International Case Study – How To Structure And Finance An International Distributed Wind Project

Panel: Export Opportunities
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Mark J. Riedy, Esq.

- *Has Represented Clients In Renewable And Conventional Energy (Fuels And Power And Infrastructure) Project Finance Since 1975, Government Funding Initiatives (Grants, Loans, Loan Guarantees, etc.) Since 1980, And Clean Tech Private Placements Since 1999, Domestically And Internationally.*
- *A Founder And Original General Counsel:*
  - *Renewable Fuel Association –1979-1984.*
  - *Clean Fuels Development Coalition – Since 1985.*
  - *Clean Fuels Foundation – Since 1990.*
  - *American Council On Renewable Energy/Biomass Coordinating Council – Since 2001.*
  - *Latin American Council On Renewable Energy – Since 2009.*
- *Member of the Finance Committee of the Alliance to Save Energy (2015 to present).*
- *Assisted Clients In The Creation Of The Original Alternate Energy Tax Incentives In The 1978 And 1980 Tax Acts, And Their Expansions And Extensions Thereafter.*
- *Assisted Clients In The Renewable Fuels And Renewable Power Industries In The Development Of Provisions In The 1978 Public Utility Regulatory Policies Act, 1983 Caribbean Basin Economic Recovery Act, 1990 Clean Air Amendments (And Reformulated Gasoline Regulations Thereto), 1992 Energy Policy Act, 2005 Energy Policy Act, And The 2007 Energy Independence And Security Act, 2008 and 2014 Food, Conservation And Energy Acts, And 2009 American Recovery And Reinvestment Act.*
- *Named One Of The Top 100 Bioenergy Leaders Worldwide – BiofuelsDigest – 2011-2012 (#67), 2012-2013 (#50), 2013-2014 (#56), 2014-2015 (#49) and 2015-2016 (#42).*
- *AV Preeminent Rating By Martindale-Hubbell For Last 20 Years.*
- *Named One Of Washington, DC & Baltimore's Top Rated Lawyers For Business & Commercial By Legal Leaders and Wall Street Journal For 2012-2016.*
- *Vice Chairman For Project Finance, American Bar Association, Section For Energy & Natural Resources Since 2010.*
- *Kilpatrick Townsend Ranked #1 Worldwide For Infrastructure Construction – Chambers – 2011-2015 and #1 in the U.S. in Intellectual Property – Chambers – 2011-2015.*
- *Graduated With JD – Georgetown University Law Center And BA – University of Michigan – Summa Cum Laude And Phi Beta Kappa.*

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Case Studies – Companies Funding Projects in the US Versus Internationally

A. International Case Study—How To Structure And Finance An International Bioeconomy Project—Not For The Neophyte Or Faint-Hearted

1. Why invest in offshore distributed wind projects?
   - US regulatory uncertainty.
   - Perceived better returns.
   - Significant pipelines of project opportunities, among other important factors attract US developers to build their projects overseas.

2. Pick the country in which to build based on various factors including, but not limited to:
   - Stability, needs, political will, ability to financially close, etc.
   - This analysis entails four big questions:
     - Do they speak English?—the ugly American Syndrome – but language barriers can be daunting and costly (many countries will require the contracts to be in their language in addition to English and you don't want to lose the intent of provisions through translation).
     - Do they have a mature Financial System?
     - Do they have a mature Legal System?
     - Can you get your money out?
   - 4 Significant Wind Energy Venues:
     - Australia
     - Brazil
     - Canada
     - China
     - Denmark
     - Europe (Germany, France, Spain, United Kingdom, Italy, Portugal)
     - India

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3. Critical Tax and Corporate Structuring—the developer "Cowboy Syndrome"—i.e. looking for the finish line while forgetting that inadequate structuring later can economically disable a project.
   - Tax structuring:
     - International Double Tax Avoidance Agreements ("DTAAs")—Tax Treaties—to reduce host country taxes. Host countries can have excessively high direct and indirect taxes and can be tax aggressors. You seek to limit:
       - Corporate Income Tax and Capital Gains Tax on Investors.
       - Interest Income Tax on Lenders.
       - Royalty Tax on Licensors.
   - Corporate Structuring:
     - Limited liability protection to stop aggressive host countries from imposing excessive tax and non-tax project liabilities.
     - Tiers of limited liability projection, each of which can block tax and non-tax aggressor host country liabilities.
       - Tier 1 – Host Country.
       - Tier 2 – DTAA Country.
       - Tier 3 – Bahamas, Bermuda, British Virgin Islands or Cayman Islands (no taxes and no bilateral tax treaties, but strong limited liability protection).
       - Tier 4 – US – Delaware LLC, Nevada LLC, etc.
   - Bilateral Investments Treaties ("BITs")—provide additional necessary investor rights – such as more favorable arbitration rights.

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3. Critical Tax and Corporate Structuring—the developer "Cowboy Syndrome"—i.e. looking for the finish line while forgetting that inadequate structuring later can economically disable a project. (cont'd)
   - Examples:
     - Mauritius – 36 plus DTAAs for Asia and Africa, substantial number of BITs, LLCs to limit investor liability from general tax and non-tax liability from aggressive host countries. Mauritian DTAAs frequently limit host country corporate income tax on equity investors to 5% and their capital gains tax to 0%. LLCs in Mauritius are non-operating company "shells" simply to move investment money through. Debt, however, can be structured through Cyprus which reduces such host country tax to 10%, as Mauritius does not reduce interest income tax.
     - Singapore's DTAAs can be useful for equity investors and lenders of debt, but they generally require an operating company to demonstrate it incurred a minimum of 200,000 Singapore Dollars of expenses (not revenues) in each preceding year to use its DTAAs in the current year.
     - Could use DTAAs from Spain or Netherlands for Latin American investments.

Case Studies – Companies Funding Projects in the US Versus Internationally

4. Debt Finance and Insurance

   – Generally, no export credit agency ("ECAs"), international funding agency or multilateral development banks ("MDBs") will accept technology risk. Incubate your first commercial project in the US (with USDA and DOE loan guarantee programs where they can stand-up 1st commerical projects) and then venture abroad with a second commercial. That said, BNDES (Brazil) and the China Export-Import Bank are the exceptions, as they will loan to particularly 1st commercial projects without a credit enhancement.

   – Prominent International Funding Authorities and ECAs – some examples are:

     - **US Trade Development Agency (U.S. Funding Agency)** – provides grant based feasibility studies to determine a country's/project's feasibility.
     - **US Export-Import Bank ("Ex-Im Bank") (ECA)**
       – Finances projects in both developing and developed countries—atypical of the majority of ECAs which generally finance only projects in developing countries.
       – Finances up to 85% of US content and up to 30% of foreign content. Thus, equity slices may be reduced at the Ex-Im Bank.
       – Loans are low cost and long term--near Treasury rates—typical base rates: Effective February 15 through March 14, 2016, 10 year fixed loan at approx. 3.04% and 18 year fixed loan at approx. 3.44%, each plus an exposure rate (dependent on the host country), and rates are recalibrated monthly but fixed at financial closing.
       – Loans and loan guarantees. No equity available.
       – Project, corporate and equipment finance.
     - **US Overseas Private Investment Corporation ("OPIC") (U.S. Funding Agency)**
       – Finances projects in developing, emerging (like Israel and Turkey) but not developed countries.
       – Where US content is unavailable – OPIC requires that 25% of the project equity be from US investors.
       – Low cost and long term financing – generally approx. 600 basis points over LIBOR depending on the country and 15 year terms are available.
       – Loans and Loan Guarantees. No project equity.
       – Various insurance policies are available. Political Risk – for expropriation, etc; arbitration award protection when host country courts do not act; feed-in tariff reduction; etc.
       – Loan Guarantees securing loans used in international equity funds to increase the available funds.

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- **MDBs** – Five (5) World Bank private sector finance arms:
  - International Finance Agency ("IFC").
  - European Bank for Reconstruction and Development ("EBRD").
  - Asian Development Bank.
  - African Development Bank.
  - Inter-American Development Bank ("IADB").

  MDBs typically:
  - Finance in developing countries only, and not in developed countries.
  - Generally provide loans, loan guarantees and project equity (sometimes corporate level, VC and private equity). Financing can be low cost and long term.
  - Typical loans have tenors of 7 to 12 years and interest rates of 450 basis points over LIBOR, while typical loan guarantees are for periods of up to 15 years.
  - Multilateral Investment Guarantee Agency (MIGA) provides insurance similar to OPIC. Usually compare one against the other.

5. International Green Banks/Green Bond Issuances.
6. Equity:
   - Private Equity.
   - Infrastructure Funds.
   - Strategic Equity.
   - MDB Equity—as described above, where available.

Case Studies – Companies Funding Projects in the US Versus Internationally

7. Challenges in Financing International Projects Depending on the Country:
   - Lack of familiarity by foreign parties with U.S. investor expectations. 20% + ROIs in a short period of time.
   - Foreign partners often require more funds from U.S. investors without wanting to provide additional ownership interest.
   - Once invested into a country, it can be very difficult to extricate oneself and leave with one’s funds. (Liquidation of Joint Venture companies involves long court proceedings in India.)
   - Litigation of disputes can take 10 years plus. (I have insurance claims, tax and contract dispute actions now in 21st year in India for a client).
   - Foreign arbitration awards may not be enforced in host country courts. (This situation is why you need OPIC/MIGA insurance.)
   - Corruption is often rampant. FCPA, OECD and UK Bribery Act Compliance are critical considerations. Need to have protective contract provisions at a minimum. Need training sessions for employees working overseas.
   - Excessive permitting often occurs at the Central, State, Provincial and local levels (Dabhol India Power Project example – nearly 900 permits and other government authorizations required to effect, at least, large financial closings).
   - Aggressive tax regimes can reach beyond the host country to assert tax jurisdiction over an investor’s worldwide income. One similar example is India’s Vodofone case, where Vodofone Europe acquired Hutchinson Wampoa’s ‘s (Asia) Cayman’s subsidiary only to be taxed $2 billion by the Government of India. India claimed that because Hutchinson had an Indian Subsidiary (which was not part of the transaction), then India could assert a capital gains tax on the unrelated transaction. Indian Supreme Court ruled in favor of Vodofone, after a long court battle.
   - Corporate laws in foreign countries may require a super (75%), and not simple (51%), majority to gain complete control – for example – to block a shareholder special resolution that could completely change the focus of a company’s business.
   - Protection of Intellectual Property from “reverse engineering.”

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Conclusion

We live in a difficult period of sputtering economies, constrained cash flows, increasing risk aversion and other negative influences, as we attempt to expand and vary the world's energy assets.

As such, the continued creation of new, and refinement of existing, highly sophisticated debt financing and equity funding mechanisms are critical to the development and construction of new energy projects of all types.