

THE LEGAL AND REGULATORY FRAMEWORK OF FOREIGN INVESTMENT IN MYANMAR'S POWER SECTOR

Analysis and Opportunities for Reform

MYANMAR PRACTICE OVERVIEW

We are known for providing the ultimate in ground connectivity to our clients. We believe that specialization, along with tenacity, is necessary to achieve this. Therefore, in 2016, we ramped up our headcount and the number of our senior advisors, and we converted to a system of exclusively dedicated practice teams in Myanmar.

We have created 4 general practice teams (Corporate M&A, Banking and Finance, Licensing and Disputes) and 4 specialized teams (Energy, Telecommunications, Infrastructure, Real Estate & Construction and Taxation).

Each practice team comprises a team leader, who assists a partner to manage the team, and minimum 4 to maximum 10 advisers who are exclusively dedicated to only one team. All team members are, just like partners Edwin Vanderbruggen and Jean Loi, residents of Myanmar.

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EXECUTIVE SUMMARY

Based on existing shortfall and projected increases in demand as Myanmar seeks to catch up with other Asian countries in terms of electrification rate, there is very little doubt that Myanmar's power sector presents a number of extraordinary opportunities for foreign investment in generation and transmission projects.

The Government's policy has been to increasingly liberalize, decentralize and open the power sector to foreign investment. In the process, foreign independent power producers face a legal and regulatory framework that is in full transition.

Besides wider economic considerations, which are outside of the scope of this report, the regulatory uncertainty associated with this transition is, in our view, reducing and slowing down the conversion and the implementation of foreign-invested power projects. This is one of the reasons why only a small number of foreign-invested projects in the power sector were licensed by the Myanmar Investment Commission (MIC) in 2013.

Myanmar is at the stage in its development where it is still building up experience with respect to certain issues that are important to foreign investors in the power sector. Contractual precedents and specific regulations still need to be developed. In addition, the Government is still finding its way with regard to adjusting its internal administrative and decision-making processes to the new needs, the volume of proposals and the new profile of the foreign investors.

There are few laws and detailed regulations that are specific to investment in the power sector. The newly amended 2014 Electricity Law, provides little more than a general framework for state governance of the electricity sector. At present, there are few detailed regulations for tariffs, legal terms, environmental aspects or other aspects of power sector investments. Most of the rules governing a power sector investment are found in the project's contractual documentation that establishes the concession. The Government practice to date has been mostly to negotiate and conclude successive and increasingly detailed agreements, going from the non-binding Memorandum of Understanding (MOU) to, after a feasibility study has been submitted by the investor, a Memorandum of Agreement (MOA), which establishes the concession but leaves a number of important matters unaddressed. At the

final stage, the actual power purchase agreement (PPA), the fuel supply agreement and the land lease, if any, are concluded. If the investment is a joint venture with the Government, the joint venture agreement is negotiated and concluded in the course of this process. In practice, the foreign investor will simultaneously need to prepare to obtain an investment license from the MIC (the MIC Permit) which will, practically speaking, be necessary once the concession has been secured. In conjunction with this process, the foreign investor will need to establish a locally registered company with the Directorate of Investment and Company Administration (DICA).

The legal framework for foreign investment in general has been significantly improved in recent years, particularly with the enactment of the 2016 Myanmar Investment Law and its implementing rules, the Environmental Conservation Law and the Foreign Exchange Management Act. Under the 2016 Myanmar Investment Law, investment with 100% foreign ownership is permitted after obtaining approval from the relevant Ministry. The number of activities to be carried out only in the form of Joint Venture with Myanmar Citizen owned entity is comparatively reduced.

The Government's administration of the power sector endows a central role to the Ministry of Electricity and Energy. Nevertheless, concessions are in practice submitted for approval to the cabinet. Although some recent developments indicate a trend towards more flexibility, the typical model for the market structure is as follows:

- The Electric Power Generation Enterprise (EPGE) purchases electricity from public and private producers.
- EPGE then sells it to various (decentralized) organizations such as the Electricity Supply Enterprise (ESE), Yangon Electricity Supply Corporation (YESC) and Mandalay Electricity Supply Corporation (MESCC) for distribution.

A number of different investment structures currently exist, reflecting the evolution in the Government's thinking on the subject. To date, two basic structures have been used for power projects with private investment:

- A number of projects are structured as a BOT transaction, where the developer imports and installs equipment purchased from a vendor and operates the facility, selling electricity to the Government under a PPA where the gas cost may or not be a pass-through. It will typically be necessary to conclude other agreements depending on the type of facility, such as a land lease and a fuel supply agreement.
- Joint ventures between the private investor and the Government law under the Special Companies Act (1950). In this case, a joint venture company is established under Myanmar law in which both the Government and the private investor own a shareholding. The joint venture company will conclude a PPA with the Government for selling the electricity, as well as other necessary agreements depending on the type of facility, such as a land lease and a fuel supply agreement.

The fiscal structure of power sector investment poses a number of issues. The applicable taxes and tax exemptions are fairly well defined, but tariffs and tariff adjustments are not regulated or public.

Based on our assessment of the legal and regulatory framework of power sector investments, we have formulated a number of practical challenges and suggestions for reform in the “Conclusions” section of this report on page 46.

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CHAPTER 1: OPPORTUNITIES FOR FOREIGN INVESTORS IN MYANMAR'S POWER SECTOR

It is generally recognized that the power sector is one of Myanmar's most promising areas in terms of foreign investment.

Myanmar has an installed capacity of approximately 3,460MW of energy generation, which is composed primarily of 2,660MW (76%) of hydropower capacity, 550MW (16%) of gas-fired capacity, 165MW (5%) of steam capacity and 120MW (3.5%) coal-fired capacity. However, even this installed capacity is estimated by the Asian Development Bank (ADB) to be between 400MW to 500MW below demand during the dry season, when Myanmar's hydropower cannot produce at full capacity, resulting in rotational load shedding. What is more, available capacity remains "significantly below" installed capacity due to poor maintenance.

When the projected increase in demand is taken into account, the opportunity for investment becomes even more apparent. With a population of more than 60 million, Myanmar's per capita electricity consumption was only 100kWh per year, which was the lowest among the 10 Association of Southeast Asian Nations (ASEAN) member states. Given Myanmar's current low electrification rate, which was estimated to be approximately 26% in 2011 by the ADB, a strong increase in domestic demand can in and of itself drive significant growth in the sector. Even if electricity output doubled every five years, it would take five years just to meet current needs. In that time, demand is predicted to grow by 12% a year, leaving an unmet demand of more than 70%. McKinsey Global Institute noted in June 2013 that provided a number of important challenges can be overcome, given the strong demand, the electricity

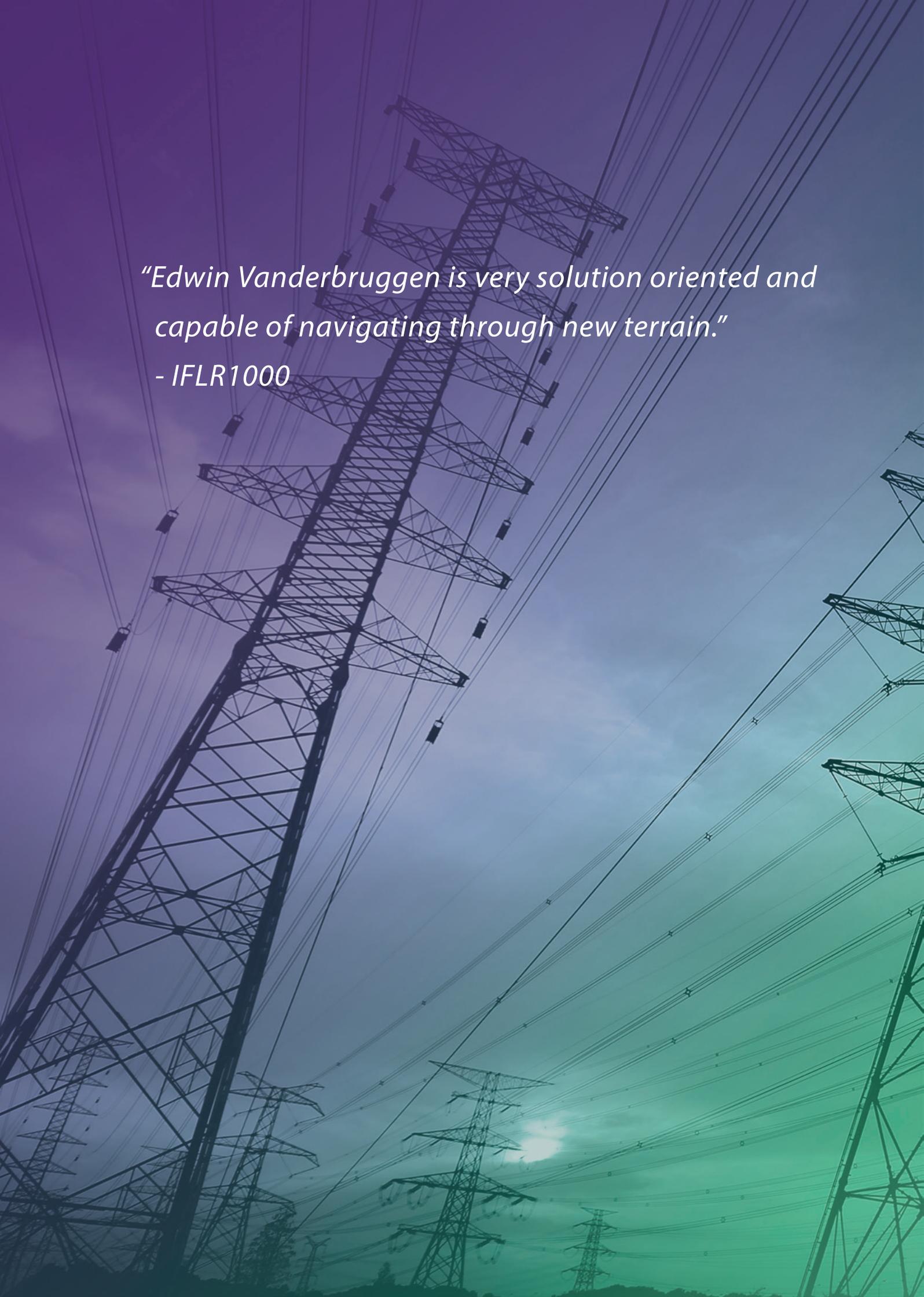
market in Myanmar is poised to experience a compound annual growth rate of 5% up to 2030.

Besides demand, foreign investors note that a number of important resources are available in Myanmar to support growth in the power sector. For example, in terms of hydropower alone, at least 92 large-scale (>10MW) sites on Myanmar's main river basins have been identified, with an estimated total installed capacity of 46.1GW. The World Energy Council estimated in 2007 that Myanmar had coal resources estimated at around 2 million tons and 206.9 million barrels (MMbbl) of oil (106 MMbbl onshore and 100.9 MMbbl offshore). With eight trillion cubic feet (TCF) of proven and 40 TCF of undiscovered natural gas, Myanmar has the eight largest reserves of natural gas in Asia (undiscovered). Recent concerns with respect to shortages in domestic natural gas, most of which is exported, as feedstock for gas-fired power facilities are being addressed in part by the Government through the possible daily purchase of 150 or 200 million cubic feet of liquefied natural gas (LNG) to operate power plants, possibly increased to 500 or 600 million cubic feet of natural gas daily after 2014.

Significant opportunities for foreign investment also exist in the expansion and improvement of the existing transmission and distribution network in Myanmar. For example, the Electric Power Generation Enterprise (EPGE) plans to install another 4,513.5 km of transmission lines before 2016. Many rural areas have an electrification ratio that is well below the national average of 25%. In addition, technical and non-technical losses of the current transmission and distribution system were as high as 30% in 2003 and reduced to 27% in 2011. ■

2015-16 POWER GENERATION MIX OF TOTAL INSTALLED CAPACITY IN THE MYANMAR POWER SYSTEM

No.	Description	During 2015-16, Installed Capacity (MW)	Total Installed Capacity (MW)
1	Hydro	501	2,760
2	Coal	300	420
3	Gas	2,878.15	3,593.05
4	Solar	50	50
	Total	3,729.15	6,823.05



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- IFLR1000

CHAPTER 2: LEGAL FRAMEWORK OF THE MYANMAR POWER SECTOR

Myanmar electricity law

The power production sector in Myanmar had been historically governed by The Electricity Law (1984), which was amended in 1990 until the new Electricity Law was passed in 2014.

The old Electricity Law distinguishes between generation, transmission, distribution and use of electricity. It generally sets forth the principle that permission is required by the relevant authorities for installation, generation, transmission, distribution and inspection activities. Permissions may be withdrawn if the licensed person infringes the contract or is unable to generate electricity as per the agreements. The licensed bodies are authorized and required to collect the payments for the use of electricity.

The old law establishes the role of the electricity inspector (currently the Electrical Inspection Department), and its responsibilities, which includes the settlement of disputes between the producers and users of electricity. The Electrical Inspection Department advises on safety standards, use of equipment, and research and development.

The old law or its amendment does not contain any provisions with respect to the contractual framework between owners, producers, users, transporters or distributors of electricity. The law or its amendment does not address environmental issues, ownership, financing, tariffs, land use, or other issues relevant to power projects. As the law does not set forth any guidance on commercial, legal or economic terms for power projects under agreement with the Government, most of these issues are left to the individual project contract.

Electricity Law 2014

A new Electricity Law was enacted on 27 October 2014, but there is no official English translation yet. A working committee solely run by the Ministry of Electricity and Energy (MOEE), apparently with some short-term legal assistance from the ADB and the government of Norway, prepared the law.

The new electricity law is, again, rather general. It lists which Government bodies and reforms are involved and it states a number of general principles

and concepts. One of the core new achievements is the establishment of a new department within the MOEE, an electricity regulatory commission, to formulate policy, prepare tariffs, advise the MOEE, set standards and form inspection bodies. The electricity regulatory commission will include non-government employees.

The new law divides projects into “small” (up to 10MW), “medium” (between 10MW to 30MW) and “large” (upwards of 30MW). States and regions can issue permits for small and medium power plants, while the MOEE will approve permits for large-scale power plants or plants connected to the national power grid.

The ADB already observed that, given its general nature, “[the new law’s] usefulness will be limited until it is operationalized by drawing up supporting secondary legislation and setting up the ERA [Electricity Regulatory Authority] as envisaged under the law”. The new electricity rules have not been publicized yet, therefore, the old Electricity Rules (1985) are still in effect as long as they do not contradict the new law. A technical assistance project of the ADB and the Norwegian government focuses on updating Myanmar’s rules and regulations, but has not been completed yet.

A brief overview of the Law

The Electricity Law (The 2014 Pyidaungsu Hluttaw Law No.44) was enacted on the 27th of October 2014.

The Law makes an essential distinction between a “Small Electrical Business” that can generate power up to 10MW, “Medium Electrical Business”, from 10MW to 30MW and “Large Electrical Business” that can generate power over 30MW. The Law also distinguishes between generation, transmission, distribution and use of electricity.

Electricity Regulatory Commission

The most important aspect of The Law is the creation of the Electricity Regulatory Commission (The Commission). The Commission is to be formed by the government with the approval of the Pyidaungsu Hluttaw and the chair to be appointed by the President. The Commission will be responsible for advising relevant government departments and

organizations on power sector development and formulation of a national electricity policy. It will monitor, assess and review the electricity sector in order to advise the MOEE departments, private organizations and investors on actions needed to bring it up to international standards. One of the main duties of the Commission is to foster investment in the sector through the creation of suitable investment conditions, cooperation between the state-owned organizations and private entities. The Commission will also supervise the writing of rules and standards for the Power System, the performance of duties by the MOEE and private companies. Moreover, the commission is responsible for monitoring and review of the activities of the MOEE departments, private organizations and investors and insuring the transparency of the findings. It will also formulate policy, prepare tariffs, form inspection bodies and regulatory sub-commissions in regions and states. The commission will be comprised of both civil servants and non-government employees.

Permits

The relevant power sector permits are issued by the MOEE and other relevant ministries as well as the relevant regional or state governments and the administrative bodies of the self-administrated divisions and zones. The MOEE has the right to carry out exploration, construction, generation, transmission, distribution, trading and exchange of large electricity volume (over 30 MW) and to issue/withdraw permits for large-scale projects. The MOEE can also establish an electricity supply board/corporation to carry out the above activities. The capital for the electricity supply corporation is provided by the MOEE through the electricity supply board but it manages its financial matters independently. The board and/or corporation is a public corporation acting on a commercial scale.

The relevant regional and state governments can issue or withdraw permits for small and medium scale projects, which fall under their jurisdiction and are not connected to the national power grid. The relevant administrative bodies of self-administered divisions and zones can issue or withdraw permits for electrical businesses in townships and villages under their jurisdiction. The aforesaid entities are under obligation to consult with the MOEE if their electrical activities are linked to the Union Government's electricity distribution and generation. The above administrative bodies and private permit holders have to conduct environmental and social impact assessments, compensate any damages and carry out necessary repairs and improvements in the power system.

The MOEE is responsible for issuing electrical permits to any local and foreign investors investing

in a large scale project. Region or state governments issue permits to persons or organizations investing in small and medium projects, not connected to the national grid. Administrative bodies of the relevant self-administered divisions or zones may, with the approval from the relevant region or state government, issue a permit. Permit holders wishing to sell power have to obtain the permit from the MOEE. The MOEE also has the authority to issue or withdraw electrical competency and safety certificates as well as electricity generation and competency certificates.

The above organizations are in charge of receiving the applications as well as issuing and rejecting the electric permits. The organizations set the terms for the permits and their extensions. The permit holder has to obtain an electrical safety permit in order to run a project. The permits from the relevant organizations have to be obtained if the permit holders want to transfer, mortgage, sell, lease or exchange the



business under the permit. The permit holders are legally responsible if any person or organization suffers damage or loss due to their failure to observe this law, but are not hold responsible in case of force majeure events.

Electricity pricing and service charges

The MOEP has the right to set reasonable electricity pricing and service charges for a particular place and such rates are subject to change from time to time. Likewise region and states governments as well as the administrative body of the self-administered divisions or zones can set their own reasonable electricity pricing and service charges in their jurisdictions.

Restrictions and Penalties

The permit holders can only conduct electrical businesses specified by their permits. In order to carry out electrical installation and repair, an electrical competency certificate has to be obtained. Likewise an electrical safety certificate is needed in order to generate, transmit, connect or use electrical power. The relevant permissions are required for manufacturing, exporting, importing or selling of electrical equipment as well as carrying out any electrical activities with the collaboration of another organization. The permission from the relevant department is needed to “sell, mortgage, sublease, exchange or otherwise transfer the permit or the business contained in the permit”.

Organizations authorized to issue permits can impose fines, suspend or withdraw permits. The Law also covers the penalties and fines for breaching a number of restrictions specified under the law. The fines range from MMK 100,000 to MMK 3,000,000 depending on the breach but anyone carrying on with the restricted activity after paying a fine is subject to up to (in some instances) three years of imprisonment and a fine. In case of being convicted of diverting the electrical current, disrupting the power supply lines or destroying the equipment the penalty is imprisonment from five to ten years. Anyone convicted of breaching the restrictions set out by the law is liable to pay an amount of money in compensation if a permit holder suffers loss of or damage to their business because of this. In case of dissatisfaction with the decree to pay damages or compensation, the appeal can be sent to the Minister within 30 days of the receipt of decree.

The Law also provides for an electricity inspector (currently the Electrical Inspection Department), and its responsibilities, which includes the settlement of disputes between the producers and users of electricity. The Electrical Inspection Department advises on safety standards, use of equipment, and research and development.

Additional Rules and Regulations

The MOEP can issue additional rules and regulations to implement this law. Likewise, the MOEE, The Commission and the government departments or organizations assigned by the MOEE can issue the required notifications, orders, directives and procedures. It is important to note that the rules, regulations, orders, directives and procedures issued under the Yangon City Electric Supply Board Law and the Electricity Law (the 1984 Pyithu Hluttaw Law No. 7) can be applied so long as they do not contradict this law.

How does the Foreign Investment Law affect the power sector?

Myanmar has revamped the Myanmar Investment Law (MIL) in 2016 and is implementing regulations (MIL Rules) in 2017. This was considered a crucial step in Myanmar’s economic liberalization and further opening up to the global economic community.



Within the provisions of the MIL, a comprehensive legal regime to license the investment of foreigners in the country is established. Contrary to certain other countries in Southeast Asia, investment licenses are not always legally required for foreign investors. An investment license issued by the Myanmar Investment Commission (MIC Permit) grants tax and other incentives for the project. Before the enactment of MIL, two separate laws existed that distinguished between foreign and Myanmar citizen investors; namely, the Foreign Investment Law of 2012 and the Myanmar Citizens' Investment Law 2013, the unification of these two legal regimes has simplified the investment law.

Previously, income tax exemption was available to all MIC permit holders, but under the MIL, the income tax holiday is extended only to those investors with investments in promoted sectors mentioned under Notification 13/2017 and located in one of three demarcated zones. The zones are demarcated in the following manner: zone 1 (less developed region), zone 2 (moderate developed region), and zone 3 (adequate developed region) Each zone has a designated income tax exemption, with zone 1 at seven years, zone 2 at five and zone 3 at three.

The long-term use of land by a foreign investor is only allowed with the permission of the Government, which is at the present time incorporated in the MIC process. Under the Transfer of Immoveable Property Restriction Act (1987), foreign investors are prohibited from leasing property in excess of one year. This prohibition is not applicable for foreign investors with an MIC Permit. Foreign investors with an MIC Permit may lease land for up to 50 years with the possibility of two 10-year extensions.

Most power projects in Myanmar, particularly those by foreign investors, will in practice need to secure an MIC Permit. The Government expects foreign investors to use the MIC process. In addition, the MIC Permit is

in practice compulsory, given the long-term use of land needed for a project – often formalized through a land lease with the Government. Furthermore, projects are often unfeasible without import tax exemptions, remittances of foreign currency, the right to obtain work permits, and the right to extract profits, which are guaranteed in the MIL. In our experience, foreign investors seek the protection and relative clarity that the MIL has to offer.

As part of the process to secure an MIC permit, section 3(c) of the MIL, read with rule 5 of the MIR, now makes it mandatory for all projects which are likely to cause a large impact on the environment and local community, which are formally classified as EIA type projects under notification no. 616/2015, to undergo an environmental impact assessment. The assessment has to be produced as part of the application material.

Foreign ownership restrictions in the Myanmar power sector

Under the MIL, investment with 100% foreign ownership is permitted for most business activities, including power generation. The number of activities deemed “restricted”, which means that a foreign investor will need a joint venture (JV) with a Myanmar partner or with the Myanmar Government, have been reduced as compared to previous law. In such restricted cases, foreign investors may hold up to 80% ownership, but it might vary at the prerogative of the commission.

Under Notification no. 15/ 2017, issued under the MIL, any company seeking investment in a large-scale power project (power project for more than 30 MW according to the Electricity Law) is not required to form a joint venture (“JV”) with a local Myanmar company. Now such investments, along with “all works of electricity to be connected with the power

system” can take place with 100% foreign ownership after obtaining approval from the Ministry of Electricity and Energy (“MOEE”). The MIL does not define what small, medium or large scale power generation of projects are, however, the Electricity Law does; namely, that small power projects are up to 10 megawatt (“MW”) in size, medium power projects are between 10MW and 30MW and large projects include anything above 30MW.

The MIL, under Notification no. 15/2017 also prohibits any foreign entity from entering into the “administration of electric power system” or the “inspection of electrical works” – these areas that are reserved only for the Union Government. Therefore, a JV with a foreign entity will not bypass this rule. However, the MIC maintains discretion to deviate on a case-by-case basis on such matters.

Incentives under the FIL for power sector investments

Foreign investors may apply for an MIC Permit in accordance with the MIL Rules. Investors are not required to obtain an MIC Permit to invest in Myanmar except for investment businesses stipulated under section 36 of MIL. In order to enjoy incentives in the form of tax relief and holiday, investors must submit an endorsement application in a stipulated form to the Commission office. Under the new law, MIC permit holders may get tax benefits for investments in promoted sectors enumerated in Notification No. 13/2017.

Please see the chart below for a list of incentives under the MIL.

	2016 Myanmar Investment Law
Forms of business allowed	<ul style="list-style-type: none"> • 100% foreign owned • JV by contract – minimum 20% direct shareholding or interest of a Myanmar Citizen investor • With approval of the relevant ministries
Tax holiday	<ul style="list-style-type: none"> • Only for Promoted Sector • Zone 1- 7 consecutive years • Zone 2- 5 consecutive years • Zone 3- 3 consecutive years
Discretionary tax benefits	Customs duty-free importation of machinery and equipment during construction period plus raw materials for three years
	Exemption from income tax on profit that is reinvested within one year
	Right to pay income tax at Myanmar citizen rates on behalf of foreign employees and to deduct the same from the income of the enterprise
	Right to deduct R&D from assessable income
	Exemption from customs duty for machinery and equipment if the investment amount is increased and the original business is expanded
	Right to depreciation when accelerated depreciation equals to 1.5 times of the original depreciation
Labor	Investors may appoint any citizen who is qualified person as senior manager, technical and operational expert, and advisor and only citizens for work which does not require skill.
Nationalization	Government will not terminate any enterprise except certain conditions
Foreign currency extraction	Authorized to remit foreign currency abroad, subject to certain limitations
Land use	Foreign investors may lease land up to an initial term of 50 years, plus two consecutive 10-year extensions.
Transfer of business	Foreign investors have the right to transfer their shares to Myanmar nationals, foreigners, local companies, as well as foreign companies.
Insurance	Foreign investors must have prescribed insurance from an insurance company permitted in Myanmar.

Note that once an MIC Permit has been obtained, the discretionary tax benefits are conferred more or less automatically. It is very unlikely for an applicant to be denied discretionary benefits. ■

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a seasoned and informed professional."*

- Asialaw



CHAPTER 3: GOVERNMENT ADMINISTRATION

The power sector in Myanmar is mainly a state-owned single buyer model. The Government owns and operates power plants itself, while private partnerships structured as BOT projects have become increasingly common.

The MOEE supervises the sector and governs all operating and management responsibilities relating to power generation, transmission and distribution. Various other ministries play a role in the entire process, such as the Ministry of National Planning and Economic Development's MIC, but the MOEE plays the role of facilitator in the entire process.

Although some recent developments indicate a trend towards more flexibility, the typical model for the market structure is as follows:

- The EPGE purchases electricity from public and private producers.
- The EPGE then sells it to various (decentralized) organizations such as ESE, YESC and MESC for distribution.

The Government has undertaken some institutional reforms in the power sector. In January 2013, the President's Office issued Notification No. 12/2013, which established the duties and functions of the National Energy Management Committee (NEMC). One of the paramount functions of the NEMC is to oversee the development of a comprehensive and coherent long-term plan for energy development.

Ministry of Electricity and Energy (MOEE)

Overall energy policy falls and power sector development falls under the responsibility of MOEE. The MOEE has the primary responsibility for electricity planning, generating and transportation. It is also the supplier of natural gas for power generation and is responsible for issuing regulations on the generation, transmission and delivery of electric power in Myanmar. The MOEE was previously known as Ministry of Electric Power and it was established in 1997 as a shoot-off from the Ministry of Energy and was later split into MOEP No.1, largely responsible for hydropower generation and MOEP No.2, in charge of gas-fired power generation and power distribution. In September 2012, the two ministries were reunited into the newly formed MOEP under one union

minister and two deputy ministers presiding over the departments and organizations of the former MOEP No.1 and MOEP No.2.

After the merger of the Ministry of Electric Power (MOEP) and Ministry of Energy (MOE), the responsibilities are such as the first deputy minister is in charge of the three departments responsible for hydro and thermal (coal) power planning, implementation and generation. The Department of Hydropower Planning (DHPP) sets policy and planning of hydro and coal-fired projects, the Department of Hydropower Implementation (DHPI) is in charge of implementing hydro and coal-fired projects while Hydropower Generation Enterprise (HPGE) is in charge of generating hydro and coal fired projects. The second deputy minister is responsible for the Department of Electric Power Planning (DEP) – in charge of policy matters for EPGE, ESE, YESC and MESC. MEPE is a state-owned enterprise controlled by MOEE, which is responsible for gas-fired power generation, owns and operates the power grid and is a single buyer of electricity and power market operator. The ESE, YESC and MESC distribute power respectively in the states and regions, Yangon region and Mandalay region.

Department of Hydropower Planning (DHPP)

The DHPP is in charge of planning hydropower and thermal (coal-fired) power projects to be implemented by both the government and the private sector. The DHPP processes JV and BOT projects between the government and Myanmar investors as well as JV projects between the government and foreign investors through negotiating and signing MOUs and other agreements.

Department of Hydropower Implementation (DHPI)

The DHPI is responsible for the implementation of hydro and thermal (coal-fired) projects. It consists of four offices responsible for design, investigation and mechanical works and seven engineering construction companies for the construction and installation of hydropower and thermal power projects. The department is also responsible for procurement of materials and equipment as well as maintenance and repair of existing power plants.

Hydropower Generation Enterprise (HPGE)

The Hydropower Generation Enterprise (HPGE) is the government partner for all hydro-generation BOT projects. The HPGE also operates and maintains all large-scale public sector hydro-generation facilities.

Department of Electric Power Planning (DEPP)

The DEPP is responsible for planning, coordination, international relations, and serves as staff of the MOEE. It is in charge of policy matters for EPGE, ESE, YESC and MESC. The DEPP also administers gas-fired plants and wind generation.

Electric Power Generation Enterprise (EPGE)

The EPGE, a public company, is the primary contact for investors entering the power generation sector in Myanmar. The EPGE is solely responsible for purchasing power from public and private power producers, including BOT project companies, and reselling that power on to the ESE, YESC and MESC. It is a separate legal entity to MOEE, therefore the obligations it has under the Power Purchase Agreements (PPAs) are not binding on the Myanmar Government – often a concern for potential investors. In addition, the EPGE operates and maintains gas-fired thermal power generation; plans, implements and operates mini hydropower plants (above 66kV) and controls all transmission lines and substations. The EPGE is headed by the managing director and is composed of three chief engineers working for power system, power transmission and gas turbine departments; as well as three general managers responsible for administration, material planning and finance departments.

Electric Supply Enterprise (ESE), Yangon Electric Supply Corporation (YESC) and Mandalay Electric Supply Corporation (MESC)

The electrical power that EPGE purchases is sold to ESE, YESC and MESC. These enterprises work together with private companies to deliver power to electricity consumers in their respective operating areas. The ESE supplies electric power to all states and regions in Myanmar excluding Yangon and Mandalay regions. The ESE is responsible for the production, transportation and distribution of electricity, planning, operation and implementation of off-grid mini hydropower and diesel stations, maintenance, improvement and expansion of distribution systems.

YESC and MESC came into existence on April 1, 2015, by order of MOEP Notifications No. 94/2015 and 95/2015 dated March 30, 2015, approved by Parliament July 10, 2015.

YESC was corporatized from Yangon Electricity Supply Board (YESB) and remains state-owned but is

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Jean is one of the region's most experienced tax and regulatory specialists with more than 12 years of experience in Indochina, Myanmar and Singapore.

She has advised on a large number of project transactions and tax disputes in the specialties of structuring, power plant projects and oil & gas.

As the managing partner of VDB Loi, Jean has extensive experience with projects related to the market entries of companies in the infrastructure, telecommunications and financial services industries in the region, as well as with supply chains. She lives in Yangon.



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Edwin is the senior partner of VDB Loi and a leading foreign legal advisor living in Myanmar since 2012. A frequent advisor to the Government on transactions and privatizations in energy, transportation and telecom, he is widely recognized for his "vast knowledge" (Legal 500) and his ability "to get difficult things through the bureaucracy" (Chambers, 2016). He advised international financial institutions on their largest Myanmar transactions so far, oil and gas supermajors, a greenfield multi-billion US\$ telecom project and the Japanese Government on the Thilawa SEZ. He assisted two newly licensed foreign banks setup in Myanmar, acted for the sponsor of an 800MUS\$ urban infrastructure PPP project and worked on 5 out of 7 power deals inked in 2016.

financially independent from the MOEP. YESC has the mission to supply quality electricity to consumers in the Yangon region. It plans, develops and maintains the Yangon electricity distribution system. Its main objectives are to reduce distribution losses, maintain stability and quality, and most of all, to reduce interruptions in the electric power system.

The former YESB has started taking steps toward privatization by inviting independent power producers (IPP) to make proposals for the supply of electric power to the 15 industrial zones located in the Yangon area. IPPs are invited on a private basis to submit their proposals, with YESC acting as the facilitator between the IPP and industrial zones. The industrial zones, on their part, negotiate directly with the IPP to set the tariff scheme.

The Mandalay Electricity Supply Board (MESB) has also been transformed into a state-owned public firm - the Mandalay Electricity Supply Corporation (MESC), also known as the Mandalay Electric Corporation (MEC). The MESC covers the entire Mandalay Region, apart from the Nay Pyi Taw Council area. The full privatization of MESC and YESC is planned to be carried out within the next 3 or 4 years.

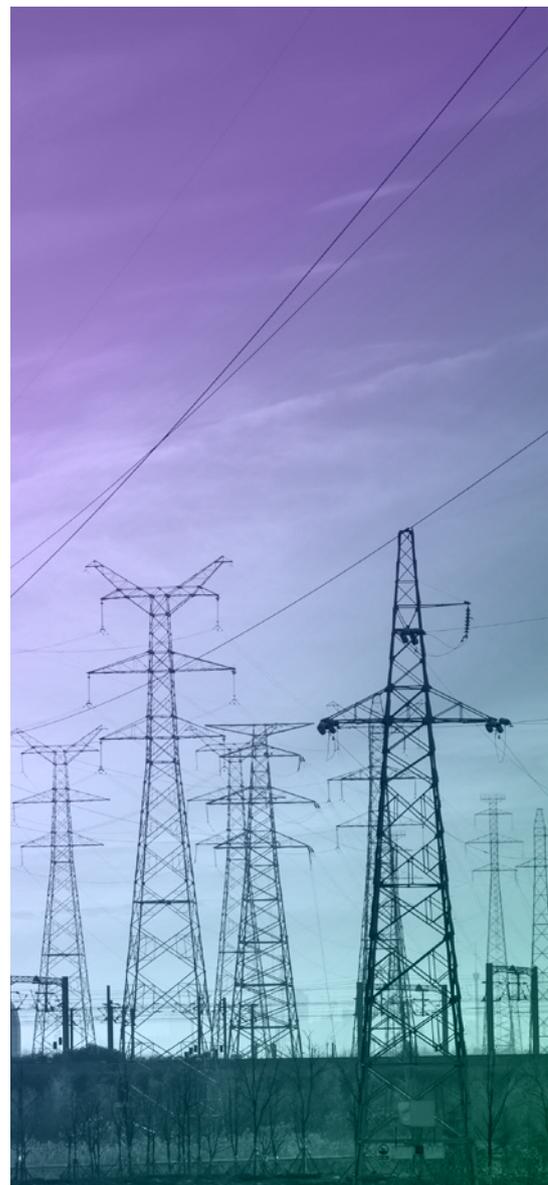
The electricity distribution by ESE, YESC and MESC is limited to medium voltage primary distribution whereas low voltage secondary distribution is open for private sector participation. Off-grid electrification in rural areas falls under the responsibility of the Department of Rural Development (DRD) in the Ministry of Livestock, Fisheries and Rural Development (MLFRD). Apart from the national ministries, each of the seven states and regions has their own ministry that implements sub-national power projects below 30 MW capacity.

National Energy Management Committee (NEMC)

President Thein Sein has created two new government bodies to assist in the development of the electricity and the energy sector. As mentioned above, Notification No. 12/2013 dated 9 January 2013 established the NEMC and the Energy Development Committee.

The NEMC is chaired by vice president No.2 and frames energy policy and plans in accordance with the main energy-related ministries. The Energy Development Committee is responsible for implementing the NEMC's policies and plans. There are 15 members in the NEMC, while the Energy Management Committee comprises 14 members. The members of these two committees are from the Ministries of Energy; Electric Power; Agriculture and Irrigation; Environmental Conservation and Forestry; Industry; Mines; and Science and Technology; and from associations related to the energy sector.

The NEMC is responsible for implementing short-term and long-term energy development plans and instituting laws, rules and regulations in order to promote the participation of the private sector. The NEMC is also in charge of compiling systematic statistics on domestic supply and demand of energy sources, implementing programs to develop renewable energy resources and insuring the delivery of energy to local populations. Furthermore, the Committee is charged with establishing relevant institutions in order for local practices to correspond with the international energy resource exploration and development standards, promoting international cooperation and framing the policy for energy product pricing. It is important to note that one of the duties of the NEMC is to "prioritize and supervise oil and natural gas and natural resources to be able to meet domestic demands" (Art. 2 k)). The use of clean coal technology is mentioned specifically as well (Art. 2 g)), as is nuclear energy (Art. 2 s)).



The mandate given to the committees demonstrates the Government's priorities in developing the country's infrastructure in connection with the energy and electricity sectors. Not surprisingly, one of the key priorities is "to fulfill the current requirements by laying down short-term plans" (Art. 2 e)).

Furthermore, it notes that the NEMC will "coordinate with the Privatization Commission and the Myanmar Investment Commission in order to change the ratio between state-owned and private-owned sectors through privatization", a clear reaffirmation that the Government is open to the privatization and development of the energy and electricity sectors through private investments (Art. 2 d)).

At present, the NEMC is mainly focusing on implementing three national projects to achieve 100% electrification in Myanmar by 2030. The project is being carried out with the assistance from ADB, JICA and the World Bank.

Ministry of National Planning and Economic Development

The Ministry of National Planning and Economic Development (MNPED) oversees the Directorate of Investment and Company Administration (DICA) and its sub-agency, the MIC.

Directorate of Investment and Company Administration

The DICA oversees most aspects of the process of company registration in Myanmar, from monitoring

the legal framework to scrutinizing specific investment proposals. It is responsible for overseeing the establishment and operations of commercial entities, including power generation projects, in Myanmar. It also has the authority to approve or reject commercial registrations, investment projects, and JV agreements (JVAs). It also serves as the secretariat for the MIC, the body responsible for receiving and approving or rejecting initial investment proposals.

The DICA also oversees the Foreign Investment Department (FID). The FID is also a useful partner in the investment project application process, reviewing applications and advising applicants. Furthermore, the FID is responsible for issuing the relevant licenses and permits, once the MIC and ultimately the DICA, have granted their approval.

Myanmar Investment Commission

The MIC is responsible for interfacing with foreign investors incorporated under the MIL. Specifically, it reviews, approves and issues permits for investment proposals. It also coordinates with other departments through this process and issues other necessary certificates, permits and registration documents as required.

The MIC also plays a policy role in determining the foreign investment framework for the country. In practice, the MIC has proven a reliable proponent of new power generation projects. ■

*"We gain trust with our partners and customers when using VDB Loi for advice."
- Asialaw*

*"They are very plugged into the market."
- Chambers and Partners*



CHAPTER 4: LICENSING OF POWER PROJECTS

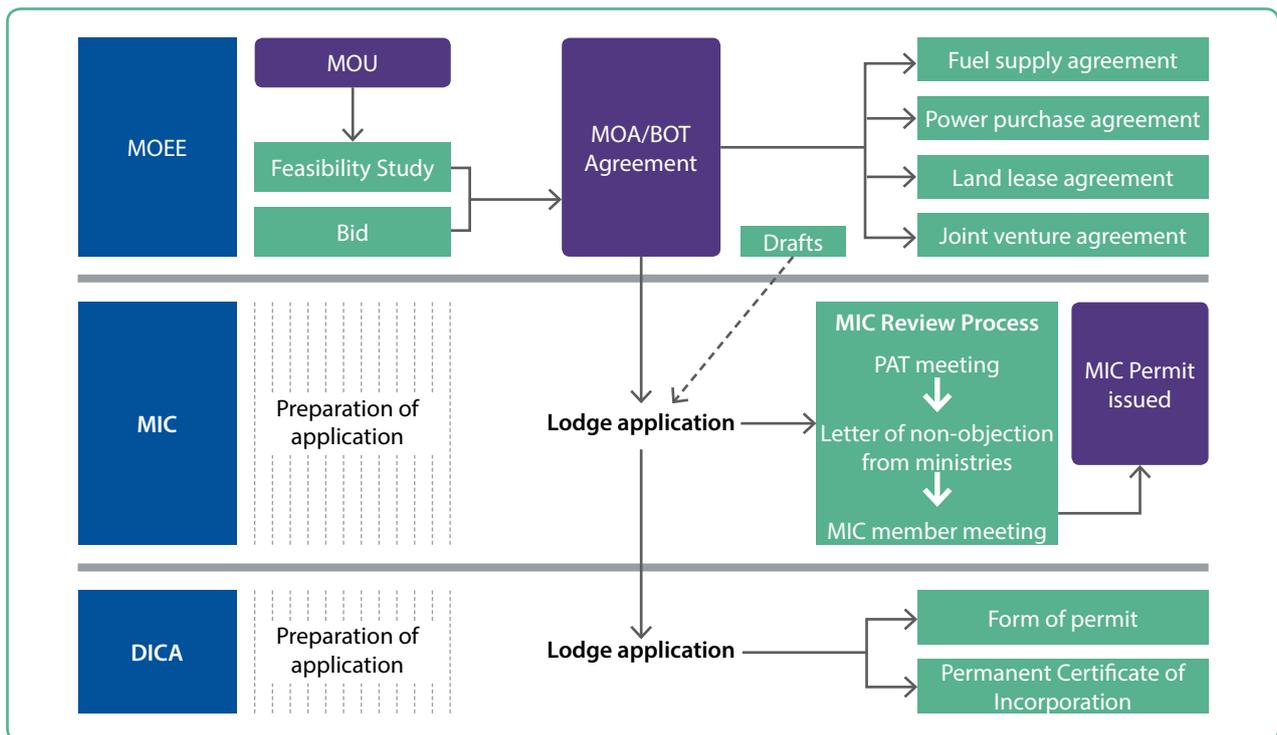
Overview

Under the current framework, a foreign investor in the power sector will need to secure the concession by concluding a series of contracts with different Government departments and state owned enterprises with respect to the construction and operation of a facility and the supply of electric power. In practice, the foreign investor will, after the concession has been obtained, need to obtain an investment license (the MIC Permit). The MIC permit is necessary to implement the project and in order to obtain the MIC permit the investor is required to submit a proposal to the Commission. In the course of this process, the foreign investor will need to establish a locally registered company with DICA. More or less in parallel, the investor applies for the environmental and social approvals of the project. The activities or investments which do not require to obtain the MIC permit need to submit endorsement application in order to enjoy rights to use land and any exemption under section 75, 77 and 78 of the MIL.

There are thus four tracks to this process: the concession, the investment license or endorsement, the company incorporation and the environmental and social approvals.

The time frame needed for each track depends on many different factors and circumstances. The time needed to negotiate and finalize the concession contracts (which are explained in more detail below) depends to a large degree on whether or not the foreign investor is willing to accept models of contracts which the Government has already used and internally approved on earlier occasions. However, there are no official contract models, published or otherwise, and most often the project documents are drafted on a case-by-case basis. Until recently, because the Government's contracts are much less detailed than what foreign investors have come to expect internationally, these were often not the investor's preferred option. In the wake of the Myingyan project, the Government has access and sometimes used (parts of) the documents which were developed for that project and which are deemed to be in line with international standards.

The time frame for obtaining MIC permit officially starts once all documents are deemed acceptable to the MIC, which can take a number of months. The foreign investor's lack of familiarity with the details of the MIC process, in our experience, a major factor influencing the time needed to complete this procedure.



Obtaining the concession

Typically, a foreign investor interested in a “large scale project” (30MW or more) will initiate their venture into the power industry by submitting an Expression of Interest to the MOEE. This may have been prompted by a publicly announced invitation or it might be unsolicited. In practice, foreign investors often bring local partners into the fold, even when this is not legally required.

At this point, the MOEE may invite the foreign investor to sign a non-binding memorandum of understanding (MOU) for a fixed period during which the foreign investor will be required to conduct technical and financial feasibility studies.

Once the project is deemed to be feasible, foreign investors may bid on the project, or in some cases, there can be private awards. In the past, the custom was to make private awards; however recently, awards have tended to be made through an open and competitive bidding process.

After a successful bid, the parties typically proceed to the next phase of signing the first legally binding document, the memorandum of agreement (MOA). The MOA is essentially a framework agreement for a BOT arrangement. In the BOT structure, the foreign investor can own 100% of the Myanmar entity, which concludes the BOT agreement with the Government. Usually, cabinet approval is obtained before the concession is granted by means of the MOA. The MOA is negotiated and executed with the DEPP (gas fired) or the DHPP (hydro and coal). The Power Purchase Agreement (PPA) is executed with EPGE (gas fired) or the HPGE (hydro and coal).

Within the framework of the MOA, the parties will execute a number of supporting agreements, such as a JVA (if applicable), PPA, a fuel supply agreement and a land lease.

Small scale projects (below 30MW) can be negotiated with the relevant regional or state governments or the relevant administrative bodies of the self-administered divisions and zones, often with support from MOEE.

Investment licensing by the MIC

The process for power sector investments

The procedure for investment licensing in Myanmar is specified in the MIL. It specifies the creation of an inter-ministerial committee, the MIC, to receive and assess proposals from investors, to set the country’s investment policy in general, and to issue investment licenses.

The particulars of a proposal is prescribed in detail for

projects in general by the MIL Rules and the practice of the MIC, and it is fairly economically oriented. Much of the focus is on the financial projections of the project in terms of revenue, profit, recoupment period, IRR, cash flow and capital expenditure. The project must be in an advanced stage of planning and agreement in order for these projections to be completed. For example, if the escalation clause of the PPA has not yet been agreed, the projections of the foreign investor will not be accurate.

In terms of legal documentation, the MIC will essentially review most of the key legal aspects and (draft) agreements of a proposal, often with the help of the Union Attorney General’s Office (“UAGO”). The MIC proposal must include the PPA and MOA, the land lease agreement and the feedstock agreement (if any). In addition, the proposal should include the financing and security agreements which, under Myanmar’s MIL, are also reviewed by the MIC. The MIC, with the help and advice of the UAGO, then



expresses a view on the legality of the concession, the right to use land for the use of power generation and the articles of incorporation of the project company. In case of a JV with a private party, the MIC will also review the draft JVA. A JVA with the Government will need to be reviewed and approved by the UAGO.

For power projects, foreign investors are, strictly speaking, not allowed to submit a proposal directly to the MIC. Instead, as is the case with other areas that are listed in the State-Owned Enterprises Law, any proposal must be submitted through the MOEE.

The table below summarizes the step-by-step process.

Power project investment licensing step-by-step		
Steps	Actions	Timing
Before this stage: negotiate and conclude the concession and possibly the PPA		
1	Submit proposal through the DEPP of the MOEE to the MIC or DHPP	
2	Intake meeting at the MIC; submit proposal to the MIC	Within 2-4 weeks following the submission of the proposal
3	Project assessment team meeting	Within 4-8 weeks after submission of proposal
4	Feedback from the MOF, states/regions, UAGO and Internal Revenue Department (IRD)	Within 2 weeks of completing or amending the proposal as per the project assessment team's request
5	MIC Member Meeting approval: MIC Permit is issued	Immediately after the feedback from the states/regions, UAGO, IRD and MOF has been received

Points of attention in the investment licensing process

A foreign investor submitting a proposal to the MIC is required to present information about the contemplated project, including the following:

- Capital structure
- Type of business
- Land use needs
- Construction agreement(s)
- Financial information
- Technical aspects
- Project's environmental and social impact (applicable for certain sectors)

Capital structure

Depending on the investment structure (i.e., 100% foreign owned vs. JV with a local partner), an investor needs to provide information on all partners, including identification number, location, business sector, share ratio, etc.

The schedule for the capital contribution must specify both equity and loans. The investor will register the authorized capital, which should exceed the minimum capital required by the DICA. Apart from the authorized capital, the investor can utilize loans to finance the project. These loans and the authorized capital will constitute the entire investment capital for the project.

For the investment capital, an investor needs to

specify the portion contributed by foreign partners and local partners (in the case of a JV). For each portion, the categories of contribution must be stated, such as cash, in kind (machinery and equipment, materials), intangible assets (license, know-how), etc. For equipment and materials imported from offshore, the authorities normally require a detailed list of basic information, such as name, quantity and price.

Whereas the MIL does not impose any minimum capital or debt-to-equity restrictions, the MIC can set the policy by requiring applicants for an MIC Permit to increase the proposed capital of a project before granting its approval.

Most investors in Myanmar maximize the debt financing of their projects to reduce risks. As external financing is usually not available at the inception of the project, investors typically provide shareholder loans to the Myanmar project company. How much of the total investment cost may be financed in such a manner is now under scrutiny, as the MIC may be tightening its stance on the foreign financing of investment projects.

When obtaining an MIC permit as a matter of practice DICA imposes that projects should have the minimum capital set through applying a debt to equity ratio of 3:1 or 4:1 to the total amount of investment.

A number of countries in Asia use, formally or informally, minimum debt-to-equity ratios for projects

that seek investment incentives. China imposes debt-to-equity ratios for JVs (for larger investments, up to 66% overseas financing is allowed), but 100% foreign-owned companies are not subject to this restriction. Vietnam used to require 30% minimum capital, and although that particular regulation has been abolished, the regulator often still uses 30% capital as a rule of thumb. However, a much lower portion of equity is required in Vietnam for real estate (15%) and BOT or BTO projects (10% or 15%). Thailand generally uses a 30% equity requirement for projects with investment promotion, with exceptions. Laos has a requirement that investment projects based on Government concessions must have at least 30% capital.

List of equipment to be imported

The MIC application needs to include a detailed list of equipment that is to be imported for the project. This list will be the basis for the tax exemption that is applied to these imports. Nevertheless, an import license and a tax exemption letter also needs to be secured for most of the equipment before these items are shipped to Myanmar.

For power sector investments, the equipment list raises a number of practical problems. There may be many months between the preparation of the MIC proposal by the foreign investor and the actual importation. Differences on the list have to be amended and approved.

Land use needs

Leases that are longer than one year will need approval by the MIC. If land will be leased by the project company, then the investor needs to describe in detail (if possible) the following on the MIC application form: location, area, type, owner's information, lease rate and term of lease. The investor may have to enclose the land map, land ownership certificate and draft lease agreement (or draft sub-lease agreement and master lease, as the case may be) to the MIC for evaluation. Consistencies between the lease or sub-lease agreement and the master lease will be verified by the UAGO.

Financial information

In order to demonstrate to the MIC that the project is feasible and economically efficient, the MIC application must show the projected financial evaluation, including income statement, cash flow and certain basic financial indices (i.e. EBITDA, IRR, NPV, payback period). The MIC application will also need to state how the funding is arranged and detail the schedule of remitting the funding into Myanmar.

The calculation should be detailed and provide breakdowns to support the figures in as much detail

as possible, as per the practice of the MIC.

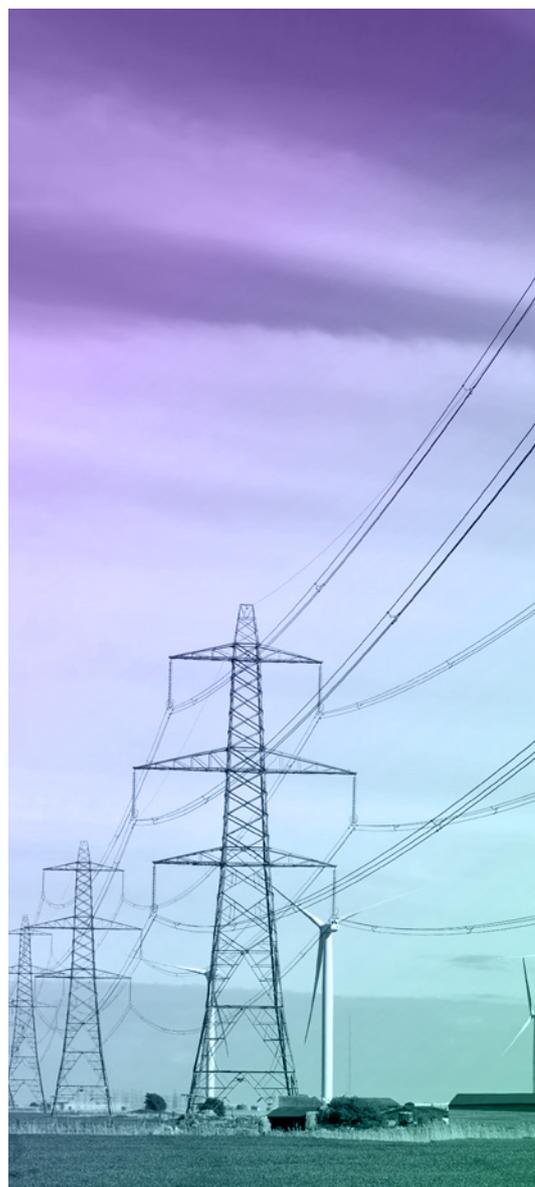
Technical aspects

For the power plant sector, the MIC application form will need to describe the technical aspects of the project, such as the technology to be used, the methodology, the age of the technology, the construction methodology, a fire safety plan, and selected construction materials.

Environmental Impact Assessment

The EIA is a crucial aspect of a power plant project and will be examined closely by the MIC and by the Ministry of Environmental Conservation and Forestry. Accordingly, the EIA must cover every potential environmental impact, such as, impacts on air, water, solid and liquid waste, noise, and odors.

The Environmental Conservation Act, which is broadly interpreted by the Ministry of



Environmental Conservation and Forestry, sets forth broad environmental policy objectives. The Ministry of Environmental Conservation and Forestry is empowered to implement the Government's environment policies. The Ministry has a wide responsibility "to plan the environmental management both at the national and regional level"; "to plan, implement and monitor environmental conservation and promotion, and to prevent, control and reduce environmental pollution"; and "to pave the way for sustainable development". To that effect, the Ministry can issue "guidelines for environmental administration, conservation and promotion in different sectors which includes ozone layer protection, the conservation of biodiversity, marine coastal conservation, the effort to reduce and balance global warming and climate change, the fight against the increase of desert and waste management".

The MIL identifies environmental protection as a fundamental requirement of foreign investors in Myanmar (Art. 3(a) MIL). An investor's bid or proposal to the MIC will be scrutinized for its adherence to environmental protection (Art. 25(b)). Investors who fail to comply with the MIL will be subject to penalties such as a warning, temporary suspension of tax exemptions and relief, revocation of an investment permit, or preclusion from receiving any permit from the MIC (Art. 85 MIL). In addition, Art. 36 (c) of MIL r/w Rule 5 of the MIR makes it mandatory that any project which is categorized as EIA type project under Notification 616/2015 will require MIC permit.

The Notification 616/2015 specifies the types of business activities, which are required to secure the EIA. The Ministry of Natural Resources and Environment Conservation ("MONREC") has tasked the Environmental Conservation Department with overseeing the EIA process and evaluating the EIAs that are completed by investors.

Under MOECAF's (now renamed to MONREC) 2014 rules implementing the ECL, an EIA must be

submitted to the MIC as part of the investment proposal, and must be submitted to the Ministry of Environmental Conservation and Forestry at the same time as the investment proposal is submitted to the MIC. The EIA must be accompanied by an EMP. Although an EMP can be conducted by an investor's own expert or an expert or third party organization hired by the investor, an EIA must be conducted by a licensed third party organization. The EIA licensing procedures have not yet been finalized; thus there are currently no licensed EIA providers in Myanmar. The Environmental Conservation Department maintains a referral list of companies that have completed EIAs for MIC proposals, which it will provide to an investor upon request.

The EIA is intended to be a detailed description of the proposed project area, the methodology of the EIA and the adverse environmental impacts assessed. An EMP is the plan that an investor proposes to adopt to address and minimize any adverse environmental impacts identified in the EIA. The Ministry of Environmental Conservation and Forestry will provide guidance to the investor as to the terms of reference and timeframe for the EIA and EMP; thus, the requirements and contents of these two reports may differ between investors.

As a general rule, however, the Environmental Conservation Department's rules and procedures provide that an EIA must include:

- A summary of the report;
- An introduction;
- The policies, laws and organizational framework that is relevant to the proposed project;
- An overview of the proposed project and suggested alternatives to the project;
- The methodology, objectives, and impacts considered in the EIA;
- A detailed description of the project area (including aerial and satellite photos,

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- Chambers and Partners*

- topographical maps, geological maps, hydrological maps, maps of the water sources and soil layers, biodiversity maps, socioeconomic maps and data, cultural maps, three-dimensional depictions of the scenery, and information about the environmental quality and weather patterns in the area);
- An assessment of related effects of the proposed project;
- A description of the EMP; and
- A description of the public comment and negotiation process, the outcome of the process and future discussions and negotiations to be held.

An EMP must include:

- An overview of the project;
- The environmental, socioeconomic and health policies and legal requirements that are relevant to the project;
- A summary of the measures taken to reduce adverse environmental impacts;
- Maps and aerial and satellite photos of the area;
- Management and monitoring plans for each phase of the project (including pre-construction, construction, operation, termination, and post-termination phases);
- Sub-plans for managing and monitoring the following sectors:
 - Air quality;
 - Water quality;
 - Waste;
 - Sound;
 - Smell;
 - Chemical substance;
 - Soil erosion and silt deposits;
 - Biodiversity;
 - Health and safety for workplace and society;
 - Cultural heritage; and
 - Employment and training
- Work schedules and sub-plans for each work place;
- Cost allocations for the management and monitoring plans; and
- Contingency plans for emergencies.

The ECL rules provide that the EIA and EMP will be reviewed within 60 days. If the reports are accepted, the Ministry of Environmental Conservation and Forestry will issue a Certificate of Environmental Clearance, which is submitted to the MIC. Once the investor receives its MIC Permit, it must carry out the project in accordance with the terms set out in the Certificate of Environmental Clearance (as well as the terms of the MIC Permit, of course). If the reports are not accepted, the investor is given an opportunity to amend the reports and re-submit them to the Ministry.

A small number of very recent PPAs provide comprehensive guidance on the environmental standards applicable to the project.

Social Impact Assessment (SIA)

The SIA is part and parcel of securing the concession. In practice, for those projects with challenging social aspects such as resettlement, the investor and the MOEP will start a discussion during the feasibility study phase. In the feasibility study phase, the MOEP will scrutinize the compensation plans proposed by the investor. This issue is rendered more complex as most often the land is not within the purview of the MOEP, and the actual Government land owner (often the relevant state or region) is not a party to the project negotiations. In most cases, the investor and not the Government will have the final responsibility for the resettlement questions.

Furthermore, the MIC application must show how the power project will have a positive impact socially and its effects on the local community, the region and Myanmar. Any risk of negative effects should also be presented with an approach of how this risk will be mitigated. Positive social impacts include the following:

- Creating employment
- Training
- Social security and welfare for employees
- Tax contributions
- Creating foreign currency collection (via exports)
- Enhancement of infrastructure
- Technology transfer
- Health care
- Corporate social responsibility

Contracts and legal documentation

It is common practice to include the (draft) key contracts of the project, such as the MOA, the PPA and the land lease. These agreements will have been reviewed by the UAGO.

A proposal submitted to the MIC must be accompanied by the final draft or signed JVA between the Government entity (or Myanmar-owned company) and the foreign investor. The proposal must also include a draft of the Memorandum of Association and the articles of association (AOA). JVs with Government entities are governed by the Special Companies Act, and pursuant to this act, the JV company's AOA are not required to comply with the provisions of the Myanmar Companies Act (MCPA) or the attached template of articles that the DICA expects to be included in the articles of any JVA. ■

“The team is good at anticipating and dealing with the challenges that arise from doing business in Myanmar.”

- Asialaw



CHAPTER 5: CONTRACTUAL FRAMEWORK

Overview

Power concessions are documented in Myanmar through a series of successive agreements with the Government. The Government practice to date has been mostly to negotiate and conclude successive and increasingly detailed agreements, going from the non-binding MOU to, after a feasibility study has been submitted by the investor, an MOA, which establishes the concession but leaves a number of important matters unaddressed. In the final stage, the actual PPA, the fuel supply agreement and the land lease are concluded. If the investment is a JV with the Government, the JVA is negotiated and concluded in the course of this process.

Memorandum of Understanding

The MOU is a non-binding agreement that sets out the basic framework for the project. In practice, a successfully negotiated MOU is a strong indication of future project success and evidence of the parties' good will and intention to transact. Negotiation of the MOU also presents an opportunity to achieve consensus among the parties in relation to key terms.

In practice, there are many types of non-definitive documents being used. In some instances, the MOU contains the tariff, but there are also documents where parties leave the tariff for future negotiation. The MOU often identifies some key elements of the power project, such as the type of generation, the size, and the likely location.

Memorandum of Agreement

The MOA is the first legally binding document in the power project. It establishes the legal commitment of the Government to provide the concession and to purchase the power from the producer. This document is often the only legal agreement signed with a Government department, notably with the DEPP (gas fired) or the DHPP (hydro and coal). Most of the other project contracts, such as the PPA and the GSA are executed with one of two state owned enterprises, the EPGE (gas fired) or the HPGE (hydro and coal).

The MOA is essentially a framework agreement for the BOT arrangement. In the BOT structure, the foreign investor can own 100% of the Myanmar entity, which concludes the BOT agreement with the Government. Usually, cabinet approval is obtained before the concession is granted by means of the MOA.

The MOA is most often not as comprehensive as it could be. It is often drafted to be more of a framework agreement, defining the parameters of the project and referencing the other required documentation. For example, the MOA may state that the parties will conclude a PPA with each other, and outline some, but not all, of the key elements of the forthcoming PPA.

On the other hand, the MOA also functions as the principle BOT transaction document. This is unusual for most foreign investors, who generally outline the key terms of the BOT in a separate agreement. This raises unique drafting challenges to satisfy the document's dual roles.

Power Purchase Agreement

Prior to 2012, power projects in Myanmar were required to enter into a suite of what were generally standard form agreements consisting of an initial MOU and subsequently an MOA (incorporating BOT concession terms) and a PPA (we will jointly refer to those for convenience as the Pre-2012 Model).

More recently, more detailed PPAs have been used for a number of gas-fired power projects, some of which have already gone into commercial operation. These more recent PPAs, although based on the same template as the Pre-2012 Model, clearly have some significant differences in their commercial and legal terms when compared with their predecessors. These differences include a number of terms that are key to a bankable PPA, including a take-or-pay offtake commitment, force majeure provisions, tariff adjustments and termination payments. While the approach to these key terms is not yet sufficiently consistent to be properly described as representing a Model PPA, in the most recent Myanmar PPAs consistent approaches have become evident.

This emerging uniformity is consistent with the Government's objective to minimise variations across contracts on similar transactions, which is likely driven by a desire to increase transparency while also limiting the need for renegotiations. However, the drive towards consistency can be a double-edged sword, and it is hoped that as IPPs continue to negotiate PPAs on a case-by-case basis, the eventual outcome will be a model PPA with entrenched terms that are bankable for international lenders in the context of a developing economy at the early stages of developing an IPP programme

Take-or-pay commitment

The Pre-2012 Model historically adopted different approaches to the power purchaser's take-or-pay commitment, particularly in circumstances where an event of force majeure had occurred.

Many recent PPAs, including those executed in 2013 and 2014, favour an approach under which MEPE commits to purchase a guaranteed minimum output at an agreed tariff. This commitment commonly applies on both an annual basis and in each month (based on a percentage of the power plant's contracted capacity), although the precise payment arrangements still differ significantly from one PPA to the next.

For example, some PPAs provide for regular payment of invoices based on the guaranteed monthly kilowatt-hours only, with an annual balancing payment to compensate for any excess amounts dispatched, while other PPAs provide for regular payments based on the higher of the guaranteed monthly kilowatt-hours and the actual monthly output. Notwithstanding these inconsistencies, the most recent PPAs at least provide for a regular minimum payment. This simplifies the financial modelling exercise for prospective lenders.

A remaining area of concern with respect to take-or-pay terms is the absence of a deemed availability concept. Instead of adopting a conventional approach based on payment for actual or deemed capacity (and actual or deemed availability), past Myanmar PPAs tended to guarantee payment for actual output, which still leaves potential gaps if the plant is available and capable of generating electricity, but there is nevertheless no actual output or generation by the seller due to circumstances beyond its control (eg, due to a government force majeure event affecting the power purchaser or its ability to deliver electricity).

It will be essential for successful large-scale project financing that any gaps in the take-or-pay commitment are properly identified and addressed. Gaps in at least some recent PPAs due to unclear and ambiguous drafting have left uncertainty as to whether or not the take-or-pay commitment applies in circumstances where it would commonly be expected. Assuming these ambiguities are unintentional, they should be easily remedied with more careful drafting in the future.

There is cause for optimism, as the approach to force majeure risk already appears to be increasingly detailed and sophisticated with each new PPA, including with respect to the distinctions drawn between natural force majeure events (earthquakes, floods, typhoons, etc), governmental/regulatory

force majeure events (change in law, non-renewal of permits and expropriation) and other force majeure events (strikes, acts of terrorism and sabotage) and the consequences thereof.

In the most recent PPAs, governmental/ regulatory force majeure events and other non-natural force majeure events affecting the seller or the power purchaser result in an MEPE obligation to make payments at least sufficient to cover the seller's debt service obligations and operating costs. It appears that MEPE is reviewing regional examples and this is helping move the Myanmar PPAs towards a more bankable approach on take-or-pay and force majeure.

Tariff adjustment

Tariff adjustment arrangements are a significant concern for the Government and sellers alike and have, in practice, been one of the more challenging



areas upon which to reach agreement. PPAs in the Pre-2012 Model featured a diverse approach to tariff adjustment formulas. These ranged from a straightforward escalation of the tariff in line with Myanmar inflation to more sophisticated arrangements taking into account both local and foreign components of operation and maintenance costs, and allowing tariff adjustment by reference to consumer price indices in both Myanmar and relevant foreign jurisdictions.

The Government has generally resisted tariff adjustment structures that could allow significant tariff increases due to factors outside Myanmar or outside the Government's control. A number of the Pre-2012 Model PPAs consequently provide for tariff adjustment on the basis of tariff renegotiation and more recent PPAs have included strict limits on the maximum possible tariff escalation in each contract year.

In addition, the Government has successfully been implementing measures to harmonize tariffs across power projects based on the type of power generation (eg, hydroelectric or gas-fired), making it more challenging for individual project developers to negotiate bespoke tariff adjustment provisions. Although these arrangements are generally an improvement on the uncertainty of the "renegotiation" approach in the Pre-2012 Model, the more recent formulations are not without risk and international project developers and lenders should ensure that tariff adjustment formulas are carefully reviewed in any future PPAs very early in the negotiation process.

Termination payments

Myanmar's PPAs vary widely in the consequences of a party's default in the performance of its obligations and the seller's entitlement to compensation in the event of termination due to a party's default or a prolonged force majeure event.

Under the most recent Myanmar PPAs, the events of default and other circumstances that can give rise to termination are fairly conventional and are broadly consistent with common market practice in the region. However, the circumstances in which the power purchaser (or the Government) is obliged to purchase the project upon a termination event are much more limited.

As an example, under the most recent PPAs, termination after commercial operation due to an MEPE default results in an option, but not an obligation, for MEPE to purchase the project (and even if it agrees to do so, the price is subject to further agreement). If MEPE does not exercise its option to purchase, or an acceptable price cannot be mutually

agreed, the seller's only remedy is to claim general damages in accordance with Myanmar law (and export whatever parts of the plant and equipment it is able to dismantle).

This current termination treatment does not provide the level of certainty and protection required by international project developers and lenders, which would commonly expect to see an express and unequivocal obligation for the power purchaser to buy out the seller with a termination payment expressly covering the full amount of the actual outstanding debt (plus accrued unpaid interest and certain breakage costs and prepayment fees) and the seller's loss of profit as a result of the early termination of the PPA.

Termination payments are obviously a key area of concern for international lenders as the lack of a termination payment under certain circumstances



could lead to the failure of a borrower to repay its loans and result in an underlying power asset with no value. Lenders require a very clear understanding on how outstanding project debt will be repaid in different termination scenarios, both before and after commercial operation has commenced.

“Free Power” and “Free Share”

Depending on the project, the Government may claim a royalty payment in the forms of “free power” and a “free share”. This is typical for hydro and coal projects. The free power usually totals about 7% of the total output while the free share can range from 5-25%. Both of these figures are negotiable however (but may all also exceed our estimates).

Government payment guarantees

The payment terms of power under Myanmar PPAs vary considerably from one PPA to another. Foreign investors should be sure to negotiate their preferred currency and consider an offshore payment option. A related issue is whether the payment terms are tied to the responsibility, if any, of the MOEE and EPGE for the availability of various inputs.

Dispute resolution

Mandatory negotiation: Many MOAs or PPAs call on the parties to enter into good faith negotiation, prior to resorting to dispute resolution mechanisms.

Arbitration: Many agreements stipulate that arbitration shall take place in Myanmar, in accordance with the Myanmar Arbitration Act, or on occasion, with other rules.

Enforcement of judgments: In July of 2013, Myanmar deposited the instruments of accession and became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However,

with a dualist legal system, Myanmar requires implementing legislation which has not been passed. It remains unclear what the implementing law will look like, what reservations may be incorporated and how the Convention will be applied in practice.

Other key provisions in Myanmar PPAs

- ***“Change of control”:*** In a number of PPAs, the change of control provisions are limited in scope and not well developed.
- ***“Language for documentation”:*** The documentation is generally required to be in the Burmese or English language. In practice, several projects have been subject to delays due to translation, and it is not always clear that the Burmese language version accurately reflects the understanding of the parties.
- ***“Testing”:*** Under some PPAs the developer bears the cost for testing prior to commissioning and as required by either party throughout the project term. In other agreements, there are no rules on compensation of, for example gas, for testing.
- ***“Tax incentives”:*** Under the MIL, foreign investors obtain tax incentives for income tax, Commercial Tax and customs duty. MOAs and PPAs most often just refer to the applicable investment legislation which establishes the possibility of tax incentives for the producer. Certain MOAs and PPAs go beyond that, and identify the tax treatment which will be accorded to the producer.
- ***“Nationalization”:*** The MIL guarantees against nationalization, except the mentioned conditions the Government guarantees not

“.. very good in terms of response times, industry knowledge, business understanding and the level of advice provided.”

- Legal 500

to take any measures which expropriates or indirectly expropriates or leads to termination of an investment.

- “Applicable law”: Although not required by law, in practice MOAs and PPAs are governed by Myanmar law at the Government’s insistence.

Myingyan project – a model form for future projects?

Myingyan power plant is located in the Myingyan district, in Mandalay division. An international bidding process was called by the MEPE, now known as EPGE, in September 2014 with the assistance from International Finance Corporation of the World Bank Group. The power plant is worth USD 300 million and is expected to be the largest gas-fired independent power plant in Myanmar.

On April 24, 2015, the BOT project was awarded to Sembcorp Industries (Singapore). Its wholly owned subsidiary, Sembcorp Utilities, received a Notice of Award to develop and operate a 225-megawatt power plant. The project is expected to be completed in 2017 and supply power to the EPGE under a 22-year PPA.

Traditionally, Myanmar does not use a standard PPA model. The EPGE negotiates every PPA on a project-by-project basis, leading to uncertainty regarding the terms that can be negotiated. Previous projects have not executed PPAs until after the project has become operational. The Myingyan project is a key exception, where it is contemplated that the PPA will be executed before the commencement of construction.

The MOEE and EPGE proposed a comprehensive international style PPA for the Myingyan competitive tender. The PPA addresses risk areas that foreign investors would normally expect and adopted a risk allocation not dissimilar to other countries in the region such as Thailand and Indonesia. Aspects of the risk allocation are unique to Myanmar (for example in relation to fuel take-or-pay issues) and it remains to be seen how these will be accepted and mitigated by investors. It is not yet clear whether the Myingyan PPA will become a model form for future projects.

Joint Venture Agreement

JV companies with the Government are established under the Special Companies Act. The essential difference with the MCPA is that in the case of the Special Companies Act, the articles of the company rule supreme. They are not subject to any compulsory rules of the MCPA. In theory at least, therefore, the parties have substantial freedom of agreement. In practice, however, the DICA expects the MCPA’s Table A articles to be included in the articles of any JVA. While companies may deviate from some of the articles, there are a number of other articles from

which a company may not deviate, such as dividend calculation, voting, rotation and retirement of directors, and proxies.

Land Lease

Acquiring land for any project at all is a complicated task in Myanmar; the legal system is a combination of quite dated laws alongside new and untested ones, hampering the predictability of the outcome. In Myanmar, all land belongs to the State as a matter of principle. Foreign investors can only lease it, so the first choice to make is whether to lease the land from the Government or from a private land rights holder.

MOEP itself does not manage the land necessary to energy projects, although it might play a supporting role in acquiring it. Investors must be prepared to source land to lease by themselves. The lack of coordination between Government organizations,



as well as the number of administrative subdivisions makes this task more challenging make it paramount to have strong support at the subnational level.

Private land owners themselves need approvals in order to be allowed to lease land to foreign investors. These approvals of the various competent Government organizations may be very difficult to obtain and even once obtained, it may prove challenging to fold them into a transaction making timing an issue. On top of this, land documentation is often unreliable.

When it comes to using land rights as security, leased land can be the subject of a mortgage. However, foreign investors require special Government permission granted by the MIC to acquire immovable property by way of mortgage.

Fuel Supply Agreement

Depending on the nature of the project, such as for gas-fired projects and certain biomass projects, the Government will conclude a fuel supply agreement with the developer. This agreement will address the required physical or chemical characteristics of the fuel, price of the supply, agreed quantities and other issues such as supply of fuel for testing purposes.

Myanmar laws governing project documents

Generally speaking, the contractual documentation of power projects will be subject to all Myanmar laws, some of which are particularly relevant. We cite in particular the following laws and issues:

- The Myanmar Contract Act of 1872 - Provides the general legal framework for the MOU, MOA, PPA and other agreements. It addresses validity, breaches, and rights of the parties, voidable

clauses, damages and guarantees.

- The Transfer of Property Act of 1 July 1882 – Provides the overarching framework governing interests in moveable and immoveable property. While the FIL Rules supersede certain provisions in the Transfer of Property Act, overall, the Act continues to stand as the primary reference for lease agreements, mortgages and the like.
- The Easements Act of 1 July 1882 – Outlines the law concerning the establishment (and/or imposition) of easements, rights-of-way and other servitudes that would be relevant to the rollout of power networks and/or other rights-of-way that would be necessary for power plants.
- Myanmar Stamp Act of 1899 – Stamp duty is payable on the execution of instruments, including lease agreements and transfer of property.
- The Code of Civil Procedure of 1908 – Provides the legal framework for the resolution of civil disputes. A prominent piece of the Code's provisions is its sections concerning the recognition and enforcement of conclusive foreign judgments.
- Registration Act of 1908 – Specifies the type of documents compulsory and optional for registration.
- The Sale of Goods Act of 1920 (which explicitly applies to the sale of electricity) - Provides general rules on the transfer of title, price, delivery, rights of an unpaid seller, and breaches.

*“Edwin is very good at dealing with very difficult issues; he can push things through, make things work.”
- Chambers and Partners*

- The Myanmar Companies Act (MCPA) – Provides general rules for the establishment, governance and functioning of companies in Myanmar. The Special Companies Act provides a few special rules for JV companies with the Myanmar Government.
- The Arbitration Act of 2016 – Relates to local arbitration within Myanmar and international arbitration.
- The Arbitration (Protocol and Convention) Act of 1937 – Deals with foreign arbitral awards. The provisions of both laws may affect the project documentation clauses on the settlement of disputes.
- Income Tax Law of 1974 – Income tax rates vary on the basis of residency, non-residency and the nature of the business.
- Transfer of Immovable Property Restriction Act of 1987 – Lists the restrictions on immovable property to foreigners.
- The State-Owned Economic Enterprises Law of 1989 – Identifies twelve types of economic activities that are restricted to being carried out solely by the Government, which includes postal and telecommunications services. However, if it is in the interests of the State, the Government may permit such restricted economic activities subject to prescribed conditions.
- Commercial Tax Law of 1990 – Commercial Tax is levied on goods produced within Myanmar, services rendered within Myanmar and imported goods.
- The Tariff Law of 1992 – Administers the customs tariff rates.
- Environmental Conservation Law of 30 March 2012 – Lists broad principles and empowers the Ministry of Environmental Conservation and Forestry to enforce environmental standards, environmental conservation, environmental management in urban areas, and conservation of natural and cultural resources. It also specifies the process for businesses to apply for permission to engage in an enterprise that has the potential to damage the environment, prohibitions, offenses and punishments.
- Foreign Exchange Management Act of 10 August 2012 (FEMA) – Governs the financing of projects owned by foreign lenders and provides additional guidance on foreign exchange transactions within Myanmar. This law will relate to the payment provisions of the project

agreements if these payments are in foreign currency.

- The Myanmar Investment Law 2016 - Provide general rules on the rights of investors, including on land leases, the transfer of shares, taxation, importation, use of foreign currency, and financing or investments. It relates to a wide number of corresponding sections of the MOA and the PPA. ■

Judicial Enforcement of Contracts in Myanmar

The highest court is the Supreme Court which has the power to supervise all lower courts in civil and criminal cases.

State or region courts have unlimited pecuniary jurisdiction in original civil cases. The State or region court may adjudicate, appeal, or revise any judgment, order, and decision passed by the district court.

District courts have pecuniary jurisdiction up to the maximum value of 3 million kyats and may revise decisions of township courts.

Township courts have pecuniary jurisdiction up to the maximum value of 500,000 kyats.

Myanmar has a domestic system of arbitration, and is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

"... the partners know more about the legal environment than anyone else."

- Legal 500



CHAPTER 6: FINANCING

There has been only very limited experience with international project financing in Myanmar. Although in theory permitted under pre-2012 laws, international financing was in practice subject to strict limitations and oversight by the Ministry of Finance and the Central Bank of Myanmar. Moreover, international sanctions, which particularly hit financial remittances, made it very difficult to carry out any financial operations, including traditional asset-based financing, in relation to Myanmar.

Starting from 2012, a legislative framework has been put in place to support international financing by means of the updated FEMA and the FIL. Concurrently, the US and the EU have eased or removed most of the international sanctions that affect international financial remittances. For example, the US Department of the Treasury has eased sanctions in relation to four Myanmar banks, notably Asia Green Development Bank, Ayeyarwady Bank, Myanma Economic Bank, and Myanma Investment and Commercial Bank. It issued General License Number 19, which permitted financial transactions from 22 February 2013 onwards with these banks, subject to a few exceptions (e.g. no new investment in these banks, no precious stones, no transactions with the Ministry of Defense or entities in which the Ministry of Defense holds at least a 50% interest).

Approximately thirty foreign banks have also opened representative offices in Myanmar and foreign investors are allowed to conclude JVs with Myanmar banks. Additionally, nine international banks have been given banking license by the Central Bank of Myanmar and they have also established their branches in Myanmar.

Recently Myanmar has witness increasing number of project financings either in syndication or by a single lenders especially in telecommunication industry and also a number of corporate and other financing such as trade financing. This is set to increase with time and more the country gets experienced and comfortable with complex internal financing transactions.

Nevertheless, there are still certain roadblock and hinges which requires to be smoothen for effecting financial condition and comfortable lending market to reach its peak.

Laws governing international project finance

Predominantly the laws governing international project financing are FEMA (Foreign Exchange Management Act) and FIL (Foreign Investment Law).

Interestingly, FEMA is the core law governing any international lending in Myanmar, while FIL would be applicable only in case the borrowing entity is an MIC approved company.

As per FEMA there are two kinds of account payments permits in cases of payment transfers from Myanmar to overseas:

1. **Current Account Payments:** Which include payment towards short term bank loans, trade, services, money transfers for family expenses etc.
2. **Capital Account Payments:** All those payments which are not current account payments are deemed to be capital account payments.

In case of project finance the payments towards the principal amount and interest would fall within the meaning of capital account payments and payment towards fees and expenses would fall within the meaning of current account expenses.

While for the remittances towards current account expenses do not require any sort of prior approval, for the capital account remittances, prior approval of Central Bank of Myanmar would be required.

For any foreign lending, sections 48 to 52 of Notification 7/2014 under FEMA makes it clear that foreign loans are allowed by companies in Myanmar (whether an MIC company or a non-MIC company), subject to Central Bank of Myanmar's prior approval to such company, before a local bank will be allowed to accept or remit any money transferred by the parties to the project finance facility agreement. The process for availing Central Bank of Myanmar's permissions is rather simple, whereby the borrower simply has to file an application before the Central Bank of Myanmar and wait for their decision. Central Bank of Myanmar always reserves its rights to ask for any further information and documents concerning the financial structure or the company itself. An application includes the following:

- a) A request letter, stating the purpose of such loan, details about the borrower, in brief the security structure/details of contractual comfort and the interest rate;
- b) The draft facility agreement;
- c) Copy of constitutional documents of the borrower (article of association and memorandum of association);
- d) Copy of MIC permit (if the borrower is an MIC

- company);
- e) Board resolutions of the borrower approving the indebtedness;
- f) Draft security documents;
- g) Draft contractual comforts (corporate guarantee or personal guarantee);
- h) Justification of interest being charged;
- i) Repayment and drawdown schedule; and
- j) Total amount of capital (either by way of debt or equity) brought into Myanmar and the details of bank through which the same was brought.

As stated earlier, this list is not exhaustive and the Central Bank of Myanmar may ask for any further document or explanation which they deem fit and proper for approving the loan.

One important factor which Central Bank of Myanmar looks into while approving or disapproving any application is the debt to equity ratio of the borrower and the interest rate at which the facility is being taken. Central Bank of Myanmar basically sees whether the interest rate is at prevailing market rate or not and the same is approved on a case to case basis. As per our experience Central Bank of Myanmar has been comfortable with seventy percent of debt against 30 percent of equity. Additionally it is a general practice of Central bank of Myanmar to allow shareholders' loan having interest rate of 6%, while Central bank of Myanmar would generally accept interest of 8% for any lending in US Dollars and for any funding in Myanmar Kyat interest rate of 10% in cases of microfinance business. When the process is finalized, usually a document is provided which will serve as the authorization for the investor's bank to remit funds.

In case the borrower is a MIC company and MIC approval is also required prior to the availing any such facility. The approval can be obtained at the outset, i.e. when the investment proposal is submitted to the MIC, or at any other time simultaneously with Central bank of Myanmar's approval. The approval process requires the submission of a number of documents and drafts which will be reviewed by the MIC. The list of document would be same as the one to be submitted before the Central Bank of Myanmar (as mentioned above). When the process is finalized, usually a document is provided which will serve as the authorization for the investor's bank to remit funds.

The FIL Rules (through Notification 11/2013) provide for this right and the practice of the MIC is to ask for details and documentation from the investor on the financing of the project. Chapter 11 of Notification 11/2013 provides that foreign investors are allowed to establish security on land and buildings. In order for the security to be established, the notification states that the investor must request approval from

the MIC. The MIC can permit security over land and buildings after evaluating the reasons for the security and any possible risks to the national interest or to the interest of Myanmar nationals. The notification also states that the MIC should take into account whether the successor (e.g. the lender) would be able to continue the investment project or not.

Interest-free loans from a shareholder to the BOT project entity are acceptable to authorities. However, with regard to foreign interest-bearing loans, please note that approval may be required from the Myanmar Central Bank. Interest incurred on foreign loans is usually deductible and a 15% withholding tax on interest paid to a non-resident is payable.

Security

Stamp duty and registration of security

Myanmar has stamp duties on a wide range of documents under the Myanmar Stamp Act 1899 and



its Schedule I. There is currently a lot of uncertainty as to the application of stamp duty for modern financing and security documents. Previously, a groundswell of opposition had arisen from banking associations, several lenders and the Myanmar Investment Commission regarding an internal, non-published circular (“Circular”) from the tax authorities, subjecting all loan, security and guarantee documents to 0.5% duty (category for “bonds” or “mortgage deeds”). However, in practice, the borrowers prefer to rely on the actual law, i.e. the Stamp Act and not on the Circular.

The recently published Notification 146/2016 from the Ministry of Planning and Finance, levying a duty of 0.5% on ‘bond’ has not allayed the previous disconnect between the law and its interpretation. Therefore, the stamp authorities still persist in applying the stamp duty applicable to a ‘bond’, to a loan agreement and security documents.

Our view is that 0.5%, which is the highest stamp rate, only applies to a very small and strictly defined group of instruments as per the definitions and requirements of the Stamp Act. To be taxable as a bond, for example, the instrument needs to be attested and the amount needs to be ascertained. Furthermore, the statutory definition for “bond” requires that there is an indebtedness to pay money, not just an agreement to lend money. There is case law which supports this interpretation. Our opinion is that a facility agreement or another agreement arranging for a credit line is in most cases not the same as a bond, since there is no indebtedness in and of itself in the instrument for a facility, which is required under the definitions of the Stamp Act. Instead of creating indebtedness in and of itself by the instrument (“the borrower is hereby indebted for the amount of x\$ to lender”), as a bond does, a facility merely sets a framework for a future indebtedness should the borrower indeed utilize.

Along the same lines, the duty for the security agreements cannot be set at 0.5%. This rate is reserved for “mortgage deeds” only, and although that concept is defined widely, it does require clearly under the law that there is indeed a “secured amount”. Case law confirms that without a secured amount, an instrument that would otherwise be a mortgage deed is dutiable as a normal agreement at a nominal rate. So, again, because facilities have no fixed and determined amount, and because security instruments do not mention a specific amount, the better interpretation is that it is simply impossible to apply the 0.5% rate.

In Myanmar borrowers have the right to pay stamp duty in several ways. Traditionally, the “Government assessed method” is required, which means that the relevant party take the instrument to the stamp office

where the rate of stamp duty is adjudicated by the incumbent officer. But legally, taxpayers can also buy the stamps of the applicable amount themselves and stick them on the instrument and devalue them. This is not done often because the stamps are not made available by authorities.

As recent as August, 2017, the Stamp Act was further amended and rates applicable to conveyance, gift and mortgage deed (where possession has been given or agreed to be given) has been increased from 2% to 4%. This in effect increases the stamp duty applicable to leases of duration of more than three years which are essentially considered as a conveyance.

Primer on Securities used in Loan Transactions in Myanmar

Main types of borrowers corporate security providers

The corporate security providers in Myanmar are primarily Myanmar companies incorporated under



the Myanmar Companies Act, 1914 (“MCPA”). These companies can be both private and public (but most are private), and either a company which is wholly-owned by Myanmar citizens or a Myanmar-incorporated (partially) foreign owned company. Note that shares in a company wholly owned by Myanmar citizens can administratively not be transferred to a foreigner, for example, in execution of a share pledge. Larger security providers may have an investment license (“MIC Permit”), which means the investment regulator’s approval is needed for various transactions. Myanmar individual residents and citizens may also give guarantees.

Frequently used types of commercial security and contractual comforts

(A) Mortgage

It is noteworthy that in the case of immovable property being charged to a foreign lender, there is a requirement for an onshore security trustee (the services are provided by local Myanmar banks). Although there are six forms of mortgages possible under Myanmar law, in general practice, only three forms are used – English mortgage, simple mortgage or equitable mortgage. We briefly outline each of the three mortgage types below:

English Mortgage

An English mortgage can only be created by way of a registered deed, whereby the mortgaged property is absolutely transferred to the mortgagee with re-transfer upon repayment of the mortgaged amount as agreed. The mortgagor under an English mortgage is bound to repay the amount on a certain date. An English mortgage can be created with or without possession as well. This possibility of possession is a key difference with simple mortgage. An important element of the English mortgage is the right to sell

the mortgaged property upon default, wherever the property is situated, without any intervention by the courts. From that perspective, the English mortgage is the strongest form offered under Myanmar law. The “absolute transfer of property” at the outset of the mortgage does not have to discourage lenders from choosing this option. Myanmar case law interprets this absolute transfer in a highly functional manner, without transfer in fact:

“For the plaintiff it was contended that one who mortgages his property by an English mortgage has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest until the land is re-transferred to him by the mortgagee in fulfilment of the condition or provision that this shall be done upon payment of the mortgage money. No doubt this contention would be correct if English common law were applicable to the case. But what has to be applied is the Transfer of Property Act 1882. Under this Act a mortgage is a transfer of an interest in specific immovable property for the purpose of securing (1) the payment of the money advanced or to be advanced by way of loan, (2) and existing or future debt or (3) the performance of an engagement which may give rise to a pecuniary liability. [...] Consequently, although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee the [Myanmar] law does not recognize that he does so in fact, and the mortgagor remains in [Myanmar] law owner of the property subject of course to the mortgage”.

Simple Mortgage

Under a simple mortgage, neither ownership nor possession of the immovable property is transferred to the mortgagee. With a simple mortgage, the

*“..incredibly commercial in their approach.”
- Chambers and Partners*

mortgagor keeps possession of the property and is bound to pay the amount secured by the mortgage. Upon a failure to pay the amount secured by the mortgage, the mortgagee has the right to cause the mortgaged property to be sold and to apply the proceeds towards payment of the debt owed.

Equitable mortgage

Also known as a mortgage by deposit of title deed, an equitable mortgage is completed by the deposit of the title deed by the mortgagor (or anyone duly authorized by the mortgage in this regard) with the mortgagee, with an intention to create a mortgage. Generally, there is no deed or agreement required for the creation of an equitable mortgage. The security can only be enforced through court proceedings.

The main disadvantages of equitable mortgage are that (i) it only applies when there are title-like documents available for this land and (ii) it normally requires court intervention for enforcement. The advantage lies in the fact that it can be perfected without having to depend on registration with the ORD, which may be time consuming.

(B) Charge

A charge can be taken over fixed or current assets, intellectual property rights, receivables, bank accounts, assignment of rights under contracts, or any other movable property, whether tangible or intangible. There are two forms of charge under Myanmar law, in following of English law:

Fixed Charge: Such a charge is against a specific clearly identifiable and defined property. The property under charge is identified at the time the charge is created. The nature and identity of the property does not change during the existence of the charge. The company can transfer the property charged only after first paying the debt to the charge holder.

Floating Charge: A floating charge covers property of a circulating or fluctuating nature, such as stock-in-trade, debtors, etc. It attaches to the property charged in the varying conditions in which they happen to be from time to time. Such a charge remains dormant until the undertaking charge ceases to be a going concern or until the person in whose favor the charge was created takes steps to crystallize the floating charge. Upon crystallization, a floating charge becomes a fixed charge.

(C) Pledge

A pledge of goods is where possession of the goods is handed over to the lender in order to secure payment, and if the borrower defaults, then the lender may take over the goods and sell them in order to satisfy the debt (similar to how a pawn shop works). It should be noted that a pledge may be used to secure other obligations besides a debt. Pledges are often created over shares in a company.

(D) Assignment

An assignment is where one party ("the assignor") transfers or agrees to transfer its property or contractual rights to another party ("the assignee"). Contractual rights are assigned by way of a "deed of assignment" that is signed by the assignee and the assignor (and the other original party to the contract, if required). In a legal assignment, the assignee can enforce its rights against the debtor without



involving the assignor; however, in such a situation the assignment must be absolute and comply with the requirements specified in the Myanmar Transfer of Property Act (“TPA”) with regard to notice to the debtor, etc.

(E) Hypothecation

Hypothecation, although not clearly defined by Myanmar law but recognized in case law, is used to create a charge against the security of movable assets. However, the possession of the security remains with the borrower itself. Thus, in the event of default by the borrower, the lender (i.e. to whom the goods/security has been hypothecated) will have to first take possession of the asset and then sell it. Hypothecates generally have the right to sue the hypothecator for the debt and proceed in execution against the hypothecated goods, if they are available.

(F) Guarantees

Both corporate and individual guarantees are commonly used in Myanmar. The legal rules pertaining to guarantees are set out in the Myanmar Contract Act. There are a number of reasons why a guarantee might not be valid, such as through misrepresentation by the creditor or his agents, explicit or implied release of security by the creditor or, it seems quite strictly, as the result of “any variance” in the principal contract.

Myanmar individuals may give guarantees to third parties, but customary Buddhist matrimonial law would require that spouses agree to commit communal assets.

Myanmar registered companies frequently have a very restrictive company objective, which arguably does not allow for the provision of guarantees, prompting an “ultra vires” issue. There are other company law rules to take into account, such as directors with conflicts of interest, particularly in the case of public companies.

The CBM has not yet taken an official position whether guarantees in connection with a foreign currency must be approved in advance.

Security per type of asset

Land and buildings

There are several categories of land in Myanmar, ranging from (rare) freehold to grant land, permit land, farmland, garden land, etc. Depending on the land type, some of the underlying documents include permission to mortgage, transfer or create any sort of charge, however, in the absence of such, prior case-by-case permission from the relevant authorities would be required. Generally, the two categories of land that are easily charged are freehold land and grant land. To secure a charge over any immovable property, a mortgage, charge or assignment is created. The most common form of mortgage in Myanmar is an equitable mortgage, as the applicable stamp duty is lower and there is no requirement to register with the land authorities (“ORD”).

Movable property

Movable property is generally secured by way of a pledge, hypothecation or a charge. Generally, the definition of movable property in Myanmar includes plant and machinery, stock-in-trade, cash

*“...very good commercial understanding of
Myanmar.”
- Chambers and Partners*

or cash equivalents, book debt/accounts receivable, bank accounts, intellectual property, etc. Any form of security over movable property of a company (other than a pledge of movable property) requires registration with the CRO.

Shares

The shares of a Myanmar company can also be pledged as security for financing in Myanmar. In the event of default, the shares pledged are enforced, control of the company is relinquished to the pledgee. If the borrower is a company which is wholly owned by Myanmar citizens, and the lenders are non-Myanmar lenders/financial institutions, an onshore security agent would be required to enforce the pledge over the Myanmar company's shares or the articles of the company have to be changed first to allow foreign shareholders. Transfer of shares in a company with an MIC Permit must be approved by the investment regulator, the MIC. Change in control provisions are typically found in Myanmar telecom licenses as well as certain other licenses and concessions.

Contractual rights

Contractual rights, such as concessions, are often assigned under Myanmar law, either by way of a charge or by way of an absolute assignment, which triggers only upon default. However, in many assignments of contractual rights, where such rights are derived from the government, prior permission to that affect is required from the relevant governmental authority.

Internal approvals required for granting security rights

Under Myanmar law, the creation of any security over the assets of a company in most cases requires a specific resolution from the company's board of directors. However, a due diligence is always recommended to look at the charter documents of the Myanmar company to ascertain ultra vires issues which are a real concern in Myanmar.

Registration and perfection of security

Broadly, the perfection requirements are two-fold in Myanmar, and differ on the basis of the security being granted. Any security over immovable property, other than a mortgage by way of a share pledge, can be perfected after registration of the underlying instrument with the ORD, and registration with the CRO within 21 days of the creation of security.

No security over the movables of a company requires registration with the ORD. However, all types of security, other than a pledge of a company's shares/movable property, would require registration with the CRO within 21 days of its creation.

Enforcement of security rights

Securities such as English mortgages and certain simple mortgages can be enforced without a court's

intervention. However, in the case of an equitable mortgage, a court proceeding is necessary to enforce the security. Similarly, a court's intervention is required to enforce all security over movable assets, other than a pledge. Also, where movables form part of a mortgage that can be enforced without a court's intervention, they would also be allowed to be enforced without court intervention.

However, enforcement actions in Myanmar are invariably subjected to judicial proceedings, as the borrower tries to create difficulties by obtaining injunctions etc.

Priority of secured creditors in the event of insolvency

Myanmar law provides that secured creditors have priority over unsecured creditors. Furthermore, the hierarchy of payments is specified in the case of the winding-up of a company (whether insolvent or not). Tax payments due to the central government or local authorities, all wages or salaries of employees up to 100 rupees due in last two months, all wages of laborers, up to 500 due in last two months, compensation payable under the Workmen's Compensation Act, 1923, dues pertaining to any employee for a provident fund, pension fund, gratuity etc., shall have priority over any payments made to the creditors of the company.

Choice of governing law

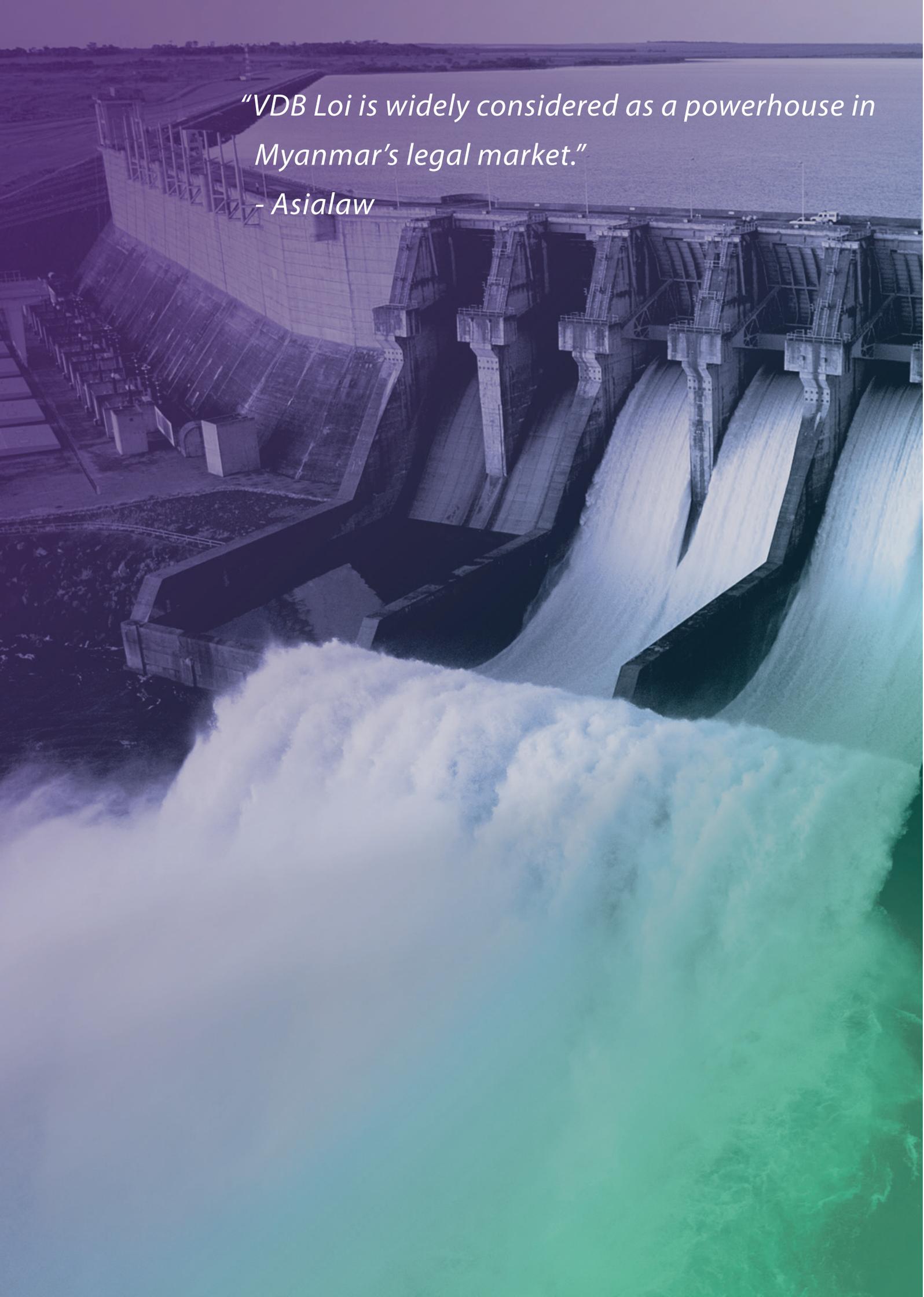
Parties generally have the freedom to choose governing law, but given the enforcement may be subject to a Myanmar court, most choose Myanmar law.

Existence of a trust or equivalent concept

The use of private trusts is possible in foreign lending in Myanmar. The basic reason is that foreigners cannot hold title over immovable property in Myanmar, and therefore, security trustees are hired to protect and enforce the security in any offshore lending where immovable property is part of the security package. Specifically, Myanmar has the Trust Act, which governs the rights and obligations of a trustee and the functioning of a trust. ■

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- Asialaw



CHAPTER 7: FISCAL STRUCTURE

Tariff setting

The new Electricity Law came into force in 2014 which, under chapter X, pertains to electricity pricing and service charges. The new Electricity Law has provisions for pricing of the electricity yet the pricing is not clear. It is not crystalized how the tariff should be calculated, what should the tariff rate and tariff policy should be.

No general tariff settings have been published by the Government by means of regulations or announcements. The tariffs of existing PPAs are generally not publicly disclosed by the Government. Only tariffs for the sale of electricity are generally published by the Government.

In practice, tariffs are negotiated by the investor with the MOEE and these may vary widely. Depending on the type of power production, geographical location, the investment needed from the developer and the nature of the end user, prices may be set according to the end-user price, fuel price, or other considerations. The tariff for purchase is minimal in the case of gas-fired projects, where the supplied gas is usually a pass-through for the investor.

A particularly difficult point in Myanmar PPAs is the escalation of tariffs over time. Internationally, a number of different formulas exist in this regard. In Myanmar, the escalation of the tariff is negotiated on a case-by-case basis. There does not seem to be one prevailing formula that has been universally adopted in the practice of Myanmar PPAs.

Government for the purchase of electricity. It is unclear whether the Government intends to produce regulations under the new Electricity Law which would provide more guidance on the determination of tariffs. However, the draft Electricity Rules does provide for tariff principles and standards based upon which the electricity tariff can be fixed.

Lately, the government has expressed concern about the losses it suffers due to the difference between the average cost of generation and the total cost collected from the consumers. Also, there are concerns that the fund spent on subsidies of electricity can be better spent on building power plants, substations and power lines. The government has realized that they

Factors taken into account for tariff adjustment in some Myanmar PPAs

1	Rate of inflation
2	Changes in Commercial Tax rate
3	Increases or decreases in operating costs, spare parts, manpower
4	Foreign exchange rate fluctuations
5	Consumer price index, insurance
6	Capital recovery cost
7	Crude oil price index inflation
8	Other factors

The Electricity Law 2014 does not provide any guidance on the determination of tariffs by the



require a well-defined electricity tariff policy suitable for consumers, investors and the government.

In April 2014, the Parliament approved a new block tariff system proposed by MOEE to improve the income and expense balance. The first such rise was announced in October 2013 and fueled large citizen protests prompting the government to freeze the tariff rise. The new block tariff system has higher rates for higher consumption while retaining a 35 Kyats/kWh tariff for residential consumers.

Royalties

Under the current Electricity Law, there is no guidance on the obligation to pay royalties to the Government in power sector investments. There is thus wide discretion regarding the determination of tariffs for energy production, transmission, distribution or use.

Royalties payable to the Government, usually as a free share, are common in hydropower projects, where a significant portion of the produced power is exported. The percentages are not publicly announced and in our experience, vary from one project to another.

A Government share can alternatively be arranged through a JV structure, which has been done on a number of occasions.

Applicable taxes to power projects in Myanmar

Myanmar’s power sector investments are subject to the normal tax rules applicable throughout the country. There is no exception regime for income derived from power generation, except in the framework of the general MIL. The following table provides an overview of the taxes and tax incentives which apply to power sector investments along with a comparative analysis of the changed tax incentives under 2016 MIL.

Myanmar does not currently have a full coverage of double taxation agreements (DTAs). However, there are currently DTAs in place with India, Malaysia,

Singapore, South Korea, Thailand, Laos, the United Kingdom and Vietnam. It also has DTAs with Bangladesh and Indonesia, though these are not yet in force.

Tax considerations of international financing

With respect to commercial lenders, it is to be noted that there is no withholding tax on interest paid to domestic recipients. However, a 15% withholding tax applies to payments of interest to non-residents. There is no tax deduction on the remittance of capital reimbursements. The 15% withholding tax rate is reduced to 10% under a number of DTAs, and even to 8% under the DTA with Singapore (only lenders that are banks). There is no withholding tax on interest paid to Myanmar branches of foreign banks.

The corporate income tax (the common rate is 25% for corporations) contains general rules on the limitation of the deductibility of expenses, including interest expenses, which need to be taken into account for tax planning purposes.

The table below sets out the withholding tax on interest and for those countries with which Myanmar has a DTA.

Withholding Tax on Interest Paid to Non-Residents	
No DTA	15%
UK	No rule
India	10%
South Korea	10%
Malaysia	10%
Thailand	10%
Vietnam	10%
Laos	10%
Singapore	10% or 8%

“Edwin is the leading international lawyer in Burma. He assisted on two of my projects in Myanmar and has been first rate.”
- IFLR1000

		2012 FIL	2016 MIL	Notes
1	Corporate income tax holiday	The MIC had no choice but to give every foreign investor a 5 year tax holiday.	The MIC may or may not grant an income tax holiday. The holiday period can be 3, 5 or 7 years depending on location. Myanmar is divided into 3 zones for that purpose.	Myanmar citizen investors may receive more favorable incentives than foreign ones, the 2016 MIL states.
2	Reinvestment	Profit which is reinvested within one year is exempt from income tax.		Reinvestment of profit is allowed for other similar type of business under 2016 MIL, whereas reinvestment is allowed only in the same business under 2012 FIL.
3	Depreciation	Right to depreciate at a rate set by the state.	Accelerated depreciation equal to 1.5 times of the original depreciation can be allowed (Accelerated depreciation is allowed to start from the date of commercial operation under 2016 MIL).	Clarified
4	Export income tax rate	Reduction of income tax to 50% of rate for export.	No such rule	Abolished
5	Equal income tax rate	Right to pay tax at rate for Myanmar citizens.	Law states that income tax on foreigners shall be the same as on citizens.	Clarified, made into a general rule rather than a right.
6	R&D deduction	Right to deduct from assessable income.	No change	
7	Loss carry forward	Up to three consecutive years from the year the loss is sustained in respect of such loss sustained within two years immediately following the exemption.	No such rule	The 2012 FIL, following the 1987 FIL on this matter, contained this confusing rule on losses, which actually is less advantageous than the general income tax law rule that applies to everyone.
8	Imported machinery, equipment, materials	Exemption from customs duty and Commercial Tax during the construction period of the project.	No change	
9	Raw materials	Exempt from customs and tax for first three year.	Same, but only if used enterprises who export their entire production from Customs Duty and Commercial Tax is given for "materials used in the business" if imported during construction period.	Incentive restricted- If the raw materials are imported during construction period, exemptions may be available. Semi-finished goods added to scope by 2016 MIL.
10	Refund of tax and duty in case of export	No such rule	When goods are exported, duty and tax paid on the import of the raw materials and semi-finished goods of those goods can be refunded.	New incentive
11	Expansion of the project	Exempt from customs and tax	No change	
12	Commercial tax for export	Exemption	No such rule	Deleted. Apart from electricity (CT @ 8%) and crude oil (CT @ 5%), CT is zero rated for other export goods.

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- IFLR1000



CONCLUSIONS

As Myanmar increasingly liberalizes, decentralizes and opens its power sector to foreign investment, foreign IPPs are faced with a legal and regulatory framework that is in full transition.

A number of fundamental pieces of legislation, including the 2016 MIL and its implementing rules, the Environmental Conservation Act and FEMA have significantly improved the legal environment for foreign investors in general, including IPPs. However, Myanmar is at the stage in its development where it is still building up experience with respect to certain issues that are important to foreign investors in the power sector. Contractual precedents and specific regulations still need to be developed. In addition, the Government is still finding its way with regard to adjusting its internal administrative and decision-making processes to the new needs, the volume of proposals and the new profile of the foreign investors.

Besides economic circumstances, which are outside of the scope of this report, the uncertainty associated with a regulatory system in full transition is, in our view, reducing and slowing down the conversion and implementation of foreign-invested power projects. This is one of the reasons why only a small number of foreign-invested projects in the power sector were licensed by the MIC in 2013.

In our experience, potential foreign investors in the power sector face a number of practical challenges and uncertainties that are associated with the present legal and regulatory framework:

- **Commercial terms are difficult to predict**
In the absence of detailed regulation or a published Model PPA, the commercial terms of power investments are difficult to predict. Tariffs are not regulated or published but are instead negotiated on a case-by-case basis with the Government. They may vary considerably from one project to another, although the Government uses an identical basic tariff for all recent gas-fired projects.

Other crucial commercial and fiscal terms such as tariff escalation, take-or-pay arrangements, and compensation for termination, payment terms, currency, or step-in terms are up to individual negotiations, the outcome of which is difficult to predict.

- **For some major projects, it is challenging for the foreign investor to be certain of compliance with the Government's environmental and social policy**

Environmental issues have rapidly come to the forefront of the Government's policy in recent years. This can be seen with two major policy developments. Firstly, environmental concerns have played a crucial role in the cancellation of a number of major power projects, such as a 3,600MW coal-fired project by Italian-Thai Development and Ratchaburi Electricity Generating Holding at the planned Dawei Industrial Zone, and the 6,000MW Myitsone Dam project by China Power Investment Corporation and Asia World. Secondly, in the wake of the new MIL, the environmental aspects of a proposed project have featured more prominently in the Government's investment regulations and in its assessment of projects.

Under Myanmar law and policy, any resettlement issues are largely the responsibility of the investor, with the Government playing the role of facilitator. The lack of regulatory standards in terms of, for example, resettlement compensation, introduces unknown variables into the project's financial planning.

- **The actual implementation of secured international commercial and institutional lending, let alone enforcement, remains largely untested**

Most of the rules governing international financing have been revamped in 2013. As a result, there is little experience with the actual implementation of financing and security.

- **The timeframe needed for completion of the concession is hard to determine from the outset**

In the 2011-2014 period, the Government has negotiated PPAs (and MOAs) both on its previously used model and, more recently, on the basis of more comprehensive, newly proposed texts. Unsurprisingly, the timeframe needed for completion of a concession relates directly to the Government's familiarity with the

documents. Debated points in the negotiations may result in significant time delays. In some cases, these delays may be in sharp contrast to the ambitious time schedule for construction of the facility which is imposed by the Government.

To a large degree, the issues associated with a legal and regulatory system in full transition will be remedied by the passage of time. The time needed can however be reduced by speeding up targeted regulatory and administrative reform. The following areas are, in our view, some of the priorities in this respect:

- **Standardization and shortening of the decision-making process for concessions:** The outcome of proposed projects and negotiations can be rendered more predictable for foreign investors through a combination of public contract templates, published tariffs (and tariff adjustment formulas) and use of public key commercial terms, as is the case with the Ministry of Energy's Standard Terms for Oil and Gas Exploration and Production contracts. The Government is of course aware of this and is addressing the problem with the help of international institutions. For example, we expect that first drafts of a template PPA may be ready for discussion within the Government by August 2014. However, templates and standard terms cannot solve everything. On individual concessions, it will likely be necessary to provide for individual circumstances. In order to reduce the negotiation time, it would also be beneficial to rethink the decision-making and approval authority within and between the different Government actors involved with approving concessions.
- **Continuing to promote decentralization:** The States and Regions are receiving more authority with respect to power projects from the Union level, which may increase the efficiency of small and medium-scale plants, but it may also pose greater inefficiencies with respect to coordinating large-scale power projects that connect to the national power grid. On this note, the draft Electricity Law provides that States and Regions may issue permits for small and medium-scale electricity businesses, provided they are not connected to the national power grid.
- **Additional regulation and international agreements are needed to provide investors and their lenders with comfort on security, enforcement, and environmental issues:** We believe that the Government will need to create additional or more detailed regulations in a number of areas that are still mired in

uncertainty. This is particularly the case with environmental compliance, land use and resettlement, and the practical implementation and enforcement of secured interests. We would like to cite a few practical examples:

- On the issue of international financing, Myanmar has made important progress in recent years, as was noted in this report. But there is still significant room for improvement. For example, it would be helpful for investors if there was a specific regulation issued to complement the existing rather general context of securities under the MIL, which does not provide for the types of securities that lenders to a power project generally expect.
- With respect to environmental protection, we already noted a lot of progress



through draft regulations and the insertion of comprehensive provisions on environmental standards in a few very recent PPAs. We think that the progressive codification and publication of the applied standards will contribute to the growth of foreign investment in the power sector.

- Myanmar has acceded to the New York Convention on Foreign Arbitral Awards, but the implementing law to amend the current Myanmar arbitration laws has not yet been issued. Furthermore, the Government could consider putting in place additional practical measures to strengthen the enforcement of secured interests, such as specialized chambers within the judiciary, and updated regulations for court-supervised auctions.

- Myanmar became a member of the Multilateral Investment Guarantee Agency in 2013. Nevertheless, the country's coverage in terms of bilateral investment treaties remains thin, with less than ten bilateral agreements in place. Bilateral investment treaties with umbrella clauses to protect commercial agreements between the Government and nationals of foreign states can provide significant comfort to investors to supplement the arrangement found in the project's contractual documentation.

It will take time to finalize and implement reforms, but the outlook for the power sector is from our perspective very positive. The Government is addressing all the major legal and regulatory areas that need improvement, and a lot of progress has already been made. ■

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ABBREVIATIONS

DEFINITION	TERM
ADB	Asian Development Bank
AOA	Articles of Association
ASEAN	Association of Southeast Asian Nations
BOT	Build Operate Transfer
CP	Conditions Precedent
CT	Commercial Tax
DEP	Department of Electric Power
DICA	Directorate of Investment and Company Administration
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
ESE	Electricity Supply Enterprise
FEMA	Foreign Exchange Management Act of 2012
FID	Foreign Investment Department
FIL	2012 Foreign Investment Law
FIL Rules	Foreign Investment Law Implementing Regulation
HPGE	Hydropower Generation Enterprise
IPP	Independent Power Producer
IRD	Internal Revenue Department
JV	Joint Venture

DEFINITION	TERM
JVA	Joint Venture Agreement
LNG	Liquefied Natural Gas
MCPA	Myanmar Companies Act
MEC	Mandalay Electric Corporation
MEPE	Myanmar Electric Power Enterprise
MESC	Mandalay Electric Supply Corporation
MIC	Myanmar Investment Commission
MIC Permit	Investment license issued by the Myanmar Investment Commission
MNPED	Ministry of National Planning and Economic Development
MOA	Memorandum of Agreement
MOEP	Ministry of Electric Power
MOF	Ministry of Finance
MOU	Memorandum of Understanding
NEMC	National Energy Management Committee
PPA	Power Purchase Agreement
SIA	Social Impact Assessment
TCF	Trillion Cubic Feet
UAGO	Union Attorney General Office
YESB	Yangon Electricity Supply Board
YESC	Yangon Electricity Supply Corporation

*“... Edwin is quite a creative thinker.”
- Chambers and Partners*

OUR RECENT EXPERIENCE IN ENERGY AND NATURAL RESOURCES

Hydro

- ▶ 1,000MW HPP in Myanmar for one of the world's largest producers of electricity
- ▶ 700MW HPP in Myanmar for a global hydropower developer
- ▶ Hydropower concessions in Laos, assisting a Thai-based energy company
- ▶ Financing transaction involving a hydropower developer in Laos, acting for the lenders
- ▶ 300MW HPP in Myanmar, acting for the consortium of sponsors which includes the government

Photovoltaic, wind, other renewables

- ▶ 300MW solar plant in Myanmar, the largest in ASEAN, acting for the sponsors
- ▶ Assisting an international financial institution with its financing of a solar project in Cambodia
- ▶ 30MW wind farm in Myanmar for one of the largest Asian power producers
- ▶ 90MW biomass power facility in Kampot, Cambodia, acting for the sponsors

Transmission

- ▶ US\$1 billion, one of the largest financings ever in Laos, acting for an international financial institution on the financing of two transmission line construction projects in Laos
- ▶ Construction of a transmission line from Sihanoukville to Phnom Penh in Cambodia
- ▶ Acquisition of a majority stake in a transmission line interest in Cambodia

Gas and other thermal generation

- ▶ 500MW CCGT at Thaketa, Myanmar acting for the lenders
- ▶ 250MW CCGT at Myingyan, Myanmar acting for prospective sponsors
- ▶ 200MW CCGT in Myanmar, acting for the sponsors
- ▶ 300MW power rental project with HFO/LNG in Myanmar
- ▶ International acquisition of a major coal mining asset in Indonesia

Mid- and downstream gas, petro, LNG

- ▶ Acting for the Ministry of Electricity and Energy in Myanmar on the privatization of 5 state-owned assets in the mid-stream space
- ▶ Assisting sponsors of an LNG terminal in Myanmar with planning and project acquisition
- ▶ Assisting the developer of a petroleum refinery in Cambodia

Upstream oil and gas

- ▶ Advising 4 supermajors on the acquisition and operation of their oil and gas interests in Myanmar
- ▶ Disposal of a producing gas asset and pipeline interest in Myanmar, acting for the purchasers
- ▶ Advice on the acquisition of an oil and gas block in Cambodia
- ▶ Assistance with 3 farm-in transactions in Myanmar
- ▶ Acquisition of an onshore gas block in Laos

Industrial infrastructure

- ▶ Investment in the Thilawa SEZ in Myanmar, acting for the Japanese government
- ▶ Investment of a US\$300 million nickel smelter industrial project in Indonesia
- ▶ Development in a new industrial zone in Myanmar, acting for the state-owned foreign investor
- ▶ Planning and project procurement of an offshore supply base in Myanmar

Telecom infrastructure

- ▶ Advising two international financial institutions on their US\$300 million corporate financing of telecom infrastructure in Myanmar, the largest of its kind so far
- ▶ Submarine fiber optic cable project in the Andaman sea, assisting the sponsors
- ▶ Acting for a consortium of bilateral development financial institutions on the US\$175 million financing of the deployment of a network of telecom towers in Myanmar
- ▶ Acquisition of passive network infrastructure in Vietnam, acting for the purchaser
- ▶ Deployment and licensing of a closed circuit cable network in Indonesia
- ▶ Assistance with the concession for a nationwide fiber optic cable network in Laos

Public sector

- ▶ Advising the Government of the Union of Myanmar on PPP reform
- ▶ Executive committee of the IFC-supported Hydropower Developer Working Group in Myanmar

Water and sanitation, social infrastructure

- ▶ Advised a consortium of sponsors with a water treatment and distribution project in Myanmar
- ▶ Acquisition and financing of a US\$28 million hospital in Indonesia
- ▶ Assisting the sponsors of a US\$2 billion social infrastructure with mixed-use real estate in Yangon, Myanmar

Transportation

- ▶ Cambodia's first PPP highway
- ▶ Assisting one of the sponsors of the largest foreign-owned port terminal project in Thilawa, Myanmar
- ▶ Acting for the Ministry of Transport and Communications on 2 dry-port projects in Myanmar
- ▶ Yangon's new international airport at Hanthawaddy, advising a state-owned stakeholder



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