force majeure* clauses often contain provisions requiring parties to exercise reasonable diligence to avoid or overcome the *force majeure* event and its consequences, failing which performance will not be excused under the *force majeure* clause. But even in the absence of such provisions, New York courts appear to still require parties to make such a showing. Other jurisdictions, including Texas, have held that such a showing need only be made when expressly required by the *force majeure* clause.

COVID-19 AND THE SCOPE OF FORCE MAJEURE

Whether COVID-19 or the governmental actions taken to contain COVID-19 are within the scope of a *force majeure* clause depends on whether those events are listed or are of the same type of events listed in the clause. Courts construe *force majeure* clauses narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically enumerated. When an event is not specifically enumerated in the *force majeure* clause, but there is a general catch-all provision in the clause, the catch-all provision is "not to

be given expansive meaning." Instead, it is "confined to those things of the same kind or nature as the particular matters mentioned." For example, a *force majeure* clause listing floods, fires, and earthquakes likely would not include COVID-19 because disease and government action are not expressly listed. However, a *force majeure* clause listing natural disasters, terrorism, and government actions may include the government action taken to contain COVID-19, but likely would not include COVID-19 itself.

CONTRACTS WITHOUT A FORCE MAJEURE CLAUSE

Courts are likely to refuse a party's *force majeure* claim if the underlying contract does not include a *force majeure* clause. In such a circumstance, a party may look to common law tools to excuse nonperformance, such as the doctrines of impossibility and, where available, impracticability.

ECONOMIC HARDSHIP AND FORCE MAJEURE

Economic hardship does not generally provide enough basis to exercise *force majeure*. Absent express contractual provisions to the contrary, economic

factors or financial hardships generally do not constitute *force majeure* events that excuse performance under a contract. However, the specific terms of the contract at issue and jurisdiction governing their interpretation may provide a basis for considering economic hardship when exercising *force majeure*.

OVERCOMING A FORESEEABILITY REQUIREMENT IN POST-COVID-19 CONTRACTS

A party exercising a *force majeure* claim generally must establish that the event giving rise to nonperformance was unforeseeable, depending on jurisdiction. If COVID-19 is the event giving rise to nonperformance, a party likely will face difficulty in excusing performance pursuant to a *force majeure* clause if the contract was executed after the World Health Organization declared COVID-19 a pandemic because COVID-19 would be deemed a foreseeable risk. On the other hand, because the COVID-19 situation has continually changed over the course of the year, as has the response of different national, state, and local governments, a party may be able to argue that the particular consequence of these responses was not foreseeable.



FORCE MAJEURE IN THE UNITED KINGDOM

The concept of *force majeure*, a civil law derived term, has no universally applicable meaning under English law. Rather, it is to be assessed on a contract by contract basis, applying normal principles of contractual interpretation/construction.

A customary *force majeure* clause in a contract will provide contractual relief to a party affected by an event or circumstance which: (i) is beyond the reasonable control of the affected party; (ii) is not the result of any act, omission or delay of the affected party; (iii) could not have been reasonably foreseen, avoided, or reduced by the exercise of reasonable measures; and (iv) causes or results in that party not being able to perform its obligations (other than the obligation to pay money) under the contract. The contract will also typically have a non-exhaustive list of events or circumstances that would constitute a *force majeure* event (provided that the above general conditions are satisfied) such as acts of nature (sometimes referred to as acts of God, such as earthquakes, tsunami and epidemics), acts of man (such as war, industrial action, piracy, riot and sabotage) and governmental action (such as change in law, regulations and expropriation). “Disease” or

“epidemic” are frequently listed as one of the specific events or circumstances that may constitute *force majeure* (as long as the general requirements of the *force majeure* provision are satisfied), or the COVID-19 outbreak may be caught by a more general term such as “act of God,” or simply as an event or circumstance beyond the affected party’s reasonable control.

Although this list of events or circumstances is neither exhaustive nor conclusive, it should be noted that the principle of *eiusdem generis* often operates to narrow construction of such a clause when a party is trying to argue that an additional, unlisted event falls within the definition.

MAKING A FORCE MAJEURE CLAIM

To make its claim, the affected party would need to establish that the outbreak is contemplated as a *force majeure* event as an “epidemic” or an “act of God” or, if relevant, that the restrictions placed upon companies and citizens by a government in order to help contain the outbreak, are contemplated by the *force majeure* definition as “governmental action.”

Some issues that may be encountered are:

- (i) whether the outbreak could have been reasonably foreseen given the precedents for other major epidemics impacting global supplies, including the unrelated SARS outbreak in 2003;
- (ii) where the affected party may not have been directly impacted by the outbreak but rather impacted by the subsequent governmental action to contain the outbreak. In this case, the affected party would have to show that governmental action (for which the contractual relief may differ relative to an act of God *force majeure*) constitutes a *force majeure* event;
- and (iii) where the affected party is not directly affected by the outbreak but yet is unable to

perform an obligation under its contract (the affected contract) because its supplier is claiming *force majeure* due to the outbreak. In this case, the affected party will need to show that the supplier’s claim for *force majeure* meets the standards under the affected contract, and that the affected contract expressly allows a *force majeure* claim when the affected party’s performance is impacted by a *force majeure* event somewhere else along the supply chain. This is often referred to as ‘chain *force majeure*.’

It is worth noting in this regard that the English courts have held that a failure of performance due to the provision of insufficient financial resources, or loss of market due to the event, is unlikely to amount to *force majeure*. Accordingly, a change in economic/market circumstances due to the outbreak affecting the profitability of a contract or the ease with which the parties’ obligations can be performed, is perhaps unlikely to be regarded as being a *force majeure* event.

To read more about *force majeure* and the COVID-19 pandemic from the US law perspective [click here](#), and from the English law perspective [click here](#).

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FIRESIDE CHAT: Karen Wong Reflects on Her Career as a Renewable Energy Pioneer



Global Project, Energy and Infrastructure Finance partner Karen Wong, who is retiring after a distinguished career as one of the world's leading project finance lawyers, sat down with partner Allan Marks to explore how renewable energy technology and transactions have evolved globally since the early days of wind power in California. They look at how the practice of law is evolving, as technology allows for increased responsiveness and productivity, and also share personal insights on building professional teams, deepening relationships, and the importance of giving back. **To listen to the full interview on the Law, Policy and Markets: Milbank Conversations podcast episode, [Renewable Energy Past and Future: The Lawyer's Role - "Be the Change You Wish to See"](#), click [here](#).**

Edited for content and brevity.

Allan: Over the last three decades that we have worked together, the renewables sector and the practice of law has changed, and your personal philosophy has transformed. Going back 30 years to the first deal we worked on, which involved financing a small power plant near Bakersfield, California—how did it feel practicing law then, compared to how it feels today?

Karen: I always recall how little technology we had at our disposal as junior associates. With today's advances, junior lawyers can undertake more substantive work.

Allan: In our day, the financial markets were also different: they were predominantly controlled by banks and bank relationships. Now there is more disintermediation: private equity funds, infrastructure funds, insurance companies and pension funds are playing roles in earlier stages. Have these changes affected your practice, and how have you navigated these shifts in sources of capital?

Karen: Prior to Milbank, my practice mainly involved developer and lending work, but when I started at the firm's LA office in 1990, my work shifted towards being sponsor-oriented. It always felt like I had the luxury of a more diverse practice, without being primarily focused on bank side work. One of the first deals I worked on was a restructuring involving a portfolio of wind farms in Tehachapi, and that was also unique in comparison to work on thermal energy projects.

Allan: Early wind farms had issues with reliability, but there have been notable improvements in material science and equipment since then.

Karen: For the early deals, the manufacturers had to give extended warranties since the technology was so new! But over the course of our practice, we've seen deals grow from 25 megawatts to over 1000 megawatts. In just three decades, there's been a huge shift towards renewable energy.

Allan: Solar is displacing wind as the preferred renewable source. Do you see that trend continuing?

Karen: I do, because solar installations are easier than wind farm installations and the cost of solar equipment has come down.

Allan: Then there's the advent of batteries and energy storage projects—that seems to be the flavor of the day—and offshore wind.

Karen: Offshore wind projects can be complex because of their sheer size and the interplay between federal maritime and Jones Act issues, and the costs are so great. The deployment of these projects has been much slower, to a lot of sponsors' chagrin. When we first closed Block Island Wind back in 2016, that was a 30-megawatt project. The next offshore wind project turned out to be the 800-megawatt Vineyard Wind project. That was a huge jump, but bigger size projects are often necessary to make the economics work. Hopefully, the regulatory environment will support the projects slated to come down the pipeline.

Allan: Part of what attracted me to this practice was the idea of working on renewable energy projects that benefit the environment, and knowing that my work could aid in resilient, sustainable economic development.

Karen: That appealed to me, as well. And with the advances in wind and solar technology, these projects are increasingly more reliable, affordable and scalable, and critical to reducing greenhouse gas emissions. This is the type of work that keeps the sky blue, and the lights on.

Allan: We were handling a lot of overseas project finance work in the '90s and 2000s. Would you expect similar work for other lawyers in these globalized emerging markets?

Karen: The skills we have as US attorneys will definitely be in

demand and exported to other renewable projects globally. One of my clients in Vietnam is looking at an offshore wind project, while our Singapore office is also working on an offshore wind project. US attorneys will be looked to as a source of knowledge, similar to how Milbank's London office looked to us when they started working on energy projects in the Middle East.

Allan: How would you characterize the major differences between domestic and cross-border transactions?

Karen: A cross-border transaction is a US deal on steroids. In the United States, you have to consider the number of contracts, then add in the interplay between real estate, environmental permitting and financing discussions. For cross-border transactions, which invariably include government-owned entities, there are local regulations and the political environment to consider, as well.

Allan: In the US, political risk revolves around getting a project permitted and entitled. But once the facility is built, there's very low political risk, because contracts are enforced. In some other countries, in contrast, the government can make sure you have the site and the permits. But once the project is built, you might have less confidence that your contracts would be respected.

Karen: Absolutely. I worked on the Meizhou Wan project, which was the first wholly foreign-owned independent power project in China. The project got built on time, but ultimately went into litigation – different jurisdictions certainly pose unique legal risks. As lawyers, we have unique opportunities to establish the model for moving forward. I worked on the very first independent power project in Thailand and had the opportunity to speak with the state-owned utility about why certain risk allocations in the power purchase agreement were made in a specific way. It felt like being a professor: I was teaching engineers and government staff about international financing sources.

Allan: As lawyers, we often act as translator for those interdisciplinary teams. On the topic of teams: you have been instrumental in building them at Milbank. You have been involved with the recruiting committee, as well as a leader in our diversity and inclusion efforts and affinity groups. What advice do you have for building teams of associates who are not just competent and qualified, but actually enjoying their work?

Karen: Act as if everyone on the team has an important role to play, because a team is only as strong as its weakest link. By recognizing the value of each individual team member, people become engaged. Always make sure the whole team has a clear sense of the objectives and feels committed.

Allan: There used to be a lot of talk about role models. Now, it seems like empathy is at least as important. Have you seen other shifts?

Karen: When I started, the role models I was looking for didn't exist. 30 years later, though, and the firm looks very different. There's more appreciation of work/life balance, and thus more longevity among lawyers and staff. Empathy, like you said, is very important. It helps us recognize that while our job is to help our

clients, at the end of the day they are individuals and humans.

Allan: What about changes in technology? Now we have the capability to be responsive at any hour. Has that led to more stress, or more flexibility?

Karen: I believe technology is liberating, in the sense that you can work from anywhere. But at the same time, I think technological advances have created added stress by making everything immediate.

Allan: The productivity gain is huge.

Karen: I totally agree. You used to laugh at me because I liked to take red eyes, but the whole point of taking a red eye was that I didn't have to miss any time, and no one expected an immediate response.

Allan: Right, because everybody is asleep! Your responsiveness is one of the reasons clients have been so loyal to you.

Karen: I think Milbank lawyers are successful because of the trust that our clients have in us. If you are dedicated to clients' success and timely with your responses, that's half the battle.

“ I know that having legal skills to help others is a privilege. ”

Allan: Throughout your career you handled pro bono matters, working with Public Counsel and other legal aid organizations. How do your values impact your approach to law? What is your advice to junior associates who are attuned to the ways in which institutions can align with their own personal value systems and social justice goals?

Karen: I think it's important for people to remain true to themselves. Longevity in any career depends on being personally satisfied. Our work in project finance involves representing large institutions in a capital-intensive setting, and if someone wakes up every day dreading that work, then it is not a sustainable path for them. You need to have a positive outlook, and be able to derive happiness from your career, and that means your work needs to be genuine reflection of your values. I recognize that what I do may not directly erase racial inequality. But our legal skills can make a difference – through pro bono services, for instance – by helping to address some of those issues. We can use our education and our financial success to contribute to organizations dedicated to our values. I have always viewed philanthropy as a privilege, and I know that having legal skills to help others is also a privilege.

Allan: With that privilege comes responsibility, but in this case, the resources to make a difference.

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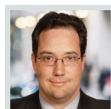


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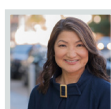
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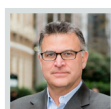


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