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Power in Myanmar

Ten things to know



Ten things to know about power in Myanmar

With an installed generating capacity of about 3,500MW and a population of more than 53 million, Myanmar's lack of capacity offers huge potential for developers. The IPP approach is still in its infancy in Myanmar and the purpose of this briefing is to highlight ten of the key issues that investors should be aware of when considering investing in power projects in Myanmar.

01 | Institutional framework

The Ministry of Electric Power (MOEP) is both supervisor of and facilitator for the power sector in Myanmar. It assumes all operating and management responsibility relating to power generation, transmission and distribution.

Myanmar's electricity industry is structured around a typical state-owned single buyer model, with two offtaking entities:

- Myanma Electric Power Enterprise (MEPE) is a state-owned enterprise controlled by MOEP and the primary contact for investors entering the power sector. MEPE purchases electricity from public and private producers, and then sells it to various (decentralised) organisations for distribution. MEPE implements gas-fired projects, and owns and operates the power grid.
- Hydro Generation Enterprise (HPGE) is the Government partner for all hydro-electric projects. The HPGE also operates and maintains all large scale public sector hydroelectric facilities.
- Various Electricity Supply Boards such as the Yangon Electricity Supply Board (YESB) complement MEPE's role as purchaser and distributor of power on a state and regional level.

A variety of other government departments and agencies are involved in the power sector, with responsibilities delineated by location, role and/or by fuel source. One notable development is that local states and regions, and special economic zones increasingly start to negotiate their own IPP deals.

In addition, several other government ministries have oversight of aspects of IPP development, including the Ministry of Energy, Ministry of Environmental Conservation and Forestry and the Ministry of Agriculture and Irrigation.

02 | Regulatory framework

Myanmar's regulatory framework is in a state of transition. The existing regulatory framework is based on English and Indian laws, but it is old, relatively untested and has for the most part not been updated to address the concerns of present-day investors. Progress has been made with recent and key legislation such as the Foreign Investment Law 2012 (FIL), but investors should appreciate that the regulatory framework will continue to evolve for some time to come.

The Electricity Law 2014 (which replaces its predecessor of 1984) governs the power generation sector. It is fairly general in nature. The law distinguishes between generation, transmission, distribution and use of electricity and requires that permission must be granted by the relevant authorities for these activities. A new electricity regulatory commission has been established with responsibility for formulating policy, preparing tariffs, advising MOEP, setting standards and performing inspections, but it has only very recently started operations. It is expected that more detailed provisions will be issued later by way of implementing regulations.

The Electricity Law does not contain any provisions with respect to the contractual framework between owners, producers, users, transporters or distributors of electricity and does not address environmental issues, ownership, financing, tariffs, land use or other issues relevant to power projects. Most of these issues are left to the individual project contracts.

03 | Foreign Investment Law

The FIL permits 100 per cent ownership by foreign entities of gas-fired power projects. Participation in hydroelectric and coal-fired projects requires Government approval and must be structured either as a joint venture with the Government or as a build-operate-transfer (BOT) project. Projects below 10MW are in theory prohibited activities for foreign investors, but in reality a joint venture with the local authorities may be permitted. Some elements of the electricity transmission network remain subject to restrictions, such as the management of electric power

systems, but power trading was recently opened up to foreign investors (Notification 49/2014).

The FIL and related legislation grant approved foreign investors various protections including:

- against expropriation and nationalisation of the project
- the right of investors to foreign dispute resolution mechanisms stipulated in contracts
- the right to convert Myanmar Kyat income to foreign currency
- repatriation of capital and profits in foreign currency.

The FIL also provides the basis for the grant of various tax incentives including income tax holidays, customs duties exemptions on the importation of machinery and materials. It is important to note that the MOEP is not authorised to negotiate tax incentives with foreign investors, and only the incentives granted by the MIC will be applied in practice.

Bilateral investment treaties can provide a degree of added comfort to foreign investors. Myanmar is a party to several bilateral investment treaties, but only three have entered into force, being those with India, China and the Philippines. The ASEAN investment protection framework (ASEAN Comprehensive Investment Agreement) and the investment protection provided in ASEAN’s free trade agreements and economic partnership agreements with third states such as Japan, Korea and Australia also extend to Myanmar.

04 | Procurement process

Until recently, projects have been procured on the basis of bilateral negotiations between developers and the Government. Interested investors are permitted to submit proposals directly to the Government. The Government’s efforts to encourage foreign investors into the sector are evidenced by the recent competitive tender for the 250MW combined cycle power plant at Myingyan.

There are no laws addressing the grant of concessions, BOT or PPP projects in Myanmar. Such projects are governed by general Myanmar law, including the Myanmar Contract Act, the foreign investment law and various land laws. A Presidential notification addresses the process of public procurement in general.

Power projects are generally structured as joint ventures or on a BOT basis. Theoretically, projects can also be structured on a build-own-operate (BOO) basis. Concessions are generally awarded at the conclusion of a series of

negotiations with the Government and the agreement of progressively more detailed contracts.

05 | Contracting process

With the exception of the Myingyan competitive tender process, most Myanmar IPPs have proceeded based on the following contracting sequence:

Phase 1	An investor submits an expression of interest to MOEP.
	The investor and the Department of Electric Power execute a memorandum of understanding (MOU) for a fixed period to enable the investor to conduct a feasibility study. The MOU must be approved by the Attorney General’s office, the Ministry of National Planning and Economic Development and the Ministry of Finance. Several projects are currently at this stage of development.
Phase 2	The investor carries out the feasibility study. If the feasibility study produces favourable results, the project may be awarded to the party who has carried out the study, or the project may then be publicly tendered on an open and competitive basis.
Phase 3	Execution of a memorandum of agreement (MOA) between the developer and the DEP. The MOA is for a limited duration, sufficient to govern the relationship between the parties until the power purchase agreement (PPA) is executed. As well as granting the concession to develop and operate the project, the MOA sets out the broad obligations of the parties including the concession period, specification of the project, tariff, fuel procurement and tax incentives.
Phase 4	Execution of (as applicable): <ul style="list-style-type: none"> • Land lease agreement • Gas supply agreement • Joint venture agreement • BOT Agreement • PPA (between the developer and MEPE (gas-fired projects) or HPGE (for hydro and coal)). 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 prior to the commencement of construction.

As was the case with the Myingyan tender, it is anticipated that future projects may combine phases 3 and 4, with the result that all key project agreements with Government counterparties are executed prior to the commencement of construction.

06 | **Tariff and payment**

The tariff is not regulated and is subject to bilateral negotiation with the MOEP or is determined by a competitive bidding process. Tariffs tend to vary according to location and fuel source and are not published. The tariff consists of fixed and variable elements and is denominated in US dollars. More recent PPAs have addressed the issue of escalation for inflation, but the formulae used vary from one project to another. Whilst tariffs vary from project to project, recent gas-fired projects have been subject to the same basic tariff.

Some projects receive free gas on a tolling basis from MEPE, whereas other projects enter into a gas supply agreement with MEPE or Myanma Oil and Gas Enterprise (MOGE) and pass-through the cost of gas to MEPE under the PPA.

The Government commonly seeks a free equity holding in hydroelectric projects and/or a royalty by way of 'free power'. Royalties are not regulated or published and vary from one project to another.

The tariff paid to generators is one of the highest in the region, but the retail tariff is one of the lowest in the region. Given the level of subsidies, the creditworthiness of the offtaker is often an issue for developers and their lenders. To provide comfort on this issue, previous projects have enjoyed one or more of the following benefits:

- payment in US dollars into an offshore account
- advance payment
- a letter of credit
- a MOEP guarantee.

The benefits offered to a project are negotiated on a case-by-case basis, so previous experience is not necessarily an assurance that all of these protections will be available to a future project.

Myanmar became a member of the Multilateral Investment Guarantee Agency (MIGA) in 2013, which means that, in principle, investments in Myanmar are eligible for protection under MIGA guarantee arrangements.

07 | **Power purchase agreements (PPAs)**

Traditionally, Myanmar does not use a standard form PPA. MEPE negotiates each PPA on a project-by-project basis leading to uncertainty regarding the terms that can be

obtained. Existing PPAs vary in sophistication, with some more comprehensive than others. Developers should note that the length of negotiation time generally correlates with the complexity of the proposed agreement. Comprehensive documentation will likely involve significant negotiation time.

Myanmar PPAs generally include the following provisions; however the exact nature of the provisions will vary in scope:

- **Take-or-pay (or Guaranteed Offtake Electricity):** take-or-pay provisions are usually included in Myanmar PPAs, as well as under-supply penalties for the generator. Offtake and under-supply provisions for hydropower projects vary according to the season.
- **Force majeure:** most existing PPAs use a standard force majeure clause; however some more recent PPAs include more specific and detailed provisions.
- **Change in law:** Recent PPAs have offered protection for increase in capital and operating costs arising from a change in law. A change in law resulting in a reduction in revenue is less commonly addressed.
- **Termination:** termination provisions are often not well defined, however in more recent PPAs, detailed termination payment provisions have been agreed.
- **Governing law:** most PPAs are governed by Myanmar law.
- **Foreign arbitration** is permitted, with UNCITRAL terms generally preferred by the Government. Myanmar has acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2013, but is yet to enact implementing domestic legislation.

MOEP and MEPE 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.

08 | **Permits and approvals**

Project developers need numerous permits and approvals from a range of Government ministries and agencies at a central and local level. These agencies are operating in an environment of changing regulation and policy, as well as a volume of new applications, many of which are increasingly

sophisticated and unprecedented. Foreign investors should manage their time expectations accordingly.

The main permits that power project developers must obtain are listed below.

- Certificate of Environmental Clearance issued by the Ministry of Environmental Conservation and Forestry approving an Environmental Impact Assessment (EIA). The EIA includes an Environmental Management Plan (EMP) and a Social Impact Assessment (SIA).
- A foreign investment permit under the FIL from the Myanmar Investment Commission (MIC).
- Registration of a local company with the Directorate of Investment and Company Administration. Upon approval, the project company will be issued with a Certificate of Incorporation and a Permit to Trade.
- Construction permits, which will need to be obtained from the relevant local development committee.

09 | Land acquisition

As with any power project, land acquisition is an important issue – even more so in the hydropower sector in Myanmar, where power projects are often located in remote regions far from consumers and transmission lines are long. Reform of Myanmar’s land law is high on the political agenda but in the interim the basic position with regard to land acquisition in the power sector is as follows:

- The process of acquiring the land and land related approvals can be difficult and often involves several Government ministries or agencies at central and local levels.
- Land is designated into different categories e.g. freehold land, grant land, farm land, religious land etc., and different rights and obligations apply to each category.
- All land in Myanmar ultimately belongs to the Government, and Myanmar citizens may hold land with varying rights and obligations.
- The approval of the MIC is required for a foreigner to lease any land with a term of more than one year. If the relevant land is owned by a Government entity, the approval of the Government is also required.
- Foreign companies may lease land under the FIL for a term of up to 50 years, with the option to extend the lease for two additional terms of ten years each.

- Foreign investors can obtain initial land tenancies of more than 50 years if they invest in less developed regions of Myanmar.
- There has been some concern over the difficulties inherent in identifying overlapping title deeds, despite the existence of the Office of the Registration Deeds. During the due diligence process, investors should confirm who is in actual possession of the land.
- Depending on the project, resettlement and compensation issues may arise.

10 | Project financing and taking security

There is very little experience of project finance in the power sector in Myanmar but in recent years structured financings have taken place in the mining, oil and gas and telecoms sectors. Foreign borrowing is permitted, but subject to approvals from the MIC and the Central Bank of Myanmar. MIC must approve the proposed debt to equity ratio. There are no limits on the debt to equity ratio but 70:30 is generally preferred by MIC.

Practical experience of implementation and enforcement of security arrangements is limited in Myanmar. While there are a number of types of security interests available in theory, some are uncommon in practice and remain largely untested. Recent telecom tower financings have helped to establish practices in relation to taking of some of the less common forms of security. The following security interests are permissible under Myanmar law:

Security over land and building

A company operating under the FIL may charge/mortgage long-term leases, subject to MIC approval. The consent of the lessor/property owner is also required, as is the consent of the Government if the property is owned by a Government entity, or regulated by another regulatory body.

Security over moveable and immovable assets

A fixed and floating charge or debenture over the moveable and immovable assets and property of the company may be granted, including a charge over plant and equipment, book debts, moveable property and a floating charge over the property and undertakings of the company.

Security over shares

There is little precedent relating to the forms of security that can be taken over shares. However, case law appears to permit an equitable mortgage and pledge. Enforcement of any share security would require approval from MIC.

Assignment of contractual rights

Assignment of the rights and obligations under all relevant project contracts, including the PPA and insurance policies, can be taken.

Security over bank accounts

There is precedent for security being created over a bank account of a joint venture company in Myanmar. Such a charge over a company's bank account is thought to be enforceable under Myanmar law, but this is untested.

For more information on taking security in Myanmar see Norton Rose Fulbright's briefing entitled *Offshore financing into Myanmar – Ten things to know*.

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