

PATHWAY TO AN INDEPENDENT POWER PROJECT IN VIETNAM

Steps involved in launching a
privately-initiated IPP project by
a foreign investor

JULY 2022

HIGHLIGHTS

- WHAT ARE THE MAJOR REGULATORY PATHWAYS TO A NEW PROJECT
 - MAJOR PERMITS REQUIRED
 - LAND ALLOCATION REGIME
 - SPECIFICS OF REGULATION IN ENERGY SECTOR AND EXPECTED DEVELOPMENTS
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I. Main Regulatory Pathways for a New Project

Investors in Vietnam can choose different routes to implement their projects. The major pathways are envisaged by the PPP Law and the Investment Law.

1. The PPP Law pathway

Under the PPP (public-private partnership) regime, project would generally be implemented on the basis of a PPP contract signed by the investor with the relevant government authority. Selection of the investors can be done through: (i) open bidding, (ii) competitive negotiation and (iii) (in limited specifically identified cases) through direct selection, which is referred to as "investor appointment" in the PPP Law.

PPP Law also envisages an option where a project can in certain cases be proposed not by the government side, but by a private developer. If such project will be authorized for implementation, then at the investor selection stage, the investor who made the initial proposal will be entitled to the preferential treatment. Namely such investor will be eligible for additional scoring incentives when various proposals will be evaluated.

2. The Investment Law pathway

Under the Investment Law, an investor can propose and implement a project subject to receipt of relevant approvals, licenses and registrations. Competitive selection may or may not be applicable, depending in particular on whether the investor already has the land required for the project.

3. Which route to take?

As between the above routes, the choice is usually made taking into account the following major considerations:

- (a) sector/industry of the project;
- (b) whether the project is being initiated by the government side or by the investor;
- (c) whether investor already has the land necessary for the project and where such land is located (e.g. whether it is located in an industrial park or elsewhere, as land allocation procedures differ depending on the location);
- (d) does the investor need support from the government in implementing the project, or the investor would like and is able to implement it fully at its own expense.

These aspects are further considered below in more detail.

II. How Does the Industry and Size of the Project Impact on the Available Route?

It is important to note that PPP Law provides for a specific list of industries in which a project can be implemented on PPP basis. These include projects in the following sectors:

- (i) transportation,
- (ii) power grids and power plants. **Except:** hydropower plants and those that are subject to the state monopoly requirement as provided in the Law on Electricity (such as, for example, operation of large-scale power plants (e.g. nuclear and several specifically designated hydro- stations),
- (iii) water resources and irrigation; clean water supply; water drainage and wastewater treatment; waste management and disposal,

- (iv) healthcare; education – training, and
- (v) information technology infrastructure.

PPP Law further requires minimum capital to be invested: at least VND 200 billion (approx. USD 8.6 mln.), except for projects in healthcare and education, in which the minimum capital requirement is reduced to VND 100 billion.

In terms of Investment Law route, approach is generally formulated in the opposite way, i.e. there is a list of banned activities in which investors should not be involved (the list is set in Article 6 of the Investment Law, and includes for example dealing with listed narcotic substances, trade in specific chemicals, etc.).

III. Investment Law Route – Who Approves the Project and How to Initiate It?

Approval of "investment guidelines"

Generally, for larger and more complex projects it is necessary for "investment guidelines" to be first approved by the government authority of competent level. Examples of such projects are listed below and the level of approval (National Assembly, Prime Minister or Provincial People's Committee) depends on the size, complexity and the impact that the project may have.

National Assembly

Projects that exert great effects or potentially serious effects on the environment, including, for example:

- (a) nuclear power plants;
- (b) investment projects that require relocation of 20,000 people or more in mountainous areas or 50,000 people or more in other areas.

Prime Minister

- (a) investment projects that require relocation of 10,000

people or more in mountainous areas or 20,000 people or more in other areas;

- (b) airports and aerodromes; cargo terminals of airports and aerodromes with a capacity of at least 1 million tons per year;
- (c) ports and wharves in which investment is at least VND 2,300 billion within the category of Class I seaports;
- (d) investment projects on petroleum processing;
- (e) investment projects which involve betting and casino services.

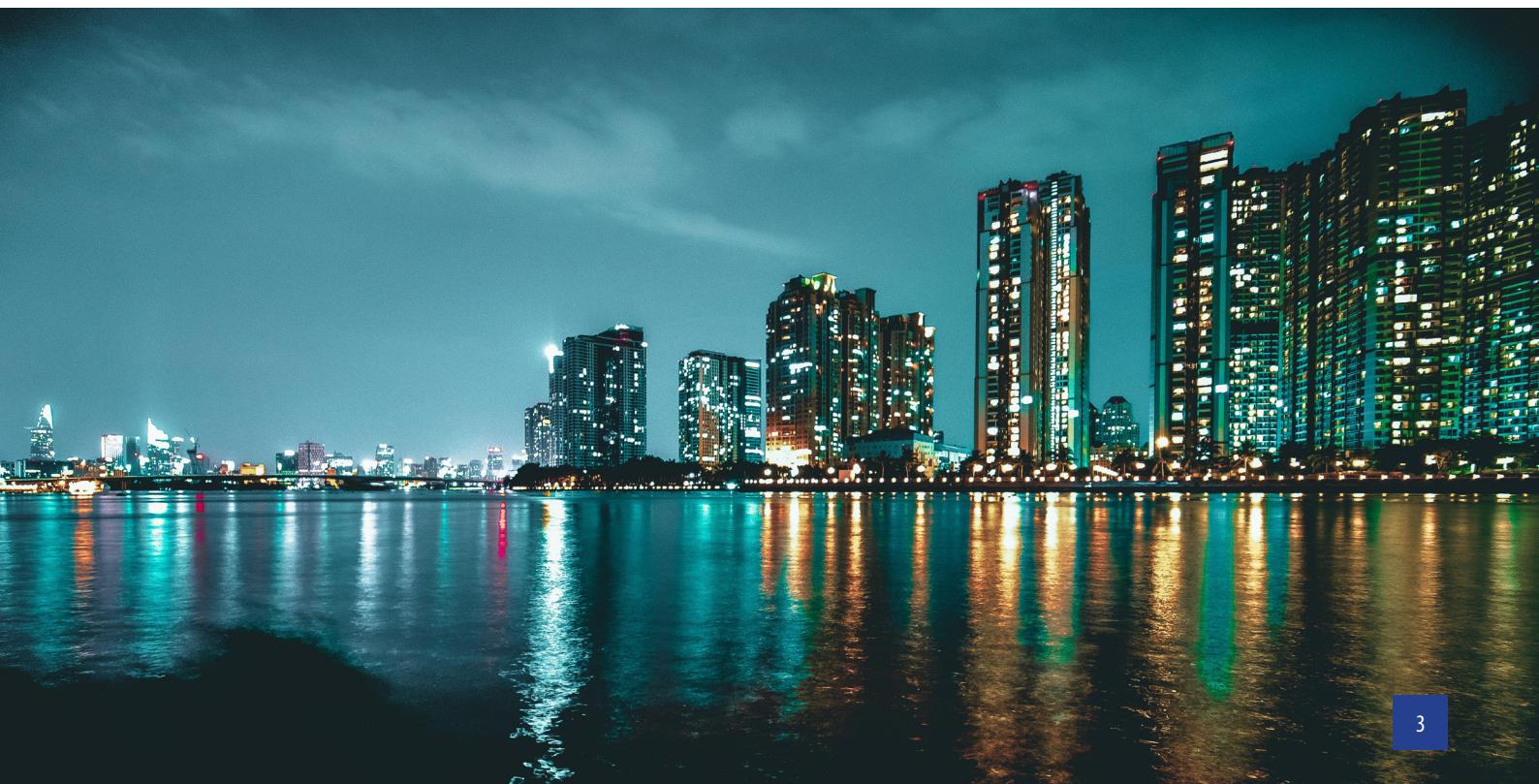
Provincial People's Committees

- (a) construction of residential housing that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area;
- (b) investment projects of foreign investors and foreign-invested business organizations executed on islands or in border or coastal communes; in other areas affecting national defense and security.

The investors willing to undertake a project that requires one of the above approvals will need to apply for it via the Ministry of Planning and Investment (for projects that are subject to National Assembly or Prime Minister approval) or via provincial Departments of Planning and Investment (for projects that are subject to Provincial People's Committee approval).

The **application dossier** would typically include:

- An application, including a commitment to incur related costs, if the project is not approved;
- Documents relating to the investor's legal status;
- Documents relating to financial capacity of the investor, such as financial statements of the parent company,



- funding commitments from parent company or from a bank;
- Proposal for implementation of the investment project (including investment objectives, amount of required capital and plan for raising capital, location, duration and schedule of the investment project, information about the current use of land in the location of the project);
- If the project does not require the government to allocate or lease land, investor provides a copy of the available document regarding the land use right;
- Description of the technology to be used in the investment project.

“Investment Registration Certificate”

Upon receipt of the above approvals “in principle”, or (for projects that do not require such approval “in principle”) – directly, the investor would apply for **an investment registration certificate** at the local investment registration authorities.

Certain conditions apply, including:

- The investment project shall not involve any banned business lines (as listed in the laws)
- There is a project site available for execution of the project. In practice this means that investor was able to obtain necessary land use rights for the project (e.g. through lease) and can provide evidence thereof in the application dossier.

IV. What Are the Routes to Receive Land Rights by a Foreign Owned Project SPV?

General regime: land “allocation”, “lease”, “land use certificate”

In Vietnam land is not “owned” either by individuals or by entities, whether they are Vietnamese or foreign. The

Constitution provides that land is owned by the people and that the state administers land on people’s behalf.

In its exercise of the people’s rights, the state allocates land to individuals or organizations. This means that the state may permit an individual or an organization to use a piece of land for a definite or an indefinite period of time, with or without the need to pay a land use fee, or lease a piece of land to individuals, households or companies.

Individuals or entities to whom a piece of land was allocated or leased, must use the land for the purposes stipulated in the land allocation decision or in the land lease agreement.

In terms of terminology that is used in regulations and practice, reference is usually made to “**allocation**” of land when the land user acquires the land use right and pays a fee to the government for such allocation. Where reference is made to “**lease**”, the user is normally required to pay rent (on regular basis or in lump sum for the whole lease term).

Land use right is evidenced by a “certificate of land use right, residential house ownership and ownership of other assets attached to the land” (“**LUR Certificate**”) granted by a competent state agency.

Specifics of the regime to be followed by foreign investors

Foreign owned enterprise (a “**FOE**”) can receive LUR Certificate through leasing or subleasing land from: (1) the competent government authority or (2) from other land users, provided that such land users are permitted by law to lease or sublease land.

The identity of the entity that can potentially grant land use rights to a FOE usually depends on the location of the project site:

A FOE that intends to implement a project in **an industrial zone** may:

- (a) lease land from the industrial zone developer; or



- (b) sublease land from another enterprise located in such zone with the approval of the industrial zone developer.

For **project outside of industrial zones** a FOE usually may:

- (a) lease land from the competent government authority; or
- (b) lease / sublease land from a domestic economic entity that is permitted to sublease land in accordance with its LUR Certificate. The plot must be already connected to the utilities infrastructure suitable for industrial development; or
- (c) FOE may sublease land (also on the condition that the land plot is connected to the required utilities infrastructure) from another FOE within the remaining term of the original lease,

The term of validity of the LUR Certificate generally coincides with the term of the investment registration certificate, but may generally not exceed 50 years (or 70 years in specific areas).

IV. What Are the Key Operational Permits Required for a Large Energy Project?

The precise scope of required permits of course depends on the specifics of each project. However, the key approvals would typically include:

- (i) as mentioned above, the investment registration certificate ("IRC") for the project;
- (ii) **business registration certificate** for incorporation of the project company; and
- (iii) **operating license(s)** (if required) in certain conditional business, such as **electricity generation**, chemical production, intermediary payment solutions, etc.

In addition to the above, the project company would also typically be required to obtain construction permit, EIA approval, Firefighting and Fire Prevention certificate.

V. What Is the Usual Corporate Vehicle Used for the Project SPV?

Project companies are set up in one of the forms envisaged by the Law on Enterprises of Vietnam. The most frequently used forms are a limited liability company or a joint stock company (in this form there must be a minimum of three shareholders).

VI. Project Financing Aspects. Which Security Can Be Offered by the Project Company to Lenders

Please refer to our separate briefing "**Foreign Loans for Vietnamese Borrowers – Q&A**" on the following [LINK](#).

VII. Tax, Customs and Other Incentives

Investors can benefit from a range of incentives envisaged by the Tax Law, Land Law and other laws in Vietnam. As such either a PPP project or a privately-initiated project can enjoy generally consistent incentive schemes.



VIII. Energy Sector: Specifics of Regulation and Expected Developments

Private investments into the power transmission grid

Article 4 of the Law on Electricity 2004 was amended in January 2022 to allow private sector to:

- (i) invest in the construction of the transmission grid; and
- (ii) operate the transmission grid that was so developed.

This positive change in regulation would allow investors to benefit from a broader range of structuring options when developing their projects, in particular in the renewables sector, where project sites may not necessarily be closely located with the existing grid network.

“Direct PPAs”

In May 2022 the Ministry of Industry and Trade of Vietnam (“**MOIT**”) released another draft circular regarding the implementation of the pilot program for direct power purchase agreements (“**DPPA**”).

The regulation is intended to allow new contractual mechanisms between power developers and private consumers.

Under the latest draft, the pilot scheme will apply to:

- On the generators' side - the generating units (wind or solar power plants) with an installed capacity of more than 30 MW connected to the national power system, which includes:
 - (a) Power plants that are ready to go into operation, but are not eligible for application of the electricity price mechanism under:
 - (i) the Prime Minister's Decision No. 13/2020/QD-TTg dated April 6, 2020 on incentive mechanisms encouraging the development of solar power in Vietnam (for solar power); or

- (ii) the Prime Minister's Decision No. 37/2011/QD-TTg dated June 29, 2011 on the mechanism to support the development of wind power projects in Vietnam; or
- (iii) Decision No. 39/2018/QD-TTg dated September 10, 2018 of the Prime Minister amending and supplementing a number of articles of Decision No. 37/2011/QD-TTg dated June 29, 2011 of the Prime Minister on the mechanism to support the development of wind power projects in Vietnam (for wind power).

- (b) Power plants that are not yet in operation, are under construction, are included in the electricity development planning, have identified investors and are selected by competent state agencies according to current regulations and are expected to be completed, accepted for commercial operation within 270 working days from the date of implementation of the pilot DPPA program.

- On the consumer side: large electricity users (customers), being organizations and individuals that are purchasing electricity for industrial production purposes in the amount of 22 KV or more.

The DPPA arrangement in the pilot scheme includes the following transactions:

1. Bilateral contract between Customer and Generator. The generating unit and the customer directly negotiate and sign a bilateral contract covering among other things:
 - Contractual output and contract price: the two parties agree on trading cycles on the spot electricity market; reference price (or spot price) to be set according to the spot price of electricity market that is announced in accordance with the provisions of Circular No. 45/2018/TT-BCT dated November 15, 2018 of the Minister of Industry and Trade; parties will be making payments to each other depending on the difference between the contract price and



the reference price which is the spot price of electricity.

2. Purchase of electricity of generating units through the spot electricity market.

The generating unit also signs a contract with the Electricity of Vietnam (EVN) to participate in the competitive wholesale electricity market and sell all the electricity of the power plant project to the spot electricity market. The generating unit is responsible to register and participate in the competitive wholesale electricity market according to the provisions of Clause 2, Article 4 of Circular No. 45/2018/TT-BCT.

3. Sale of electricity by EVN to the customers

The EVN will then distribute and supply electricity to customers to meet the entire demand for electricity for production activities at the registered pilot scheme location at the retail price of electricity specified in the Prime Minister's Decision No. 24/2017/QĐ-TTg dated June 30, 2017.

The total capacity of power plants participating in the pilot program of direct purchase and sale of electricity should not exceed **1,000 MW**.

The generating unit must satisfy, in addition to the above criteria, the following requirements:

- There should be no limitation on power generation capacity due to grid overload at the time of registration for commercial operation.
- There should be no effective power purchase agreement signed with EVN at the time of registration for participation in the pilot scheme.
- There is a binding agreement with one (or more) customers under the DPPA if selected to participate in the pilot scheme.

Power development plan

The Power Development Plan is a document of fundamental importance for the energy sector in Vietnam. Projects initiated either by the investor or by the government are generally firstly assessed and approved for inclusion into the PDP.

The power development plan has been prepared by localities based on their demand, land, conditions and presented to MOIT for consolidation and approval (after getting approval by the Prime Minister).

If an investor would want to initiate a new project (which is not yet included in the PDP), it would need to conduct the pre-feasibility study, research and apply to the local People's Committee for submission to the MOIT for approval and inclusion in the PDP.

Following that, the investment process into the project can be undertaken as described above.

The Council for Appraisal of National Electricity Development Plan for the period of 2021-2030, with a vision to 2045 (Electricity Planning VIII) approved the draft "**PDP VIII**" on 26 April 2022. The next step in the approval process is its approval by the Prime Minister.

The latest version of PDP VIII has considered a lot of matters associated with commitments related to energy transition in the spirit of commitments at COP 26. In particular, the PDP VIII is addressing the issues of total installed capacity, structure of power sources (reduce coal power, increase renewable energy), policy and roadmap for energy conversion and the allocation of power sources in regions, general economic efficiency issues (reducing investment costs for power sources and power grid).



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Our advice is relied upon by international and development financial institutions for some of the region's largest ever financing transactions. Multinationals often choose us for multibillion dollar investment projects in a wide range of sectors.

We have particularly strong expertise in Energy and Infrastructure, Project Finance, Real Estate, TMT, and Tax. VDB Loi also provides ongoing support to its clients at all stages of their investments in Vietnam, from initial market entry, business set up, and obtaining regulatory approvals, to continued compliance with reporting and filing requirements.

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The background image shows a panoramic aerial view of the Ho Chi Minh City skyline at night. The Bitexco Financial Tower is the central focus, its distinctive spiral design and illuminated glass facade reflecting the surrounding city lights. Other modern skyscrapers are visible, some with unique architectural features like vertical red panels. The city is densely packed with buildings of various heights, and the network of streets below is brightly lit by streetlights and vehicle headlights.

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