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## ENERGY AND INFRASTRUCTURE MARKET: OUR LATEST INSIGHTS

Myanmar is undertaking a series of reforms, both in terms of laws and policies, that strengthen the country's attractiveness for energy and infrastructure projects. Many of these reforms, although they are crucial, are not widely known outside of Myanmar. Furthermore, the Government has given the green light for a number of major LNG, hydro and transportation infrastructure projects which will require international financing on a scale not seen before in this newly opened but heavily under-electrified Southeast Asian country, population over 50 million. To sum up, Myanmar is poised to break through to a new level of project finance activity.

### Major Projects in the Pipeline

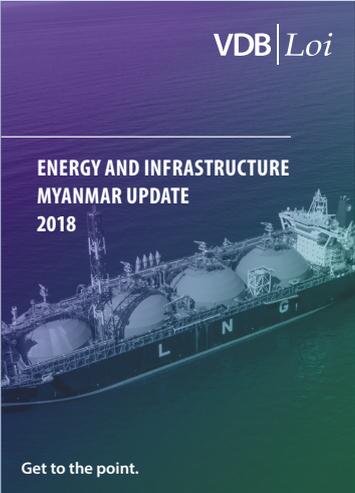
In Myanmar at this time, there are more major energy and infrastructure projects in advanced stages of planning and approval than ever before, and the projects are significantly bigger in size. Take power, for example. In 2016, five power purchase agreements ("PPAs") were signed. Each had a capacity between 200MW to 300MW. In 2018, the Government approved two projects in excess of 1,000MW (notably the LNG to Power projects of Total Siemens at Kanbauk, and of Zhefu/Supreme Trading in Ayawaddy region), one in excess of 600MW (the Shweli 3 hydropower project of EDF

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and Marubeni), while also approving three other power projects below 200MW (TTCL's Ahlone LNG project, Sinohydro's gas fired plant in Kyauk Phyto and the Deedoke hydropower project of Shwe Taung/Kansai/Andritz). Most of these projects are presently in various stages of negotiating the PPA, and several have started to talk to potential lenders.

Besides the size, we also notice a shift in the profile of the sponsors of power projects. Since 2018, we see involvement by major global energy players. And for every one of these large players that indeed secured a project in Myanmar, there are at least

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ten of their competitors that visit my office and the Ministries alike, looking for an opportunity.

In transportation infrastructure, we are just getting started. A multibillion US\$ deep sea port and special economic zone project was awarded in 2016 to CITIC after an international competitive tender, and the Government announced recently that negotiations to finalize the investment plan for the project have reached a final stage. The International Finance Corporation is assisting the Government with a 50km elevated expressway, the inner ring road circling Yangon. This project,

according to some estimates with a price tag exceeding a billion US\$, would be one of the largest PPP projects in Southeast Asia. The Government is also implementing the “Yangon New City” and the 10,000 acre “Mandalay Resort City” urban infrastructure projects, a new industrial zone with the Korean Government, a comprehensive nationwide railroad rehabilitation, while reforming and revamping the entire existing network of toll roads and BOT roads (totaling more than 22,000 km).

Water and waste projects are challenging in Myanmar, in part due to the low legacy tariffs involved. Yet, every single large city or state/region (Myanmar is a Union comprising 14 states and regions) is in some kind of talks involving water treatment and distribution, either as a PPP or on an EPC basis. Project financing will play a role here, I believe, but projects will likely need some sort of grant or subsidy to be feasible at this stage.

### **Reform of the Project Procurement Process: the Notice to Proceed**

One of the eye-catching reforms of the Ministry of Electricity and Energy (MoEE) concerns the way projects are approved by the Government. In Myanmar, nearly all power and infrastructure projects are planned and negotiated by the line ministry, then approved by the cabinet, to be then implemented by the line ministry.

In the electricity sector, previously the MoEE would sign an MOU to allow a feasibility study. After that study would be approved, a legally binding framework agreement (“Memorandum of Agreement” or “MOA”) would be approved by Cabinet, then executed. Signing the MOA would kick off the negotiation of the PPA and other project documents. That never made much sense to me, as the Government bound itself with the MOA to do a project the detailed terms of which were not yet known. Instead, now, the sponsor would receive a Notice to Proceed (“NTP”) by the MoEE, an in principle decision by the Government to proceed with the project together with that particular sponsor based on the feasibility study by the sponsor. This triggers the PPA and, also new, the Concession Agreement (which replaces the role the MOA played as well as the Build Operate Transfer agreement some sponsors have concluded in the past. The Cabinet will be asked for final approval of the Concession Agreement and a PPA at the same time, when both have been fully agreed, at the end of the negotiations.

The new procurement process has some important advantages, for both parties. The sponsor gets a public confirmation of his role in the project. The Government has, as a principle, already made the decision and all the required ministries and other agencies can go forward on that basis. The NPT, in my experience, also narrows the range of commercial negotiation room between the parties. For example, the tariff range, the currency, the main points of the risk allocation will if not informally agreed at least much closer between the parties by the time the NTP is issued.





## **New Model Power Purchase Agreement**

During 2017 and early 2018, with the support of its development partners, the Government drafted a new Model Power Purchase Agreement, particularly for hydropower projects. The Model PPA is balanced but I would say clearly “FDI friendly”. In all respects, the PPA was drafted in accordance with international best principles and regional expectations in terms of risk allocation. The purpose of the Government and the development partners was to make sure the PPA would be internationally bankable. The tariff structure was designed to minimize uncertainties and to manage hydrology risk in a manner that is attractive to both investors and the offtaker.

Individual projects will certainly require individual solutions to at least some extent, but the Model PPA will be central to the negotiations. I believe that with the Model PPA, the time needed to negotiate individual PPAs is cut down to 50% or less.

The experience of the MoEE in interpreting, applying and negotiating PPAs is also increasing significantly. Although the group of officials who are conversant in PPAs is still a comparatively small for the daunting list of big IPP projects in the pipeline, this can be expected for a country that had its first ever IPP in 2013.

## **Some Terms of Myanmar Power Purchase Agreements**

Most Myanmar PPAs with foreign IPPs are more or less based on the same internationally prepared model, but there are significant variations particularly with respect to tariff and tariff escalation.

The offtake risk by the single offtaker utility, the Electric Power Generation Enterprise (“EPGE”), is typically mitigated by means of a minimum guaranteed take-or-pay volume per season, or, less frequently, by actual capacity payments. The effect on the financial model of the seller is normally the same in both cases. Some PPAs provide instead that the buyer will purchase all generated electricity.

The buyer would typically contract on a conversion basis in case the project will receive domestic gas, which means the sponsor would not have to assume the risk of the gas supply. In more recent LNG-to-Power projects, you will normally see the sponsor make arrangements for the LNG supply and the regasification.

The MoEE strives to have comparable headline tariffs for comparable projects. Given the subsidized nature of the electricity market in Myanmar there is generally significant pressure on would-be sponsors to keep the tariff as low as possible. Incidentally, the electricity market is increasingly liberalized and some projects have already been given permission to supply private sector offtakers directly, such as industrial zones.

The tariff is adjusted for inflation in nearly all thermal PPAs, but with a wide range of measures. Some PPAs just increase the tariff for inflation, other PPAs have more complex formulas providing for adjustment of variable and fixed expenses of the seller.

The definition of force majeure in most Myanmar PPAs is in line with international precedents. The seller has the right to payments in one form or another during force majeure periods in case of governmental force majeure or force majeure affecting the buyer.

Termination provisions and payments in Myanmar PPAs are generally considered internationally bankable. The seller receives a payment which takes account of senior debt, equity and costs in all scenarios, with variations on the return on equity.





Change in law and change on tax clauses are normally found in all Myanmar PPAs and they are based on internationally well settled precedents.

Foreign arbitration is common in contracts with the Myanmar Government, and most PPAs are no exception. Incidentally, Myanmar is a signatory to the New York Convention and to the Multilateral Investment Guarantee Agreement. It has also implemented the New York Convention with an UNCITRAL Model Law type arbitration law.

### **Hard Currency Tariffs?**

Myanmar is remarkably open in terms of its foreign exchange regulations. Everyone is allowed to hold US\$ bank accounts, and there are no restrictions on converting local currency into foreign currency. Influx of foreign loans require only a one-time approval from the Central Bank of Myanmar, at the outset of the loan, which is nearly always granted. Payments to suppliers, vendors or dividends to shareholders can be made freely, without Central Bank permission.

So far, all the of PPAs signed with foreign IPPs in Myanmar are entirely in US\$. I think the policy will evolve to a dual currency approach (both US\$ and Myanmar Kyat), but, on a case-by-case basis with a very small Myanmar Kyat component at least during the debt repayment period. The Myanmar Kyat portion might be determined keeping in mind the individual situation and financial model of each project. Some projects have local companies in the consortium of sponsors, and many with have at least some local O&M expenses. All projects need to pay

taxes in Myanmar Kyat, for example the Commercial Tax which is 5% on the revenue of the Generator.

All parties are concerned about possible weakening of the Myanmar Kyat and the Government is quite focused on this aspect. Nevertheless, I also see a deep understanding, much more than before, that there is little alternative to paying foreign lenders/investors in foreign currency, as domestic sources of financing are far from being sufficient. Sponsors should expect that the Government counterparts in the infrastructure deals will be looking for ways to minimize the forex impact wherever possible. Better yet, they should anticipate it by devising innovative solutions that will help with the approval of the project.

### **Sovereign Guarantee**

One of the more difficult issues I have had to work on in recent years with the Government is the need for and structure of sovereign guarantees for infrastructure projects. In a country where private investment in public infrastructure was an unfamiliar

concept until very recently, and for some it remains so to this day, present plans call for roughly 50% of the electricity generation to be with private stakeholder engagement. The MoEE has repeatedly spoke publicly about the need for PPPs and IPPs as part of their vision for a nearly fully electrified Myanmar by 2030. The Government has a long standing practice of providing Ministry of Planning and Finance (MOPF) guarantees for “G to G” loans. Opening up to private sector led developments, Government support was provided in one power project signed in 2016. In 2017 and 2018, I helped devise a regulation and an annexed letter of guarantee on the subject, and the MOPF is taking the matter forward as part of a comprehensive policy on prioritizing and financing projects for the public interest.

Meanwhile, I think the discussion in Myanmar is no longer “if” projects should be given Government support, but rather, “what form” and “which projects”. I believe that the Government very well understands the need for an extensive and attractive



Government support policy across the infrastructure spectrum to speed up infrastructure investments, but I also believe the Government will want to heavily scrutinize which projects should be given what kind of support. Certainly not all projects will receive comprehensive guarantees, in my opinion.

### Environmental and Social

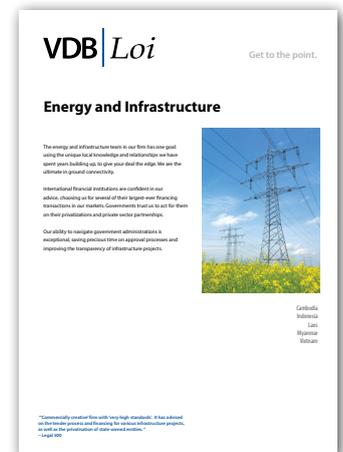
In the wake of the Environmental Protection Law 2012, the country has taken a sharp turn emphasizing the need for environmental protection and social sustainability. No project can be approved by the Government without extensive scrutiny, often with compulsory involvement by a recognized list of expert consultants, on the environmental and social impact assessment. Some existing projects were cancelled or effectively put on hold only for environmental

and social reasons (such as the Myintsone hydropower project and a number of coal fired projects), a sign the Government is serious to maintain the newly set standards. New laws on the use of dams, on biodiversity, on forest protection, on use of certain hazardous materials, on work safety, on employee protection strengthen the environmental legal framework. Such laws come in a wider context of a legal framework of anti-corruption and more emphasis on competitive tender procedures. A long and detailed study was conducted by the IFC to assist the Government to help decide which hydropower projects presented the lesser environmental and social impacts ("Strategic Environmental Assessment").

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Edwin is one of Myanmar's most prominent foreign legal advisers and is widely recognized for his experience in power projects. He advises sponsors and lenders on the large majority of IPP projects in Myanmar, including LNG to Power, gas, solar, wind and HPP. He assists the Government, DFIs and IFI's on power projects, policy and reform, and helped draft a new Model PPA in 2018. He is known for actually getting things done and for his extensive regulatory knowledge.

### ENERGY AND INFRASTRUCTURE TEAM

VDB Loi has created a practice team to support the partners comprising foreign and locally qualified lawyers and regulatory advisers work exclusively on Energy and Infrastructure matters.



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Philipp is a Swiss qualified lawyer with more than 15 years of experience in corporate, commercial and infrastructure law. He leads our Energy and Infrastructure team assisting clients with regulatory issues, structuring and documentation of large investments in the sector. He has solid experience in advising on the establishment of large scale power generation projects.

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