

No Local Partner Required for Offshore Oil and Gas Bidding Round in Myanmar

Edwin Vanderbruggen, Paul Nikitopoulos & Ngwe Lin Myat Chit

In following of the tender for onshore blocks commenced on 17 January 2013, Myanmar's Ministry of Energy (the Ministry) has now launched its long awaited bidding round for offshore oil and gas blocks. Bids will be entertained for total 30 blocks from Rakhine, Moattama and Tanintharyi Areas, which includes 19 deep water blocks and 11 shallow water blocks.

In a landmark decision, the Ministry has finally chosen not to require foreign oil companies to team up with local partners for deep water blocks, ending months of speculation. However, shallow water blocks are required to team up with a minimum of one local partner, who is registered at Energy Planning Department, Ministry of Energy. Furthermore, the documentation required for submission of "the Letter of Expression of Interest" for offshore blocks is the same as onshore blocks. The potential bidders are allowed to submit up to three proposals for any three (3) offshore blocks (Shallow Water and/or Deep Water and/or both).

100% Foreign Ownership Possible

As we expected (see for interview with Edwin Vanderbruggen in M-Zine dated 04 April 2013), the Ministry has dropped its requirement for a local partner for this round. In the onshore bidding round, which is very near the stage where the shortlisted companies will be announced, local partners are only required at the stage where an actual bid is submitted. In other words, one can submit an Expression of Interest without a local partner.

ABOUT THE AUTHORS



Edwin Vanderbruggen is VDB Loi's partner responsible for Myanmar, and lives in Yangon. Formerly with Loyens & Loeff and a partner at DFDL, he has 21 years of legal and tax experience, 5 years of which in relation to Myanmar.

edwin@vdb-loi.com



Paul Nikitopoulos is a US attorney with 15 years of experience, and was formerly with Clifford Chance and O'Melveny & Myers. He holds an MBA from Cambridge University and a J.D. from Duke University. He has extensive experience in providing integrated solutions for M&A and private equity transactions. He lives full time in Yangon.

paul.nikitopoulos@vdb-loi.com



Ngwe Lin Myat Chit holds a Bachelor's in Commerce from the University of Newcastle, Australia. She formerly worked with a global audit and advisory firm, where she was based overseas for a number of years. At VDB Loi, Lin advises clients on tax structuring, licensing, general regulatory and customs duty issues. She has worked on major projects in the FMCG sector, oil and gas, power and health/life sciences.

ngwe.lin@vdb-loi.com

ABOUT VDB LOI

VDB Loi is a leading law and tax advisory firm with more than 60 transactional lawyers and tax advisors across our offices in Cambodia, Indonesia, Laos, Myanmar, Vietnam and our liaison office in Singapore. We provide the highest quality solutions for transactions and taxation.

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The FIL and the MIC's Notification 1/2013 (which sets out a list of permitted activities for foreign investment) do not impose any foreign ownership restrictions for oil and gas exploration. Nevertheless, one can imagine that the Ministry might want to encourage, where possible, investment in this area on the basis of joint ventures between foreign and local investors.

According to Notification 11/2013 of the Ministry of National Planning and Economic Development, even in restricted sectors, up to 80% foreign ownership is allowed. This maximum threshold was confirmed recently in a vote taken by the Upper House of the National Assembly.

In the case of a PSC that is executed with one SPV where both the foreign partner and the local partner will be shareholders, a branch structure will prevent the local partner from holding any local shares. In other words, if one opts for a foreign SPV, the local partner would have to hold an interest in the PSC directly.

Documents required for the offshore EoI

The first step in the bidding process is, as usual, the lodging of an expression of interest. This is a straightforward letter for which there is no obligatory template.

A number of documents are required to be attached to the EoI:

- Letter expressing interest
- Articles of Association, Memorandum of Association of the interested party
- Certificate of Incorporation
- Latest Annual Report
- Latest Financial Statements
- Track record

Above documents are to be endorsed by the appropriate Myanmar embassy

As we have noted before, in practice, the endorsement procedures can be a bit lengthy. It involves waiting time at the relevant Myanmar embassy and at times notarization in the country where the interested party is established. However, the announcement also allows the company to use the "nearest" Embassy.

The Track Record is particularly important for deep-water blocks, as the Ministry wishes to evaluate the technical expertise of the contractor.

If you are short-listed

The Government gives interested parties 2 months to submit their EoI. Then, pre-qualified bidders will be selected. Those pre-qualified bidders will be given a general overview of each block and access to data by the Myanmar Oil and Gas Enterprise (MOGE), and standard terms and conditions by the Ministry of Energy's Energy Planning Department (EPD).

After that, bidders can actually propose terms for up to three blocks, but there should be a separate proposal for each block. The proposed terms will be evaluated by the Ministry of Energy, and the bidder with the best terms will be awarded the contract.

Total List of blocks for which bids are sought

Offshore Shallow Water Blocks

No	Block	Area	Type of Contract
(1)	A-4	Rakhine Offshore Area	PSC
(2)	A-5	Rakhine Offshore Area	PSC
(3)	A-7	Rakhine Offshore Area	PSC
(4)	M-4	Moattama Offshore Area	PSC
(5)	M-7	Moattama Offshore Area	PSC
(6)	M-8	Moattama Offshore Area	PSC
(7)	M-15	Tanintharyi Offshore Area	PSC
(8)	M-16	Tanintharyi Offshore Area	PSC
(9)	M-17	Tanintharyi Offshore Area	PSC

No	Block	Area	Type of Contract
(10)	M-18	Tanintharyi Offshore Area	PSC
(11)	YEB	Tanintharyi Offshore Area	PSC

Offshore Deep Water Blocks

No	Block	Area	Type of Contract
(1)	AD-2	Rakhine Offshore Area	PSC
(2)	AD-3	Rakhine Offshore Area	PSC
(3)	AD-4	Rakhine Offshore Area	PSC
(4)	AD-5	Rakhine Offshore Area	PSC
(5)	AD-9	Rakhine Offshore Area	PSC
(6)	AD-10	Rakhine Offshore Area	PSC
(7)	AD-11	Rakhine Offshore Area	PSC
(8)	AD-12	Rakhine Offshore Area	PSC
(9)	AD-13	Rakhine Offshore Area	PSC
(10)	AD-14	Rakhine Offshore Area	PSC
(11)	AD-15	Rakhine Offshore Area	PSC
(12)	AD-16	Rakhine Offshore Area	PSC
(13)	MD-1	Moattama Offshore Area	PSC
(14)	MD-2	Moattama Offshore Area	PSC
(15)	MD-3	Moattama Offshore Area	PSC
(16)	MD-4	Tanintharyi Offshore Area	PSC
(17)	MD-5	Tanintharyi Offshore Area	PSC
(18)	MD-6	Tanintharyi Offshore Area	PSC
(19)	YWB	Tanintharyi Offshore Area	PSC

Which legal structure is suitable?

In devising a shareholding structure for upstream oil and gas activity in Myanmar, oil companies need to take into account a wide range of complex legal and commercial issues. Restrictions

on foreign ownership, local partner rights and desires, and tax efficiency are some of the key factors in this regard.

The provisions of Myanmar’s Model Production Sharing Contract (PSC) with respect to requirements for a local commercial presence or a local registration of the contractors or operators form a natural starting point for creating the legal structure.

When to setup the SPV?

In case the company wishes to use a Special Purpose Vehicle (SPV), contractors should carefully consider the available options and the bidding requirements.

Equally important practically speaking, when the oil and gas interest is to be acquired through a bidding round, are the Ministry of Energy’s prequalification requirements. For example, a Special Purpose Vehicle (SPV) might be fine for your structure, but does this entity meet the prequalification requirements? Or, is it possible to change entities before executing the PSC?

In addition to Myanmar’s written laws and regulations, a thorough understanding of the actual practices of the Myanmar Oil and Gas Enterprise (MOGE), the Myanmar Investment Commission (MIC), and the Internal Revenue Department (IRD) are centrally important to devise a structure that is workable in reality.

Joint operating agreements and joint ventures in Myanmar oil and gas

In deciding on the appropriate legal structure, one of the more fundamental questions is whether the parties will hold 100% of the interest in the PSC through one and the same legal entity in which they are both shareholders, or whether each one of the contractors will hold its own percentage in the PSC. The second structure is more common.

In any event, the joint operating agreement (JOA) will need to be approved by the MOGE. In practice, the MOGE may have suggestions for certain key issues of the joint operation, such as decommissioning, operations by fewer than all parties, and accounting.

There are a number of provisions of the JOA that will create some Myanmar legal issues. For example, the tax compliance arrangements. Typically, the tax registration and compliance obligations for the contractors/operators of a PSC will be in accordance with the Myanmar Income Tax Law and the IRD's established practice. The operator is primarily responsible for declaring and paying the applicable taxes. However, depending on the legal structure and type of income generated, the contractor may have tax compliance obligations in Myanmar which are not applicable to the operator.

How to handle sanction events

Oil companies might be struck by future sanctions in the unfortunate situation where new sanctions are introduced. Alternatively, existing sanctions may come into play because of changes in the business's situation, e.g. transfers of the local partner's shareholding to a sanctioned person.

These risks should be addressed in the joint venture agreement or JOA. It is advisable to closely connect such provisions with any related provisions in the PSC itself. For example, should the contractor be targeted by new sanctions, will the Myanmar government allow transfer to a third party with recognition of sunk costs?

Tax efficiency in case of a future farm-in

Upon an acquisition or divestment of an oil and gas interest, capital gains apply for the seller of such interest. The Myanmar Income Tax Law provides special tax rates for realizing a capital gain on an interest in oil and gas. The applicable tax rates depend on the amount of the gain as follows (subject to an applicable double taxation agreement (DTA) to which Myanmar is a signatory):

Amount of Gains	Rate
Up to US\$100M	40%
US\$100M to US\$150M	45%
Above US\$150M	50%

Tax returns for capital gains must be filed within one month from the date of disposal of the capital assets (including shares). Under the Income Tax Rules (which implement Myanmar's Income Tax Law), the date of disposal means the date of execution of the deed of disposal or the date of delivery of the capital assets, whichever is earlier (Rule 5(a) of the Income Tax Rules).

These are important points of attention for structuring oil and gas joint ventures. The transfer of an (direct) interest in a PSC, or of shares in a company that holds an interest in a PSC can trigger this tax impost. In its practice over recent years, the IRD has developed a distinction between taxable and non-taxable farm-ins, based on the fact pattern of each transaction.

The outcome in terms of tax efficiency will depend on the legal structure and the exact wording of the applicable DTA. For example, if the investment is structured as a Singaporean company with a Myanmar branch, a gain will likely be treated as the disposal of the property of a PE and taxed accordingly. If the investment is structured as the subsidiary of a South Korean company, the Myanmar taxing right will depend on whether or not the transferred shareholding constituted 35% in the Myanmar company.

For more information on this subject matter, contact: Edwin Vanderbruggen, Partner VDB Loi edwin@vdb-loi.com

VDB Loi in Myanmar

Partners



Jean Loi

Jean Loi is widely recognized as one of the region's most experienced tax specialists. She was formerly a tax partner with PricewaterhouseCoopers in Southeast Asia. Jean is a highly successful tax advisor with a CPA background. She works on major projects throughout Southeast Asia, dividing her time between Yangon and the rest of the region.



Edwin Vanderbruggen

Edwin was formerly with Loyens & Loeff and a partner at DFDL. He has 21 years of experience as a lawyer, academic and government advisor, including five years of experience on Myanmar tax and investment issues. Edwin has advised oil companies, distributors, property funds, and private equity funds on making investments in Myanmar. He lives full-time in Yangon.

Directors and Senior Counsel



Paul Nikitopoulos

Paul is a US attorney with 15 years of experience, and was formerly with Clifford Chance and O'Melveny & Myers. He holds an MBA from Cambridge University and a J.D. from Duke University. He has extensive experience in providing integrated solutions for M&A and private equity transactions. He lives full time in Yangon.



U Myo Nyunt

U Myo Nyunt is an advocate to the Supreme Court of Myanmar and one of Myanmar's most distinguished senior lawyers. He is the former Director of the Supreme Court and Appellate Judge, and a noted author on Myanmar law. He is a member of the Bar Council, and a member of the board of editors of the Myanmar Law Review.



May May Kyi

May directs our licensing team, focusing primarily on investment permits, operating licenses and import/export licensing. In addition, her practice areas include customs duties, customs valuation, compliance and company establishment. She holds a bachelor's degree in Commerce from the Institute of Economics, University of Yangon.



Yumi Ishimoto

Moto has 20 years of experience working in Southeast Asia as an administrator, auditor and accountant, including several years with PricewaterhouseCoopers as a senior auditor, where she worked with a broad cross-section of organizations and industries. Moto heads the Japanese desk of our firm, dividing her time between Cambodia and Yangon.

Some of our Managers, Consultants and Associates



Cynthia Herman

Cynthia, living in Yangon, is a Chartered Accountant and a member of the Institute of Chartered Accountants of Scotland. She also holds a Master's in Mechanical Engineering with Business Finance (University College London, UK). Her experience in mining, oil & gas and utilities audits and management accounting are a major asset to VDB Loi.



Adam Mcbeth

Adam Mcbeth is a US attorney with a J.D. from St. John's University and an LL.M. from NYU. Adam has experience in assisting clients in Myanmar with the legal structuring of power generation projects, real estate, telecommunications and oil and gas transactions. He lives full-time in Yangon.



Ngwe Lin Myat Chit

Lin holds a Bachelor's in Commerce from the University of Newcastle, Australia. She formerly worked with a global audit and advisory firm, where she was based overseas for a number of years. At VDB Loi, Lin advises clients on tax structuring, licensing, general regulatory and customs duty issues. She has worked on major projects in the FMCG sector, oil and gas, power and health/life sciences.



Marla Bu

Marla is an American of Burmese descent with a degree in law from the College of Law of England and Wales and a bachelor's degree from Fordham University in New York. She has seven years of experience with the United Nations and law firms in New York, where she worked on commercial and civil legal matters and prepared briefs on Myanmar law. She lives in Yangon.



Chaw Nandar Aung

Chaw has built up a comprehensive knowledge of taxation, including calculation of tax liabilities, preparation of tax returns, and in particular, the tax clearance and audit process. She holds a Bachelor's degree and has a diploma in Accounting. She also has an extensive knowledge of company establishment and investment licensing.



Kyi Naing

Kyi Naing is a Myanmar-qualified lawyer with seven years of experience, most recently with DFDL in Myanmar. Experienced in cross-border legal issues, he has assisted international clients with their investment projects in Myanmar, and advised on a wide range of corporate and commercial issues.



Nay Nwai Linn

Nay has six years of experience in tax, accounting and corporate compliance working for international enterprises in Myanmar. She liaises with various authorities on licensing issues, and is an accomplished corporate tax advisor. Nay holds a bachelor's degree from Yangon University.



Aung Myat Thu

Aung Myat Thu advises on corporate establishment and investment licensing. He has extensive experience liaising with Government offices, especially for the Directorate of Investment and Company Administration, the Myanmar Investment Commission, and the Trade Department.

Senior lawyers with Myanmar experience not based in-country



Huy C. Luu

Huy is a tax lawyer with a J.D. from Hofstra University and an LL.M. in taxation from Georgetown University. After practicing with Latham & Watkins and Ernst & Young in the US, he came to Southeast Asia in 2008. Huy combines his international tax expertise with a detailed knowledge of tax and laws in Southeast Asia. Huy has worked on Myanmar projects in oil & gas, FMCG, mining, and oilfield services. He is based in Vietnam.



Chris Muessel

Chris is one of Southeast Asia's most experienced foreign lawyers. As a Baker & McKenzie lawyer, he advised MNCs on a broad range of legal matters. As a partner with the US firm Duane Morris LLP, Chris headed the firm's Ho Chi Minh City office, and later undertook partnership roles with Watson Farley & Williams and Rajah & Tann. He is based in Cambodia and Singapore. Chris has overseen Myanmar due diligence and M&A projects.