CRISIS PREPAREDNESS IN CROSS-BORDER IMPACT INVESTING: LESSONS FROM THE COVID-19 PANDEMIC

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I. INTRODUCTION

The global community is not on track to achieve the aspirations set forth in the 2030 Agenda for Sustainable Development (Agenda 2030).[2] A confluence of crises—from the COVID-19 pandemic and climate emergency to a rise in conflict—have reversed years of progress toward the Sustainable Development Goals (SDGs), leading the United Nations (U.N.) Secretary-General to call for an "urgent rescue effort for the SDGs."[3] Moreover, at the 2023 World Economic Forum in Davos, the Secretary-General of the U.N. Conference on Trade and Development urged the global investment community to help bridge the USD $4 trillion annual SDG funding gap facing low- and middle-

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2. UNITED NATIONS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2022 2–3 (2022), https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf.

3. *Id.* at 2.

income countries.[4] One investment approach called "impact investing" has gained significant momentum in this regard.[5]

Impact investing describes a range of investment practices designed "to generate positive, measurable social and environmental impact alongside a financial return."[6] A 2022 study conducted by the Global Impact Investing Network estimates that the size of the impact investing market is USD $1.1164 trillion in assets under management (AUM) globally, with the "vast majority of impact AUM [being] allocated by organizations headquartered in developed markets (92%)."[7] Impact investing offers a promising tool to accelerate progress and commit capital towards the implementation of Agenda 2030 by aligning an investment's impact goals with the achievement of particular SDGs—from investments in affordable housing to access to financial services—while also generating a financial return for investors.[8]

However, in a world marked by multiple intersecting and expanding crises,[9] what happens to an impact investor's commitment to achieving SDG-related objectives if an investment underperforms financially?[10] Are social and environmental goals abandoned in favor of safeguarding financial returns at a time when the communities served by such investments need them most?[11] As these questions suggest, crises triggered by unforeseen events serve as stress tests for the triple

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4. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, MORE INVESTMENT NEEDED TO GET GLOBAL GOALS BACK ON TRACK, SAYS UNCTAD CHIEF (Jan. 19, 2023), https://unctad.org/news/more-investment-needed-get-global-goals-back-track-says-unctad-chief-0. *See also* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, CLOSING INVESTMENT GAP IN GLOBAL GOALS KEY TO BUILDING BETTER FUTURE (Sept. 23, 2022), https://unctad.org/news/closing-investment-gap-global-goals-key-building-better-future (noting that more private sector investment in the SDGs is needed to "get the world back on track towards a better future").

5. D. HAND, B. RINGEL, & A. DANEL, THE GLOBAL IMPACT INVESTING NETWORK (GIIN), SIZING THE IMPACT INVESTING MARKET: 2022 2 (2022), https://thegiin.org/assets/2022-Market%20Sizing%20Report-Final.pdf [hereinafter *GIIN Sizing the Impact Investing Market Report*]. *See also* THE GLOBAL IMPACT INVESTING NETWORK, ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS: THE ROLE OF IMPACT INVESTING 1 (2016), https://thegiin.org/assets/GIIN_Impact%20InvestingSDGs_Finalprofiles_webfile.pdf [hereinafter *GIIN Achieving the SDGs Report*].

6. *What You Need to Know About Impact Investing*, GLOBAL IMPACT INVESTING NETWORK, https://thegiin.org/impact-investing/need-to-know/#s1 (last visited Mar. 19, 2023).

7. GIIN SIZING THE IMPACT INVESTING MARKET REPORT, *supra* note 5, at 1 and 4.

8. *See* GIIN ACHIEVING THE SDGS REPORT, *supra* note 5, at 1.

9. *See* UNITED NATIONS, *supra* note 2, at 3.

10. Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL'Y 55, 74 (2015).

11. *Id.*

bottom line (i.e., financial, social, and environmental) in impact investments.[12] The COVID-19 pandemic has proved to be one such stress test as its aftermath and widespread impact resulted in significant liquidity issues and, in some cases, solvency concerns for many impact investees, as well as impediments to the implementation of SDG-related programs.[13] This Annotation explores some of the many ways that the impact investing community sought to protect impact goals during the COVID-19 pandemic, with a particular focus on lessons learned for preparing for future crises. Part II begins with an overview of the relationship between impact investing and the SDGs. Part III then describes the challenge of protecting an impact investment's social and environmental goals when an unforeseen event occurs outside of the control of contracting parties. Finally, Part IV identifies four lessons from the COVID-19 pandemic for protecting impact goals in times of crisis, as well as potential strategies for enhancing the impact investing community's preparedness and resilience for future threats. Ultimately, this Annotation argues that crisis preparedness should be embedded in the structuring and documentation of impact investments from the outset of a transaction in order to ensure that an investment's social and environmental objectives are not abandoned in times of crisis.

II. ALIGNING IMPACT INVESTMENTS WITH THE SDGS TO ADVANCE AGENDA 2030

In 2015, U.N. Member States adopted Agenda 2030, which consists of seventeen goals and 169 targets[14] to advance "dignity, peace and prosperity for people and the planet, now and in the future."[15] The SDGs are "integrated and indivisible," covering the economic, social, and environmental dimensions of sustainable development, such as

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12. NEIL GREGORY & ARIANE VOLK, THE INTERNATIONAL FINANCE CORPORATION, GROWING IMPACT: NEW INSIGHTS INTO THE PRACTICE OF IMPACT INVESTING xi (2020), https://documents1.worldbank.org/curated/en/823581596091469569/pdf/Growing-Impact-New-Insights-into-the-Practice-of-Impact-Investing.pdf (describing the "crucial stress test" facing the impact investing community in light of the COVID-19 pandemic and associated economic crisis).

13. DEBORAH BURAND & IVO JENÍK, CGAP, DEBT RESTRUCTURING IN MICROFINANCE, COVID-19 BRIEFING: INSIGHTS FOR INCLUSIVE FINANCE 1 (Sept. 2020), https://www.cgap.org/research/covid-19-briefing/debt-restructuring-in-microfinance.

14. G.A. Res. 70/1, ¶ 18 (Oct. 21, 2015).

15. *SDGs —Fast Facts*, UNITED NATIONS, https://www.un.org/sustainabledevelopment/sdg-fast-facts/ (last visited Nov. 6, 2023).

poverty, education, hunger, health, and climate change.[16] Achieving the ambitious goals in Agenda 2030 will require between USD $5 trillion and $7 trillion per year.[17] However, present investment levels from governments, development finance institutions, and other traditional development actors are falling short of the necessary financing.[18] In response to this funding gap, the private sector can play a critical role in leveraging resources to help achieve the SDGs.[19] Impact investors in particular have mobilized to address this funding gap by directing capital toward investments that advance social and environmental goals alongside financial returns.[20]

Many impact investors align their investment strategies with Agenda 2030, targeting the SDGs throughout their portfolios. In its 2020 survey of nearly 300 of the world's leading impact investors, the Global Impact Investing Network (GIIN) found that 73% of respondents reported using the SDGs as a guiding framework for setting impact objectives and measuring performance.[21] For example, 71% of the investors surveyed reported to target "Decent Work and Economic Growth" (SDG 8) in their investment portfolio, 62% reported to target "No Poverty" (SDG 1), and 59% reported to target "Good Health and Well-being" (SDG 3).[22] Moreover, the same investors reported targeting on average eight different SDG-aligned impact themes across their investment portfolios.[23]

III. THE CHALLENGE: PROTECTING AN INVESTMENT'S IMPACT

16. G.A. Res. 70/1, *supra* note 14, at 1.

17. SDG IMPACT, SDG IMPACT: INVESTMENT SOLUTIONS FOR GLOBAL IMPACT 2, https://sdgimpact.undp.org/assets/SDG-Impact-Brochure.pdf.

18. *Id. See also* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, CLOSING INVESTMENT GAP IN GLOBAL GOALS KEY TO BUILDING BETTER FUTURE, *supra* note 4 (noting that "in 2020, international private sector investment flows to developing and transition economies in sectors relevant for the SDGs fell by one third. The gap now stands at about [USD] $4 trillion per year").

19. *See* SDG IMPACT, *supra* note 17, at 2.

20. *GIIN Achieving the SDGs Report*, *supra* note 5, at 1.

21. DEAN HAND, HANNAH DITHRICH, SOPHIA SUNDERJI & NOSHIN NOVA, THE GLOBAL IMPACT INVESTING NETWORK (GIIN), 2020 ANNUAL IMPACT INVESTOR SURVEY 45 (2020), https://thegiin.org/assets/GIIN%20Annual%20Impact%20Investor%20Survey%202020.pdf [hereinafter *GIIN 2020 Impact Investor Survey*].

22. *Id.* at 44-45.

23. *Id.*

GOALS WHEN CRISIS STRIKES

The impact investing community is replete with examples of innovative deal structures[24] and documentation[25] to embed social and environmental objectives, including those aligned with the SDGs, and financial goals into their transactions. "Contracting for impact," as Professor Deborah Burand, Director of the International Transactions Clinic at New York University School of Law, argues, "[r]equires thoughtful consideration by legal counsel as to how to best modify standard contractual provisions or, where needed, create new contractual provisions that can help advance the desired impact as well as financial goals of their clients."[26] Impact investors and investees carefully negotiate the allocation of anticipated impact and financial risks in their deals.[27] However, it is not feasible nor efficient for parties to anticipate or contract for every event that might occur.[28] Moreover, the transaction costs of attempting to forecast and plan for every eventuality could outweigh the size of the impact investment itself.[29] In this context, research from deals done during and responses to the impacts of the COVID-19 pandemic has shown that, when it comes to confronting unforeseen events outside of the control of parties, transaction documentation tended to focus more on allocating financial risks at the outset of a deal rather than social and environmental risks.[30]

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24. *See, e.g.*, *Case Studies*, GLOBAL IMPACT INVESTING NETWORK, https://thegiin.org/case-studies/ (last visited Mar. 19, 2023) (providing case studies with examples of various impact investments).

25. *See* Deborah Burand, *Contracting for Impact: Embedding Social and Environmental Impact Goals into Loan Agreements,* 13 N.Y.U. J.L. & BUS. 775, 782 (2017) (cataloguing trends in embedding impact objectives into the loan documentation of impact investments).

26. *Id.*

27. Deborah Burand & Louise Savell, *What Can Go Right When Things Go Wrong: Contracting for Impact Risk and Opportunities*, IMPACT ENTREPRENEUR (Oct. 20, 2022), https://impactentrepreneur.com/what-can-go-right-when-things-go-wrong/.

28. Deborah Burand, David Koch, & Katy Yang, *Scaling Social Enterprises Through Franchise Models: Rethinking Social Franchise Agreements*, 88 UMKC L. REV. 827, 845 (2020) (describing Oliver Hart and Sanford Grossman's theory of "incomplete contracting").

29. *Id.* (explaining that "parties often deliberately choose to contract incompletely with each other to reduce the transactional costs of trying to anticipate and negotiate ex ante every issue that could emerge during the life of the contractual relationship").

30. Burand & Savell, *supra* note 27; Deborah Burand & Louise Savell, When things go wrong – contracting for impact risk and impact returns (Sept. 9, 2022) (unpublished presentation) (on file with author).

The impact investing community is no stranger to crisis.[31] At the very heart of impact investing is the investing community's motivation to deliver social and/or environmental impact for the communities who need it most,[32] many of whom tend to be vulnerable and disproportionately affected by global crises.[33] However, a poignant lesson from the debt workouts of microfinance impact investments following the 2008 global financial crisis was that an investor's commitment to impact goals may be tested when an investment's financial returns are at risk.[34]

The COVID-19 pandemic is one of the latest global crises the impact investing community has faced. While its impacts diverged locally, the crisis affected investees' operations, portfolios, and liquidity, as well as the livelihoods and health of the wider communities these organizations serve.[35] The pandemic and associated responses also impacted investors' operations, for example travel restrictions and occupational health and safety considerations required investors to change the way they conduct diligence, identify deals, and monitor investments. The COVID-19 pandemic was distinct from previous crises that the sector has faced, particularly because of its global scope and uncertain duration, as well as the fact that its adverse impacts were

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31. JULIE ABRAMS, CGAP, CRISIS ROADMAP FOR MICROFINANCE INSTITUTIONS: COVID-19 AND BEYOND 1 (Feb. 2021), https://www.cgap.org/sites/default/files/publications/2021_02_Crisis_Roadmap_for_MFIs_Techncical_Guide.pdf (showing that the impact investing community experienced the 2008 global financial crisis and a range of political upheavals).

32. *See, e.g.*, *GIIN 2020 Impact Investor Survey supra* note 21, at 20 (reporting the results of a global survey of 294 impact investing institutions, which found that advancing impact was among the most cited motivations for making impact investments).

33. *See, e.g.*, FONDATION GRAMEEN CREDIT AGRICOLE ET AL., PLEDGE: KEY PRINCIPLES TO PROTECT MICROFINANCE INSTITUTIONS AND THEIR CLIENTS IN THE COVID-19 CRISIS 2-3 (2020), https://www.gca-foundation.org/wp-content/uploads/2020/06/2020-06_Principles-to-protect-MFIs-and-clients-in-COVID-19-crisis.pdf (demonstrating that the communities served by microfinance institutions are uniquely vulnerable to the impact of crises such as COVID-19).

34. Burand, *supra* note 10, at 70–74 (summarizing results from a 2009–2010 study of seventeen microfinance debt workouts, which found that the largest cause of the workouts was microcredit portfolio deterioration and that this experience demonstrated that "while social objectives mattered, investors' perceived fiduciary responsibilities to their own sources of capital sometimes led them to prioritize capital protection over advancement of the investee's social mission").

35. *See* FONDATION GRAMEEN CREDIT AGRICOLE ET AL., *supra* note 33, at 1–2 (outlining the foreseeable impacts of the COVID-19 pandemic on microfinance institutions and highlighting the need for these institutions to ensure the needs of clients are at the center of their efforts in managing the crisis).

largely outside of the control of contracting parties.[36] As such, the COVID-19 pandemic offers a unique lens to identify lessons learned for safeguarding impact goals and financial return in impact investments in times of crisis. This analysis is particularly important given the threat of future crises facing the sector, as described in a recent International Finance Corporation report:

> Much of the institutional impact investing industry has grown up since the 2008 Global Financial Crisis, and has thus benefitted from the tailwinds of liquid markets, low interest rates, and widespread, steady economic growth as the global economy made its long, slow recovery. Suddenly the winds have shifted, and . . . impact investing will face strong headwinds in terms of tighter liquidity conditions, risk averse investors, portfolio rebalancing, and widespread economic disruption, all of which will threaten the viability of many impactful firms.[37]

As the above excerpt suggests, whether it was the COVID-19 pandemic or another crisis, high interest rates, inflation, foreign exchange risk, and other market conditions will test the impact investing sector moving forward.

IV. LESSONS FROM COVID-19 FOR ENHANCING CRISIS PREPAREDNESS IN IMPACT INVESTING

While the world is still grappling with the impacts of the COVID-19 pandemic, this Annotation outlines four emerging lessons for strengthening the impact investing community's preparedness for future crises. It seeks to contribute to the many efforts underway to take stock of the pandemic's impact on the sector, including what worked and what did not work, as well as best practices for safeguarding social and environmental goals and building resilience for future threats.[38] Such considerations should be balanced with the need for ensuring financial sustainability in order to achieve impact; financial risks must be

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36. BURAND & JENÍK, *supra* note 13, at 2 (noting the factors that made the COVID-19 crisis unique for the microfinance sector and its funding sources).

37. NEIL GREGORY & ARIANE VOLK, *supra* note 12, at xii.

38. For example, the 2023 Annual Conference on "Legal Issues in Social Entrepreneurship and Impact Investing - in the United States and Beyond," hosted by the Impact Investing Legal Working Group and Grunin Center for Law and Social Entrepreneurship at NYU Law, included a panel theme on "Impact Investing in Times of Crisis: Governance, Collaboration, Restructurings, Data, and Resilience." *2023 Conference*, GRUNIN CENTER FOR LAW AND SOCIAL ENTREPRENEURSHIP, https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/events/2023Conference (last visited Aug. 25, 2023).

managed alongside social and environmental risks. While the evolving regulatory environment associated with local governments' COVID-19 policies shaped the sector's response to the pandemic, especially in the financial services sector, this Annotation focuses on lessons learned for the impact investing community itself, acknowledging that such lessons will need to be adapted according to the relevant jurisdiction. Further, recognizing that impact investing involves a variety of asset classes—such as private or publicly traded debt (e.g., loans or bonds), private equity, or public equity[39]—it provides an analysis of lessons learned that may apply to different categories of investments.

First, while the documentation underpinning impact investments cannot anticipate every extraordinary event,[40] it can provide guidance for determining how parties will make decisions if and when unforeseen events materialize.[41] However, recent research by Professor Deborah Burand and Louise Savell, co-founder of Social Finance, regarding how impact bonds addressed pandemic challenges found that investment contracts generally did not provide helpful guidelines for parties to navigate the crisis, nor were they structured to encourage innovative or collaborative responses.[42] Instead, they found that parties tended to negotiate extra-contractual solutions to safeguard an investment's impact objectives, such as "extend[ing] timeframes and budgets, reschedul[ing] outcome evaluations, and even advance[ing] performance payments."[43]

Even where contract language addressed unforeseen events—for example force majeure clauses[44] for the early suspension or termination of performance obligations in response to an unanticipated event—they were expressly designed to mitigate *financial* risks and rarely

39. D. HAND, S. SUNDERJI, & N.M. PARDO, THE GLOBAL IMPACT INVESTING NETWORK (GIIN), 2023 GIINSIGHT IMPACT INVESTOR DEMOGRAPHICS 13 (2023), https://thegiin.org/assets/documents/pub/2023-GIINsight/2023-GIINsight-Impact-Investor-Demographics.pdf.

40. Indeed, impact investment contracts may be more incomplete than the documentation underpinning more commercial transactions since investors may seek to limit negotiation costs given the relatively smaller deal sizes. *See, e.g.,* Burand, *supra* note 10, at 75 ("some of the complexity being built into the structures of impact investments may give way to simpler transactions—particularly for low-value transactions where the cost of enforcing a complex . . . deal structure threatens to overwhelm the amounts in dispute").

41. Deborah Burand, David Koch, Katy Yang, *supra* note 28 at 845 (outlining the contractual governance arrangements that can be established when parties choose to contract incompletely).

42. Burand & Savell, *supra* note 27.

43. *Id.*

44. Force majeure provisions are more common in impact bonds. In debt transactions, material adverse change clauses attempt to pass the risk to borrowers.

addressed the *social and environmental* risks of suspending performance.[45] As such, impact investors resisted triggering these provisions given the potential shocks posed by unexpectedly suspending performance obligations for the communities served by impact investments at a time of heightened vulnerability.[46] For example, a survey of stakeholders of impact bond-funded projects in low- and middle-income countries during the COVID-19 pandemic found that more than half of the projects surveyed had force majeure provisions, but did not invoke them because of the aforementioned concerns.[47] Even where parties may have sought to invoke force majeure provisions, it was not clear that a pandemic and/or the associated government responses constituted events that triggered these clauses.[48]

These examples suggest that, despite the lack of contractual provisions to manage impact risks resulting from COVID-19,[49] for the most part, impact investors responded to the crisis with flexibility to meet performance expectations over the long-term.[50] Many investors worked with investees to mitigate potential defaults by renegotiating loan terms and/or providing more funds to sustain their investments.[51] Indeed, Professor Deborah Burand and Louise Savell found that, in dealing with the crisis, some forward-thinking impact investors not only sought to preserve mission, but discovered and implemented additional impact objectives to address communities' needs resulting

45. Burand & Savell, *supra* note 27.

46. *Id; see also* Deborah Burand, *Pandemic Shows Risks of Extreme Events to SIB Beneficiaries*, U. S. CAL. SOL PRICE CTR. FOR SOC. INNOVATION & MANCHESTER METRO. U. 4, https://socialinnovation.usc.edu/wp-content/uploads/2021/05/Pandemic-shows-risks-Burand-1.pdf (explaining that invoking force majeure provisions in the case of social impact bonds is problematic given that these investments are expressly designed to meet the needs of vulnerable populations so contracting parties cannot "throw up their hands in despair and take some time off until circumstances have improved and they can get back to work").

47. EMILY GUSTAFSSON-WRIGHT, SARAH OSBORNE & EMILY CRANE, BROOKINGS INSTITUTION, HOW HAVE IMPACT BOND-FUNDED PROJECTS IN LOW- AND MIDDLE-INCOME COUNTRIES FARED IN COVID-19? 17 (Dec. 22, 2021), https://www.brookings.edu/research/how-have-impact-bond-funded-projects-fared-in-lower-and-middle-income-countries-fared-in-covid-19/.

48. Deborah Burand & Louise Savell, The OMG Effect - When Acts of God (and Man) Imperil the Objectives of Impact Bonds (Dec. 7, 2021) (unpublished presentation) (on file with author).

49. Burand & Savell, *supra* note 27.

50. *GIIN 2020 Impact Investor Survey supra* note 21, at XIX (finding that some impact investors surveyed by the GIIN noted that "impact investors are well-placed to support the underserved, recognizing the extent to which marginalized communities are most negatively affected by the COVID-19 pandemic").

51. *GIIN 2020 Impact Investor Survey supra* note 21, at XIX.

from the pandemic.[52] Other impact investors funded new loans and/or equity investments during the crisis. However, while many impact investors' commitments to social and environmental goals appeared to have influenced their approach to the crisis, this motivation cannot be taken for granted in future crises.[53] As more commercially motivated or new investors enter the growing impact investing market, "impact alignments forged in the beginning [of a transaction] may not hold, particularly when tested by unforeseen events."[54]

Moving forward, parties should consider embedding crisis preparedness in their investment documentation from the outset to establish "clear processes for crisis-driven modifications, rather than simple termination" in the context of unforeseen events that pose impact and financial risks.[55] Crisis preparedness could take the form of so-called "relational contracting." Formal relational contracts establish mutual objectives and expectations from the outset of a deal to align parties' interests and behaviors over the long-term, building trust and collaboration, particularly in highly complex relationships.[56] Parties to impact investment transactions could leverage this approach in the context of crisis preparedness by drafting contractual provisions that define "shared goals, principles, and decision-making processes" to guide decision-making when crisis strikes.[57] These guiding principles and governance structures could help align parties' expectations and interests in protecting impact goals when extraordinary events occur outside of their control.[58] Moreover, embedding principles in investment documentation from the outset can ensure that decisions reached in times of crisis are in harmony with the contract instead of having the

52. Burand & Savell, *supra* note 27.

53. *Id.*

54. *Id.*

55. GUSTAFSSON-WRIGHT, OSBORNE & CRANE, *supra* note 47, at 20.

56. David Frydlinger, Oliver Hart, & Kate Vitasek, *A New Approach to Contracts: How to build better long-term strategic partnerships*, HARVARD BUSINESS REVIEW (2019), https://hbr.org/archive-toc/BR1905 (last visited Sept. 25, 2023) (". . . . a formal relational contract [creates] a flexible framework designed to foster collaboration in complex strategic relationships over the long term. These contracts, which are legally enforceable, specify mutual goals and establish governance structures to keep the parties' expectations and interests aligned").

57. Nigel Ball & Michael Gibson, *Partnerships with principles: putting relationships at the heart of public contracts for better social outcomes*, GOV'T OUTCOMES LAB, BLAVATNIK SCH. OF GOV'T, UNIV. OF OXFORD 9-10 (2022), https://golab.bsg.ox.ac.uk/documents/Partnerships_with_principles_final_web.pdf.

58. 2023 Grunin Conference, Morning Plenary - A New Approach to Contracting: Building on Shared Values, NYU LAW GRUNIN CENTER (Jul. 31, 2023), https://www.youtube.com/watch?v=-XfWPeQ6lXg&t=799s.

"problem of real deal versus paper deal."[59] This can also help ensure that impact objectives are not abandoned in favor of financial goals. At the same time, parties will need to balance the advantages of including such provisions in their documentation against the transaction costs of incorporating additional complexity into contracts which might overwhelm the size of the associated impact investments.[60]

Second, the COVID-19 pandemic highlighted the importance of inter-creditor coordination for safeguarding impact objectives in times of crisis and the need to plan for such collaboration as early as possible in the lifecycle of an investment.[61] During the pandemic, in the debt context, some impact investors issued coordination statements to help guide their collective responses.[62] For example, nine impact investors signed a Memorandum of Understanding (hereinafter MoU) to enhance cooperation and support efforts to respond to the crisis within the sector.[63] Recognizing that each of these nine investors had distinct roles with respect to their investment vehicles, the MoU was not intended to be legally binding, but rather to serve as a working document to guide various stakeholders and coordinate their responses.[64] The MoU outlined four categories of loans, each of which required its own level of coordination among investors: ordinary renewals, informal handshake rollovers, legally binding forbearance agreements, and ordinary restructurings.[65] Another international coalition of impact investors developed a pledge (hereinafter the Pledge) at the initiative of Grameen Crédit Agricole Foundation, in which signatories committed to complying with key principles—regarding information sharing and reporting, technical assistance, foreign exchange risk, and restructuring rules—to support the microfinance sector and address liquidity issues throughout the crisis.[66] Further research is needed to assess the impact and effectiveness of the MoU and the Pledge on coordinating investor behavior and safeguarding impact investments' social and environmental goals during the COVID-19 pandemic. Some investors may prefer informal "handshake" deals for their flexibility in dealing with complex

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59. *Id.* at 25:00 - 26:11.

60. Burand, *supra* note 10, at 75.

61. BURAND & JENÍK, *supra* note 13, at 2.

62. Abrams, *supra* note 31, at 10.

63. MEMORANDUM OF UNDERSTANDING: COORDINATION AMONG MIVS IN RESPONSE TO COVID-19 1–2 (April 23, 2020), https://www.infine.lu/wp-content/uploads/2020/04/2020-04-24-MIV-Covid-19-coordination-MoU.pdf.

64. *Id.* at 2.

65. *Id.*

66. FONDATION GRAMEEN CREDIT AGRICOLE ET AL., *supra* note 33, at 1–6.

and unforeseen events.[67] Others may seek to establish from the outset inter-creditor agreements amongst investors with common borrowers to enable, at a minimum, communication between impact lenders as loans are administered and if there are any defaults in times of crisis. Research into the effectiveness of the various coordination commitments could also investigate whether developing inter-creditor agreements or shared principles amongst investors before crisis strikes could help ensure alignment with impact objectives when unanticipated risks materialize. This research would also need to consider the practical and operational elements of an inter-creditor agreement: who would pay to prepare it? How would borrowers encourage future lenders to join it? While embedding crisis preparedness throughout the lifecycle of an investment should include plans for how best to ensure inter-creditor coordination in times of crisis, there is no "one size fits all" approach and the most effective mechanisms for such coordination may vary depending on the particular operations and objectives of the parties to the transaction.

Third, crisis preparedness and response efforts should take into account the perspectives and needs of the communities the impact investment seeks to serve (these communities are sometimes referred to as an investee's "clients," "beneficiaries," or "service users").[68] Professor Deborah Burand and Louise Savell's research regarding impact investment transactions during the COVID-19 pandemic found that "[s]ervice users themselves were generally not part of decision making processes."[69] Community needs should be at the center of response efforts and considered in the governance and decision-making processes embedded in the underlying contractual arrangements between investors and investees.[70] These governance arrangements are important in establishing channels for communication and collaboration before a crisis strikes, and enable greater preparedness in the underlying investment. Further investigation is needed to highlight innovative efforts to incorporate communities' perspectives throughout the lifecycle of an impact investment to ensure that it is meeting and adapting to their expressed needs,[71] while also ensuring that both financial and impact risks are managed.

Finally, the COVID-19 pandemic highlighted the critical importance of transparency and information sharing between impact

67. Frydlinger, Oliver Hart & Kate Vitasek, *supra* note 56.

68. Burand & Savell, *supra* note 27.

69. Burand & Savell, *supra* note 30.

70. FONDATION GRAMEEN CREDIT AGRICOLE ET AL., *supra* note 33, at 2-3. *See also* Burand & Savell, *supra* note 27.

71. Burand & Savell, *supra* note 27.

investors, investees, and the communities served by these investments in order to maintain collaborative and effective negotiations in times of crisis.[72] A 2020 workshop report from the Consultative Group to Assist the Poor found that information sharing and transparency are critical tools for maintaining trust between parties in times of crisis.[73] A trusting relationship, in turn, is important for minimizing the possibility of a dispute occurring in the first place.[74] As such, information symmetry is another tool for protecting an investment's long-term impact objectives when distressed situations might distort incentives or test impact goals agreed to at the outset in favor of protecting financial returns in times of crisis. Thus, before a crisis hits, systems should be in place to enable information sharing between parties and ensure mutual alignment on safeguarding social and environmental objectives. Transparency and information sharing principles can also be embedded in relational contracts documenting the investments as a form of crisis preparedness to guide decision-making when an unforeseen event occurs. The impact investing community might also consider including these principles in extra-contractual inter-creditor agreements in the debt context as described above in order to ensure trust and transparency, including between international and local investors.

These four emerging lessons demonstrate that, for the most part, the impact investing community responded to the COVID-19 crisis in innovative ways to protect social and environmental goals, as well as financial returns, in their investments. While the data show that contractual arrangements may not have adequately included provisions to address unanticipated impact risks, nor provided sufficient blueprints for protecting impact goals in times of crisis,[75] impact investors generally responded with flexibility and a commitment to achieving social and environmental goals over the long-term.[76] However, there is concern that a reliance on a party's motivations alone might not always be enough, particularly as more commercially-motivated or new investors enter the impact investing market, potentially prioritizing financial returns over impact goals.[77] As such, impact investors may wish to consider how crisis preparedness may be embedded in the structuring and documentation of an impact investment from the outset to ensure that mechanisms are in place to guide decision-making in response to the impact and financial risks posed by unforeseen events.

72. BURAND & JENÍK, *supra* note 13, at 2-3.

73. *Id.*

74. Ball & Gibson, *supra* note 57, at 9.

75. Burand & Savell, *supra* note 27.

76. *GIIN 2020 Impact Investor Survey supra* note 21, at XIX.

77. Burand & Savell, *supra* note 27; Burand, *supra* note 10, at 74.

The COVID-19 pandemic also highlighted the importance of collaboration amongst and between impact investors and investees, as well as the need to include the perspectives of communities in governance and decision-making processes. Thus, to better prepare for future crises, the impact investing community should consider embedding plans and mechanisms for coordination and information sharing in the structuring and documentation of their investments to ensure alignment between all parties on safeguarding impact.

V. CONCLUSION

Impact investing can play a vital role in implementing the 2030 Agenda by aligning an investment's social and environmental goals with the achievement of particular SDGs while also generating a financial return for investors.[78] As such, impact investing offers a promising tool for engaging the private sector to help bridge the estimated USD $5 trillion to $7 trillion annual gap in financing required to achieve the SDGs.[79] In order to realize this promise, the impact investing community should consider embedding crisis preparedness in the structuring and documentation of impact investments from the outset to ensure that impact objectives are not abandoned in times of crisis. Lessons from the COVID-19 pandemic can provide a roadmap for the impact investing community to establish contractual and extra-contractual arrangements, agreed philosophies, and mechanisms for coordination and information sharing at the outset of a deal to mitigate and respond to the risks posed by unforeseen events. While the impact investing community will inevitably face new threats in the years to come, by implementing the lessons learned from the COVID-19 pandemic, it will be better prepared to respond and safeguard sustainable development objectives when a crisis strikes.

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78. *GIIN Achieving the SDGs Report*, *supra* note 5, at 1.
79. SDG IMPACT, *supra* note 17.