



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

12 January 2016

VDB | *Loi*

SERVICES WE OFFER IN OUR POWER PRACTICE

Transactions

Our power practice delivers the combined excellent legal and tax expertise in the region together with our deep understanding of the commercial and technical aspects of the power industry. We advise the full spectrum of energy-related clients: governments, corporates, sponsors, developers, lenders and investors alike.

Consenting and planning

- Preliminary documentation (MOU)
- Land due diligence
- Negotiation with off takers, regulators
- Environmental matters

Project documentation

Our clients primarily seek our assistance with respect to the Myanmar law issues of the contractual framework, which may include a number of documents, including:

- Power purchase agreement (PPA)
- Memorandum of Agreement (MOA) or Build Operate Transfer (BOT)
- Land lease
- Gas Supply Agreement or other feedstock agreement
- Joint Venture Agreement
- O&M Agreement
- EPC Agreement

Investment licensing

Multi-disciplinary team comprising foreign lawyers, local attorneys and accountants, assisting clients with the MIC process is a core competency of our firm. Clients choose us because of our partner engagement, the wide scope of our service (which includes preparing and correcting the financial portion of the proposal) and the sheer volume of proposals we have already managed and completed with the MIC.

Taxation

We are uniquely placed to advise on the most tax efficient onshore and offshore corporate structure for investments in Myanmar. We advise sponsors on tax the optimal debt-to-equity mix, taxation of generating and selling electricity and possible future divestment.

Financing

We assist development financial institution, commercial banks and corporate borrowers with a wide range of legal and regulatory matters

- Financing documents
- Regulatory
- Approvals and registrations
- Security agreements
- Development financing
- Debt and equity funding

Transactions

Our team has deep experience with transactions in the energy space. Our services comprise:

- Transaction
- Due diligence
- Regulatory approvals
- Documentation
- Equity

Regulatory

Our regulatory team comprises lawyers and regulatory experts with compliance or even technical backgrounds. We have extensive experience in the following areas:

- Import license
- Environmental
- Foreign exchange
- Labor compliance
- Immigration matters

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VDB Loi in Myanmar

VDB Loi (www.vdb-loi.com) is a leading international legal and advisory firm focusing on helping clients achieve their investment objectives in emerging markets of South East Asia. With our affiliated companies, we have nine partners and over 100 lawyers and advisors in offices in Myanmar, Cambodia, Laos, Vietnam and Indonesia, with representatives in Singapore and Tokyo.

With over 40 lawyers and advisors in Yangon and Nay Pyi Taw we are one of the leading foreign firms in Myanmar and have recently been ranked Top Tier by Chambers 2016.

VDB Loi has a highly regarded track record of advising on a wide range of transactions with a growing reputation in power and infrastructure projects. We regularly advise lenders, developers and sponsors on the type of large infrastructure projects that will drive Myanmar's economic development over the next two decades, across a range of sectors.

Partners



Jean Loi
Managing Partner
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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.



Edwin Vanderbruggen
Senior Partner
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Edwin is a founding partner of VDB Loi and one of the most experienced international lawyers currently working in Myanmar, where he has lived since 2012 and where he has been working regularly for five years. He is widely regarded as one of the most experienced lawyers advising lenders, sponsors, developers and the government on complex infrastructure projects.

Edwin has worked on some of the largest transactions and investments in Myanmar. He advises a number of the 'supermajors' on oil and gas interests in Myanmar, and has acted on a farm-in by a multinational oil company. He acted from start to finish on the first western-owned power plant in Myanmar, has assisted with the roll-out of a nationwide telecom network and advised state-owned bidders on the construction and operation of the new Hanthawaddy International Airport in Yangon.

Edwin's experience working with the Myanmar Government is second to none, having advised on the proposed reform of the Myanmar power sector, and he regularly provides technical assistance on Public Private Partnerships.

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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
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

WHAT WILL YOU FIND IN THIS REPORT?



In the highly dynamic environment of an increasingly liberalized Myanmar economy, economic laws and regulations play a pivotal role. This report aims to analyze how the current laws, regulations and Government processes affect foreign investment in Myanmar's power sector. Put another way, our particular vantage point for looking at the Myanmar power sector is its regulatory framework.

1 | In the first chapter, we provide an overview of the investment opportunities in the Myanmar power sector.

2 | In the second chapter, we analyze Myanmar's laws and regulations that specifically relate to the generation and distribution of electricity, and we discuss how general Myanmar legislation, such as the Foreign Investment Law and its implementing regulation, affects foreign investors in the power sector.

3 | In the third chapter, we provide an overview of the Government's organizational structure and responsibilities to oversee power projects, including tariff setting.

4 | The fourth chapter is dedicated to the licensing process of power projects by foreign investors.

5 | The fifth chapter is dedicated to the contractual documents of a power project. We discuss a number of key legal and contractual issues that are practically relevant in Myanmar, and we situate typical power project contracts within their broader Myanmar legal framework.

6 | The sixth chapter discusses the legal and administrative issues surrounding land acquisition by foreign investors.

7 | The seventh chapter discusses the challenges associated with the regulatory aspects of financing investments in the power sector.

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. Power production accounted for 41% of all foreign investment in 2011-2012¹.

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 1984 Electricity Law was replaced by the new Electricity Law, enacted in 2014, but the new law is rather general. 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 to, after a feasibility study has been submitted by the investor, a Memorandum of Agreement, 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 2012 Foreign Investment Law and its implementing rules, the Environmental Conservation Law and the Foreign Exchange Management Act. Under the 2012 Foreign Investment Law, investment with 100% foreign ownership is permitted for most business activities, including power generation. Hydropower and coal power electricity production and electricity trading caused, until 2014, only be accomplished by a joint venture with the Government or a Build-Own-Transfer (BOT). In 2014, that requirement was removed from the foreign investment regulation. In addition, projects below 10MW are restricted activities for foreign investors.

The Government's administration of the power sector endows a central role to the Ministry of Electric Power. 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 Myanmar Electric Power Enterprise (MEPE) purchases electricity from public and private producers.
- MEPE then sells it to various (decentralized) organizations such as the Electricity Supply Enterprise (ESE), Yangon Electricity Supply Corporation (YESC) and Mandalay Electricity Supply Corporation (MESC) 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.

As the investment and foreign exchange architecture of international secured lending has largely been reset in 2012 and 2013, practical experience with implementation and enforcement is very limited.

The Myingyan project is a notable exception, as it does not follow the typical model for foreign investment in the power sector.

Myingyan power project was awarded to Sembcorp Industries (Singapore) in 2015, after an international bidding process. The BOT project entails the development and operation of a 225-megawatt power plant, which is worth USD 300 million and is expected to be the largest gas-fired independent power plant in Myanmar.

Customarily, the MEPE negotiates every PPA on a project-by-project basis, leading to uncertainty regarding the terms that can be negotiated. For the Myingyan competitive tender on the other hand, the MOEP and MEPE proposed a wide-ranging international style PPA that addresses various risk areas unique to Myanmar.

The hope and expectation is that the project documents, particularly the PPA, developed for the Myingyan project will continue to be used by the MOEP.

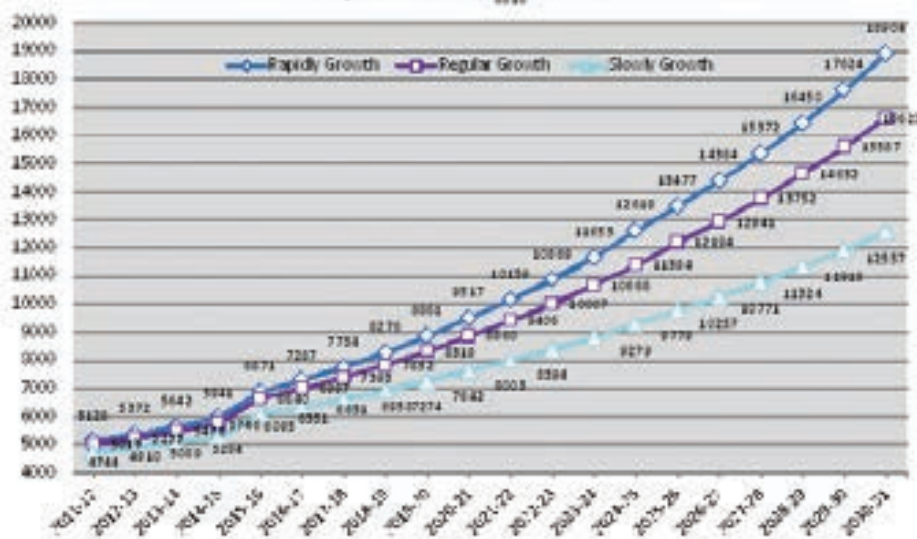
¹ Ministry of National Planning and Economic Development, Statistics 2011-2012.

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 capacity². 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.

Figure 1: Demand Forecast



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 ADB³, a strong increase in domestic demand can 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%⁴. 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 2030⁵.

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)⁶. 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.

MEET OUR TEAM



Edwin Vanderbruggen

Senior Partner

Edwin and his team secured the licenses for Myanmar's first western-owned CCGT, now in production. Still in the energy sphere, he advises on the structuring of the Thilawa SEZ, the construction of a 2,000MW coal power plant, a series of hydropower projects and several other projects in the renewables space. He also provided technical assistance to national and international stakeholders on Myanmar energy issues.



Nar Wah

Senior Legal Associate

Nar Wah, a Myanmar-qualified lawyer, is an associate on VDB Loi's legal team. She has an exceptional educational and career background in both law and accounting. She spent more than seven years working in Singapore.



Aung Soe Moe

Senior Legal Associate

Aung is an experienced Myanmar qualified attorney with a Bachelor's of Law degree from Dagon University. He has unique and extensive experience in telecommunications, land and licensing issues in Myanmar.

² "Fuel Mix Requirements for Power Generation in Myanmar", presentation by Dr. Kyaw Swar Soe Naing Executive Engineer, MEPE, 28 January 2013.

³ Asian Development Bank, Energy Sector Initial Assessment Myanmar, October 2012.

⁴ Harvard Kennedy School, Ash Center for Democratic Governance and Innovation, "Electricity in Myanmar: The missing prerequisite for development", May 2012.

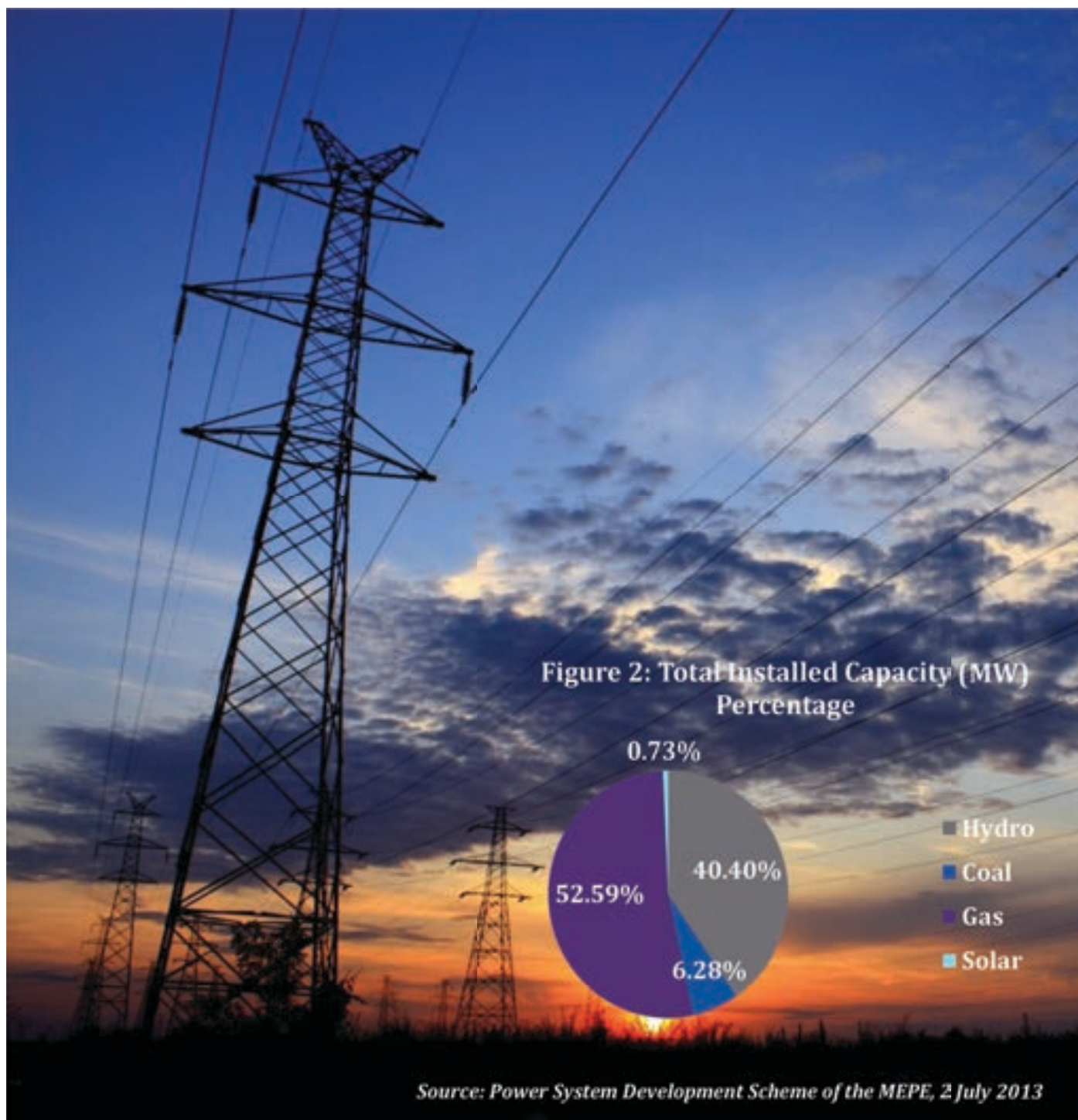
⁵ McKinsey Global Institute, "Myanmar's Moment: unique opportunities, major challenges", June 2013, p. 35.

⁶ US Geological Survey, World Petroleum Assessment 2000, 2003; British Petroleum, Statistical Review of World Energy 2012, June 2012.

Significant opportunities for foreign investment also exist in the expansion and improvement of the existing transmission and distribution network in Myanmar. For example, the Myanmar Electric Power Enterprise (MEPE) planned to install another 4,513.5 km of transmission lines in 2016⁷. 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

Source: Power System Development Scheme of the MEPE, 2 July 2013



⁷ MEPE, "Power System Development Scheme of MEPE", List of Projects to Be Implemented 2015-2016, 2.7.2013.

CHAPTER 2: LEGAL FRAMEWORK OF THE MYANMAR POWER SECTOR



MEET OUR TEAM



U Aye Kyaw
Senior Counsel

The principal of specialized litigation firm U Aye Kyaw & Associates, which teamed up with VDB Loi in 2014, this former judge, magistrate and law lecturer has over 40 year of experience with litigation and arbitration in Myanmar. He also has extensive experience with real estate and construction issues in Myanmar.



Nishant Choudhary
Senior Legal Associate

Nishant is an experienced lawyer qualified in India with an extensive background in finance and securities. He assists finance institutions navigate the emerging regulatory framework of foreign and secured lending in Myanmar. Nishant also advises on corporate M&A and restructuring in a wide range of industries.



Khin Pearl Yuki Aung
Legal Associate

Yuki holds a Bachelor's degree in Law from the Yangon University and Diploma in Business Law and International Law. She is currently studying in a Diploma in Maritime Law.

2.1. 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.

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 "Small Electrical Business" that can generate power up to 10MW, "Medium Electrical Business" – from 10MW to 30MW and "Medium Electrical Business" that can generate power over 30MW. The Law also distinguishes between generation, transmission, distribution and use of electricity.

2.1.1. 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 the power sector development and formulation of a national electricity policy. It will monitor, assess and review the electricity sector in order to advise the MOEP departments, private organizations and investors on actions needed to bring it up to international standards. One of the

“ **THE MYANMAR CONTRACT ACT OF 1872 - PROVIDES THE GENERAL LEGAL FRAMEWORK FOR THE MOU, MOA, PPA AND OTHER AGREEMENTS. IT ADDRESSES VALIDITY, BREACHES, RIGHTS OF THE PARTIES, VOIDABLE CLAUSES, DAMAGES AND GUARANTEES.** ”

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 MOEP and private companies; monitoring and review of the activities of the MOEP 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.

2.1.2. Permits

The relevant power sector permits are issued by the MOEP 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 MOEP 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 MOEP 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 MOEP 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 MOEP 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 the damages and carry out necessary repairs and improvements in the power system.

The MOEP 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 MOEP. The MOEP 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.

2.1.3. 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.

2.1.4. 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 with another organization. The permission from the relevant department is needed to “sell, mortgage, sublease, exchange



VDB Loi assisting the Government at the MPPE pre-bid conference
27 August 2014

⁸ <http://www.adb.org/projects/46486-001/details>.



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.

2.1.5. Additional Rules and Regulations

The MOEP can issue additional rules and regulations to implement this law. Likewise, the MOEP, The Commission and the government departments or organizations assigned by the MOEP 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.

2.2. How does the Foreign Investment Law affect the power sector?

Myanmar’s revamped its Foreign Investment Law (FIL) and its implementing regulations (FIL Rules) in 2012. This was considered a crucial step in Myanmar’s economic liberalization and further opening up to the world. They provide a comprehensive legal regime to license the investment of foreigners in the country. 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) bestows tax and other incentives on the project, some of which may be indispensable.

The long-term use of land by a foreign investor is only allowed with the permission of the Government, which is at the present point in 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 the import tax exemptions, remittances of foreign currency, right to obtain work permits, and right to extract profit which are guaranteed in the FIL. In our experience, foreign investors seek the protection and the relative clarity that the FIL has to offer.

As part of the process to secure an MIC permit, the FIL now also makes it mandatory for all hydroelectric power projects as well as “large scale electrical power projects” and the construction of “giant power line” to undergo an environmental impact assessment. The assessment has to be produced as part of the application material.

2.2.1. Foreign ownership restrictions in the Myanmar power sector

Under the FIL, investment with 100% foreign ownership is permitted for most business activities, including power generation. A number of activities are deemed “restricted”, which means that a foreign investor will need a joint venture (JV) with a Myanmar partner or with the Myanmar Government. In such restricted cases, foreign investors may hold up to 80% ownership, but there is a possibility of amending this rule upon request to the government.

Prior to 2014, certain elements of the electric distribution network remained restricted, however since MIC issued Notification 49/2014, any company seeking to invest in “small and medium scale generation of electricity” is required to form a joint

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.



venture (“JV”) with a local Myanmar partner. The FIL does not define what is a small, medium scale or large scale generation of electricity, 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 FIL does not provide any guidance on whether large-scale generation of electricity requires the formation of a JV with a local Myanmar company. Therefore, large scale generation of electricity may be 100% foreign owned and recent large-scale gas powered electricity projects have been 100% foreign owned. Coal and hydro powered electricity projects previously required a JV pursuant to Notification 1/2013, which has since been superseded by Notification 49/2014, and as such, this requirement for a JV for large-scale electricity projects is no longer necessary. Nevertheless, the hydroelectricity projects we are aware of have all come in the form of a JV with the government, usually with the MOEP (effectively, the Department of Hydropower Implementation DHPI). There are no precedents for the establishment of a foreign investment in a coal fired power plant.

The FIL, under Notification 49/2014 also prohibits any foreign entity from entering into the “administration of [an]

electric power system” or the “inspection of electrical works” –the areas that are reserved only for local Myanmar entities or citizens can enter into. Therefore, a JV with a foreign entity will not bypass this rule. However, the MIC has discretion to deviate on a case-by-case basis on matters in relation to the FIL requirements.

2.2.2. Incentives under the FIL for power sector investments

Foreign investors may apply for an MIC Permit in accordance with the FIL Rules. While investors are not required to obtain an MIC Permit to invest in Myanmar, there are many incentives to this permit in the form of tax relief and holidays.

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

2.3. Other relevant laws

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, 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.
- 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 1944 – Relates to local arbitration within Myanmar.
- 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 Disputes in Myanmar:
Debt Recovery, Enforcement, Arbitration, Litigation**
13 August 2015, Sule Shangri-la, Yangon

- 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.

2012 FOREIGN INVESTMENT LAW	
Forms of business allowed	- 100% foreign owned - JV by contract – no minimum threshold
Tax holiday	Automatic five-year tax holiday
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 costs and accelerate depreciation
	Losses may be carried forward and offset against profits for the subsequent three consecutive years, with the exception of capital losses. Any losses incurred during the tax holiday period cannot be carried forward.
	Exemption from customs duty for machinery and equipment if the investment amount is increased and the original business is expanded
Exemption from commercial tax (CT) on goods produced for export	
Labor	For the first two years, 75% of the workforce can be foreign. For the next two years, 50% can be foreign. In the third two years, the foreign workforce must be reduced to only 25%.
Nationalization	Government will not terminate any enterprise without “a proper reason”.
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.

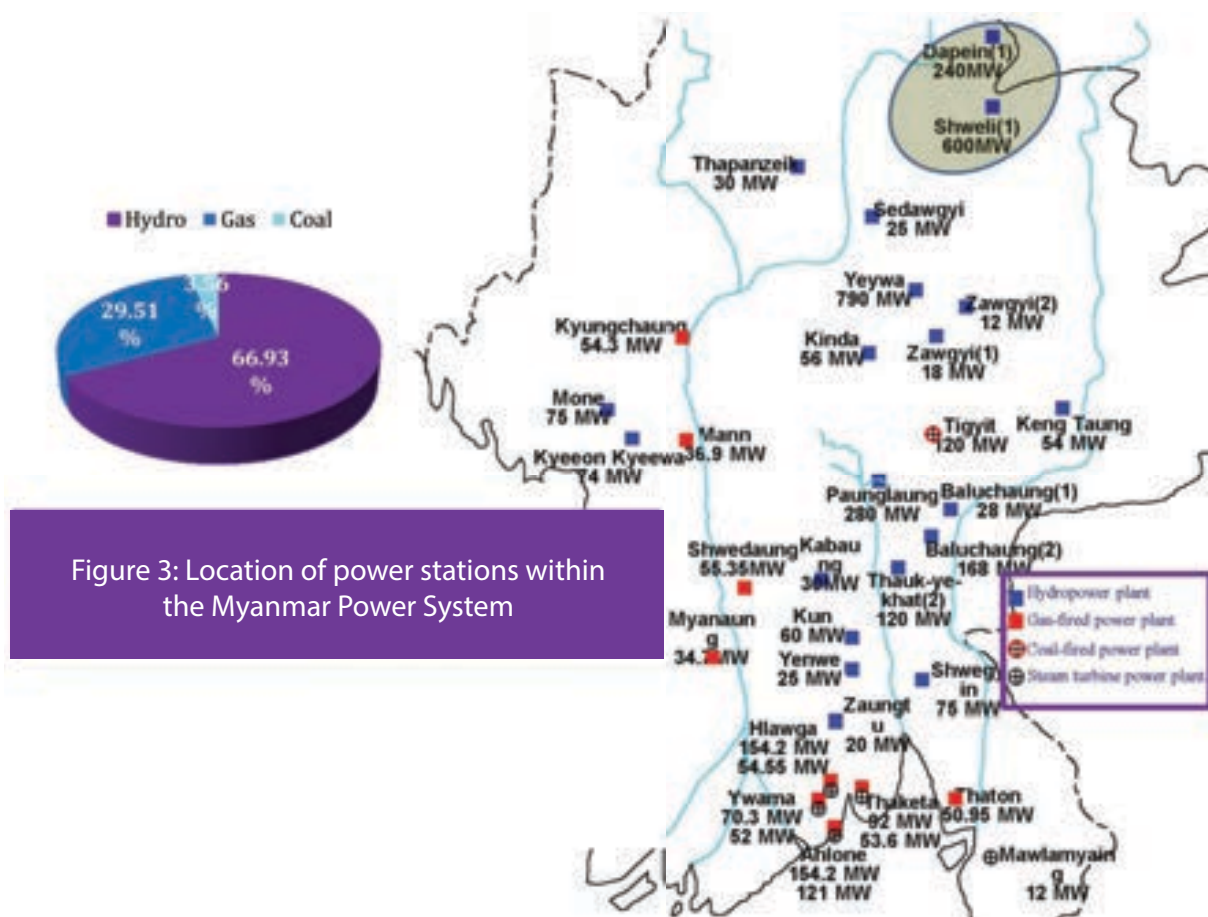


Figure 3: Location of power stations within the Myanmar Power System

CHAPTER 3: GOVERNMENT ADMINISTRATION OF THE POWER SECTOR

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 MOEP 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 MOEP 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 MEPE purchases electricity from public and private producers.
- The MEPE 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.



3.1. Ministry of Electric Power (MOEP)

Overall energy policy falls under the responsibility of the Ministry of Energy (MOE) while the MOEP is in charge of the power sector development. The MOEP has the primary responsibility for electricity planning, generating and transportation. It is also the sole 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 MOEP 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.

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 Electricity Planning (DEP) – in charge of policy matters for MEPE, ESE, YESC and MESC. MEPE is a state-owned enterprise controlled by MOEP, 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.

MEET OUR TEAM



Chris Sheridan

Senior Legal Associate

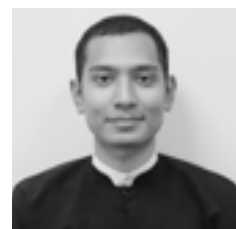
A barrister and a solicitor admitted in Australia, Chris has a solid background in commercial practice for a wide range of sectors including financial services, resources and finance. At VDB Loi, Chris advises foreign investors on commercial and corporate law, M&A, real estate law and dispute resolution.



Jeffrey Lyle Martin

Senior Legal Associate

Jeffrey is an experienced lawyer qualified in Canada with an extensive background in real estate development and transactional matters, also advising clients on related corporate, commercial and finance issues. He has assisted a broad range of clients with complex cross-border investments, offshore financing, mergers and acquisitions and joint ventures.

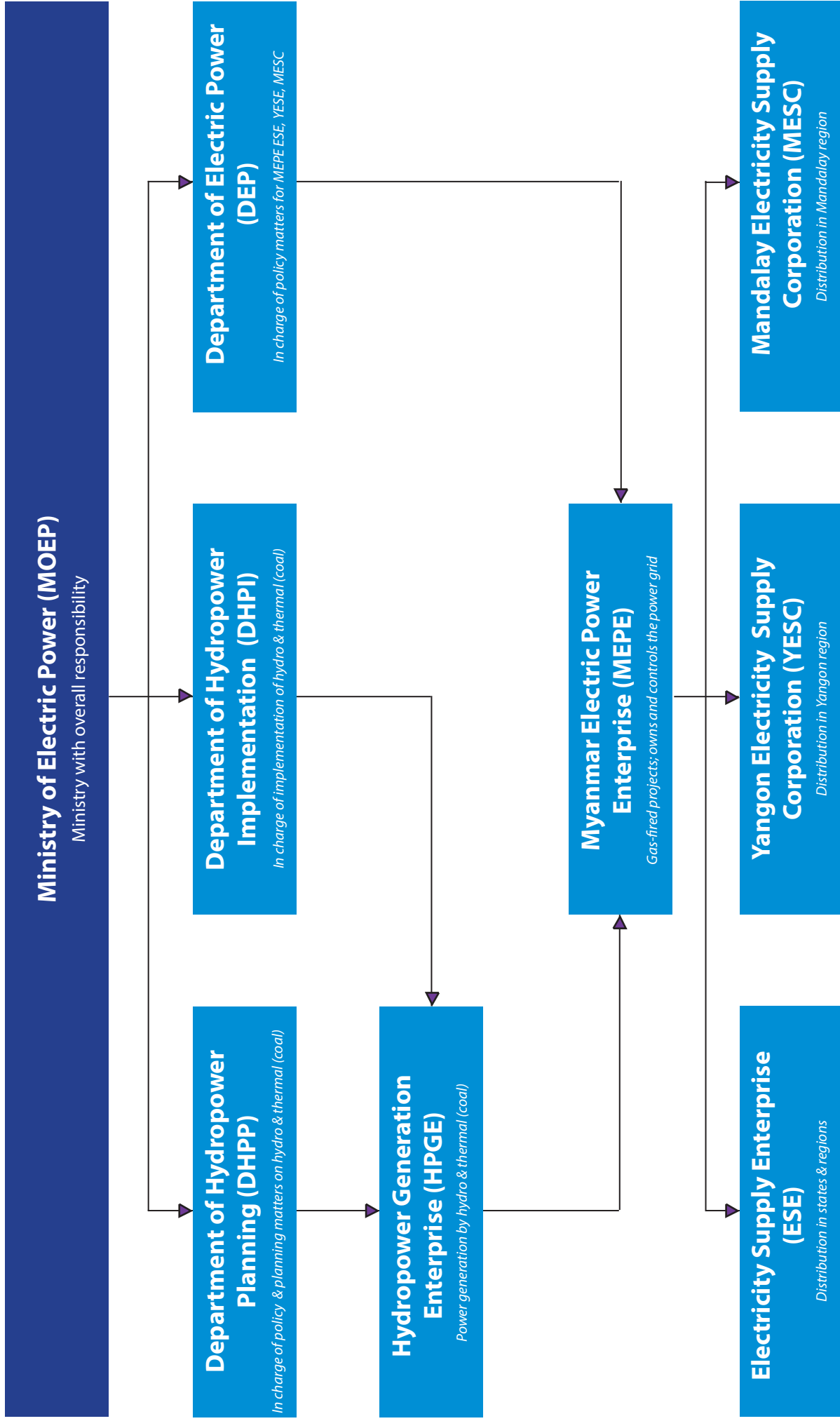


Myo Win

Legal Associate

U Myo Win is a Myanmar national who has completed two Masters degrees in Law in France. He has worked in law offices in France and Myanmar and so his in depth knowledge spans sectors across both Myanmar and International law. He has a keen eye for detail, proven through his thorough research in previous roles and is a highly proficient risk analyst. He has a special interest in human rights and humanitarian law.

Figure 4: Ministry of Electric Power organizational chart



3.2. 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.

3.3. 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.

3.4. 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.

3.5. Department of Electric Power (DEP)

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

3.6. Myanma Electric Power Enterprise (MEPE)

The MEPE, a public company, is the primary contact for investors entering the power generation sector in Myanmar. The MEPE 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 MOEP, 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 MEPE 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 MEPE 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.

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

The electrical power that MEPE 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 financially independent from the MOEP. YESC has the mission to supply quality electricity to consumers in the Yangon region. It plans, develops



VDB Loi Employment compliance and tax update
17 September 2015, Sule Shangri-la, Yangon

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 towards 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.

3.8. 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

ELECTRIFICATION RATIO (2014 CENSUS)		
No.	DESCRIPTION	QUANTITY
1	Population	51.486 million
2	Number of Households	10.877 million
3	Electrified Households	3.5 million
4	Percentage	37.8 %

Source: <http://www.president-office.gov.mm/zg/?q=briefing-room/news/2015/12/10/id-10958>

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)).

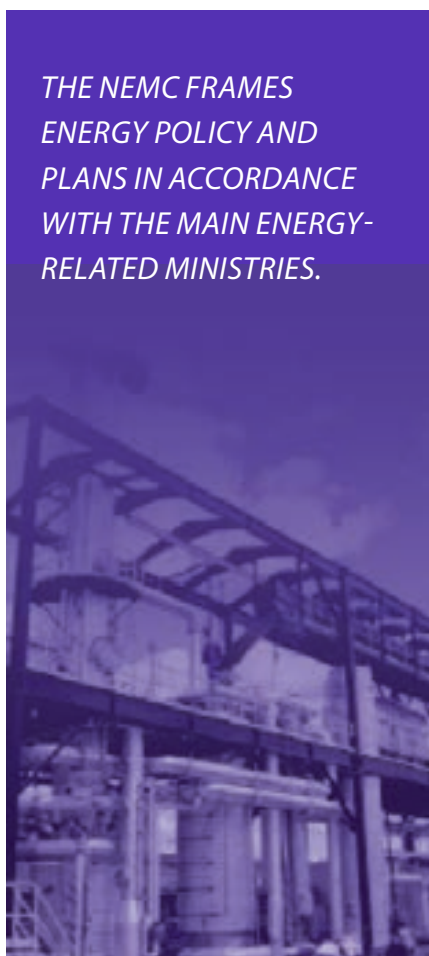
At present, the NEMC is mainly focusing on implementing three national projects to achieve 100% electrification in Myanmar by 2030. The task is being carried out with the assistance from ADB, JICA and the World Bank.

3.9. 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.

3.9.1. 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



THE NEMC FRAMES ENERGY POLICY AND PLANS IN ACCORDANCE WITH THE MAIN ENERGY-RELATED MINISTRIES.

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.

3.9.2. Myanmar Investment Commission

The MIC is responsible for interfacing with foreign investors incorporated under the FIL. 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.



Myanmar 2015 Tax Update: Commercial tax offset for all companies (English session)
25 March 2015, Sule Shangri-la, Yangon

LOCATION OF MYANMAR'S MAJOR COAL DEPOSITS							
No.	LOCATION - STATES/ DIVISIONS	POSSIBLE	PROBABLE	POTENTIAL	PROVEN	TOTAL	RANK OF COAL
1.	Dathwegyauk/ SAGAING	33.410	-	0.500	-	33.910	Sub-Bituminous
2.	Paluzawa-Chaungzone/ SAGAING	-	-	89.000	-	89.000	Sub-Bituminous
3.	Kalewa/SAGAING	65.390	17.770	-	4.620	87.780	Sub-Bituminous
4.	Mahudaung/SAGAING	0.360	-	0.440	-	0.800	Lignite
5.	Kyobin/SAGAING	-	0.030	-	-	0.030	Sub-Bituminous
6.	Thinbaung/SAGAING	-	0.080	-	-	0.080	Lignite
7.	Kyauktaga/MAGWAY	0.540	-	-	-	0.540	Sub-Bituminous
8.	Myeni/MAGWAY	0.250	-	-	-	0.250	Sub-Bituminous
9.	Lweje/KACHIN	-	-	-	-	-	Apparently Large Deposit
10.	Namma/SHAN	-	2.800	-	-	2.800	Lignite
11.	Samlaung/SHAN	1.600	-	-	-	1.600	Lignite

Note: Amounts are in million tons

CHAPTER 4: LICENSING OF POWER PROJECTS

4.1. Overview

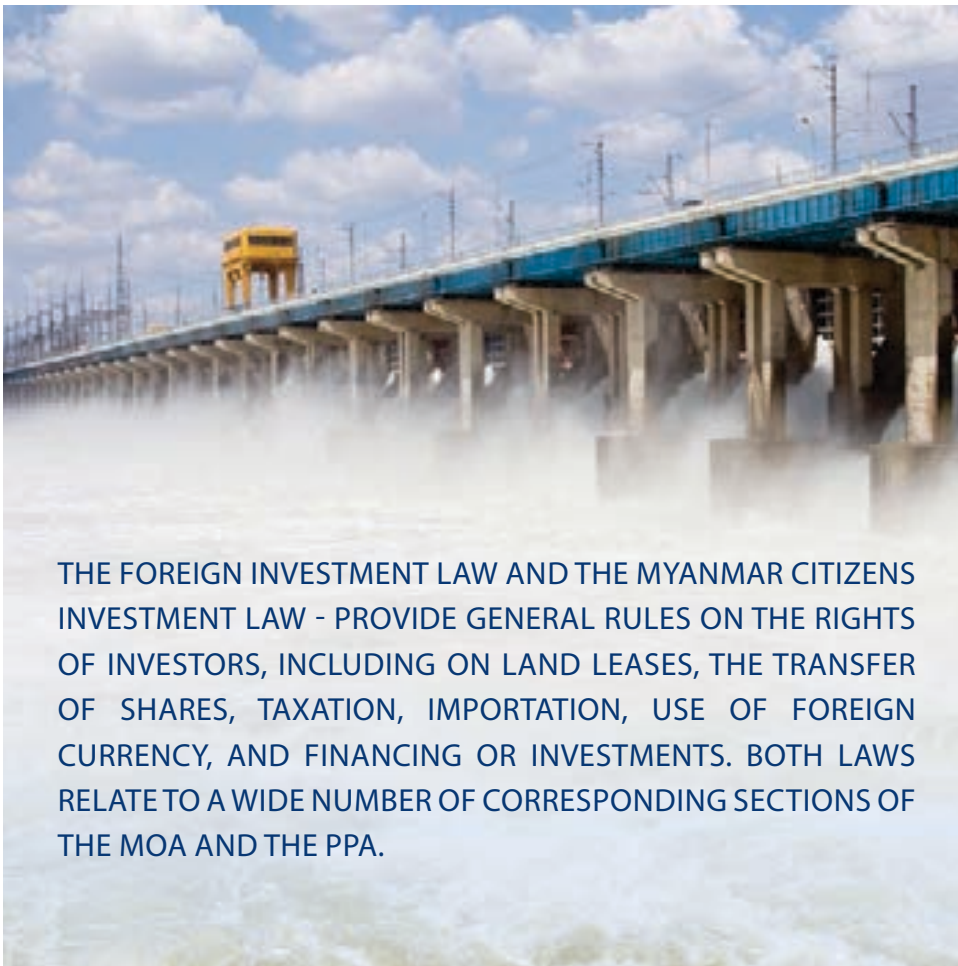
Under the current framework, a foreign investor in the power sector will need to secure the concession by concluding a series of contracts with different Government departments and state owned enterprises with respect to the construction and operation of a facility and the supply of electric power. In practice, the foreign investor will, after the concession has been obtained, need to obtain an investment license (the MIC Permit). The MIC permit, though not a legal requirement, is practically speaking necessary to implement the project given that it is the only way to receive tax incentives and various other investment incentives. In the course of this process, the foreign investor will need to establish a locally registered company with the DICA. More or less in parallel, the investor applies for the environmental and social approvals of the project.

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

The timeframe 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 accessed 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 timeframe needed to obtain the MIC Permit is legally fixed at 90 days, but the official process is only started 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 is, in our experience, a major factor influencing the time needed to complete this procedure.



THE FOREIGN INVESTMENT LAW AND THE MYANMAR CITIZENS INVESTMENT LAW - 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. BOTH LAWS RELATE TO A WIDE NUMBER OF CORRESPONDING SECTIONS OF THE MOA AND THE PPA.

MEET OUR TEAM



Jean Loi
Managing Partner

Jean Loi is widely recognized as one of the regions most experienced professional advisors with a CPA background. She was formerly a partner with PricewaterhouseCoopers in Southeast Asia. As the managing partner of VDB Loi, Jean has extensive experience with licensing, energy, power, property and consumer product projects. Her Myanmar tax experience is unsurpassed. She lives in Yangon.



My Le
Manager

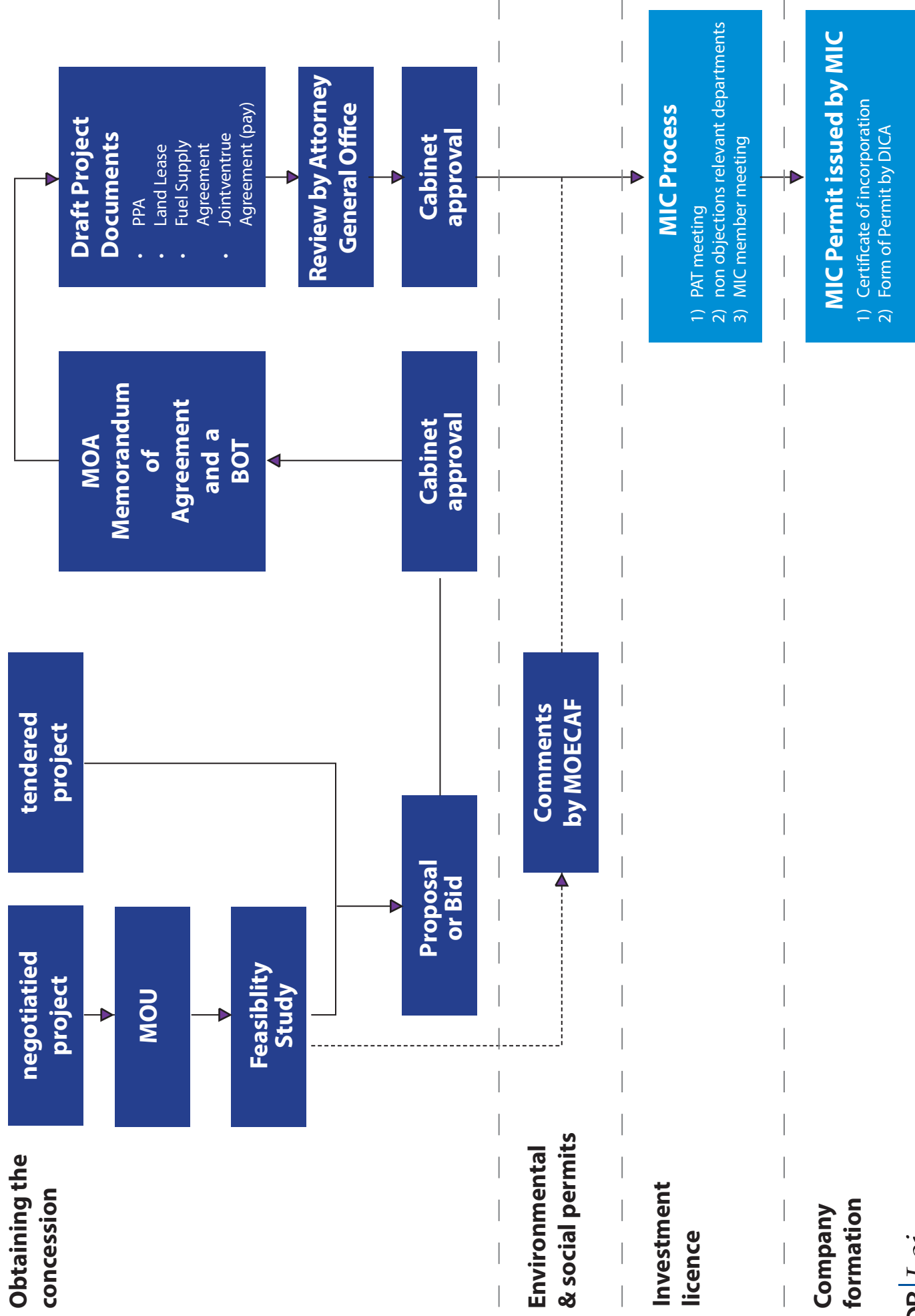
My is an experienced tax manager with a degree in Foreign Economics from the Foreign Trade University, Ho Chi Minh City. She has over seven years of experience, and worked with PricewaterhouseCoopers and DFDL in Vietnam before joining VDB Loi. She specializes in investment and tax advisory. My Le has assisted our clients with their investment licensing applications and with obtaining telecom licenses.



Honey Htun Wai
Tax Manager

Honey qualified as a Chartered Accountant with PwC in Sweden. She has worked with PricewaterhouseCoopers in Sweden before joining VDB Loi. She holds Bachelor's degree in Business Management from the Yangon Institute of Economics and Master's degrees in Accounting and Finance from Umea University, Sweden. Honey specializes in tax advisory and tax compliance for our clients.

Figure 5: Overview of the licensing process



4.2. 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 MOEP. 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 MOEP 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 DEP (gas fired) or the DHPP (hydro and coal). The PPA and the GSA is executed with MEPE (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), a power purchase agreement (PPA), a fuel supply agreement and a land lease.

Small scale projects (below 30MW) can, in theory, be negotiated with the Ministry of Electricity and Industry of each state and region, often with support from MOEP.



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 DEP of the MOEP 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

4.3. Investment licensing by the MIC

4.3.1. The process for power sector investments

The procedure for investment licensing in Myanmar is specified in the FIL and in its counterpart, the Myanmar Citizens Investment Law. Both laws specify 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 content of a proposal is prescribed in detail for projects in general by the FIL 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 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 FIL, 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 MOEP.

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

4.3.2. 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)

**COMMERCIAL TAX LAW
OF 1990 – COMMERCIAL
TAX IS LEVIED ON
GOODS PRODUCED
WITHIN MYANMAR,
SERVICES RENDERED
WITHIN MYANMAR AND
IMPORTED GOODS.**

4.3.2.1. 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 FIL 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.

A suggestion is under consideration from the Central Bank of Myanmar that projects should have 70% capital and a maximum of 30% debt (and not the other way around), with certain exceptions. It is unclear whether this suggestion will indeed be adopted by the MIC on all future or pending projects.

Until now, our experience has been that the ratio the MIC agrees to will depend on the nature or business sector of the project and its particular financial planning. For example, the MIC has accepted different debt-to-equity ratios for power generation, real estate, manufacturing, telecommunications and technology projects. To date, the MIC has, in most cases, taken into account the entire financial planning of the project to determine whether to agree with the degree of capitalization.

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.

As mentioned, it is not yet clear to us if and how exactly the MIC will limit external financing and shareholder loans. Nevertheless, we advise clients to bear in mind that this issue is currently in flux in Myanmar.

4.3.2.2. 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 need 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.

VDB Loi providing technical assistance to the Department of Hydropower Planning



VDB Loi's Edwin Vanderbruggen providing technical assistance to the Department of Hydropower Planning (DHPP) in Nay Pyi Taw

4.3.2.3. 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.

4.3.2.4. 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.

4.3.2.5. 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.

4.3.2.6. 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 FIL identifies environmental protection as a fundamental requirement of foreign investors in Myanmar (Art. 8(l) FIL). Investment projects detrimental to the environment are restricted or prohibited (Art. 4(c) FIL). An investor's bid or proposal to the MIC will be scrutinized for its adherence to environmental protection (Art. 12(a)) and investors have a duty to avoid polluting and degrading the environment (Art. 17(h) FIL). Investors who fail to comply with the FIL 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. 42 FIL).

The MIC Notification 50/2014 specifies the types of business activities, which are required to secure the EIA. The EIA and EMP are required for the generation of hydropower and other large-scale electrical power as well as the construction of giant power lines. The Ministry of Environmental Conservation and Forestry has tasked the Environmental Conservation Department with overseeing the EIA process and evaluating the EIAs and EMPs that are completed by investors.

Under MOECAF's 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.

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, 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.

4.3.2.7. 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

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.



Real Estate Market & Legal Update
24 October 2014, UMFCCI

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

4.3.2.8. 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, referred to as Table A articles.



Table 6: Power stations in Myanmar (2015)

POWER STATIONS IN MYANMAR (AS OF DEC 2015)		
No.	EXISTING POWER STATION	OUTPUT (MW)
Hydropower		
1	Baluchaung -1	28
2	Baluchaung -2	168
3	Yeywa	790
4	Kinda	56
5	Sedawgyi	25
6	Zawgyi -1	18
7	Zawgyi -2	12
8	Thapanzeik	30
9	Mone	75
10	Paunglaung	280
11	Kabaung	30
12	Yenwe	25
13	Zaungtu	20
14	Shweli -1	600(300)
15	Keng taung	54
16	Shwegyin	75
17	Kun Chaung	60
18	Kyeeon Kyeewa	74
19	Dapein-1	240(221)
20	Thauk-ye-khat(2)	120
21	Nan Cho	40
22	Che Bwe Nge	99
23	Baluchaung -3	52
24	Phyu	48
25	Upper Paung Laung	140
Gas-fired		
26	Kyungchaung	54.3
27	Mann	36.9
28	Shwedaung	55.35
29	Mawlmyaing	12
30	Myanaung	34.7
31	Hlawga	154.2+54.55=208.75
32	Ywama	70.3+52=122.3
33	Ahlone	154.2+121=275.2
34	Thaketa	92+53.6=145.6
35	Thaton	50.95
Coal-fired		
36	Tigyit	120

CHAPTER 5: MYANMAR ISSUES FOR THE PROJECT DOCUMENTS

5.1. 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.

5.2. 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.

5.3. 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 DEP (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 MEPE (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.

MEET OUR TEAM



Anna Makosa
Legal Associate

Anna is a Polish lawyer with a master's degree from Warsaw University's Faculty of Law. She has many years of experience in corporate and commercial law internationally. Anna leads a team of compliance professionals to assist clients with all corporate matters, such as incorporations, preparation and maintenance of statutory books and registers, corporate filings, and statutory and regulatory compliance.



Inga Makusheva
Legal Associate

Ms. Inga Makusheva is our new Legal Associate for the Myanmar office. She has lived and worked in Myanmar for seven years, as a consultant for foreign investors. She holds a master's degree in International Law from University of London and speaks English, Burmese, Kiswahili as well as her native Russian and Lithuanian.



Shine Myat Khin
Legal Associate

Shine holds a bachelor's degree in law from Dagon University and a master's degree in law from International Islamic University Malaysia.



**Myanmar 2015 Tax Update: Commercial tax offset for all companies
(English session)**

25 March 2015, Sule Shangri-la, Yangon

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.

5.4. 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

5.4.1. 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

“ 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 ”

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





Foreign Exchange and Central Bank Update
25 March 2015, MICT Park, Yangon

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.

5.4.2. 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 harmonise 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.

5.4.3. Termination payments

Myanmar's PPAs enforce 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.

5.4.4. "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).

5.4.5. 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 MOEP and MEPE for the availability of various inputs.

5.4.6. 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.

5.4.7. 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 FIL, 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 FIL guarantees against nationalization, termination of a permitted investment during the permitted term and allows for the

REGISTRATION ACT OF 1908
– SPECIFIES THE TYPE OF
DOCUMENTS COMPULSORY
AND OPTIONAL FOR
REGISTRATION.



transfer of entitled foreign capital upon the expiry of the investment contract.

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

5.4.8. Myingyan project – a model form for future projects?

Traditionally, Myanmar does not use a standard PPA model. The MEPE 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.

Myingyan power is located in the Myingyan district, in Mandalay division. An international bidding process was called by the MEPE 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 MEPE under a 22-year PPA.

The 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.



5.5. 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.

5.6. 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.

5.7. 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.



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.

CHAPTER 6: LAND ACQUISITION ISSUES

For a variety of reasons, acquiring land for any project at all is a complicated task in Myanmar. Applying a combination of quite dated laws such as the Land and Revenue Act 1879 and the Land Acquisition Act 1984 alongside several new and untested ones such as the Farmland Act 2012 does not always make for a predictable outcome. The Government has long aimed to produce a bill for a new and comprehensive land law, but this objective has remained elusive for now. Another complicating factor is the involvement of a wide range of Government agencies at state/region and national level.

The legal and administrative problems surrounding land acquisition by foreign investors in Myanmar is felt in a number of industry sectors, and electricity production is no exception.



**Commercial Disputes in Myanmar:
Debt Recovery, Enforcement, Arbitration, Litigation**
13 August 2015, Sule Shangri-la, Yangon

6.1. Government land or private land?

As foreign investors can only lease land in Myanmar, one of the basic choices for IPPs is whether to acquire a long term lease from the Government or from a private land right holder.

The Ministry of Electric Power (MOEP) itself does not actually manage much land. At the same time, with a few exceptions, the MOEP may mostly focus on playing a supporting role in sourcing land from other Government land owners. IPPs should thus probably be prepared to drive the search for solutions themselves in many cases.

In Myanmar, as a principle all land belongs to the state. Citizens are given land rights with various terms of use while Government organizations at central and decentralized levels also manage large areas. Foreign investors are allowed to lease land from the Government and, with the permission of the Government, from citizens. There are a number of challenges connected to both options.

6.2. The MOEP cannot dictate terms to land owners

Government land would almost certainly need to be sourced from outside of the MOEP. At times, one of the practical problems is that coordination between different Government organizations should be strengthened, which is a general issue in Myanmar. Accordingly, another Union Ministry, state or region (the Union of Myanmar has 21 administrative subdivisions, including 7 regions, 7 states and 7 self-administered zones and divisions) will often hold the land which is needed for the project.

Typically, the MOEP is not in a position to dictate any terms to that Government land owner. However, the land lease fee charged by the land owner will somehow have to be passed on to the off-taker, the MOEP overseen state owned enterprise Myanma Electric Power Enterprise (MEPE). Trying to reconcile the policy objectives of all the stakeholders may be a time consuming effort for IPPs. In our experience, having strong support at sub-national level is often the key to finding suitable solutions in this regard.

MEET OUR TEAM



Jonathan Linton
Senior Consultant

Jon Linton is a consultant in our licensing team. Based full time in our Nay Pyi Taw office, Jon liaises with various Government agencies to assist clients with their investment projects, importation, construction and various regulatory issues in Myanmar.



Kyaw Thu Htun
Consultant

Kyaw Thu Htun holds a diploma in business law from the Yangon Institute. In VDB Loi Kyaw Thu is a part of the team that prepares the investment proposals that are submitted to the MIC and other Government organizations. He also assists clients with tax compliance matters.



Kyawt Mon Min
Legal Associate

Kyawt Mon has both a law and accounting background. She has an LL.B and a diploma in business law and is currently working on her master's degree in banking and finance. Prior to joining us, Kyawt Mon was a lawyer for Win Mu Tin Intellectual Property Law Office and an accountant for Sea Wolf Marine Resources Co-op Ltd.

6.3. Approvals needed for use of certain types of private land might not be forthcoming

Depending on the type of land, private land right holders need a number of approvals from the Union Government before they are allowed to lease land to foreign investors for the development of a power plant. The most well-known approval is that of the Myanmar Investment Commission (MIC), but this one is in reality rather the final confirmation which is derived when the relevant ministries and other authorities have approved the land use. Those approvals may be much more difficult to obtain. In the case of farmland, for example, the land right holder can as a rule only lease the land to a foreign investor for non-farming purposes with the approval of the Central Farmland Management Committee of the Ministry of Agriculture and Irrigation (MAI). The policy of the MAI in this respect is unclear. Our experience has been that applications for approval are often rejected or are subject to too long delays to be workable for the project. To some extent similar issues can be found in connection with "Permit land" which is earmarked for industrial use but which comes with restrictions in term of use (often just a few years), sublease and transfer.

6.4. Land owners want to see a substantial payment before securing approvals

In our experience, obtaining these approvals is not the only problem, but it is also challenging how to fold these approvals into a transaction. That is to say,

the land right holder involved may not be willing to take steps to secure approvals (which may also be costly in some cases, as taxes need to be settled) until the IPP (perhaps through his local partner) is financially committed. The IPP from its point of view normally would subject all payments to the condition precedent that all approvals have first been obtained. A major complicating factor is that on the ground, not many land owners are willing to accept monies in escrow in Myanmar, where there is very little tradition with escrow accounts and professional escrow agents.

Another complicating factor for private land use is the availability of proper land documentation. Having all the proper documents to prove the title of use of the lessor is a crucial pre-condition to obtaining the approvals of the relevant authorities. In practice, these documents may not be available for administrative reasons beyond the lessor's control, or, quite often, the documents do exist but they are not issued in the name of the lessor.

6.5. The problem with pipelines and cables

Of course, a power plant does not only need land for the main facility. Proper approvals for access roads, water pipelines and transmission cables also need to be secured. Although we have not really seen any major difficulties with these, the process is more time consuming than one would expect. More often than not, a group of relevant authorities will have to be involved. For example, taking, transporting and dumping water will require consents from the Ministry of Transport (which oversees navigable waterways and manages the land next to these waterways), the MAI and

“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.”

the relevant state or region. Again, timing is the major problem here. An IPP would typically only commit to the project once all such approvals have been secured.

One recurring issue for pipelines and cables is whether the land rights should take the form of a lease or of a license. A license arises where one person grants to another person, or group of people, a right to do something in or upon the immovable property of the grantor, which, in the absence of such a right, would otherwise be unlawful. This right does not amount to an easement or an interest in the property. A license permitting the project company to install a water pipeline on the land holder's property could be obtained on terms agreed between the land holder and the project company, and would include a fee to be paid to the land holder by the project company (to be agreed by the parties).

6.6. Compensation for residents and farmers

Completely vacant land is rare in Myanmar, so any significant sized land plot will likely come with some issues in this regard. This is particularly the case for hydro





Myanmar Banking Update: Security on Shore Assets, Licensing of Foreign Banks and New Foreign Exchange Rules
19 September 2014, The Westin Singapore

and coal plants. Regardless of the fairly dated legal and regulatory framework of the Land Acquisition Act 1894, problems regularly occur since no universally accepted and published compensation standards exist. Furthermore, there is no robust system for quickly resolving disputes between investors and occupants, and the Government seems to play primarily a supporting role in most situations. By the same token, there is no efficient and transparent process to cope with hold-out landowners, which increases the risk of completion of investment projects. Land right holders always have the possibility under relevant laws to file a suit in the district court when they are not satisfied with the compensation offered.

The project documents may deal in different ways with the issue of delivering land. IPPs normally expect that the risk of delivering vacant land for the project lies with the Government, and not with the IPP. In Myanmar, IPPs are usually not able to secure a commitment from the off-taker and/or the land owner that it will deliver the land in vacant possession, with the exception of one or two projects which enjoy support from international organizations.

6.7. Using land rights as security

Myanmar law recognizes six types of mortgages on immovable property, namely the simple, conditional sale, usufructuary, English, deposit of title deeds and the anomalous mortgage. In addition, Myanmar law recognizes a fixed charge. Most of these are not used in current Myanmar practice. A complicating factor is that foreigners are not allowed to “acquire immovable property by way of purchase, gift, mortgage, exchange or transfer” (s. 4 Immovable Property Restriction Act) without special Government permission, which is granted by the MIC.

As foreign invested borrowers would normally have a 50-year extendable lease, it is in practice important to know that a leased property can indeed be the subject of a mortgage under Myanmar law. In fact, unless the lease agreement provides otherwise a lessor can by law mortgage his interest in the immovable property. However, in practice nearly all leases, particularly leases of Government land state that the lessee is not entitled to transfer or mortgage his interest without the express permission of the lessor.

A major issue in actual cases is whether the land right holder has the right to mortgage this particular type of land under the land law that corresponds with the land in question. The right to mortgage a property depends of the provisions of one of a dozen land laws. For

example the Vacant, Fallow and Virgin Land Act provides that cabinet permission is required to create a mortgage on land that resorts under this category. Needless to say that the due diligence should focus on this issue as early as possible.

The perfection of most types of mortgages on immovable property in Myanmar requires besides a registration of the charge with the corporate authorities, an additional registration with the Deed Registration Office (s. 17 Registration Act). Although the laws and regulations to perfect a mortgage on immovable property may exist, these rules are largely untested in practice. At present we are working with the authorities to arrange for the registration of the first long term leases and secured interests.

Security on any type of mortgage or fixed charge on immovable property can, as a matter of law, be enforced without the intervention of a court, subject to a number of conditions and restrictions. Most importantly, the mortgage deed must state the right of the mortgagee or chargee to foreclose without court intervention. In addition, a default must have occurred and have been notified to the mortgagor. Furthermore, the self-enforcement depends on the location of the immovable property in question. A mortgagee may foreclose on immovable property situated in certain designated towns without intervention of the court. In other cases, if the mortgage money has become due without payment or deposit the mortgagee may file a suit for foreclosure with the court.

APPLYING A COMBINATION OF QUITE DATED LAWS SUCH AS THE LAND AND REVENUE ACT 1879 AND THE LAND ACQUISITION ACT 1984 ALONGSIDE SEVERAL NEW AND UNTESTED ONES SUCH AS THE FARMLAND ACT 2012 DOES NOT ALWAYS MAKE FOR A PREDICTABLE OUTCOME.

CHAPTER 7: 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 witnessed 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.

7.1. 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.

MEET OUR TEAM



Nay Nwai Linn
Tax Manager

Nay has six years of experience in accounting and finance working for international enterprises in Myanmar. She held responsibilities for managing financial, tax and accounting operations.



Ngwe Lin Myat Chit
Senior Tax Consultant

Lin is a seasoned consultant with experience working overseas at global professional service firms. She holds a Bachelor's in Commerce from the University of Newcastle. Lin advises clients on market entry and licensing. She has advised multinationals.



Ei Mon Khaing
Tax Consultant

Most recently Ei Mon worked in the accounting and payroll department for Luther Corporate Services Limited, and before that she was an accountant officer for Thai Airways. Ei Mon holds a Bachelor's in Physics from Dagon University as well as accounting certificates from the London Chamber of Commerce. She is currently pursuing her ACCA qualification.

**THE ARBITRATION ACT OF
1944 – RELATES TO LOCAL
ARBITRATION WITHIN
MYANMAR.**



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.

7.2. Security

7.2.1. Security options

There are a myriad range of security measures that can be used in Myanmar. As per Myanmar laws all forms of security in practice under other common law jurisdictions are permitted. The main governing law for creations of security is Transfer of Property Act, 1882 ("T.P. Act") and the Myanmar Contract Act, 1872 ("Contract Act"). As per T.P. Act and the Contract Act, securities such as mortgage (six different forms of mortgages are recognized in Myanmar), charge, assignment, pledge, hypothecation etc. are recognized and used as security over assets of the borrowers in Myanmar. However, it is important to keep in mind that in Myanmar the real life practice often differs from the law. Accordingly, while Myanmar law recognizes the above mentioned secured interests, in practice, there are a limited number of secured interests which are able to be perfected, including mortgages by deposit of title-deeds in relation to immovable property (ie. land), pledges or guarantees of moveable property. These practices are changing slowly as Myanmar opens up to foreign investment.

In case of an MIC company a prior approval from MIC is required for creation of security of the assets of the Borrower. This approval is obtained by the Borrower and is part of the application filed before MIC for approval of loan.

Please see below under 6.2.1 (a) a table in relation to the types of assets and what securities can be secured and 6.2.1 (b) in relation to a more detailed description of the range of security measures available in Myanmar.

“ **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.** ”

Type of asset	What type of security can you use?	How to implement it?
Immovable Property Long term leases, buildings, apartments, infrastructure	<ul style="list-style-type: none"> Mortgage by deposit of title deed English mortgage Other mortgages Charge Assignment of contract pertaining to immovable properties by way of security 	<ul style="list-style-type: none"> What type of land is it? Approval from land owner Approval from MIC, Government Optimize stamp duty? Registration with ORD and CRO
Shares of MM Company	<ul style="list-style-type: none"> Equitable charge Pledge with a guarantee agreement from the (foreign) parent company Or, assignment by way of security 	<ul style="list-style-type: none"> If applicable, MIC approval Optimize stamp duty
Movable goods Such as stock, equipment, fittings and fixtures	<ul style="list-style-type: none"> Fixed and floating charge Pledge (with possession) Hypothecation 	<ul style="list-style-type: none"> If applicable, MIC approval Some need additional Government approvals Registration with CRO Optimize Stamp Duty
Cash Such as bank account in Myanmar, receipts on invoices, etc.	<ul style="list-style-type: none"> Fixed and floating charge on account held with MM bank Creating Lien on the banks account 	<ul style="list-style-type: none"> If applicable, MIC approval Registration with CRO Optimize Stamp Duty
Rights under a contract Such as Power Purchase Agreement, Build-Operate-Transfer, Production Sharing Contract	<ul style="list-style-type: none"> Fixed charge Or, assignment by way of security 	<ul style="list-style-type: none"> If applicable, MIC approval Registration with CRO If legal assignment, pay Stamp Duty and obtain approval MIC Equitable assignment

7.2.2. Types of Security

(i) Mortgage: In accordance with section 58 of the TPA, there are six types of mortgages that can be created in Myanmar. Please see the table below:

MORTGAGE TYPE	ENFORCEMENT	RIGHT TO POSSESSION	REGISTRATION
1) English Mortgage	<ul style="list-style-type: none"> Strongest of all mortgages Can be enforced without court's intervention However, obligation of re-conveyance upon payment exists 	Yes	Yes
2) Simple Mortgage	<ul style="list-style-type: none"> Parties can have power to sale without intervention of court if explicitly mentioned in the deed and the property is situated in towns notified by Myanmar government Can proceed against the mortgagor for personal covenant to repay the loan 	Not before sale	Yes
3) Mortgage by conditional sale	<ul style="list-style-type: none"> Parties can have power to sale without intervention of court if explicitly mentioned in the deed and the property is situated in towns notified by Myanmar government 	Yes	Yes
4) Usufructuary Mortgage	<ul style="list-style-type: none"> No sale. No foreclosure 	Yes	Yes
5) Equitable Mortgage (mortgage by deposit of title deed)	<ul style="list-style-type: none"> Normally cannot be enforced without court's intervention By far the most common type of mortgage, as it is not necessary to register or pay stamp duty, although the requirement of court intervention to enforce is an obvious disadvantage 	No	No
6) Anomalous mortgage	<ul style="list-style-type: none"> A combination of two or more of the above mortgages Would include simple mortgage and usufructuary mortgage or a usufructuary mortgage and a mortgage by conditional sale etc. It may take various forms depending upon custom, usage or contract. 	May or may not be given depending upon the contract.	Yes

(ii) Charge

a. Fixed Charge: Such a charge is against a specific, clearly identifiable and defined property. Under the MCA, a fixed asset can be created on (at least) immovable property, uncalled share capital, book debts, movable property and stock in trade. A fixed charge must specify the assets to be charged. A fixed charge that does not clearly identify the charged assets will be void under the MCA. The property under a fixed charge is identified at the time of creation of charge. The nature and identity of the property does not change during the existence of the fixed charge. The company can transfer the property only subject to that fixed charge so that the charge holder must be paid first that which is due to them before disposing of that property.

b. Floating Charge: A floating charge does attach to any definite property but covers the property of a circulating and fluctuating nature such as stock-in-trade, debtors, etc. A floating charge can, under Myanmar law, be created on the undertaking or property of the company. It attaches to the property charged in the varying conditions which exist from time to time. Such a floating charge remains dormant until the underlying asset ceases to be a going concern or until the person in whose favour the floating charge was created takes steps to crystallise the floating charge. The assets subject to a floating charge may be described in a general sense and do not need to be identified specifically, i.e. a reference to "all trading stock, assets and undertakings" might suffice for a floating charge.

(iii) Contractual comforts

a. Guarantee: Pursuant to section 126 of the Contract Act, a guarantee is defined as a "contract to perform the promise, or discharge the liability, of a third person in case of his default". A guarantee may be provided by individuals or legal entities (guarantors) to perform the obligations of a loan (i.e. repayment). The does not specify the internal corporate approvals that are required for guarantees involving companies. As a practical matter, the DICA may require that the shareholders sanction the guarantee in an extraordinary general meeting of the company, in addition to requiring evidence of approval of the guarantee by the Board of Directors. Accordingly, the shareholders of a company may provide a guarantee to repay the obligations of a loan.

b. Indemnity: Indemnity is a contract, express or implied to keep a person, who has entered into or who is about to enter into, a contract or incur any other liability, indemnified against loss,

independently of the question whether a third person makes a default. The term, indemnity, is used in the law in several different times and cases. In its widest sense, it means recompense for any loss or liability which one person has incurred, whether the duty to indemnify comes from an agreement or not. This clause may generally be incorporated in an agreement of security itself, however a separate deed of indemnity is allowed under the law.



We note that a contract beyond the objects clause of the company's memorandum of association is an ultra vires contract and cannot be enforced by or against the company. For example A borrowing beyond the power of the company (i.e. beyond the objects clause of the memorandum of association of the company) is called ultra vires borrowing and will not be enforceable against the company. In the context of Myanmar's company jurisprudence, this may be not that much of a problem when it comes to raising funds for the company's own business (because one can also argue that such power is implied), but it is more likely a problem when raising funds for a parent or a sister company. Accordingly when seeking a guarantee by shareholders of a company as a security interest in relation to a loan, it is advisable to review the memorandum of association of the company to ensure that such a guarantee is not ultra vires.

(iv) 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 in order to satisfy the debt (i.e., shares). It should be noted that a pledge may be used to secure other obligations besides a debt, although we will rely in the example of a loan agreement.

A pledge is based upon the premise that the moveable property (eg. shares) will be returned to the pledgor (company receiving the loan) upon payment of the debt and performance of the promise. Thus, the delivery of the moveable property to the pledgee (lender) is a pre-requisite for the

pledge to be effective. In practice, where the pledge is one of shares in a company, the pledgor must deliver to the pledgee the relevant share certificates, shareholders' register of the company, Form VI (allotments of shares), execute a share transfer form. It should be noted that enforcement, i.e. the transfer of the charged shares, will require approval from the foreign investment regulator, the MIC.

The legal title to a share is in Myanmar law transferred by the notation in the shareholder register by the board of directors. Under Myanmar corporate law, the directors have the right to refuse the transfer of shares from one shareholder to another in a number of circumstances.

(v) Assignment

Myanmar law permits the legal or equitable assignment of the rights the borrower (or guarantor) has under contracts with third parties. To make the assignment legal rather than equitable, and thus binding upon the other contracting party, such party would have to give its consent. The assignment instrument will rank higher in priority than unsecured creditors because it will have a backing of a secured contract. An assignment does not transfer the duties and liabilities of a contract. A transfer of contractual duties and liabilities can be done only through a novation of the contract, which requires terminating the existing contract and entering into a new contract with the third party A right to receive payment can be assigned simply by notifying the payor. Any assignment needs to be registered with the Companies Registration Office ("CRO") within 21 days of the deed being executed, and stamp duty will apply to the deed. Any assignment would also require registration with the Office of the Registrar of Deeds ("ORD") in case the assignment of rights arose out of immovable property.

In practice an assignment of rights is often considered with respect to power purchase agreements, build-operate-transfer contracts, leases, master license agreements for telecom towers, and similar documents.

(vi) Hypothecation

Hypothecation is used for creating charges against the security of movable assets, but the possession of the security remains with the borrower itself. Thus, in case 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 security and then sell the same. The best example of this type of arrangement is car loans. In this case car / vehicle remain with the borrower but the same is hypothecated to the bank / financier. In case the borrower defaults, banks take possession of the vehicle after giving notice and then sell the same and credit the proceeds to the loan account. Other examples of hypothecation are loans against stock and debtors.

Nevertheless there are certain peculiarities with creation of security in Myanmar, which needs to be addressed. For instance, under Transfer of Immovable Property (Restriction) Act ("TIPRA"), a foreign person including a foreign company (i.e., a company with even one foreign shareholder) cannot lease land for more than one (1) year unless that person has a relevant beneficial contract with the state. Please see below the relevant provisions of TIPRA:

"5. No person shall grant a lease of immovable property for a term exceeding one year:

- a) To a foreigner or foreign-owned company.*
- b) No foreigner or foreign-owned company shall receive a lease of immovable property for a term exceeding one year.*

...

15. The provisions of this Act do not apply to companies or organizations that have relevant beneficial contracts with the state."

Often-times, the "relevant beneficial contract" comes in the form a MIC Permit, issued pursuant to the FIL. In particular, Notification 11/2013 (issued under FIL) provides the following:

101. The Commission, in order for the investor to conduct an economic activity permitted by the Commission, may permit, with the prior consent of the Union Government, the investor to lease the following types of land from a person who is entitled to lease the land or use the land:

- (a) Land which the Government is entitled to manage.*
- (b) Land owned by Government department or organization.*
- (c) Private land owned by a citizen.*

...

103. The Commission, depending on the type of economic activity and investment amount, may grant the investor an actual required land lease period or land use period of up to an initial 50 years, from the person who is entitled to lease the land or use the land.

104. The Commission may allow an extension of 10 years to an investor ... and may allow another extension of 10 years after the first extension has expired.



7.2.3. Few practical issues in creation of security

As per T.P. Act any form of security over an immovable property (charge, mortgage or assignment) would be held to be a transfer and which is impermissible under Myanmar laws in case of a foreign lender. This creates a need to including an onshore security agent or trustee, which shall be a Myanmar national (either a company or an individual). Such onshore security agent or trustee shall create the security over the immovable property in its name on behalf of the foreign lenders. Similarly,, as per the present regulations a foreign holding even one share in a local Myanmar company would make such a company come under the category of foreign company and a different set of practice by the DICA an under the Myanmar Companies Act follow for such companies. In such a situation there would again be a need for a Myanmar national to hold the security over the shares of any local company by way of a pledge or a charge.

The service of an onshore security agent is provided by Myanmar local banks, which enters into any security documents in their name (as security agent or trustee) on behalf of foreign lenders. The onshore security agent and the foreign lender execute a formal security agent or security trustee agreement which sets out the rights and obligations of each party, including the remuneration of the onshore security agent.

In event of default the onshore security agent, takes steps for enforcement of the security upon instructions provided by the foreign lender and disburses the proceeds resulting from the enforcement of the security to the foreign lender.

7.2.4 Stamp duty and registration of security

All security documents in Myanmar are required to be stamped under the Myanmar Stamp Act ("the Act") which was enacted in 1899. It was originally known as the Indian Stamp Act of 1899. The Act is one of the oldest Myanmar laws that is still in force. Despite frequent amendments (most recently in 2011, 2014, and updates to the Schedule in 2014 and the Rules in 2015), the key definitions of terms and names of categories of instruments have never been changed. Stamp duty is

concerned with instruments, not transactions. For stamp duty purposes, only what is within the instrument itself is relevant to determining the duty.

As per the Act, stamp duty has to be paid on all sorts of financing documents, such as loan agreements, guarantee deeds, security documents, etc. When financing and security documents are not properly stamped, heavy penalties may be incurred (10 times the original duty plus the deficient stamp amount), documents may be impounded, and lenders are unable to use the documents in court to enforce the debts until the stamp duty is paid. As a result, the risk for banks and other lenders providing financing in Myanmar increases significantly and unnecessarily. Likewise, borrowers encounter unnecessary obstacles to raising financing.

Even with the most recent changes, the Act does not factor in the modern financing documentation currently in use in Myanmar. Steps are being taken and MIC has been briefed upon the issue, we hope to have some cogent decisions to address these problems from the Myanmar government soon.

As per the Myanmar Registration Act, 1908 ("Registration Act"), all documents creating security over the immovable properties are also required to be registered with the Office of Registrar of Deed ("ORD") and also with the Company Registrar Office ("CRO"). At present there is little experience with registration of security with the ORD, officers at ORD are only in practice of registering certain number of lease agreements and power of attorneys. Additionally, all the security interest other than a share pledge or pledge of movable properties are also required to be registered before CRO within a period of 21 days from the date creation of security. In case of failure to do so, such a security in not enforceable against the liquidator of the company or the other secured lenders. The registration before the CRO as per law does not require the document to be stamped or be presented in original, however CRO has recently started a practice of registering the security documents only after such documents are duly stamped. CRO is also aware about the issues with the stamp duty and the representation made before MIC to resolve the same and at present may accept the registration on the basis of an undertaking to duly stamp the document once the same is ascertained by the stamp authorities.

MYANMAR RENEWABLE ENERGY BRIEFINGS WITH HOGAN LOVELLS: LESSONS LEARNED FROM NEGOTIATING MYANMAR RENEWABLE ENERGY PPAS

15 January 2016, Sule Shangri-la, Yangon

