voting entitlements will usually also include the crystallized termination amounts owed to each hedge provider.

7.124 *Regulation of voting entitlements*: A number of borrower friendly refinements to voting and intercreditor mechanics that have developed in the leveraged buy-out and high yield bond markets have now found their way into the more conservative project finance market and, in projects with strong sponsors, appear to have become regularly used. The most recognizable of these are the so called 'yank-the-bank' and 'snooze-you-lose' clauses. The former enables the borrower to buy out a lender who does not consent to a particular voting request where the majority are otherwise in favour. The latter enables the relevant lender agent to exclude from the tally the vote of any creditor which does not respond to a voting request in a timely fashion, effectively disenfranchizing them. A more aggressively drafted snooze-you-lose clause may provide that a creditor would be deemed to have consented to a voting request if it did not signify its acceptance or objection to that request within a prescribed period.

7.125 Another measure is the stepped voting structure. Borrowers will want to ensure that enforcement action is very much a last resort and that as broad a spectrum of creditors as possible is involved in a decision to enforce the security (thereby reducing the chances of being held hostage by a rogue lender). An increasing number of voting provisions therefore make a distinction between 'fundamental' events of default (such as non-payment, insolvency, or loss of concession rights) which entitle the lenders to take enforcement action at a lower voting hurdle more quickly, and other, less cardinal defaults. Thus, the documents could require that for the first sixty days following the occurrence of a fundamental event of default, a 'supermajority' voting threshold would be required to commence enforcement action before dropping down to a less exacting threshold. On the other hand, the supermajority requirement might apply for twice as long in the case of less material defaults, before stepping down. These mechanics are likely to be heavily negotiated and the occurrence of defaults that bring third party creditors into the equation, such as the insolvency of the borrower, will entitle a simple majority to insist on enforcement. Ability to block the project accounts will usually be automatically triggered by an event of default, or require a simple majority vote.

7.126 Common voting structures include:

(1) *One dollar, one vote*: Usually, each lender's voting power will be directly proportionate to its monetary exposure and votes will be determined by the percentage of all commitments or outstandings. This approach is popular for its user-friendliness and fairness.

(2) *Block voting:* Another commonly employed voting structure is 'block voting' where lenders within a particular debt tranche are assigned a vote equal to the amount of the debt in the tranche as a group but, within each tranche of debt will vote on the basis of their individual exposure. Under this structure, passing a measure requires the vote of a majority of the lenders in each of the various

debt tranches, thus requiring a high degree of consensus among the lending group as agreement will be necessary both within each tranche and also across all tranches. This system may delay decision making.

(3) *Golden vote*: A variant to the exposure vote system is to require the consent of particular lenders within the group over and above the absolute voting thresholds. Thus a minority group could exercise a disproportionately greater decision-making power than would otherwise be possible under other structures. Moreover, determining which lenders should hold a golden vote and when the golden vote should apply is often challenging. Each lending group and each lender will tend to view itself as deserving of special recognition, given their particular market or political position and many will likely resist conceding the special treatment afforded to a co-lender/lending group. The golden vote is also commonly employed by governments in particular strategic industries.

(4) *Consultation*: Occasionally, the borrower will push for inclusion of a consultation period before a vote can be taken, particularly with respect to taking enforcement action. The usefulness of this device is, however, doubtful as most reputable lenders will, in any event, only take enforcement action as a last resort and consultation will occur as a natural part of the deliberations leading to such action.

If a project becomes distressed, the subordinated lenders will be the first to quickly **7.127**
lose any value, particularly if the senior creditors take enforcement action against the project assets. Warrants and equity held by mezzanine or other subordinated lenders will at that point become virtually worthless (if they are not already so) unless they can take steps to protect long-term value. Forming a view of where value breaks, and carefully reviewing the underlying transaction documents to uncover strategies that may have hold-out value, can ultimately improve recovery rates. In *Barclays Bank Plc and others v HHY Luxembourg SARL and another* (Rev 1) [2010] EWCA Civ 1248, the Court of Appeal held that the release on disposals clause in an intercreditor agreement in relation to a company's liabilities would apply equally to the subsidiaries of the company whose shares are being sold by way of enforcement.

Senior lenders' right to release subordinate security

Once they become entitled to take enforcement action, the senior lenders will wish **7.128**
to be free to instruct the security agent: (1) to release all the subordinated debt upon an enforcement of security; and (2) if they enforce security over an asset which is subject to mezzanine security, to release mezzanine security over that asset.

Considerations affecting hedge providers[33]

Voting rights: Hedge providers will usually only be entitled to vote in a default or **7.129**
enforcement situation and then only in respect of crystallized termination amounts.

[33] For analysis of hedging in project financed transactions, see para. 4.49 et seq.

If a sponsor-affiliated entity is acting as hedge provider, it will rarely have any voting rights. Hedging liabilities usually 'crystallize' when the hedges are terminated upon a specified event, commonly the occurrence of a default or acceleration by the senior lenders or the passage of a given period thereafter following which the hedging bank may unilaterally terminate. The postponement of a hedge provider's voting rights is a pragmatic reflection on the difficulty and potential delay in calculating closeout amounts in the time available to make a decision as well as a recognition of the fluctuating nature of such amounts.

7.130 *Drag along*: Where a hedge provider has the benefit of the undertakings in the senior facility agreements, it is commonly the case that they are deemed to waive or modify such undertakings to the same extent as senior lenders may waive or modify them.

7.131 *Information rights*: Consideration is sometimes given as to whether hedge providers should be entitled to receive all information delivered to senior lenders under the senior facility agreements, including notices of repayments and prepayments or whether to restrict such information rights prior to default or the occurrence of an enforcement event. This is usually not controversial where the lending or sponsor group is also providing the hedging.

7.132 *Hedge provider undertakings*: A hedge provider will typically covenant not to:

(1) terminate (or close out any transaction under) any hedging document prior to its stated maturity otherwise than:

  (a) upon the occurrence of a specified default; or
  (b) if it (or its relevant lender affiliate) is prepaid in full as a lender or is subject to a mandatory transfer in full (pursuant to 'yank the bank' provisions in the finance documents to avoid the spectre of 'orphan hedges'); and

(2) transfer its rights under any hedging document other than to a person that accedes to the intercreditor agreement.

ECA covered loan voting mechanics

7.133 ECAs may require a veto right in respect of representations, covenants and/or events of default relating to such matters as corrupt practices and environmental undertakings, including compliance with environmental laws and any environmental and social management plans. These rights are seen as critical to avoiding reputational damage that could arise as a result of such breaches and to ensure compliance with the applicable OECD guidelines.

7.134 In addition, as noted above, ECAs providing insurance or guarantee cover will, as a general rule, direct the manner in which voting rights held by lenders benefiting from their cover are exercised; however, if the relevant guarantee or insurance policy is terminated or is invalid or unenforceable, the lenders cease to be under such direction. The covered lenders will nevertheless have a vote on a limited number of matters, including amendments or waivers to the terms of the covered facility agreement to which they are a party or which are capable of adversely affecting their rights thereunder.

Considerations affecting project bonds

Bondholders will typically rank *pari passu* with the senior bank lenders but the latter will usually have the benefit of a considerably more conservative covenant and events of default package. Over the life of the project loan, the borrower is likely to seek, and the bank lenders are likely to grant, a number of amendments, waivers, and consents in respect of that package. On the other hand, a bond financing typically features a very large constituency of usually passive investors, making the process of obtaining amendments or waivers from bondholders expensive and laborious. Bond covenants consequently are usually structured as 'incurrence' as opposed to 'maintenance' covenants (i.e. covenants capable of being breached by the borrower's positive action). **7.135**

However, a multi-sourced project financing featuring both bank and bond financing poses a 'cross-contamination' challenge because the bondholders will, through the common finance documents, such as the intercreditor agreement, gain indirect access to the bank lenders' broader covenant package and maintenance covenants. Previously, bondholders would cede decision making to a monoline insurer, thereby ensuring a more streamlined decision making process irrespective of the nature of the decision required to be made. With the collapse of the monoline insurance market, the natural successor would be the bond trustee. However, bond trustees rarely take decisions without consulting with, and being indemnified by, bondholders. **7.136**

Current practice is to minimize the circumstances in which the bondholders' consent is required. As such, intercreditor agreements commonly provide that bondholder consent need not be obtained if an independent consultant certifies that the required amendment or waiver would not adversely affect the bondholders in a material respect. The intercreditor agreement also typically allows the borrower to obtain routine waivers and consents without the bondholders' approval if a prescribed threshold of bank lender approval (usually between 20 and 30 per cent) is obtained, with the effect that a vote by the bank lenders in those circumstances is binding on the bondholders. Obviously, these devices will not apply to more fundamental decisions that affect the common security or the economics of the project and the bond debt. **7.137**

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8

OFFICIAL FUNDING SOURCES: EXPORT CREDIT AGENCIES AND MULTILATERAL DEVELOPMENT BANKS

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General Overview

Export credit agencies and multilateral development banks are an essential source of capital for the financing of cross-border trade, including for the financing of major infrastructure projects worldwide. Historically, the role of these institutions in capital-intensive project financings has been to facilitate sponsors' access to capital in regions where commercial and political risks were deemed to be the greatest and where commercial credit providers were either unwilling or unable to make loans without some element of political or country risk mitigation. As might be expected, the primary goal of providing these credits was (and remains), in the case of export credit agencies, to support exporters in the home country of the relevant export credit agency and, in the case of multilateral development banks, to support economic and social development goals in the country or region targeted for investment. While these lending institutions have always played a major role in facilitating cross-border investment, the recent upheavals in the global markets arising from the 2008–2010 economic crisis (and the resulting constriction of available capital 8.01

to project developers from traditional commercial funding sources) has served to enhance the importance of export credit agencies and multilateral development banks in global commerce and international development. For these reasons, it is important to understand the differences between export credit agencies (ECAs) and multilateral development agencies (multilaterals), and to understand how these types of institutions fit into the spectrum of financing alternatives available to project developers.

ECAs and Multilaterals Generally

8.02 ECAs and multilaterals are—at the most intrinsic level—government-backed suppliers of financing and other credit support. The fact that these types of institutions find their roots in politics, rather than commerce, means that they possess a variety of tools that are not available to commercial entities alone. Among the most important of these tools are the ability to offer financial terms that are more generous than their commercial counterparts, as well as the ability to provide both 'hard' and 'soft' political protections for the projects in which they invest. These agencies have of late also been recognized for their ability to provide a stable flow of fresh capital during both good and bad times, making them attractive market participants in all types of credit environments.

Export credit agencies defined

8.03 An ECA is an arm or agency of a national government, created for the purpose of promoting or facilitating exports from that nation to other countries, and by so doing, contributing to national employment and overall national economic well-being in the ECA's home country.[1] Consistent with these objectives, an ECA might also be empowered to promote or facilitate national investment overseas and/or the exchange of commodities between its home country and other nations. ECAs are generally funded by the national treasury of their home nation, and virtually every nation in the world that is active in the global economy has its own ECA. Figure 8.1 gives a global list of ECAs.

[1] See, for example, s 2(a)(1) of the Export-Import Bank Act of 1945, as amended ('The objects and purposes of the Bank shall be to aid in financing and to facilitate exports of goods and services, imports, and the exchange of commodities . . . and in so doing to contribute to the employment of United States workers. The Bank's objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers.'); see also Art. 1 (Purpose) of the Export-Import Bank of Korea Act ('to promote the sound development of the national economy and economic cooperation with foreign countries by providing financial assistance required for export, import, overseas investment and the exploitation of overseas natural resources').

Figure 8.1 List of Export Credit Agencies (By Country)

Country	Name	Abbreviation
Argentina	Banco de Inversión y Comercio Exterior	BICE
Australia	Export Finance and Insurance Corporation	EFIC
Austria	Oësterreichische Kontrollbank AG	OeKB
Belgium	Office National du Ducroire	ONDD
Brazil	Banco Nacional de Desenvolvimento Econômico e Social	BNDES
Canada	Export Development Canada	EDC
China	China Export and Credit Insurance Corporation	SINOSURE
	The Export-Import Bank of China	CHEXIM
	China Development Bank	CDB
Colombia	Segurexpo de Columbia	Segurexpo
Croatia	Croatian Bank for Reconstruction and Development	HBOR
Czech Republic	Export Guarantee and Insurance Corporation	EGAP
	Czech Export Bank	CEB
Denmark	Eksport Kredit Fonden	EKF
Ecuador	Corporación Financeiera Nactional Fondo de Promoción de Exportaciones	CFN
Finland	Finnvera plc	Finnvera
	Finnish Export Credit Ltd	FEC
	Finnfund	Finnfund
France	Compagnie Française d'Assurance pour le Commerce Extérieur	COFACE
	Direction des Relations Economiques Extérieures (Ministere de L'Economie)[2]	DREE
	Promotion et Participation pour la Coopération Économique[3]	PROPARCO
Germany	Deutsche Investitions–und Entwicklungsgesellschaft mbH	DEG
	Euler Hermes Kreditversicherungs-AG	Hermes
	KfW IPEX Bank[4]	KfW
Greece	Export Credit Insurance Organization	ECIO
Hong Kong	Hong Kong Export Credit Insurance Corporation	HKEC
Hungary	Hungarian Export Credit Insurance Ltd	MEHIB
	Hungarian Export-Import Bank	Eximbank
India	Export Credit Guarantee Corporation of India Ltd.	ECGC
	Export-Import Bank of India	I-Eximbank

[2] This entity may more appropriately be classified as a bilateral agency rather than an ECA.
[3] This entity may more appropriately be classified as a bilateral agency rather than an ECA.
[4] While still nominally tied to the German government, this entity operates more as commercial bank rather than as an ECA.

Figure 8.1 List of Export Credit Agencies (By Country)—(*Cont'd*)

Country	Name	Abbreviation
Indonesia	Asuranski Ekspor Indonesia	ASEI
Iran	Export Guarantee Fund of Iran	EGFI
Israel	The Israel Export Insurance Corporation	ASHRA
Italy	Servizi Assicurativi del Commercio Estero (SACE SpA)	SACE
Japan	Japan Bank for International Cooperation	JBIC
	Nippon Export and Investment Insurance	NEXI
Korea	The Export-Import Bank of Korea	KEXIM
	Korea Trade Insurance Corporation	K-sure
Luxembourg	Office du Ducroire	ODD
Malaysia	Malaysia Export Credit Insurance Berhad	MECIB
Mexico	Banco National de Comercio Exterior	BANCOMEXT
Netherlands	Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden N.V.	FMO
	Atradius	Atradius
New Zealand	Export Credit Office	ECO
Norway	The Norwegian Guarantee Institute for Export Credits	GIEK
Oman	Export Credit Guarantee Agency	ECGA
Philippines	Philippine Export-Import Credit Agency	PhilEXIM
Poland	Korporacja Ubezpieczén Kredytów Eksportowych	KUKE
Portugal	Companhia de Seguro de Créditos, S.A.	COSEC
Romania	EXIMBANK Romania	EximBank
Russia	Export-Import Bank of the Russian Federation	Eximbank
Singapore	Export Credit Insurance Corporation of Singapore Ltd.	ECICS
Slovak Republic	Export-Import Bank of the Slovak Republic	Eximbank SR
Slovenia	Slovene Export Corporation	SEC
South Africa	Credit Guarantee Insurance Corporation of Africa Limited	CGIC
Spain	Compañía Española de Seguros de Crédito a la Exportacion, S.A.	CESCE
	Secretaría de Estado de Comercio (Ministerio de Economía)	MCX
Sri Lanka	Sri Lanka Export Credit Insurance Corporation	SLECIC
Sweden	Exportkreditnämnden	EKN
	Svensk Esportkredit	SEK
Switzerland	Swiss Export Risk Insurance	SERV
Thailand	Export-Import Bank of Thailand	Thai Exim
Trinidad & Tobago	Export-Import Bank of Trinidad & Tobago	Eximbank
Turkey	Export Credit Bank of Turkey	Türk Eximbank

Figure 8.1 List of Export Credit Agencies (By Country)—(*Cont'd*)

Country	Name	Abbreviation
Ukraine	State Export Import Bank of Ukraine	Ukreximbank
United Kingdom	Export Credits Guarantee Department	ECGD
United States	Export-Import Bank of the United States	US Exim Bank
	Overseas Private Investment Corporations	OPIC
Uzbekistan	Uzbekistan National Export-Import Insurance Company	Unic

While significant overlap exists, the range of ECA mandates differs widely depending on the home country and the policy objectives the applicable ECA was created to further or promote. Whereas resource-constrained countries may seek to emphasize the securing of raw materials, other countries may focus singularly on the promotion of domestic producers, and yet others may view national objectives in a broader light and instead focus on encouraging an environment of global trade that is conducive to the over-arching goal of promoting national economic well-being. By way of example, the Export-Import Bank of the United States (US Exim Bank) focuses primarily on the promotion of US exports,[5] with each of its primary credit products being strictly tied to the US content of the goods being acquired.[6] Conversely, Export Development Canada (EDC) provides funding that is not strictly tied to exports, with a focus that is more related to the potential benefit of the applicable investment to Canada (as measured by research and development potential, market share maintenance or growth, and the number of primary/lead contractor designations for projects).[7] Other ECAs have a dual existential purpose—to serve the home economy through the promotion and facilitation of trade and investment (the 'pure' ECA purpose) while at the same time also having a developmental mission more akin to that of a multilateral (even if such developmental mission is ultimately tied to fostering a trade environment that is intended to support the domestic economy). An example, of this is the Japan Bank for International Cooperation (JBIC), which represents the amalgamation in 1999 of the former **8.04**

[5] This focus was recently confirmed through President Obama's stimulus package, whereby the US has committed—through US Exim Bank—to doubling US exports over the next five years. See 'Ex-Im's Day' in *Congress Daily*, 13 May 2010 (available at <http://www.usaexport.org/data/upload_articles/Exim's%20Day%20-%20Congress%20Daily.pdf>).

[6] See mission statement of US Exim Bank, available at <http://www.exim.gov/about/mission.cfm> ('Ex-Im Bank's mission is to assist in financing the export of US goods and services to international markets. Ex-Im Bank enables US companies—large and small—to turn export opportunities into real sales that help to maintain and create US jobs and contribute to a stronger national economy.').

[7] See mandate and role of EDC, available at <http://www.edc.ca/english/corporate_mandate.htm> ('EDC's mandate is to grow and develop Canada's trade, and the capacity of Canadian companies to participate in and respond to international business opportunities. EDC provides trade finance and risk mitigation services to Canadian companies to help them compete internationally.').

Export-Import Bank of Japan and the Japanese Overseas Economic Fund. Covering both policy goals, JBIC has the purpose of 'contributing to the sound development of Japan and the international economy and society', and its credit products may either be tied to exports (to support Japanese industry) or imports (to obtain commitments of strategically important materials to Japan), or be altogether untied (to support overseas business environments to facilitate Japanese trade).[8]

Multilateral development banks defined

8.05 Multilateral development banks are bodies or agencies created by international agreement among multiple nations whose purpose is to promote development among all or certain member states.[9] These development goals focus primarily on the economic and social benefits to be achieved through the investment, as well as corollary matters such as protection of the environment and sustainability. Unlike ECAs, multilaterals are generally funded or financed by contributions from member states party to the multilateral agreement or other arrangement creating such multilateral.

8.06 As described in further detail below, multilaterals function both globally and regionally. The World Bank Group is the principal globally active multilateral, providing private sector financing through the International Finance Corporation (IFC) and political risk insurance through the Multilateral Investment Guarantee Agency (MIGA). Other multilaterals function on a more regional basis. Examples of regional multilaterals include the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), the African Development Bank (AfDB), the Inter-American Development Bank (IADB) and the Asian Development Bank (ADB).[10] Common among each of these multilaterals is a desire to leverage their capital with that of the private sector, through co-financings or otherwise, while at the same time taking care not to displace or 'crowd out' private capital which might be available for a given use or project in the absence of multilateral participation.

[8] See Art. 1 of the Japan Finance Corporation Act, Act No. 57 of 2007, available at <http://www.jbic.go.jp/en/about/company/law/pdf/japan-finance-corporation-act.pdf> ('The Japan Finance Corporation . . . has the purpose of contributing to the sound development of Japan and the international economy and society and to the improvement of the quality of national life, by taking responsibility for (i) the financial function to provide for procurement assistance to the general public . . . and (ii) the financial function to promote the overseas development and securement of resources which are important for Japan'). Note that, to maintain brand awareness, the international finance arm of the Japan Finance Corporation continues to use the name of JBIC.

[9] See e.g. Art. 1, s 1 of the Agreement Establishing the Inter-American Development Bank, as amended ('The purpose of the Bank shall be to contribute to the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively.').

[10] See Figure 8.2 for a global list of multilaterals.

Figure 8.2 List of Multilateral Development Institutions

Name	Abbreviation
African Development Bank	AFDB
African Development Fund	ADF
Andean Development Corporation	CAF
Arab Bank for Economic Development in Africa	BADEA
Arab Fund for Economic and Social Development	AFESD
Arab Investment & Export Credit Guarantee Corporation	DHAMAN
Arab Monetary Fund	AMF
Arab Organization for Agricultural Development	AOAD
Asian Development Bank	ADB
Caribbean Development Bank	CDB
Central American Bank for Economic Integration	CABEI
Central African States Development Bank	CASDB
East African Development Bank	EADB
European Bank for Reconstruction and Development	EBRD
European Investment Bank	EIB
European Investment Fund	EIF
Financial Fund for the Development of the River Plate Basin	FONPLATA
Fund for Co-operation, Compensation and Development (Economic Community of West African States)	ECOWAS Fund
International Bank for Reconstruction and Development	IBRD (World Bank)
Inter-American Development Bank	IADB
International Development Association	IDA
International Fund for Agricultural Development	IFAD
Islamic Development Bank	IsDB
International Finance Corporation	IFC
Multilateral Investment Guarantee Agency	MIGA
Nordic Development Fund	NDF
Nordic Investment Bank	NIB
OPEC Fund for International Development	OECD
Saudi Fund for Development	SFD
United Nations African Institute for Economic Development and Planning	IDEP
West African Development Bank	BOAD

Other governmental and quasi-governmental funding sources

8.07 While not the primary focus of this chapter, it is worth noting the existence of other 'official' funding sources that cannot cleanly be categorized as ECAs or multilaterals. A good example is the Overseas Private Investment Corporation (OPIC), a development finance institution that is an agency of the US government whose purpose is to promote economic development in new and emerging markets through US private sector investment in a manner that is complementary with US foreign policy objectives.[11] By its authorizing statute, OPIC is limited to participating in projects that meet specific eligibility criteria, including substantial US person participation in the relevant project. Much like an ECA, OPIC provides two primary forms of support to projects: (1) financing support, where OPIC provides either a loan guaranty or a direct loan; and (2) political risk insurance. In France, the mission of Promotion et Participation pour la Coopération Économique's (PROPARCO) is to be a catalyst for private investment in developing countries which target growth and sustainable development. PROPARCO is a bilateral agency partly owned by Agence Française de Développement (AFD) and private shareholders. It finances operations which are economically viable, socially equitable, environmentally sustainable, and financially profitable, and it tailors its operations to the level of a country's development, focusing on infrastructure and equity investments. PROPARCO's products include a range of financial instruments for private investors in developing countries, including direct loans and equity guarantees.[12] Another example of a development finance institution is the Millennium Challenge Corporation (MCC), whose purpose is to provide large-scale grants to less developed countries to fund projects aimed at reducing poverty.[13] Grants given by MCC fall into two categories: 'compacts', which are five-year grants for countries meeting MCC's eligibility requirements,[14] and 'threshold programs', which are generally smaller sized grants awarded to countries that substantially

[11] See Title IV, s 231, Foreign Assistance Act of 1961 (P.L. 87-195) (establishing OPIC and stating that the purpose of it is to 'mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas . . . thereby complementing the development assistance objectives of the United States').

[12] See generally PROPARCO's website, <http://www.proparco.fr> (providing mission statement and background information of PROPARCO).

[13] See Millennium Challenge Act 2003 (P.L. 108-199) (establishing the Millennium Challenge Corporation and stating that the purpose of it is to provide 'assistance in a manner that promotes economic growth and the elimination of extreme poverty and strengthens good governance, economic freedom, and investments in people').

[14] See Selection Criteria for Countries Eligible for MCC Assistance, available at <http://www.mcc.gov/mcc/selection/index.shtml> (indicating that: 'for a country to be selected as eligible for an MCC assistance program, it must demonstrate a commitment to policies that promote political and economic freedom, investments in education and health, the sustainable use of natural resources, control of corruption, and respect for civil liberties and the rule of law as measured by 17 different policy indicators.').

meet MCC eligibility requirements (and undertake to fully meet those requirements).[15]

Similarly, domestic loan incentives, subsidies and loan guarantees are available in certain countries for both domestic and foreign-owned investors. An example is the US Department of Energy's Loan Guarantee Program, established under Title XVII of the Energy Policy Act of 2005, which provides a mechanism for US federal support of clean energy projects that use innovative technologies as well as investments in new innovative technologies. Under this program, the Secretary of Energy is authorized to make loan guarantees to support qualified projects. In Japan, the Ministry of Economy, Trade and Industry (METI) helps foster foreign direct investment into Japan. METI supports foreign companies by matching them with Japanese companies interested in establishing business partnerships, and by inviting and assisting individuals from abroad in establishing companies in Japan.[16] **8.08**

These programmes and entities, while not directly tied to exports or development, do provide project developers with other options for officially backed credits where the requirements for ECA or multilateral funding may not otherwise be met. **8.09**

Funding Considerations

Sponsors and project companies have much to gain by considering ECAs and multilaterals in their mix of funding sources, since these institutions are generally perceived as being able to offer more competitive cost of funds and longer tenors than might be available, if at all, in the commercial lending market for projects being developed in more challenging markets. The remit of these institutions is also to promote best practices, and so sponsors need to be prepared to face higher levels of scrutiny, increased documentary and sourcing requirements, and stricter covenant packages when negotiating the terms of their credit. Understanding the different products that are available and the limitations that may apply when working with an ECA or a multilateral is critical to the decision as to whether to access guarantees or financing from entities of this type. **8.10**

[15] See Millennium Challenge Threshold Program, available at <http://www.mcc.gov/mcc/panda/programs/threshold/index.shtml> (stating that MCC selects countries for the Threshold Program based on: (1) the country's overall performance on all 17 MCC policy indicators; (2) the country's commitment to improving their scores on each of the 17 MCC policy indicators that they have failed; and (3) the country's ability to undertake reform).

[16] See generally METI's website, available at <http://www.meti.go.jp/english/index.html> (providing history of METI, organizational charts, and a listing of the agencies that make up METI).

Credit alternatives with export credit agencies

Guarantees and direct loans

8.11 ECAs generally offer credits in support of trade or investment that are 'tied' credits—meaning that the amount and required use of the credit are limited to a percentage of the value of the exported goods and services from the ECA's home country and related finance charges (i.e. interest during construction), or to the value of the supported home country private sector investment overseas, as the case may be. ECAs typically offer these types of credits in the form of guarantees of third party debt and/or in the form of direct loans. Such home country 'sourcing' requirements are in most instances the key factors when deciding which ECA to approach.

8.12 The calculation of eligible 'tied' content of goods and services requires detailed preparation in conjunction with the exporters of goods and services sourced from the country of the relevant ECA. Commonly, a sponsor will be assisted in the preparation of an the application to the relevant ECA, by the relevant exporters of such goods or services and by a financial adviser with working knowledge of the procurement rules and documentation of that ECA. The criteria for eligibility for 'tied' content is specific to each ECA. However, common factors include the source of the content; the timing of the shipping of content compared with the application process; the national flag of the vessel shipping exported content; whether the content is sourced from a related party to the sponsors and, if so, whether such sourcing is on arms' length terms; and the nature of the goods or service (for example, whether it is a capital cost, a finance charge, a contingency built into the contract value relating to the service or goods to be financed, etc.). In addition to goods and services sourced from the country of the ECA, a percentage of eligible local costs can typically also be co-financed by the same ECA.

8.13 The distinctions between direct loans and debt guarantees are exactly as the names imply. ECAs that are able to make direct loans are able to fund directly to project companies, in the case of 'tied' facilities, upon confirmation that the proceeds of such loans will be used to satisfy (or reimburse the borrower for) the above-described sourcing requirements. For other ECAs, due to internal liquidity restrictions, direct funding of a loan is not an option—for these entities, the mechanism for providing official funding credits in support of exports is through the provision of debt guarantees (as further described below) to third party commercial lenders who provide loan advances directly to the project company. The Italian ECA—Servizi Assicurativi del Commercio Estero (SACE)—is an example of the latter type of ECA, insofar as its primary mechanism for providing export credits is by guaranteeing loans granted by commercial banks to foreign borrowers to finance Italian exports or civil works executed overseas by Italian companies or their foreign subsidiaries.[17]

[17] Other forms of credit support offered by SACE include political risk insurance policies and the issuance of surety bonds on behalf of Italian suppliers. See Profile of SACE, available at <http://www

Political and comprehensive risk coverage

ECA debt guarantees include both guarantees against political risks as well as guarantees against all risks—commercial and political (i.e. 'comprehensive guarantees'). Historically, political risk guarantees were the staple long-term credit product of many ECAs. This is because so many ECAs supported private sector transactions involving the sale of goods and/or services from the developed country of origin to a developing and emerging market, where private sector capital has historically been unavailable due to its inability to absorb political or country risks perceived to be greater in such markets than in the developed world. While there are important differences among individual ECAs, such political risk debt guarantees generally cover private sector lenders against loss resulting from: **8.14**

(1) expropriation or nationalization of the project or its assets;
(2) currency conversion or transferability restrictions (including cancellation of export rights); and
(3) war and politically motivated violence.[18]

In certain cases, such coverage also includes breach of contract or contract repudiation coverage where the counterparty to a key agreement or contract in the particular ECA-supported transaction is an instrumentality of the host government in which a project may be located (such as a power purchase agreement with a state-owned electric utility or a concession with state agency). Political risks that are not typically covered include:

(1) currency devaluation;
(2) increased taxes (except for breach of contract coverage of the type described above in cases where an 'implementation agreement' or 'investment agreement' between a sponsor and a host government exists and 'freezes' a taxation regime applicable to the relevant investment);
(3) legal system risk; and
(4) strikes that are not country or industry-wide.

In the context of major international project financings, some ECAs used to combine their political risk debt guarantee product with a direct 'take-out' loan made at 'project completion', with the effect that the ECA would take political risk during the project's construction period and comprehensive risk thereafter. While still an important product, stand-alone ECA political risk debt guarantees have become much less prevalent in large international project financings since the Asian **8.15**

.sace.it/GruppoSACE/content/en/corporate/sace_group/profile/index.html> (providing general background information on the forms of credit support offered by SACE).

[18] MIGA defines political risks generally as risks that: 'are associated with government actions which deny or restrict the right of an investor/owner: (i) to use or benefit from his/her assets; or (ii) which reduce the value of the firm. Political risks include war, revolutions, government seizure of property and actions to restrict the movement of profits or other revenues from within a country.' See <http://www.pri-center.com/directories/glossary.cfm>.

economic crisis of the late 1990s. Increasingly, in such transactions, ECA debt guarantees are taking the form of comprehensive cover against all risks.

8.16 ECA debt guarantees (whether against political or comprehensive risks) generally provide for payment by the ECA guarantor if a borrower cannot pay scheduled interest or principal on the guaranteed debt as a result of any of the covered risks. In certain cases, the guarantee may be triggered by other, unscheduled payment failures resulting from a covered risk (such as a failure to make a mandatory prepayment), although this is less common and it is generally the rule that such guarantees extend only to the stipulated covered percentage of scheduled principal and (non-default) interest thereon. Increased costs, funding losses, and general indemnification obligations are almost universally never covered by ECAs. When a borrower defaults in the payment of a covered amount, such guarantees will generally (although not always, and often with waiting periods before payments may be made) provide for the payment by the ECA to the guaranteed lender of the specific covered amount which the borrower failed to pay, rather than for a one-time, lump-sum payout by the ECA of the entire guaranteed debt.

Political risk insurance

8.17 As discussed in Chapter 4,[19] political risk insurance (PRI) is another mechanism whereby political risks can be mitigated to support the need of international investors. Although a commercial market for PRI does exist, it has historically been (and remains) an important product for many ECAs and other official credit providers in developing world infrastructure projects, although many government providers encourage investors to look first to commercial markets before seeking to obtain policies from official sources. These policies are quite similar to political risk debt guarantees in terms of the covered 'political' risk events, and the existence of such a policy can often facilitate equity investors' ability to obtain financing—whether from commercial or official funding sources—on more favourable terms. As with their direct loan and debt guarantee products, the policy goals of the ECA providing a PRI policy will dictate the extent to which such policies can be made available to the relevant investor, and many of the same policy requirements (i.e. compliance with environmental and social standards; anti-corruption, etc.) that apply to direct loan and debt guarantee products are applicable to PRI policies issued by ECAs.

Working capital facilities

8.18 In addition to direct export credits, ECAs will sometimes offer credits for working capital facilities intended to be made available to potential exporters. The EDC Supplier Financing Program is a good example—under this program, EDC will buy promissory notes issued to a small- or medium-sized exporter by a foreign buyer related to the sale of Canadian goods and services. Doing so reduces the risk

[19] See para. 4.56 et seq.

of non-payment and increases access to cash, and is available for contracts with relatively simple payment terms and with repayment terms of up to two years. The Export-Import Bank of Korea (K-Exim) offers a similar program through its Technical Service Credit that is extended to Korean companies for the export of technical services abroad, including overseas construction products. Repayment terms are two years or more, and repayment of principal typically occurs in instalments or in a lump-sum. Yet another example of an ECA support program is US Exim's Working Capital Guarantee Program. These working capital loans, made by commercial lenders and backed by US Exim Bank's guarantee, enable US exporters to obtain loans that facilitate the export of goods or services. Generally, US Exim Bank guarantees 90 per cent of the bank loan (including principal and interest) and typically loan terms are from one to three years. Exporters may use the guaranteed financing in a variety of different ways, including to: (i) pay for raw materials, equipment, supplies, labour, and overheads to produce goods and/or provide services for export; (ii) cover standby letters of credit; (iii) finance foreign receivables; or (iv) purchase finished products for export.

Rules applicable to ECAs

One area of concern related to ECA financing is the risk that government provided export credits have the potential to create significant distortion of global trade as a result of subsidies in the form of favourable or concessionary ECA financing terms. To address this concern, agreements have been entered into among certain ECAs that regulate the terms pursuant to which ECA funding may be provided. **8.19**

The Arrangement

In order to provide for a common framework for the orderly use of ECA credits, and specifically to provide for a level playing field whereby international trade competition is based on price and quality of the exported goods and not on the terms and conditions of related country ECA support, certain member countries[20] of the Organisation for Economic Cooperation and Development (OECD) in 1978 adopted the 'Arrangement on Export Credits' (the Arrangement), which is often referred to as the 'OECD Consensus'. The Arrangement is a voluntary 'gentleman's agreement' among its participants, with provisions for information sharing and monitoring among such ECAs being intended to promote transparency and ensure compliance. A participating ECA may deviate from the Arrangement rules to match financial and other terms offered by another ECA, or the participants can collectively agree to offer a 'common line' in relation to a specific transaction. In such cases, the Arrangement includes procedures to ensure consultation and agreement. Although the Arrangement does not have the force of law, it is generally credited **8.20**

[20] As of February 2011, the participants to the Arrangement are: Australia, Canada, the European Community (all 27 member states), Japan, Korea, New Zealand, Norway, Switzerland, and the US.

with having introduced discipline into the marketplace and most commentators agree that it has been successful in avoiding many of the more severe international trade distortions resulting from government subsidy. The Arrangement applies to ECA credits with a maturity of two years or more and establishes, among other things, minimum down payment requirements on supported sales of goods and services, maximum permitted levels of support for export and local costs, maximum principal repayment periods, required commencement dates for repayment of principal, minimum interest rates, and minimum risk-based premium fees. The basic rules of the Arrangement require that:

(1) the first principal repayment and the first payment of interest occur within six months of the 'starting point of credit';
(2) interest ceases to be capitalized after the 'starting point of credit';
(3) equal instalments of principal in respect of the credit be repaid no less frequently than semi-annually (although 'mortgage-style' amortization involving fluctuating principal repayments is allowed for lease transactions and nuclear power plants);
(4) interest be repaid no less frequently than annually (semi-annually for nuclear power plants); and
(5) the credit have a maximum weighted average life not to exceed:
    (a) in the case of exports to sovereign buyers (or exports guaranteed by a sovereign), four years where the export destination is a high income country and five-and-a-quarter years where the export destination is a non-high income country;
    (b) in the case of exports to non-sovereign buyers which are not guaranteed by a sovereign, five years where the export destination is a high income country and six years where the export destination is a non-high income country;
    (c) in the case of non-nuclear power plants (regardless of whether a sovereign is involved and regardless of the country of destination), six-and-a-quarter years; and
    (d) in the case of nuclear power plants (regardless of whether a sovereign is involved and regardless of the country of destination), nine years.

8.21 Additionally, the Arrangement allows 'on an exceptional and duly justified basis' export credits to be provided on terms different from those described above.[21] An imbalance in the timing of a borrower's revenue stream relative to a semi-annual, equal principal payment debt service profile is specifically identified as such an 'exceptional and duly justified' basis.[22]

[21] See Arrangement on Officially Supported Export Credits, January 2010 Revision, s 14(d) (available at <http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/PG(2010)2&doclanguage=en>).

[22] In such cases, ECAs may offer credits having the following terms: (1) principal shall be repaid no less frequently than every twelve months, with the first repayment of principal being made no later

The Arrangement requires a minimum 15 per cent down payment on supported sales of goods and services, limits the covered percentage of an export to 85 per cent of the related export contract value (exclusive of local content) and allows for support of local costs associated with the export (up to 30 per cent of the value of the export contract, with prior notification to other Participants if such support for local content exceeds 15 per cent of the export contract value). The Arrangement stipulates that the maximum principal repayment period is five years for exports to high income countries (with the possibility of extending to eight-and-a-half years if prior notification requirements are followed) and ten years for exports to non-high income countries, except that for exports relating to non-nuclear power plants the maximum principal repayment period is 12 years and for exports relating to nuclear power plants the maximum principal repayment period is 18 years.[23] **8.22**

Over the course of the years, the OECD ECAs have come to recognize that certain of the Arrangement rules were not readily applicable to limited recourse project financings (i.e. financings where the ECA looks primarily to a special purpose, non-sovereign project company's cashflows for repayment are not guaranteed by a sovereign and are limited recourse to the sponsors). As a consequence, revisions to the basic Arrangement rules described above have been implemented in order to allow an OECD ECA more flexibility in structuring each of the first principal repayment date, the maximum principal repayment term and the overall principal repayment profile, in each case better to match the cashflow requirements of a limited recourse project financing. The limited recourse project financing regime allows an OECD ECA to offer a project company a maximum repayment term of 14 years, together with repayments of principal that are less frequent than **8.23**

than twelve months after the starting point of credit and no less than 2 per cent of the principal sum of the credit shall have been repaid twelve months after the starting point of credit; (2) no single repayment of principal or series of principal payments within a six-month period shall exceed 25 per cent of the principal sum of the credit; (3) interest shall be paid no less frequently than every twelve months with the first interest payment being made no later than six months after the starting point of credit; (4) the maximum weighted average life of the repayment period shall not exceed: (a) four-and-a-half years for transactions with sovereign buyers (or with a sovereign repayment guarantee) in Category I countries and five-and-a-quarter years for Category II countries, (b) five years for Category I countries and six years for Category II countries where the transaction is with non-sovereign buyers (and with no sovereign repayment guarantee), and (c) notwithstanding (1) and (2) above, six-and-a-quarter years for transactions involving support for non-nuclear power plants. Further, the applicable ECA must give prior notification explaining the reason for not providing support that doesn't fall into the 'exceptional and duly justified basis' category.

[23] The rules for nuclear power plants were added to the Arrangement in 2010. The maximum repayment period for credits extended in respect of the initial nuclear fuel load is four years from delivery, with credits in respect of subsequent re-loads having a maximum repayment period of two years. Additionally, the maximum repayment term for credits relating to spent fuel disposal is two years, and the maximum repayment term for credits in respect of fuel enrichment or other fuel management is five years.

semi-annual and are in uneven amounts (such that mortgage style amortization would be permissible), so long as:

(1) the weighted average life of the export credit is no longer than seven-and-a-quarter years;
(2) the first repayment of principal due is within two years of the starting point of credit; and
(3) no single principal repayment or series of principal repayments within any six-month period is more than 25 per cent of the principal sum of the credit.[24]

Starting point of credit

8.24 The 'starting point of credit' referred to in the Arrangement will vary depending on the nature of the transaction being financed. For instance, in 'pure' export transactions, the credit period generally starts at the time of delivery of goods. In the case of projects involving a turnkey construction arrangement, the 'starting point of credit' may be the day on which care, custody and control of the project is handed over to the project company. In projects where the importer is obliged to assemble and commission the equipment, the starting point of credit may be the day the equipment is ready for commissioning.

Commercial interest reference rate

8.25 The Arrangement additionally sets minimum interest rates to be charged by OECD ECAs. In general, OECD ECAs providing fixed rate export credits are required to fix interest rates at a level not less than the applicable 'commercial interest reference rate' (the CIRR rate) applicable to the currency in which the ECA credit is denominated. The CIRR rate is established for each currency of the participants to the Arrangement and is re-set monthly. A CIRR rate may also be established for a non-participating country currency. According to the Arrangement, the CIRR rate should represent the current fixed rate of interest which corresponds, as closely as possible, to the fixed rate charged by commercial lenders to 'first-class' borrowers in

[24] Certain of the special Arrangement rules relating to limited recourse project finance transactions (specifically those relating to maximum repayment term and minimum weighted average life in high income countries) will expire at the end of 2010 unless they are affirmatively renewed by parties to the Arrangement. If they are not renewed, then the fourteen-year maximum repayment term will remain applicable except where the aggregate credit support provided by the OECD ECAs to any project in a high income country exceeds 35 per cent of the 'total syndication', in which case the maximum repayment term for such project will be ten years. Similarly, the current rules applicable to the minimum weighted average life of a credit in a limited recourse project finance transaction will remain applicable except where the aggregate credit support provided by the OECD ECAs to any project in a high income country exceeds 35 per cent of the 'total syndication', in which case the weighted average life for such project may not exceed five-and-a-quarter years.

the country in question. Each OECD ECA is required to designate one of two base rates for its CIRR rate-either:

(1) the three-year government bond yield for credits having a repayment term of up to five years, the five-year government bond yield for credits having a repayment term of up to 8-and-a-half years and the seven-year government bond yield for credits having a repayment term in excess of eight-and-a-half years; or
(2) the five-year government bond yield for credits of all maturities. A 100-basis point margin is added to the applicable base rate in order to arrive at the applicable ECA's CIRR rate.

Additionally, for repayment terms in excess of twelve years, a surcharge of twenty basis points is added. OECD ECAs are not precluded by the Arrangement from offering support for floating rate export loans, and frequently do so, but may not offer support based on the lower of a fixed CIRR rate and a short-term floating rate. Finally, the Arrangement sets minimum risk premia which may be charged by OECD ECAs based on objective criteria relating to the country that is the export destination.

It should be noted that although the Arrangement is designed to ensure level pricing across participating ECAs, those ECAs that are able to provide direct lending have a potential advantage over those who simply issue loan guarantees that support loans from banks with higher funding costs than the sovereign cost of funds of the ECAs themselves. **8.26**

Helsinki Package

In 1991 the participants to the Arrangement agreed to the 'Helsinki Package' of rules regarding the use of 'tied' aid. Generally speaking, 'tied' aid is governmental support that is 'tied' to trade and may take the form of financing provided by ECAs or their governments on concessionary terms that oblige the recipient to procure goods or services from the provider country, whereas 'untied aid' is aid which includes loans or grants whose proceeds are fully and freely available to finance procurement from any country, the use of which is outside the terms of the Arrangement (as further described below). Such 'tied' support may take the form of credits or grants. Although part of the overall Arrangement, the Helsinki Package of rules deals specifically with 'tied' aid or government support. There are two keys tests of project eligibility for tied aid. First is whether the project is financially non-viable (i.e. whether the project lacks capacity to generate cashflow sufficient to cover operating costs and to service the debt). The second key test is whether it is reasonable to conclude that it is unlikely that the project can be financed on market terms. The Helsinki Package also established baseline rules precluding the granting of any tied aid to high income nations and established minimum levels **8.27** of 'concessionality'.[25] Under the Agreement, the Participants are prohibited from providing tied aid that has a concessionality level of less than 35 per cent, or 50 per cent if the beneficiary country is a 'least developed country'.[26]

8.28 In 2005 the Participants clarified in the 'Ex Ante Guidance for Tied Aid' (the 'Ex Ante Guidance') the two tests of project eligibility for tied aid originally established in the Helsinki Package.[27] In addition to the two keys tests of project eligibility for tied aid described above, the Ex Ante Guidance provides specific guidance and recommendations for various types of projects, including power plants, transmission facilities, transportation projects, and manufacturing facilities. For example, to determine whether a project is financially non-viable, the Ex Ante Guidance states, the:

> … general characteristics of financially non-viable projects include projects whose principal output is a public good, capital-intensive projects with high per unit production costs and slow capacity update, and/or where the beneficiary group (normally household consumers) is deemed unable to afford the output at the appropriate market-determined price.[28]

Whether a project is feasible, such that it is reasonable to conclude that it is unlikely that the project can be financed on market terms, is a more nuanced question. The Ex Ante Guidance provides a checklist intended to assist in the preparation of 'Feasibility Studies' for the evaluation of individual projects subject to the Helsinki process.[29]

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[25] The concept of 'concessionality' relates to the value of the subsidy being provided for any individual loan. For example, if a country receives a grant of $100 million for a $100 million project, the 'concessionality' level would be 100 per cent, whereas a grant of $35 million combined with a traditional export credit for the remaining $65 million would have a 'concessionality' level of 35 per cent. See <http://www.exim.gov/products/policies/appendix-g-03.pdf>.

[26] Two exceptions may apply: (1) technical assistance: tied aid where the official development aid component consists solely of technical cooperation within certain defined limits; and (2) small projects that are funded entirely by development assistance grants.

[27] In agreeing to the original tied aid rules under the Helsinki Package, the participants fully expected to revisit the topic of tied aid once a body of experience had developed over time that 'would more precisely define, both for export credit and aid agencies, *Ex Ante* guidance as to the line between projects that should be financed with tied aid or with commercial terms'. See Arrangement on Officially Support Export Credits, 'Ex Ante Guidance for Tied Aid', 2005 Revision, available at <http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=TD/PG(2005)20&doclanguage=en>.

[28] See ibid.

[29] For example, the 'Feasibility Study' asks specific questions about:

> (1) the justification for and objectives of the project (including how it is expected to contribute in the long run; (2) the level of development in the economy of the country where the project is to be located; (3) information on the financial capacity of the implementing organizations, including their profitability, their relations with the borrower, and the impact the project will have; (4) a description of the consumers of the products of the project, including GNP per capita; (5) various financial appraisals (including cashflow calculations and sensitivity analysis); and (6) development aid aspects relevant to the project. See ibid.

Berne Union and the Prague Club

Of less direct and visible relevance to the funding and sourcing of finance from ECAs are the principles formulated under the umbrella of The International Union of Credit and Investment Insurance, otherwise known as the Berne Union. The Berne Union, is made up of members from both the public and private sectors of export credit and investment insurance providers and the association works closely with the OECD and the World Bank.[30] It is an international, non-profit organization dedicated to facilitating worldwide cross-border trade and investments by fostering international acceptance of sound principles in export credits and investments insurance, and by providing a forum for professional exchanges among its members.[31] The Berne Union promotes uniform principles for export credit and investment insurance through organized meetings of members, ad hoc seminars and workshops, and the exchange of the information and experiences among the insurers. In accordance with the message included in its 'Value Statement', members of the Berne Union declare their commitment to operate in a financially responsible manner, to be respectful of the environment, and to demonstrate high ethical values. **8.29**

The Prague Club is another ad hoc group of relevance. It is made up of certain insurers in the public sector who do not meet the entrance requirements for the Berne Union but broadly share the same goals.[32] The aim of the Prague Club is to work out an information exchange forum for newly established credit and investment agencies as well as encouraging the international trade development by supporting unified rules both for export credit insurances and foreign investments. A number of Prague Club members have gone on to meet the requirements for full Berne Union membership, but remain active members of the Prague Club. **8.30**

[30] See Members of Berne Union, available at <http://www.berneunion.org.uk/bu_profiles.htm> (listing private insurers, for example, Chubb and Chartis, alongside ECAs such as SACE, COFACE, and US Exim Bank).

[31] See Value Statement of Berne Union, available at <http://www.berneunion.org.uk/value-statement.html>.

[32] The five membership requirements for Berne Union members: (1) institutions should be underwriters carrying out actual and direct export credit and/or investment insurance business as their core activity; (2) institutions must have been effectively in operation in the field of credit/investment insurance for a period of at least three years; (3) institutions should meet certain thresholds for premium income or business covered; (4) if the applicant is engaged in export credit insurance, its operations must include insurance of both commercial and political risks and it must underwrite political risks in a global and general sense; and (5) if an institution is engaged in the insurance of outward investment, it must be providing direct insurance against the normal political risks, including expropriation, war and transfer difficulties). Membership in the Prague Club is open to: (1) organizations engaged in insuring or guaranteeing export credit transactions and in underwriting the political risks in such transactions and/or in insuring outward investments; and (2) organizations that are not yet legally established but that are in development.

Credit alternatives for multilaterals

8.31 Where political risks are significant, or where export content may be insufficient for ECA financing—for example, where a project entails a substantial civil works component[33]—multilaterals or similar regional or national development finance institutions may be instrumental in financing a project.

8.32 The principal multilateral, the World Bank, comprises the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The IBRD focuses on middle income and creditworthy poor countries, whereas the IDA focuses on the poorest countries in the world. Each of the IBRD and the IDA provides low-interest loans to developing countries for a wide range of purposes, including infrastructure projects. The World Bank also offers private sector lenders a variety of guarantee products against commercial risks. 'Partial risk' guarantees cover private sector lenders against loss resulting from default by a sovereign under one or more key project documents between the sovereign and a private sector project, such as a concession agreement, a power purchase agreement, or any sovereign guarantee of the same. One significant condition to a partial risk guarantee is that an indemnity agreement between the project's host country and the IBRD will be required. Pursuant to such an indemnity agreement, the host country sovereign agrees to indemnify the IBRD against payments made under the partial risk guarantee.

8.33 Other members of the World Bank group include the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), which, unlike the IBRD and IDA, extend credit principally to non-sovereign borrowers. The IFC promotes growth in the private sector of the economies of developing countries by mobilizing domestic and foreign capital and making loans and equity investments to private corporations or investment funds that have projects in such countries. Unlike the World Bank, the IFC does not require direct state support. MIGA provides both debt and equity guarantees against losses caused by non-commercial risks, including currency transfer restrictions, expropriation, war and civil disturbances, and, in certain cases, breach of contract.

8.34 While multilaterals have traditionally been in the business of extending or supporting financing to borrowers, more recently certain multilaterals have focused on expanding their efforts to include assistance with equity investments. These investments typically focus on providing start-up capital, early stage capital, and/or expansion capital, in each case where equity funds are needed to assist companies with their product development and commercialization efforts. Examples of multilaterals that provide this type of assistance include the IADB, the AfDB, and the ADB.

[33] For example, hydroelectric dam projects.

A/B loan structures

Co-financings of loans among commercial banks and multilaterals have become standard in the project finance market. While in many cases multilaterals and commercial banks will lend side by side, certain multilaterals have developed A Loan/B Loan structures that allow such multilaterals to leverage available liquidity from commercial banks while acting as lender-of-record on the loan. Both the IFC and the IADB, for example, have structured their B-loan programs such that they will enter into a loan agreement with the borrower for the entirety of the loan, but then enter into a participation agreement with a syndicate of commercial banks that will provide liquidity for the B portion of such loan. Under this type of structure, the IFC/IADB administers the loan and collects all payments from the borrower, while also committing to distribute payments pro rata among itself and the commercial banks. This structure has the benefit of allowing the multilateral to commit more funds to a project in order to achieve its development priorities, while also providing participating banks the ability to hold an economic interest in loans that are effectively being administered by the multilateral. **8.35**

Nonetheless, while commercial bank lenders may take substantial comfort from the participation of multilaterals in the financing of a project, explicit provisions in the documentation often exclude any inference that such multilaterals are acting in any type of governmental capacity. Indeed, commercial banks involved in the project are often required specifically to acknowledge that they have entered into the transaction exercising their own credit judgment and without reliance on the decisions taken by the co-financing agency (similar to the acknowledgement given by the participating banks to an agent bank); any responsibility or duty on the part of the multilateral to the commercial banks is excluded, except for those responsibilities that are expressly set out in the documents. **8.36**

Preferred creditor status

Multilateral agencies that have 'preferred creditor status' enjoy preferential access to foreign exchange by member governments in the event the host country experiences a foreign exchange crisis. Such multilaterals are excluded from general country debt restructurings and are not subject to new money obligations under any such restructurings. Preferred creditor status also typically exempts the relevant multilateral from in-country taxation, including in respect of withholding taxes. In most cases, preferred creditor status is recognized as a matter of practice, rather than as a matter of law. The involvement of multilaterals with preferred creditor status can be a source of comfort to lenders in a multi-sourced financing, because the host government is likely to prioritize loans made by multilaterals so as to maintain access to financial support. Other lenders take the view that the involvement of multilaterals with preferred creditor status leaves them at a disadvantage to the extent that the multilateral does not pass along the benefit of its preferential access to foreign exchange to the other lenders in the financing group. **8.37**

Common funding issues

Documentation

8.38 As a conceptual matter, much of the documentation for an ECA or multilateral-funded loan will seem familiar to those that are experienced with traditional project financing structures. In a direct loan context, the lending institution will enter into a credit agreement with the borrower which will set forth the basic terms and conditions relating to the loan. Most institutions have their own 'form' agreement or heavily rely on precedents from prior loans, although the documentation requirements and reliance on precedent may differ substantially from institution to institution. Additionally, the extent to which ECAs and multilaterals will agree to covenant packages that are common among commercial lending institutions in their loan documents will vary, although (as further discussed below) there has recently been a trend where certain agencies have become more and more comfortable looking to the commercial markets for guidance on appropriate levels of loan oversight.

8.39 Most multi-sourced financing facilities will be structured around a common terms agreement, where each of the agencies (and commercial banks, where applicable) involved will negotiate common conditions, representations, covenants, and other loan terms and conditions that will apply to each of the loans being extended to the project company. Each agency (and again, each group of commercial banks, where applicable) will then issue their loans under a separate loan agreement, which may include terms and conditions that are specific to such facility, including in respect of pricing, tenor, yield protection, and other specific covenants and events of default that may apply to such lending group. Often one of the most complicated aspects of documenting these types of multi-sourced loans is harmonizing the different requirements of each loan facility and ensuring that each individual agency's requirements have been addressed in a manner that is satisfactory to not only the project company, but also the other lenders in the transaction. Where A Loan/B Loan structures are being used, negotiations often occur between the B lenders and the relevant agency to ensure acceptable voting rights for each of the applicable credit providers. In general, ECAs and multilaterals will share in any project security on a *pari passu* basis, except for any proceeds available to a multilateral as a result of its Preferred Creditor Status.

Pro-rata lending

8.40 One issue that can arise in multi-source financings—particularly where 'tied' loans are being provided by more than one institution—is the potential that loan drawdowns may not be able to occur on a pro rata basis across all facilities insofar as certain loans may only be permitted to be used for specific eligible costs. In these types of financings, project companies and their advisers need to pay close attention to drawdown schedules as well as construction and or delivery schedules to ensure that loan proceeds can be sourced from the appropriate lender or group of lenders in a timely manner while also satisfying each applicable ECA's sourcing requirements. Project companies additionally need to monitor the impact any such non-pro rata drawdown schedule may have on loan repayment schedules. In general, ECAs have come to accept non-pro rata drawdowns necessitated by sourcing requirements and the timing of acquisition of disparate project components.

Voting rights and other intercreditor matters

Transactions involving more than just a single ECA or a single multilateral will often involve intercreditor arrangements that need to be designed to contemplate special ECA/multilateral rights on key issues. Such special rights may relate to issues such as environmental and social matters, minimum off-take requirements (for example, where an ECA may require that a minimum percentage of project production be sold to companies based in such ECA's home country, which is often a requirement in mining and commodities projects), minimum equity ownership requirements (for example, where an ECA requires that a minimum threshold of the project company's equity be owned by companies from such ECA's home country), or continued membership in the applicable multilateral by the country in which the project is being developed. Where applicable, parties also need to agree as to the impact of the Preferred Creditor Status (described above) that may be available to some, but not all, of the agencies involved in the transaction. Special veto rights may also be considered where the applicable ECA or multilateral has identified 'core' or 'fundamental' events (often relating to matters such as political risks or developmental goals) that could conflict with such institution's policies or cause substantial political embarrassment for the applicable institution. **8.41**

In addition, significant intercreditor issues often arise in the context of multi-source financings that include ECAs, multilaterals, and commercial lenders as a result of the different policy goals that influence the investment decisions made by these entities. Given the different credit perspectives of the various institutions that may be involved in a single financing, project companies and lenders must focus on structuring intercreditor rights in such a way as to address the needs of the different lending entities that are involved, and to anticipate that lender perspectives may differ when it comes to addressing major transactional issues. An example of this arises in the context of events of default—depending on the institution involved, certain lenders may favour efforts to work out any issues with the project company and enable the project company to take steps to rectify the circumstances leading to the default; other lenders, particularly commercial lenders, may seek to extract high waiver fees from the project company or to enforce rights against the project company in a much more aggressive manner. Both lenders and project companies need to be cognizant that these credit and policy perspectives will colour the respective rights being required by commercial banks, ECAs, and multilaterals. Where A loan/B loan structures are being used, these issues may become more pronounced **8.42** in the context of negotiating participant rights for those commercial banks providing liquidity under a B loan package, where participants may request voting and/or oversight rights that the fronting multilateral may not be prepared to grant.

Environmental and social considerations

8.43 Environmental and social considerations play a large role in financings undertaken by institutions providing official credits. Most multilaterals and ECAs adhere to some variation of the performance standards developed and implemented by the IFC. In developing its performance standards, the IFC's objective was fourfold:

(1) to identify and assess social and environmental impacts, both adverse and beneficial, in the project's area of influence;
(2) to avoid or, where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment;
(3) to ensure that affected communities are appropriately engaged on issues that could potentially affect them; and
(4) to promote improved social and environmental performance of companies through the effective use of management tools.

8.44 To meet these objectives, the IFC has come up with a 'Social and Environmental Management System' (the Management System) applicable to projects with social or environmental risks and impacts that need to be managed, beginning in the early stages of project development and continuing on an ongoing basis through project completion. The Management System incorporates the following elements:

(1) social and environmental assessment that considers in an integrated manner the potential social and environmental risks and impacts of the project;
(2) creation of a management program consisting of a combination of operational policies, procedures, and practices, effectively to mitigate negative externalities and improve performance;
(3) establishment of an organization structure that defines roles, responsibilities, and authority to implement the management program;
(4) training of employees and contractors with direct responsibility for activities relevant to the project's social and environmental performance;
(5) community engagement, including discourse on the project's risks to and adverse impacts (if any) on the affected communities;
(6) monitoring and measurement of the effectiveness of the management program, including site inspections and audits; and
(7) reporting, consisting of periodic assessments of the effectiveness of the management program.[34]

[34] See IFC Performance Standard 1, 'Social and Environmental Assessment and Management Systems', 30 April 2006, available at <http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_PS1/$FILE/PS_1_SocEnvAssessmentMgmt.pdf>.

Monitoring requirements

Monitoring requirements are mandated by multilaterals to ensure compliance with environmental action plans throughout the course of the project, from inception through project completion. For instance, the Environmental Policy of the EBRD states that: 'operations are monitored on an ongoing basis by an operation team . . . throughout the Bank's relationship with the project.'[35] EBRD uses a host of monitoring mechanisms for projects that it finances, including 'review of periodic environmental reports and other progress reports, monitoring visits by the Bank's environmental specialists or consultants and periodic third party audits to ensure that the sponsor is implementing agreed programs, policies, and actions' as set forth in the underlying legal documents.[36] Although broadly applicable, EBRD defines a specific monitoring program for each project, based upon due diligence and public consultation. The negotiation and implantation of these programs often require significant negotiation and documentation to ensure that the standards being applied are properly enforced throughout the term of the loan. Other multilaterals similarly require comprehensive monitoring of projects in order to assess social and environmental impacts, including, for example, the IADB,[37] the AfDB,[38] and the EIB.[39] ECAs often apply similar standards, although monitoring requirements can differ substantially from institution to institution. **8.45**

[35] See EBRD Environmental Policy, available at <http://www.ebrd.com/downloads/research/policies/policy.pdf>.

[36] Ibid.

[37] 'The ESMP [environmental and social management plan] must include: . . . the framework for the monitoring of social and environmental impacts and risks throughout the execution of the operation, including clearly defined indicators, monitoring schedules, responsibilities and costs. The ESMP should be ready for, and reviewed during, the analysis/due diligence mission.' See Inter-American Development Bank, 'Environment and Safeguards Compliance Policy', 19 January 2006, available at <http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=665902>.

[38] 'The project implementation phase involves that the Borrowers ensure the implementation of ESMPs and monitor project impacts and results . . . supervise the Borrowers' work and verify compliance through supervision missions and/or environmental and social audits, whenever necessary.' See African Development Bank, 'Environmental and Social Assessment Procedures for African Development Bank's Public Sector Operations', June 2001, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/ESAP%20for%20Public%20Sector%20Operations.pdf>.

[39] 'The EIB [European Investment Bank] monitors the environmental and social performance of the projects it is financing, especially the fulfilment of any specific obligations described in the Finance Contract. The extent of monitoring is a function of the characteristics of the project, the capacity of the promoter and the country context. Monitoring by the Bank is based on reports from the promoter. It may be supplemented by site visits by the bank and other sources of information, including that provided by affected communities.' See The European Investment Bank, 'The EIB Statement of Environmental and Social Principles and Standards', 2009, available at <http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf>.

Recent Trends

8.46 While global commercial markets have suffered recently, a number of recent developments have indicated the staying power of ECA and multilateral funding sources as part of the project finance landscape for the foreseeable future.

Non-OECD ECAs and 'cooperation' agreements

8.47 Although ECAs have traditionally been based in OECD and other developed countries, recent growth in a number of developing countries have encouraged the development of ECAs in places that have historically been the target, rather than the sourcing of ECA funding. While this development evidences growth in these regions and should be encouraging from a development perspective, it is worth noting that many of these 'newer' ECAs often do not adhere to common agreements such as the OECD Arrangement that are intended to ensure that ECA funding does not constitute unfair subsidization of home country exporters. In order to effectively compete with ECAs that do not adhere to the Arrangement, certain ECAs have established funds to enable them to offer additional financing options in order to prevent market distortions that may occur when official funding is offered to projects on terms that are not consistent with consensus protocols. US Exim Bank's Tied Aid War Chest, for example, is a program that was designed to counter situations where there is a reasonable basis for determining that a foreign government is unfairly supporting home exporters in a manner that does not comply with the Helsinki Package. Part of the purpose of the program is to defend US exporters from foreign government financing that may create long-run trade advantages for foreign exporters to the detriment of US exporters.

8.48 Another recent trend relating to non-OECD ECAs has been the initiation of cooperative arrangements between different agencies. The Brazilian ECA BNDES and US Exim Bank recently concluded a cooperation agreement allowing both entities to work together to identify projects of interest for both Brazilian and US companies. Similar arrangements have been entered into by JBIC, IFC, and ADB, as well as by K-Exim and the IADB, the latter which will focus on infrastructure development in Central and South America. These cooperation agreements, while a new trend and (as of now) limited to a finite time period, enable these entities to work together to both identify mutually beneficial opportunities while leveraging the support they are ultimately able to provide to their domestic exporters.

Local currency funding options

8.49 Given recent turmoil in currency markets and investor's demands to limit the potential for currency risk exposure, certain multilaterals have begun to provide local currency funding options. The IADB, for example, has recently begun offering local currency facilities to project companies, which not only helps mitigate the risk of currency shocks and potential mismatches between asset values and project liabilities, but also acts to strengthen local capital markets by encouraging local currency investments in projects that have all the traditional stability of multilateral support. The participation of local investors can also help mitigate political risks, as local governments may be less inclined to interfere in investments where local participation has provided crucial funding for project development.

Credit crisis of 2008–2010 and beyond

While ECAs and multilaterals have always constituted a major source of potential financing for investors and developers, recent events have thrust these institutions into an even more central role in the funding of major projects. Simply put, over the past few years there have been virtually no major project financings in non-OECD countries that have not involved at least one ECA or multilateral, and a substantial portion of what has been financed has included two or more of these types of entities. In addition to providing a constant source of liquidity and credit protection, the presence of ECAs and multilaterals has proven to be a major attraction for commercial banks, as these institutions have been perceived to provide stability in an otherwise unstable market. Without even considering the 'hard' and 'soft' political support an ECA or a multilateral can bring to the table, commercial lenders have grown comfortable with the extensive diligence and technical expertise that these entities offer, and given the prevalence of these funding sources over the past few years, many in the commercial market have come to not only invite agency participation but also to expect it. **8.50**

On the agency side, after numerous years of developing their expertise working side-by-side with commercial lenders in a variety of projects markets, many have become accustomed to their role of not just providing competitive economic terms but also of leading negotiations in respect of the general terms and conditions for the multi-source transactions in which they are involved. More and more often, these covenant packages reflect standards that have been commonplace in the commercial project finance market for many years. Indeed, many ECAs have not only embraced these standards, but have also taken structural steps to adopt commercial bank covenant standards as their own and to participate in financings in regions that were not traditionally designated for official credits. An example of this is the 2008 spin-off of KfW Ipex-Bank, which effectively created a fully independent subsidiary of KfW Bankengruppe that was designed to function in a primarily commercial capacity, while still supporting its parent company's primary mission of supporting exports and promoting development. This fusion of official ownership with a commercial mandate has been welcomed by the market, as borrowers and other lending institutions have recognized the value of merging the strengths of a public institution—with the ability to coordinate with international institutions and foreign governments—and the commercial perspectives necessary to address many complex financing issues. Other public institutions have also **8.51** expanded their mandates to address demand for ECA-style funding in developed as well as developing nations. Both JBIC and COFACE have recently made forays into the US domestic PF market in support of Japanese and French exporters, respectively. These institutions are able to provide a full spectrum of support for the companies they seek to promote, from initial investment structuring to analysis of funding alternatives, all the way through to financial closing.

8.52 ECAs and multilaterals have, in short, become key financing providers to the projects marketplace. As the market continues to rely on the levels of diligence and technical capability—not to mention the attractive loan terms—offered by these official funding sources, it is to be expected that both ECAs and multilaterals will continue to play a leading role as credit providers to the project finance market for many years to come.

9

DOCUMENTATION OF PROJECT BONDS

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Introduction

Bonds issued in the international capital markets to raise financing for projects—commonly referred to as 'project bonds'—have been a well-known source of project capital since the 1980s, though less commonly used than traditional sources of project financing debt such as export credit agencies, banks, and other financial institutions, as well as loans from the sponsors. The attractiveness of the bond market tends to fluctuate depending upon the comparative cost and availability of funding from these other sources, the willingness of the sponsors to undertake the additional effort to incorporate a bond offering into a project's capital structure and the relative difficulty of implementing a bond financing at any given stage of a project's development (for example, bonds issued early in a greenfield project entail more risk for investors, compared with bonds issued to fund the expansion of a project that is already producing revenue and, therefore, entails less risk). **9.01**

9.02 Documenting a project bond involves a number of elements not found in more common forms of project finance. This difference is primarily due to the way bonds are marketed and the fact that, unlike loans, bonds are 'securities', making them subject to various legal regimes governing the offering and trading of securities, to which traditional loans are not subject. From a documentation standpoint, the most significant additional element is the need to prepare an offering document, or prospectus,[1] and to comply with the attendant disclosure requirements, as well as the need to document the relationship with the underwriters who are responsible for the sale and distribution of the bonds to investors while complying with restrictions on where and to whom the bonds may be marketed.

9.03 This chapter summarizes the legal framework for securities offerings, recognizing of course that various jurisdictions may impose different requirements. After describing the general legal context, the chapter explains the due diligence and underwriting processes for project bonds, followed by a discussion of the various project bond offering documents and how they relate to the legal framework. Finally, there is a brief discussion of bond listings.

History of project bonds

9.04 Accessing capital markets to fund projects and infrastructure arguably dates back to the 1800s, with bond offerings used to back railroad expansion in the US. The US also has a long history of state and local government bonds to fund infrastructure projects, with bond debt service being covered by revenues from those projects. The first modern private sector project bond offerings date to the late 1980s and early 1990s, encouraged in part by changes in the US securities regulatory regime that facilitated bond offerings to institutional investors. The first wave of project bonds financed independent power projects (IPPs), notably the $800 million project bond offering for Sithe/Independence Funding Corporation of a 1,000 MW cogeneration facility in New York State, which was the first capital markets transaction in which the debt securities of a project under construction received an investment grade rating. Project bonds also provided refinancing for completed IPPs, such as the $600 million project bond for IEC Funding Corp. to refinance debt incurred in the development of two 300 MW cogeneration projects in the US, which helped to demonstrate the burgeoning role of project bonds as a key portion of projects' capital structures.

9.05 Capital markets financings of projects have evolved rapidly, covering a broad range of electric, oil and gas, water, and other power-related assets; toll roads, railways,

[1] An offering document may also be referred to as an 'offering circular' or 'offering memorandum'. These terms should not be confused with an 'information memorandum', a document that is less comprehensive than a prospectus and used to syndicate bank facilities or to assist in a private placement of bonds with institutions who conduct their own due diligence rather than relying on a prospectus.

rolling stock, and other infrastructure-related assets; as well as more esoteric assets such as hospitals, schools, and prisons (as a result of private financing initiatives in places such as the UK).

Further afield, project bonds have played critical roles in financing oil and gas and other energy-related projects in the Middle East, Africa, and the former Soviet republics of Central Asia, presenting opportunities to connect international institutional investors seeking to diversify their portfolios with interesting new projects and geographic regions. As new markets focused on green energy sources continue to emerge, project bonds are likely to find a place in the financing of a variety of new project classes. **9.06**

Securities Regulation and Legal Framework

Generally speaking, bonds are financial instruments that can be sold to a wide range of investors who do not have direct access to information about the issuer of the bonds, unlike a bank lender or ECA that deals directly with a project borrower and its sponsors. In addition, as securities, bonds can be traded in the capital markets more readily than other types of debt, such as bank loans. However, in order to protect investors and the integrity of the capital markets against abuses such as fraud, insider trading, and market manipulation, securities laws are extensive and complex, particularly in countries with mature capital markets. The requirements of the securities laws in particular jurisdictions drive decisions as to which geographic markets and types of investors to target for a project bond offering and, consequently, decisions about the form and substance of the bond documentation. **9.07**

In this regard, the most significant aspects of securities laws are those directed at assuring adequate disclosure to investors and preventing offers and sales of securities to unsophisticated investors unless the offering has been vetted by a regulatory authority for distribution to the general public. **9.08**

Disclosure

A more specific discussion of the process for preparing a project bond offering document and its contents is set out later in this chapter. These aspects of documentation will be easier to understand if one first has an overview of how securities laws shape the disclosure process. **9.09**

United States

Extensive regulation of securities markets began first in the US in the 1930s, leading to one of the most developed bodies of regulatory and case law in this **9.10** area currently. The US also is important because it was the first, and is today the largest, market for project bonds. This is no surprise, given the size and liquidity of US markets, the sophistication of the US investor base for project bonds, and the long-standing and well-understood US regulatory environment for securities. US and foreign issuers alike regularly structure their project bond offerings to allow offers and sales in the US markets as one of the best ways to assure sufficient investor demand and competitive funding terms for those bonds.

9.11 In the US, as in other jurisdictions, raising new capital from public markets is more heavily regulated than capital raising in the institutional or private markets where investors are viewed as more sophisticated and, therefore, less in need of regulatory protection. For example, public offerings in the US are subject to the Securities Act of 1933 (the Securities Act)[2] which requires that such offerings be registered with the US Securities and Exchange Commission (the SEC), unless an exemption from registration is available. The registration process essentially requires disclosure in accordance with SEC rules in an offering document (the prospectus) filed in a registration statement with the SEC. A filing is required before the relevant securities may be offered to the public. The registration statement must be declared 'effective' by the SEC before actual sales may be completed. Once securities are registered and publicly traded, an issuer must provide ongoing disclosure in periodic reports filed publicly with the SEC under the Securities and Exchange Act of 1934 (the Exchange Act). The Exchange Act also regulates the subsequent trading of securities in the secondary market.[3]

9.12 Exemptions from the SEC registration and reporting process are available in the US for offerings to large institutional investors (so-called 'Rule 144A' offerings[4]) and private placements to accredited investors. These exemptions (discussed further below under 'Selling Restrictions') have become the preferred choice for foreign issuers wishing to issue debt securities—including project bonds—to US investors. By employing these exemptions, issuers can avoid SEC registration and reporting. As a result, the preparation of the offering is not delayed by the SEC registration process, the prospectus disclosure and ongoing reporting requirements are less burdensome for the issuer and, in the event of defective disclosure, the liability exposure under securities laws is somewhat less for the issuer. Regulatory regimes in other jurisdictions are similar in that they impose less stringent disclosure requirements,

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[2] This section discusses securities laws at the federal or national level in the US. Issuers of securities and their offerings in the US are subject to securities regulation at the state level as well under the so-called 'blue sky' laws. These should be considered in connection with any securities offering into the US.

[3] A variety of other federal laws may also be relevant to a US bond offering, including the Trust Indenture Act of 1939, which imposes a standard of independence and responsibility upon the bond trustee and requires that certain protections for debt holders are included in the terms of the bonds or notes. Generally, these requirements are not burdensome for issuers.

[4] Rule 144A promulgated under the Securities Act.

prospectus review procedures and ongoing reporting requirements for securities that are not distributed into retail investor markets.[5]

Regardless of whether a bond offering will be registered with the SEC or exempt from registration, the anti-fraud provisions of US securities laws impose potential liability on bond issuers, underwriters, and, potentially, their 'control persons'[6] if disclosure in the offering document is deficient in a material respect. The most relevant statutory provision in this regard is Section 10(b) of the Exchange Act, which provides that it is unlawful to use, in connection with the purchase or sale of any security, whether registered or not, any manipulative or deceptive device in contravention of rules adopted by the SEC.[7] Rule 10b-5, promulgated by the SEC under Section 10(b) of the Exchange Act, provides that in connection with the purchase or sale of a security it is unlawful: 'to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.' 9.13

This regulatory approach seeks to protect investors primarily through mandating adequate disclosure, thereby allowing investors to make properly informed investment decisions. Note that this approach does not leave it to a regulatory authority to rule or comment on the actual merits of an investment in the securities being offered or the creditworthiness of the issuer. In other words, the US regulatory regime is designed to ensure full and complete disclosure of all material information to investors in order to enable investors to make their own investment decisions. Hence, potential liability under this regime is directly tied to defective or deficient disclosure. 9.14

Parties that can be liable for defective disclosure under Section 10(b) and Rule 10b-5 include the issuer and the underwriters of a bond offering. An underwriter (and the issuer, for unregistered offerings) may avail itself of the 'due diligence defence', which basically allows the underwriter to avoid liability where it can demonstrate that it properly undertook due diligence with respect to the information contained in the prospectus. Specifically, the due diligence defence requires a showing that the defendant 'had, after reasonable investigation, reasonable ground to 9.15

[5] In the EU, for example, Article 3 of the Prospectus Directive (Directive 2003/71/EC) does not require an issuer to publish a prospectus fully compliant with the disclosure requirements of the Prospectus Directive for: (1) an offer of securities solely to 'qualified investors'; (2) an offer of securities to fewer than 100 individuals per EU member state (excluding qualified investors); (3) an offer of securities with a minimum investment threshold of €50,000; (4) an offer of securities with a minimum denomination of €50,000; and/or (5) an offer of securities with a total consideration of less than €100,000.

[6] 'Control persons' can include, among others, senior executive officers, directors, and controlling shareholders of an issuer or underwriter.

[7] There are various other statutory provisions imposing liability. For example, in the case of a registered offering, the issuer faces strict liability, for which there is no defence, with respect to any material misstatement or omission from the registration statement (Section 11, Securities Act).

believe and did believe . . . that the statements [in the prospectus] were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading'.[8] Control persons can also be held liable.[9]

9.16 What is deemed to be 'material' varies with the specific facts and circumstances of the particular situation. The basic test is whether there is a substantial likelihood that a reasonable investor would consider the misstatement or omission to be important in deciding whether or not to purchase a security. The US Supreme Court has ruled that a fact is material if there is: 'substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'[10] The SEC has indicated that the following factors, among others, can contribute to the determination of whether a misstatement or omission is material:[11]

(1) whether the misstatement arises from an item capable of precise measurement or whether it arises from an estimate and, if so, the degree of imprecision inherent in the estimate;
(2) whether the misstatement masks a change in earnings or other trends;
(3) whether the misstatement hides a failure to meet analysts' consensus expectations for the enterprise;
(4) whether the misstatement changes a loss into income or vice versa;
(5) whether the misstatement concerns a segment or other portion of the issuer's business that has been identified as playing a significant role in the issuer's operations or profitability;
(6) whether the misstatement affects the issuer's compliance with regulatory requirements;
(7) whether the misstatement affects the issuer's compliance with loan covenants or other contractual requirements;

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[8] Section 11(b)(3)(A) of the Securities Act. The burden of proof rests with the defendant (i.e. the issuer or underwriter). Note that this section refers to 'non-expertised' information in the prospectus (i.e. information that has not otherwise been vetted by experts such as the issuer's auditors), which requires 'reasonable investigation' by the underwriters. However, with respect to expertised information, case law suggests that underwriters cannot blindly rely on experts where 'red flags' suggest a flaw in the disclosure. See generally *In re WorldCom, Inc. Securities Litigation,* 346 F Supp 2d 628 (SDNY 2004). Further, what constitutes a 'reasonable investigation' varies with the relevant facts and circumstances, though courts have held that a reasonable investigation requires 'more effort on the part of the underwriters than the mere accurate reporting . . . of "data presented" to them' by the issuer, concluding that 'the underwriters must make some reasonable attempt to verify the [issuer's] data'. *Escot v BarChris Construction Co*., 283 F Supp 643 (SDNY 1968).

[9] The control person may raise a defence of having acted in good faith and not having directly or indirectly induced the act or acts constituting the violation or cause of action.

[10] *TSC Industries v Northway, Inc.*, 426 US 438, 449 (1976).

[11] SEC Staff Accounting Bulletin: No. 99—Materiality, 12 August 1999.

(8) whether the misstatement has the effect of increasing management's compensation—for example, by satisfying requirements for the award of bonuses or other forms of incentive compensation; and
(9) whether the misstatement involves concealment of an unlawful transaction.

These points are merely guidance, however. The issuer together with the underwriters and their legal counsels, and perhaps the auditors and/or other experts and advisers, will collectively have to take a view on specific points as to whether or not they are material in the particular context of the bond offering and the project. **9.17**

As the market regulator, the SEC has the authority to bring enforcement actions for violations of Rule 10b-5. In addition, the securities laws in the US recognize a private right of action under Rule 10b-5 such that investors themselves may bring their own claims under Rule 10b-5 for damages against the participants in a offering, asserting that the seller acted intentionally or recklessly in preparing a misleading offering document and that the claimant relied on a material misstatement or omission in making its purchase. Often these claims are brought collectively as class actions by groups of investors and, as a result, an extensive body of case law exists in the US with respect to liability for disclosure documents. This system of, in effect, enforcement through private litigation is somewhat unique to the US. Accordingly, issuers and underwriters have to take the due diligence process and contents of the disclosure document seriously when offering bonds in the US. **9.18**

Moreover, even in a Rule 144A offering which is exempt from SEC registration, the disclosure requirements for an SEC-registered offering will be followed as closely as possible for the content of a prospectus, including a project bond prospectus, being used in the US. Although the specific disclosure rules applicable to registration statements for a public offering do not apply in an exempt offering, the rules are viewed as guidance as to what is material to investors for purposes of Rule 10b-5. **9.19**

The scope of disclosure in a Rule 144A offering can deviate, however, from strict compliance with SEC requirements, as long as all material information is disclosed. For example, where a project company is not able to produce financial statements that meet requirements for an SEC-registered offerings, a Rule 144A offering may still be possible. (Similarly, under EU legislation, where a company does not prepare financial statements that satisfy the requirements for a prospectus that complies with the Prospectus Directive,[12] an offering may still proceed with institutional investors in markets that are exempt from such compliance requirements.) **9.20**

In any event, when drafting a prospectus, one should bear in mind that its function is twofold. First, it is needed to provide investors with sufficient information to make an investment decision whether to purchase the bonds. Secondly, it is often **9.21**

[12] Directive 2003/71/EC.

characterized as a 'defensive' document, meaning that, in the event of litigation if the bond's value collapses for any reason, the project company, its sponsors and the underwriters can point to the prospectus as evidence that they met their legal obligations to disclose all material information to investors. Drafting the prospectus is, in that respect, a liability management exercise. In other words, liability will not necessarily stem from a collapse in value of the bond or the underlying project. Rather, liability can emanate from a failure adequately or accurately to disclose information that would have enabled an investor to understand a particular risk or aspect of the project that related to the subsequent cause of such loss.

9.22 Alternatively, in order to avoid the disclosure burdens and risks in the US, it is not uncommon for an issuer to elect not to offer its securities there, even if, by excluding the large capacity of the US market, the issuer limits the amount of capital markets financing it can raise.

European Union

9.23 Comprehensive securities regulation exists in many other jurisdictions and continues to evolve with globalization of capital flows. For example, during the past decade, the EU adopted both the Prospectus Directive and the Transparency Directive,[13] now part of national law of the EU member states, as part of a general reform and harmonization of securities regulation in that region.

9.24 In Europe, as in the US, project bonds generally are not marketed as a retail investor product. Accordingly, project bonds can be documented in a manner that exempts them from the disclosure requirements of the Prospectus Directive and are listed on the 'exchange-regulated' markets,[14] which are largely self-regulated and accessible only by mainly institutional investors, rather than on the 'regulated' markets[15] where retail instruments are listed and which are subject to more extensive governmental regulation. Issuers listed on certain exchange-regulated markets can also avoid being subject to the ongoing disclosure requirements of the Transparency Directive.

9.25 Project bonds listed on exchange-regulated markets are subject to the disclosure requirements of those markets and whatever ongoing disclosure requirements are dictated by market practice and agreed in the terms of the bonds themselves.

9.26 However, given the common practice of offering at least a portion of a project bond issuance in the US under Rule 144A, as a matter of market practice the more

[13] Directive 2004/109/EC.

[14] For example, the Euro MTF market of the Luxembourg Stock Exchange or the Global Exchange Market of the Irish Stock Exchange.

[15] For example, the Bourse de Luxembourg, the main market of the Luxembourg Stock Exchange, the Main Securities Market of the Irish Stock Exchange, or the Main Market of the London Stock Exchange.

extensive disclosure required for the US determines the scope of disclosure in the prospectus. Even where project bonds are not offered in the US, investor expectations often are that the disclosure will be based, more or less, on market practice for Rule 144A offerings.

Other jurisdictions

Emerging markets have generally adopted new legislation or modernized existing legislation as the globalization of capital flows has brought foreign investors, including bond investors, into those countries. Given that these jurisdictions are relatively new sources of international capital, they have less developed histories of disclosure regulation. A prospectus that complies with the requirements for a Rule 144A offering generally will satisfy the requirements in these jurisdictions but for, perhaps, some local technical requirements. **9.27**

Selling Restrictions

Typically the documentation for a project bond will contain restrictions on the types of investors to whom the bonds may be offered or transferred upon resale. These restrictions are designed to ensure that the bonds are offered and sold only to investors permitted by relevant legislation in each country where the bonds will be distributed. **9.28**

United States

In the US, unless a project bond offering has been registered with the SEC, it must be distributed in a manner that fits within one of the available exemptions from registration. As mentioned above, the exemption most commonly used for project bonds is Rule 144A, promulgated by the SEC in 1990, essentially to create a securities market limited to large institutional investors, known as 'qualified institutional buyers' or 'QIBs'.[16] **9.29**

In a Rule 144A offering, an issuer will sell its securities in a private placement (explained below) to one or more underwriters who, in turn, resell the bonds in the US to QIBs, such resales being exempt from SEC registration under Rule 144A,[17] **9.30**

[16] To be eligible as a QIB, an investor must own or invest in, on a discretionary basis, a least $100 million of securities and must be one of the types of institutions specified in Rule 144A, including certain types of insurance companies; an investment company registered under the US Investment Company Act of 1940; certain types of small business investment companies; certain types of employee benefit plans; any broker-dealer registered under the Exchange Act; and any US or foreign bank or savings and loan or equivalent institution that has an audited net worth of at least $25 million.

[17] Rule 144A has fairly minimal requirements. The securities cannot be of the same class or otherwise fungible with a class of securities that is SEC-registered (i.e. already publicly traded in

and outside the US to other investors, in resales exempt, under the SEC's Regulation S,[18] from SEC registration.

9.31 An alternative to a Rule 144A offering for project bonds targeted at the US is available in so-called 'US private placements'. The private placement exemption allows an issuer to place its bonds directly with accredited investors in a transaction that does not involve an underwriter. From a documentation perspective, private placements are simpler to execute because a prospectus is not required. A placement agent[19] and the issuer prepare a relatively simple information memorandum and term sheet to approach institutional investors, who are responsible for conducting their own due diligence on the issuer. No underwriting agreement is used. The placement agent has a simple engagement letter. The bonds themselves are documented in a form note purchase agreement between the issuer and each investor.

9.32 However, although simpler from a documentation and execution standpoint, the disadvantage of a US private placement is that the investor base is significantly smaller than for a Rule 144A offering or a registered public offering, so the market is inevitably capacity-constrained, resulting in relatively small deal sizes, and bonds that are less liquid for trading purposes.

European Union

9.33 In the EU, bonds that have a minimum denomination in excess of €50,000 are exempt from the requirement for a prospectus that complies with the Prospectus Directive in a public offering. The Prospectus Directive also exempts from its prospectus requirements bonds that are offered only to 'qualified investors' somewhat like the exemption in the US for offerings only to QIBs under Rule 144A.

the US). Investors must be notified that the seller may be relying on the Rule 144A exemption (i.e. the securities being sold are not SEC-registered and the issuer may not be a public reporting company). The issuer must undertake to provide basic information to QIB investors or potential investors (i.e. a brief description of the issuer's business and the product and services it offers, as well as its most recent balance sheet, profit and loss statement, or similar financial information for the periods during the two latest fiscal years that the issuer has been in operation).

[18] Regulation S under the Securities Act confirms a territorial approach to US securities laws by establishing an exemption for non-US transactions. Generally speaking, in order to fit within the Regulation S exemption safe harbor, an offer or sale of securities must occur in an 'offshore transaction' and must not involve any 'directed selling efforts' in the US. An offshore transaction is one in which the seller reasonably believes that the buyer is offshore at the time of the offer or sale or one which occurs on certain 'designated offshore securities markets' and the transaction is not prearranged with a buyer in the US. 'Directed selling efforts' are any activities made in the US by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing that could reasonably be expected to condition the US market for the securities.

[19] As opposed to an underwriter. The placement agent acts as an agent for the issuer and does not actually purchase and resell the bonds. See the discussion at para. 9.41 et seq.

Other jurisdictions

Generally speaking, exemptions similar to those in the US and the EU are available in other jurisdictions for offerings of securities to the institutional markets. Project bond documentation will include offering and transfer restrictions for the principal jurisdictions where the bonds will be offered. One point worth noting, however, is that offers and sales of the bonds in some jurisdictions may be prohibited for tax or other regulatory reasons. **9.34**

Governing Law

The securities laws of the relevant jurisdictions (for example, the US, the EU, or individual EU member states) where the bonds will be offered regulate the securities offering process and related issues of liability. However, contractual project bond documents—the underwriting agreement, the indenture or trust deed, and the bonds themselves (as opposed to the regulatory regime governing the offering process) generally will be governed by either New York or English law, regardless of the jurisdictions in which the offering is undertaken. This practice has developed over time because the contract law in these two jurisdictions is well established and familiar to investors. The governing law of the project bond contracts will be agreed between the issuer and the underwriters at the commencement of planning for the project bond offering. Note that although it is common for project bond contracts for Rule 144A offerings to be governed by New York law, there is no reason that English law could not be used even for offerings into the US, and vice versa for transactions targeted at European investors. **9.35**

Security documents will usually be governed by the law of the jurisdiction in which the collateral is located. **9.36**

The Due Diligence Process

Given the importance of the due diligence defence for various parties in both registered and Rule 144A offerings, establishing the grounds for such a defence, along with ensuring accurate and adequate disclosure, is the objective of the extensive due diligence process that characterizes securities offerings involving the US markets. The objective of the due diligence process is to create a record that the potential defendants undertook significant and reasonable due diligence efforts to ensure the accuracy of disclosure in the offering materials. **9.37**

A foreign issuer contemplating a bond offering to US investors is expected to comply with the due diligence process, including opening its books and records to its own legal counsel, the underwriters, and the underwriters' legal counsel. **9.38**

For example, underwriters and the respective legal counsels will seek to review material documents that have been prepared by the issuer or its affiliates including, among other things:

(1) the issuer's constitutional documents;
(2) minutes of board of directors, board committee, and shareholders' meetings;
(3) material agreements with major suppliers and customers;
(4) agreements regarding credit facilities and other significant sources of financing for the project;
(5) licences, intellectual property, and permits material to the project;
(6) documents relating to insurance and liability management;
(7) employment agreements with senior executives and other key employees, labour union contracts, and employee medical, retirement, and stock option plans;
(8) research reports about the project prepared by financial analysts;
(9) press releases by the project;
(10) financial statements and management accounts;
(11) tax returns;
(12) internal management reports relating to the adequacy of the issuer's accounting procedures and controls; and
(13) documents relating to regulatory issues and ongoing litigation.

9.39 The issuer is also expected to facilitate aspects of the underwriters' due diligence that involve discussions with various parties, such as key officers, board members, and outside auditors. In particular, the issuer is expected to facilitate the following:

(1) a review of operations with the issuer's chief operating officer (or equivalent) and heads of major business divisions and material subsidiaries;
(2) a review with the chief financial officer and the issuer's external accountants (often in separate meetings) of the issuer's financial condition, accounting standards, and internal controls;
(3) a review with internal and external counsel of existing and potential litigation or governmental proceedings; and
(4) additional discussions to the extent the issuer's business and financial condition is dependent on a few important key customers, suppliers, or lenders.

9.40 In addition to the legal imperative to avoid material misstatements in, and omissions from, the information contained in the prospectus, due diligence procedures followed in preparing for Rule 144A offerings are often designed with business and reputational issues in mind for both issuers and underwriters. This means that, while the scope of due diligence may vary depending on the circumstances of a particular offering, the underlying rationale for conducting a thorough due diligence review (that is, the need to avoid defective disclosure, liability and litigation) remains the foundation on which the due diligence process is based.

The Underwriting Process

One of the key distinctions between a bond transaction and a bank loan transaction is the offering process itself. Most bond transactions are undertaken through an underwriting process whereby investment banks, acting as underwriters, purchase the bonds from the issuer at closing and then resell the bonds to investors. This intermediate step of sales through underwriters encourages the offering process both in terms of facilitating marketing and also assisting with securities regulatory compliance, particularly in the US. As a practical matter, the underwriters receive funds from investors prior to funding their own purchase of the bonds and sell the bonds on to investors immediately upon receipt of the bonds from the issuer. This also makes the process easier for the issuer, as the issuer only has to receive funds from one or a few underwriters, rather than separately from all investors. Figure 9.1 illustrates the underwriting process in simplified form. **9.41**

Many transactions, particularly higher value bond issuances, tend to have several underwriters. **9.42**

Types of underwritings

There are three basic types of underwriting commitments, which are as follows: **9.43**

(1) Firm commitment underwriting—also known as a 'hard underwriting', whereby the underwriters assume all risk by purchasing a pre-agreed principal amount of bonds at a pre-agreed price, after which the underwriters sell the bonds on to investors. If the underwriters fail to sell the bonds on to investors successfully, the underwriters must retain the bonds, making this the riskiest underwriting arrangement from the underwriters' perspective (and conversely the safest form for the issuer). As a result, firm commitment underwriting is the most expensive type of underwriting for the issuer because underwriters demand the highest fees for this arrangement.
(2) Standby underwriting—whereby the underwriters agree to purchase the portion of the bond issue that remains unsold to investors. As a practical matter, this form of underwriting is not fundamentally different from a firm commitment.
(3) Best efforts underwriting—whereby the underwriters agree to use their best efforts to sell as much of an issue as possible. However, the underwriter is obliged to purchase only the amount required to fulfil investor demand. If the underwriters are unable to sell the total principal amount of bonds sought to be issued by the issuer, the underwriters do not have to purchase the shortfall.

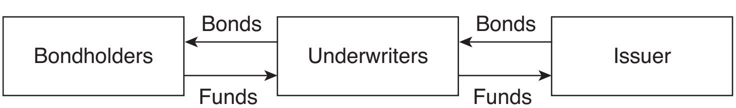

Figure 9.1 The Bond Underwriting Process

9.44 Regardless of which underwriting arrangement is followed, the underwriters are expected to advise the issuer in the pre-marketing stage about how best to structure and market the transaction to appeal to investors and then assist in the roadshow process to present the issuance and the project to investors. Investment banks often have teams specializing in different industries and asset classes and it is common to select underwriters based on their industry and/or asset class expertise and their relative access to investors who are interested in that industry or asset class.

Roadshow

9.45 After completion of the preliminary offering circular (described below), the underwriters will organize a 'roadshow' whereby senior members of the issuer's management team will meet with potential investors in a series of presentations scheduled over a period of anywhere from one to two days to several weeks. These meetings are usually scheduled in multiple cities, usually at least in New York (assuming the offering is targeted at US investors) and London, and often encompassing other major financial centres such as any of Hong Kong, Frankfurt, Dubai, Abu Dhabi, Milan, Paris, Los Angeles, Tokyo, Singapore, Shanghai, and Beijing, depending on the size of the deal and the number and type of investors being targeted.

9.46 At these meetings, the issuer's management presenters will use a slide presentation, prepared in conjunction with the underwriters, that summarizes the project and its financial prospects. The information contained in the roadshow presentation should be consistent with the information included in the offering circular. Hard copies of the presentation should not be left with investors.

9.47 During the roadshow process, the underwriters will be undertaking a 'bookbuilding' process, whereby the underwriters assess demand from potential investors to determine what size investment the investor might be willing to make and at what price. Through this process, the underwriters can work towards optimizing the deal size and price for the issuer.

9.48 Throughout this period, it is likely that the underwriters will keep the issuer apprised of market conditions and how activity in the markets might impact the offering. At the time of pricing, the underwriters will advise the issuer as to their views on appropriate deal size and price. Once the deal size and price are agreed with the issuer, the underwriting agreement will be executed and the parties will move towards issuance and funding of the bonds.

Typical Project Bond Documentation

9.49 Numerous documents comprise the suite of materials for a project bond offering. Together they encapsulate:

(1) materials and information used to market the bond offering;

(2) part of the foundation for establishing the underwriters' due diligence defence; and
(3) the contractual terms with respect to the initial marketing and sale of the project bonds by the underwriters and the terms and conditions of the project bonds themselves.

Figure 9.2 shows the primary bond documentation, described in detail below. Obviously each transaction and each project is different, and the commercial and disclosure issues that present themselves in each transaction will vary. In addition, the documentation governing the project bonds will vary depending on governing law and specific market practice.

Offering circular

As mentioned above, the bond offering process requires that the project bond issuer produce an offering circular or prospectus. Given the disclosure liability and due diligence obligations described above, the offering circular has evolved into a critical transaction component for conveying all material information about the project to investors. As mentioned above, although the specific disclosure rules applicable to a public offering do not apply in exempt offerings, those rules are viewed as guidance as to what is material to investors, and therefore what needs to be disclosed, in an exempt offering. For this reason, market practice has developed to the point where Rule 144A offerings adhere generally to public disclosure guidelines (often even in non-US offerings). **9.50**

Similarly, although disclosure tends to be less extensive for transactions that are done entirely outside the US (i.e. without seeking US investors), the stringent US **9.51**

Primary project bond documentation

- Offering circular
- Subscription/underwriting agreement
- Bond trust deed/indenture
- Global note
- Intercreditor arrangements
- Security documents/collateral deed
- Auditor's comfort letter
- Agreement among underwriters
- Legal opinions

Figure 9.2 The Primary Bond Documentation.

requirements provide a good checklist or reference point for assessing the adequacy of a disclosure document. However, the scope of disclosure can depend on a variety of factors, including:

(1) the customary scope of inquiry in the international market and, if it is well developed, the issuer's home market;
(2) the type of securities being offered;
(3) the financial strength of the issuer and its credit standing; and
(4) technical disclosure requirements of regulatory regimes where the bonds will be offered or of stock exchanges where the bonds will be listed.

9.52 In other words, while the level and type of disclosure required for a US public offering is usually relevant in a Rule 144A offering, in practice the necessary disclosure may be more extensive or less so, depending on the particular circumstances and marketing objectives.

Categories of information in the offering circular

9.53 Regardless of how closely the offering circular disclosure adheres to US public offering disclosure requirements, there are broad categories of information that will almost always be included. These include, inter alia, a description of the project, a description of the project's other financing arrangements, descriptions of upstream and downstream contractual relationships, and the terms and conditions of the project bonds. If the sponsors are providing financing, completion guarantees, construction services, or off-take arrangements for the project, disclosure about the sponsors will likely be necessary as well. Similarly, if other third parties are providing material support for the project or credit support for the project bonds, disclosure about them and those arrangements will be appropriate.

9.54 Typically, the issuer and its legal counsel will take the lead in drafting the sections of the offering circular specifically related to the issuer, such as those mentioned in paragraphs 9.55 through 9.66 below.

9.55 *A technical description of the project*: Disclosure regarding a project normally begins with a description of the material details of the project itself—its development history, physical location, facilities and operations, the technology involved and its supporting infrastructure. If a project is based upon the extraction of natural resources—an energy or mining project, for example—a description of the size of the resource, often based on an engineer's or geologist's report annexed to the prospectus, will be essential.

9.56 *Descriptions of material project agreements*: For a project still under construction, the prospectus will include summaries of the material terms of the significant construction agreements, including EPC contracts, completion guarantees, and construction services agreements. Contract descriptions for a project, whether completed or not, will cover concession agreements, land use rights, agreements with key suppliers to the project (including raw materials, power and other utilities, and transportation), key customers (particularly if a project depends on one or a handful of major off-takers) or the nature of the customer base if it is diffuse. Note that a major consideration when planning for contract disclosure in a bond offering is that contracts with third parties may contain commercially sensitive information such as pricing, quality, quantity, duration, take-or-pay features and the like. These provisions can be quite material to investors when trying to model the project company's ability to generate cashflow to service the bonds and other project debt. Yet, a confidentiality clause in a material agreement may prohibit disclosure without the consent of all parties to the contract. If a party refuses to consent to disclosing terms that are material to bondholders, financing through a project bond will not be possible.

Competitors: If a project faces current or likely future competition for markets or customers, the offering circular should describe the sources of competition and management's view of the relative strengths and weaknesses of competitors. **9.57**

Risk factors relating to the project and/or industry: These can include geographic risks, political and jurisdictional risks, environmental and safety risks, and competitive risks, among others. This section is an area that issuers initially may find troublesome, as it may seem counter-intuitive to include negative information in the document that will be used to market the project bonds to investors. However, for the disclosure-related liability reasons explained above, it is critical to disclose potential pitfalls that could materially impact the issuer and/or the project. **9.58**

A description of the issuer's industry: This will include typical supply and sales frameworks, domestic and international considerations and industry performance and outlook. The underwriters are often also deeply involved in drafting this section, with input from their internal industry analysts. It is important that the underwriters help 'position' this section from a marketing perspective to focus investors on critical industry drivers and expectations. If appropriate, industry specialists or consultants may also be separately engaged to produce reports to assist in drafting this section or to support the data and conclusions included. Ideally, all statistics and data included in the industry section will be cited from independent sources, which may involve seeking permission to reprint information, such as data included in industry reports published by trade associations or other industry publications. **9.59**

A description of the project's other financing/indebtedness: This description should include a reasonable level of detail on the overall financing of the project, credit support, and intercreditor provisions such that bond investors have sufficient information on all sources of funds for the project and all material obligations of the project. The ranking of different groups of creditors, whether senior, *pari passu*, or subordinate in relation to the bonds, also must be described. Such a description will contain detail as to the material terms of the intercreditor arrangements that affect the bonds, as well as bondholders' relative position in the project's overall capital structure. **9.60**