

**ENERGY AND INFRASTRUCTURE  
MYANMAR UPDATE  
2018**



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# CONTENTS

Myanmar practice overview  
2

Ministry of Construction decides to promote  
Public Private Partnership in Myanmar for  
roads and bridges  
4

New Rules for Government Tenders  
6

What is a Notice to Proceed?  
8

Energy and Infrastructure Team  
11

Acquiring a Port Terminal Project in Myanmar  
12

Myanmar approves 4 Major LNG/Gas-to-Power  
projects  
18

Edwin Vanderbruggen discusses Myanmar's  
growing power needs with Channel News Asia  
25

MONREC issues first ever Environmental  
Compliance Certificate  
25

Toll road Public Private Partnerships projects in  
Myanmar  
26

# MYANMAR PRACTICE OVERVIEW

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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**

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Edwin is the senior partner of VDB Loi and a leading foreign legal advisor living in Myanmar since 2012. A frequent advisor to the Government on transactions and privatizations in energy, transportation and telecom, he is widely recognized for his "vast knowledge" (Legal 500) and his ability "to get difficult things through the bureaucracy" (Chambers, 2016).

He advised international financial institutions on their largest Myanmar transactions so far, oil and gas supermajors, a greenfield multibillion US\$ telecom project and the Japanese Government on the Thilawa SEZ. He assisted two newly licensed foreign banks setup in Myanmar, acted for the sponsor of an 800MUS\$ urban infrastructure PPP project and worked on 5 out of 7 power deals inked in 2016. He lives in Yangon since 2012.



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# MINISTRY OF CONSTRUCTION DECIDES TO PROMOTE PUBLIC PRIVATE PARTNERSHIP IN MYANMAR FOR ROADS AND BRIDGES

## Overview

On the 15 June 2018 the Ministry of Construction (“MOC”), in partnership with VDB Loi, organized a landmark conference on Public Private Partnerships for Toll Roads in Myanmar. The goal of the conference was to foster co-operation and understanding between the Government of the Union of Myanmar, the Myanmar private sector, and international investors. The event was attended by His Excellency U Han Zaw, Union Minister of the Ministry of Construction of the Government of the Union of Myanmar, and over 300 other participants including several distinguished members of the Amyotha Hluttaw and interested investors from Myanmar, Japan, Korea, China and other nations.

Before the opening of the conference, a private discussion session between the His Excellency U Han Zaw and other key potential parties in the project took place. Edwin Vanderbruggen, senior partner at VDB Loi and head of the local advisory team assisting IFC and MOC with the YEX project, remarked that the session allowed for a better understanding between all parties and laid a solid foundation on which a successful PPP project can be built

His Excellency U Han Zaw opened the conference by sharing his views on the PPP projects. The Minister remarked that the PPP model can serve as a vehicle for the development of Myanmar’s infrastructure. He extended an invitation to international investors to partner with the government to invest in the transportation and infrastructure sectors to further foster social development in Myanmar.

Edwin Vanderbruggen, in opening the conference, pointed out that the ambitious road infrastructure investment plans of the Government make it crucial that private sources of funding are also tapped. He emphasized, in particular, the use of PPP structures as model for development. He also called for the formation of a “Myanmar PPP Association”, to help dialogue between private and Government stakeholders.

## Reports

The conference began in earnest when a series of reports were presented to the conference on the topic of the Yangon Expressway Project.

In the first report of the day, James Harris, partner at law firm Jones Day, provided an in-depth presentation on “Concession Agreements”. The presentation addressed the key issue over what a concession agreement should contain in order to ensure a successful toll road PPP project. Charles Magdelaine, a senior associate in VDB Loi’s Energy and Infrastructure Practice, provided insight into how the concession agreement is treated under Myanmar law.

Deputy Director General of the Ministry of Construction, Kyi Zaw Myint, along with John Leber, senior investment officer for the IFC, provided an overview of the Yangon Expressway Project and what can be expected to take place in the coming months. Kyi Zaw Myint also highlighted some of the other ambitious PPP infrastructure projects proposed by the MOC. These included the upgrade of the Yangon-Mandalay Expressway, the construction of the Mandalay-Tigyaing-Muse Expressway, the construction of the Tigyaing-Myitkyina-Kan Paik Ti Expressway, and the Naypyitaw-Kyaukphyu Expressway.

The final report by Edwin Vanderbruggen, discussed how a PPP infrastructure project can be structured in Myanmar. Vanderbruggen gave an overview of the Myanmar legal environment and how it is conducive to the development of a project the size and scope of the Yangon Expressway. Special emphasis was placed on investment licensing process, available tax incentives, and other important aspects of interest to potential investors for the project. Vanderbruggen also explained the detailed legal roadmap for toll road PPP infrastructure projects in Myanmar.

### Panels

A series of panel discussions on topics central to all PPP infrastructure projects were hosted at the event. Panellists discussed the key Myanmar-specific issues faced by the Yangon Expressway Project, such as the “willingness to pay” of road-users in Myanmar, how toll rates in Myanmar compare to others in the region, and the prospects of toll-related regulatory reform. Also, under discussion were the key commercial terms relating to the project, such as who bears the “traffic risk” and “foreign currency risk”.

Panellists delved into lessons learned from other toll road projects in the Asia-Pacific region and provided useful guidance on how this project may avoid some of the potholes on the road to a successful toll road PPP.

### First Step on the Road to Making the Yangon Expressway Project a Success

Following the conference, intense interest in joining the new PPP Association has developed and VDB Loi is in the process of establishing the Myanmar PPP Association. VDB Loi hopes that the **Myanmar PPP Association** can serve as platform for constructive dialogue between the private and Government stakeholders.

The event, the first of its kind for PPP projects in Myanmar, was a resounding success with lively participation by the Government of Myanmar, Myanmar local developers and international investors. Edwin, when asked on the significance of the event, remarked that “For a project the size of the Yangon Expressway, close co-operation between the private sector and Government is essential, and this conference is the first step on the road to making the Yangon Expressway project a success.”



*“... incredibly commercial in their approach.”*  
- Chambers and Partners

# NEW RULES FOR GOVERNMENT TENDERS

Myanmar has precious little regulation governing Government tenders, but what it does have, has just been revamped and enlarged. Presidential Notification 1/2017 dated 10 April 2017 (the Notification) has reset and strengthened rules on certain types of Government procurement (primarily the Government purchasing goods or services, selling assets, or leasing out land). In this note, we examine the salient features of the new rules, and we try to understand how they will affect some of the common projects and transactions in Myanmar.

## **To which tenders does the Notification apply?**

Mainly to the Government purchasing goods and services including construction services. The Notification also applies to tenders where the Government sells or leases out assets to private parties. It replaced the must shorter Notification 1/2013 with the same subject matter. The Notification does not apply to Public Private Partnerships, construction of electric power stations, telecommunication license tenders, oil and gas block tenders and mining. It states that separate rules will be created for those activities, but to date none have been published as far as we know.

## **Is a tender obligatory in all cases?**

The Notification, though in convoluted language, requires agencies to undertake a tender for procurement of goods and services, sale of assets and leasing out in case the price exceeds 10,000,000 MMK (approximately 8,000 US\$). In such cases and up to this amount the agency may collect 3 price quotes from companies without going through a tender. In excess of this amount, Government agencies must conduct a

tender in case we are talking about the procurement of goods and services or the sale or the leasing out of a Government asset.

It does seem clear that if the agency does initiate a tender, it must do so following the rules laid out in the Notification.

## **Who can authorize a tender?**

The Notification does not specify which Government agency can initiate a tender, or who within an agency has the power to make legally binding decisions in connection with the tender. As mentioned, the Notification does state that “for large scale projects”, the State/Region agencies must obtain approval by the State/Region Government. It also mentions that Union level agencies must obtain the approval of the President’s Office and the Cabinet.

It is unhelpful that the Notification does not define what a “large” project is, which severely limits the practical use of this rule.

The Notification also requires the creation and approval of a procurement plan, which is to be approved by the head of the Union Ministry or, as the case may be, the state/region Minister.

## **Funding and currency issues**

For those tenders where the Government has to pay something, the Notification puts much emphasis on making sure the needed funds are secured. The Notification requires not only sufficient appropriations for the main cost, but also for raw materials, training materials, etc.





The Notification also addresses the issue of foreign currency. It states that for international tenders, foreign currency is permitted. It also states that foreign currency is permitted for other tenders “where the use of foreign currency is necessary”. In all cases, the agency organizing the tender has to apply for the foreign funds to the appropriate budget.

### How are tenders to be publicised?

That depends on the nature and size of the tender. This table reflects the publication obligations:

Tender Publications		
<b>Goods and services, including construction</b>		
1.	Below 10,000,000 MMK	No publication, no tender, the agency invites three companies for a price quote
2.	Between 10,000,000 MMK and 100,000,000 MMK	Announcement on the notice board at least two weeks in advance
3.	Above 100,000,000 MMK	Two announcements in state-owned newspapers at least one month in advance and on the website also one month in advance
<b>Sale and lease out of assets</b>		
1.	Below 10,000,000 MMK	Announcement on the notice board at least two weeks in advance
2.	Above 10,000,000 MMK	Two announcements in state-owned newspapers at least one month in advance and on the website also one month in advance

### Who is on the Tender Committee?

The Notification now prescribes which committees are to be formed, and who serves on those committees. A Union level tender committee will be headed by a Deputy Minister or a Permanent Secretary. U state/region level tender committee must be headed by a state/region minister. The Notification also requires for, depending on the amount involved, for

two or three representatives to be included of Government agencies not involved in the tender. This is praiseworthy, but the regulation should have spelled out from which other ministry those independent representatives should be delegated.

In addition to other committees, the Tender Committee forms a “Floor Price Calculation Committee” in case an asset is to be sold or leased out to set a minimum price, and a “Tender Receiving and Scrutinizing Committee” consisting of 3 to 5 members.

### How to decide who wins?

The Tender Committee assigns the scrutiny and selection of the winner to the Tender Receiving and Scrutinizing Committee. The Notification now imposes the use of scorecards. The scorecards set out the marks for the Tender Committee to follow, with some flexibility.

### Security

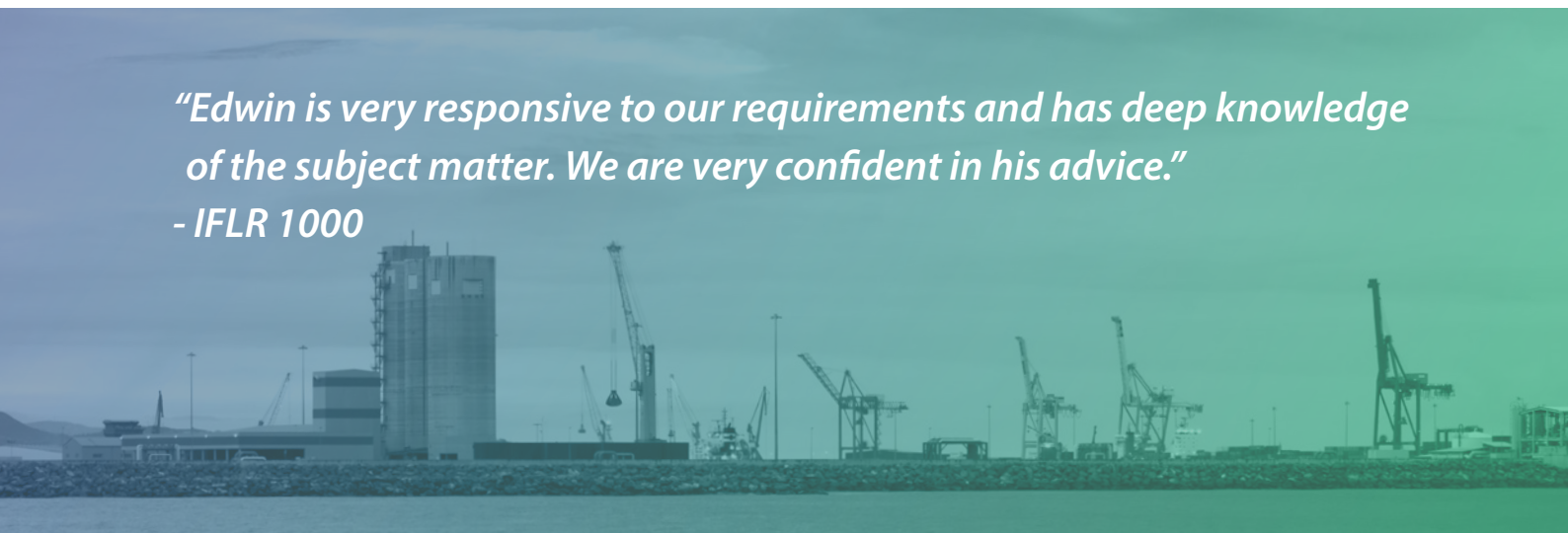
Bidders must under the new Notification provide security for their performance under the tender process. The security must be 1% of the value concerned for the period of the tender plus 28 days. In the case of selling and leasing out assets, the security must be 10%.

### Disputes

A final innovation the Notification has made is in the area of complaints and settlements of disputes. In case of any complaints, the Tender Committee is first to investigate and decide on the matter. If the complainant is not satisfied with the outcome, a Complaints Settlement Team formed by the Ministry of Planning and Finance shall decide the matter.

*“Edwin is very responsive to our requirements and has deep knowledge of the subject matter. We are very confident in his advice.”*

*- IFLR 1000*



# WHAT IS A NOTICE TO PROCEED?

On 30 January 2018 the Ministry of Electricity and Energy (MOEE) held a ceremony in Nay Pyi Taw to sign four so-called “Notices to Proceed”, each one for a planned LNG or Gas to Power project, in total nearly 3,000 MW. This unprecedented move has raised eyebrows in Myanmar’s energy and financial community, which was for the most part caught by surprise, for a number of reasons. Some of the questions people are asking themselves are on process. What is a “Notice to Proceed” (NTP), and how does it relate to the existing approval process? Will NTP’s now become the new standard? Does it replace the Memorandum of Agreement, the traditional project document which grants the concession in Myanmar? Other questions are on the merits of the projects. Can Myanmar really accommodate four LNG/ Gas to Power projects? Is LNG/Gas to Power not too expensive compared to other sources of generation? Are all of these projects really going to be built?

## What is a Notice to Proceed?

As readers are most likely aware, power projects with independent power producers (IPPs) in Myanmar have until now followed a common process, marked by three key documents known in the industry by their abbreviations: the MOU, the MOA and the PPA. A pre-feasibility report submitted to the Government resulted in a Memorandum of Understanding (the MOU) paving the way for the feasibility study. After the latter was submitted and approved, the parties would sign a Memorandum of Agreement (the MOA), the first binding document of the project which grants the project rights subject to the final project documents, mainly the Power Purchase Agreement (PPA) being negotiated and agreed. Only a few projects had an additional document, a Build and Transfer Agreement (BOT), as nearly all BOT-like provisions were integrated in the PPA anyway, but the BOT also offered a convenient vehicle for Government support.

To find an NTP in Myanmar IPP projects we need to go back to before 2014, and even then I can only think of one occasion on a now forgotten project. That does not mean that an NTP is an unknown term internationally. In the world of constructing infrastructure, it means the final and irrevocable go-ahead by a principal to its construction contractor to commence the works, the point the contractor knows he will be paid.

We are restricted by clients confidentiality, but even from public information it is clear the NTPs of 30 January 2018 do not play the same role as they do in construction contract jargon. The NTP is a form of MOEE approval for the project, but it seems it does not feature the same details and obligations as an MOA, or a BOT. As such, the final commitment to the project is still contingent on the parties formally reaching agreement on all the commercial and legal terms, although it is of course clear that many commercial terms have already been discussed and perhaps even preliminarily agreed before 30 January 2018.

We should keep in mind that as far as was publicly announced, none of the four LNG/Gas to Power projects have an MOU in place with the MOEE. Could we say that the NTP replaces the MOU those projects never received? Probably not. The NTP does constitute some kind of an approval for the project as discussed between MOEE and the sponsors, and MOU’s do not have that.





I think that means the NTP can be situated somewhere between the MOU, which formally comprises no project approval of any kind, and the MOA, which contains more detail and a wider range of binding obligations.

### **Why a Notice To Proceed instead of a Memorandum Of Agreement?**

In my view issuing several NTPs achieves a number of things: (i) it energizes the sponsors as they have received an some kind of an official approval for their project, prompting them to spend more resources and to speed up their work, (ii) it ensures that during the finalization of the commercial and legal terms in the four PPAs, there remains a real sense of competition, (iii) the MOEE did not have to take on all of the commitments yet that are part and parcel of an MOA, (iv) as the NTP is much less complex than an MOA, we can safely assume it took less time for the Government to draft, negotiate and approve it, and (v) it sends a strong signal to the energy investment community that we are back in business (on which more, see below).

As the NTP has certain indisputable advantages both for the MOEE and for the sponsors, I think we are going to see more of them. Existing projects in process of approval, for example those having obtained an MOU before 2016, such as half a dozen hydropower projects, should not necessarily expect an NTP in their near future but it is certainly a possibility. There may certainly be situations where both the MOEE and the sponsors will like to see some instrument expressing an approval for the sponsor's project as submitted to the MOEE outside of the confines of a more detailed contract such as a Concession Agreement.

It has always bothered me that although the MOA creates legally binding obligations, the true extent of those obligations can only be discovered once final agreements are completed. In other words, I always found it illogical for the Government to commit itself to a project without knowing the details of the PPA. It makes more sense to execute an MOA or a Concession Agreement at the same time as the PPA. The NTP can take over one of the functions of the MOA, the confirmation the Government wants to do the project with this sponsor and not others. But, the NTP will not replace a wider agreement between the sponsors or the project company and the MOEE for example by means of an MOA or a Concession Agreement or a BOT. Sponsors will continue to need a contractual vehicle for the obligations that do not fit in the PPA with EPGE, which is a state-owned enterprise but not legally part of the Government of Myanmar.

Nevertheless, I believe that the primary focus for the remaining projects which are on the priority list of

*"VDB Loi is widely considered as a powerhouse in Myanmar's legal market."*

*- Asia Law*

the MOEE will be on getting to final agreement on all commercial and legal aspects, and documenting that in more detailed agreements such as a Concession Agreement or MOA and a PPA.

### **Why are there four NTPs?**

Many observers are wondering about the combined volume of the four LNG/Gas to Power projects, which amounts to over 3,000 MW, approximately the present electricity consumption of the entire country. Why did the MOEE not pick one “winner”? Why issue all four an NTP, instead of an MOA to one of the four sponsors?

There are sound tactical reasons to take this approach. First of all, it is of course possible that the MOEE and one or more of the sponsors fail to reach final agreements and that not all projects are implemented. As the utility, you would want to plan for the possibility that one or another project does not make it.

Secondly, the competitive effect. I had dinner once with the developer of Kuala Lumpur’s Petronas Twin Towers. He told me that against all advice, he picked two competing contractors, each giving them only one of the two towers to build. As a result of the contractors’ ongoing competition in terms of time and price, he amazingly finished the project before schedule and below budget.

### **Are the four LNG/Gas projects too big or too expensive for Myanmar?**

More fundamentally, is 3,000 MW of new LNG/Gas to Power too much? Studies put the Myanmar demand for electricity in 2030 at 15,000 MW, and I believe that number is in fact far too low if you factor in compound industrial growth, significant investment in transportation and reduced reliance on fossil fuel cars. Would it be so out of step to rely for 10% to 20% of the generation mix on LNG? Particularly given the more than likely replacement by domestic gas within that period, at least in part?

Yes, there are price risks to electricity generation from imported fuel. Oil prices might go up, and the MMK might deteriorate versus the US dollar. The combined effect might be very significant for Myanmar, and that is a real risk. A risk that many consumers already have assumed, by the way, as their generation depends on diesel gen-sets. But both these effects will be largely eliminated once more domestic gas comes online, which is more than just a gamble. It is also foreseeable that once the planned additional hydro projects reach COD, these and other cheaper sources of electricity, counting for let’s say 80% to 90% of the generation, will reduce the average tariff cost significantly for the Government and the consumer. It is a risk but it is a calculated risk.

### **We are back in business**

To conclude, one of the most important things about the NTP’s is that they reinvigorate the community of investors and lenders who are interested in Myanmar’s energy space. It has been too long since March 2016, which is when the most recent power deals were signed. Investors were losing faith. You can think about the NTPs what you want, but they show a willingness on the part of the MOEE to move forward, a capacity to find innovative solutions, and leadership.

Not everyone will agree 3 Gig of LNG/Gas is the right call, but you cannot dispute the leadership is welcome. We need to see this followed up with progress on approvals and agreements both in gas and in renewables (and I already see some of that progress there as well), but for now, we are indeed back in business.

*“... the partners know more about the legal environment than anyone else.”*

*- Legal 500*

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Philipp is a Swiss qualified lawyer with 15 years of experience in corporate, commercial law and infrastructure. He leads our Energy and Infrastructure team assisting clients with joint ventures, acquisitions and large greenfield foreign investment. He will be in charge of the report and will liaise with other members of the team to ensure quality and consistency.



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# ACQUIRING A PORT TERMINAL PROJECT IN MYANMAR

## What are the assets of a Target in the port sector?

Although others forms also exist, most port terminals with private interests in Myanmar are “Landlord Ports”. That is to say, the port is leased to the private sector (“the Target”) for it to operate the port services, for which it invests capital – generally through a concession. Most ports in Myanmar are developed on a build-operate-transfer (“BOT”) basis as landlord ports. The Myanmar Port Authority (“MPA”) continues to own the basic infrastructure (i.e. the land) while the private investor rents the basic infrastructure and is in charge of the construction of the superstructure as well as the management of the port terminal through a dedicated project company (the “Project”).

Such project, deploying the infrastructure, normally requires obtaining an investment license from the Myanmar Investment Commission (the “MIC”). Operating certain elements of the business plan will usually trigger the need for licenses, permits and approvals from a wide range of Government departments. For example, if the Target also provides fuel storage services, a license must be obtained from the Ministry of Electricity and Energy (“MOEE”). If the Target operates a jetty, a permit must be secured from the Ministry of Transport and Communication. In all cases, environmental approvals are required from the Ministry of Natural Resources and Environmental Conservation (“MONREC”).

So, we can say that the typical Target looks like this:

1. Myanmar-registered company with Myanmar/foreign shareholders;
2. Port terminal concession with MPA;
3. Land lease with MPA (can be in same document as 2.);
4. MIC Permit;
5. Other permits, approvals as applicable from MOEE/MONREC/others;
6. Existing construction (if any).

## Are there any foreign ownership restrictions?

Investment regulations do not contain any restriction on foreign ownership in port terminal activities and it is possible to develop ports in Myanmar as 100% foreign investments. For instance, Myanmar International Terminals Thilawa and Myanmar Port Limited Services – both around 25 km from Yangon – are wholly foreign owned project companies

developing international ports since respectively 1997 and 1998. However, many port terminals are still developed by local companies in Myanmar or by joint ventures (JV) between local and foreign investors.

## Typical terms of a Myanmar port concession agreement

A BOT contract between the MPA and the Target (MPA Concession), often provides for the following: (Note: VDB Loi has been engaged by IFC to help produce a new Model Port Concession Agreement for Myanmar, a project which is ongoing).

1. *Construction and operation of the facility:* The private operator is usually in charge of the design and construction of the port facility based on a number of criteria approved by the MPA. Construction period depending on port size is usually within 15 to 30 months after the execution of the BOT agreement and MPA will typically request an on-demand construction bond.
2. *Operation:* After commissioning of the facilities, the private operator is in charge of handling of cargoes, including berthing and unberthing, storage and delivery of cargoes and related services.
3. *Ancillary commercial services* (i.e. not related to the operation of the port itself) are usually also provided, such as manufacturing and processing.
4. *Rent and annual fees:* A nominal upfront land premium fee will usually be due to the MPA based on the size of the land and an annual rental fee will typically be paid quarterly based on a percentage of revenues generated by the terminal (based on an audit performed by the MPA).
5. *A separate lease agreement* is executed in parallel with the MPA (or another Government agency owning the land).
6. *Tariffs:* Tariffs are set out by the MPA and the private developer will be in charge of collecting such port dues from the port users, either in Myanmar Kyats or US dollars.
7. *Handover to MPA:* At the end of the term of the Project (e.g. 25 years) the investor shall handover the facility free of all encumbrances to the MPA.

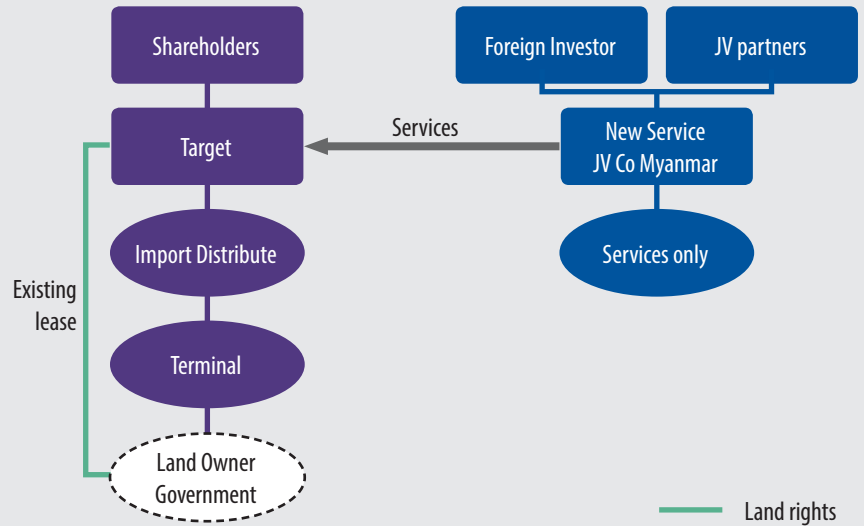
8. *Termination:* Termination payments shall be set out in case of early termination of the BOT contract, detailing different payments based on different termination cases. The Attorney General Office has however seemed reluctant to agree to termination payments for concessionaire default, despite international best practice and private sector recommendations.

**Structuring options: which are the possible acquisition structures?**

We have identified at least 4 possible acquisition scenarios. We assume in the below that there is a joint venture partner for illustration purposes, although this is not strictly required except where the Project will also import and resell goods:

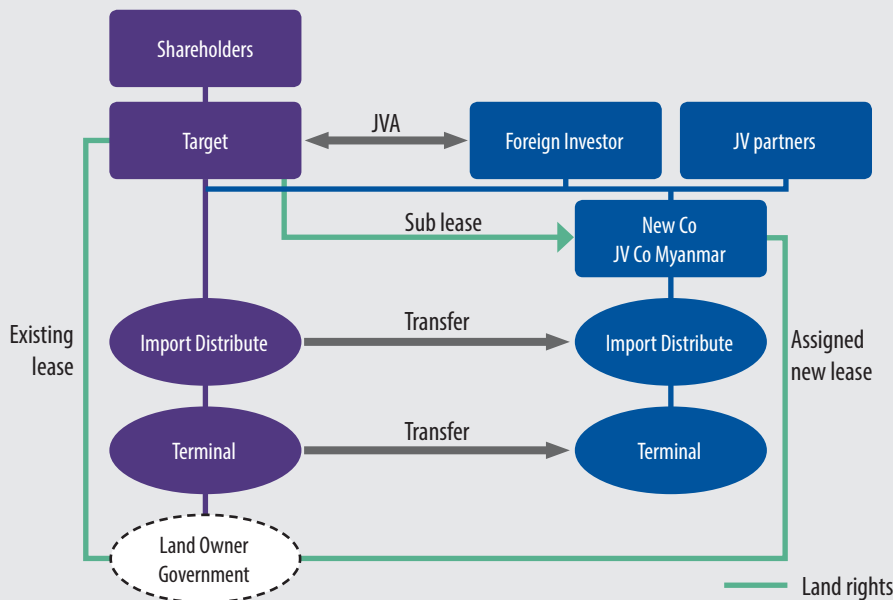
**1. The assets stay within Target, new JVCo will provide services only**

All assets and business stay in the Target and a JVCo setup by the investor and its JV partners will provide management services. In this case, the investor holds no leverage over equity or assets, although it may be possible to put in place a share pledge over Target shares and assets.



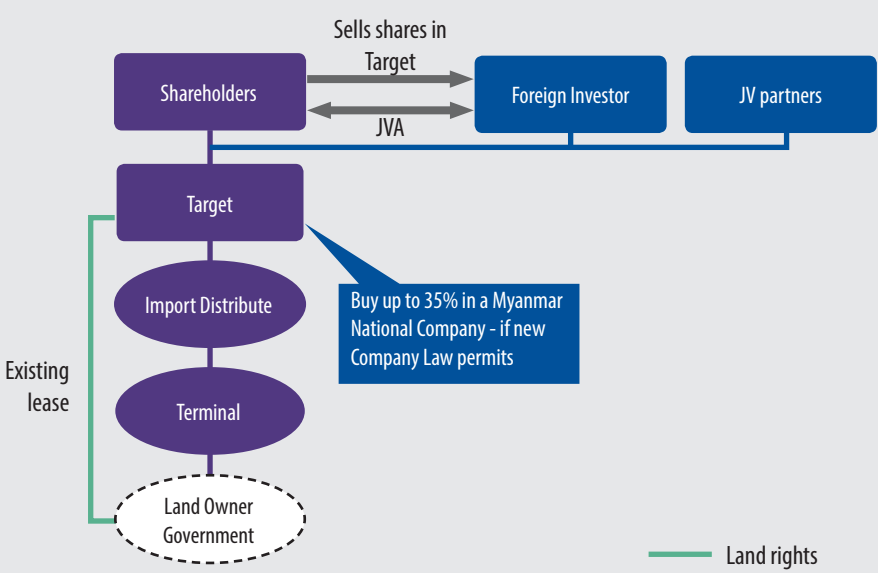
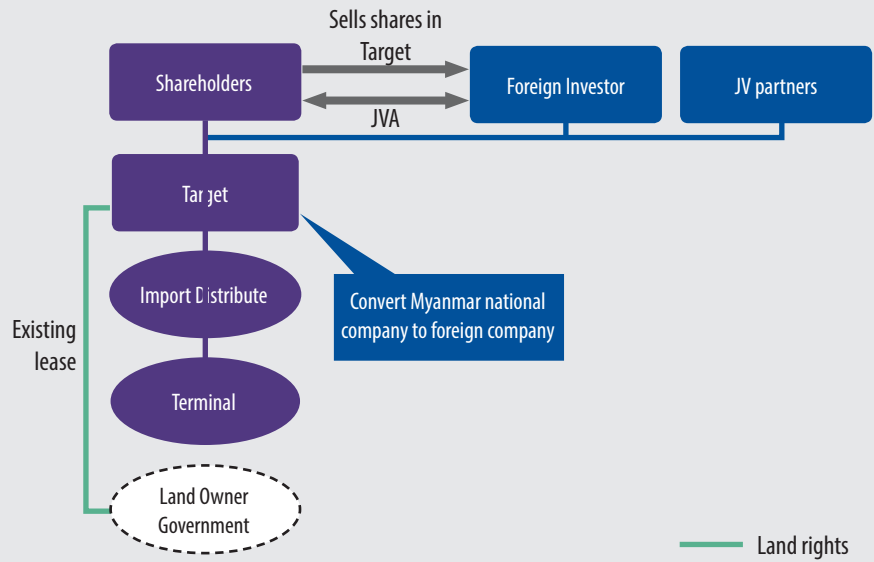
**2. Assets are transferred to a new JVCo**

The Target becomes the Myanmar shareholder of the JVCO. In this case, there is an “onshore” JVA (that is, the JVCo is a Myanmar entity). An offshore JVA is also possible, in theory.



### 3. Convert the Target into the JVCo

Used to be impossible, but we achieved the first one since last year (Note: VDB Loi succeeded in the first ever conversion of a Myanmar company into a foreign company without the creation of a new entity). This is not limited to 35%, in theory can be up to 100%. Target becomes the JVCo and a "Foreign Company" in DICA parlance.



### 4. Target becomes the JVCo, but stays a Myanmar company

This structure depends on the new Companies Law 2017 and can be implemented from August 2018. It is limited to a 35% rest can buy with call option. Target becomes the JVCo but not a Foreign Company in DICA parlance.

The big differentiator in all these structures is the need to assign or sublease the MPA Concession. In structures 1, 3 and 4, the MPA Concession stays where it is. No need to obtain MPA's approval for the transfer from Target to Newco or JVCo. In structure 2, though legally perhaps the cleanest, the MPA must approve the transfer or sublease if the structure is to proceed.

#### Offshore shareholding structure: Use Singapore as a holding jurisdiction?

An investor from China, Japan, Europe or India may consider structuring its shareholding in a Myanmar port project through an interposed Singapore holding structure. The Double Taxation Agreement between Myanmar and Singapore (the "Myanmar-Singapore DTA") provides in a number of benefits, particularly when it comes to capital gains, which are not available

in any other double taxation agreements. That, in combination with Singapore's facilities as a regional financing centre, results in Singapore being chosen frequently as a base to hold shares in Myanmar companies.

#### 1. Capital gain taxation

Capital assets include land, buildings and their rooms, vehicles, and work-related capital assets. The expression also includes shares, bonds, securities and similar instruments. Capital gains tax ("CGT") is applicable to both resident and non-resident taxpayers deriving a profit from the sale, exchange or transfer of capital assets in Myanmar.

The CGT rate for all taxpayers (except in the oil and gas sectors) is 10% and is imposed in either MMK or a foreign currency.



Under Article 13 of the Myanmar-Singapore DTA, Myanmar can tax capital gains realized by a Singapore resident only under three scenarios:

- i. Direct and indirect transfer of immovable property;
- ii. Transfer of a permanent establishment or fixed base; and
- iii. Transfer of shares in a local subsidiary in which the selling company owns at least 35 per cent and sells at least 20 per cent of its shares during any fiscal year.

We note that the lease of the port terminal could qualify as an immovable property right under the internal laws of Myanmar and hence also under the Myanmar-Singapore DTA (Art. 6 (2) Myanmar-Singapore DTA). Therefore, in case where the property of JVCo consists principally of the lease right, any capital gain realized on the transfer of shares in JVCo would be subject to 10% CGT in Myanmar because qualifying as an indirect transfer of immovable property.

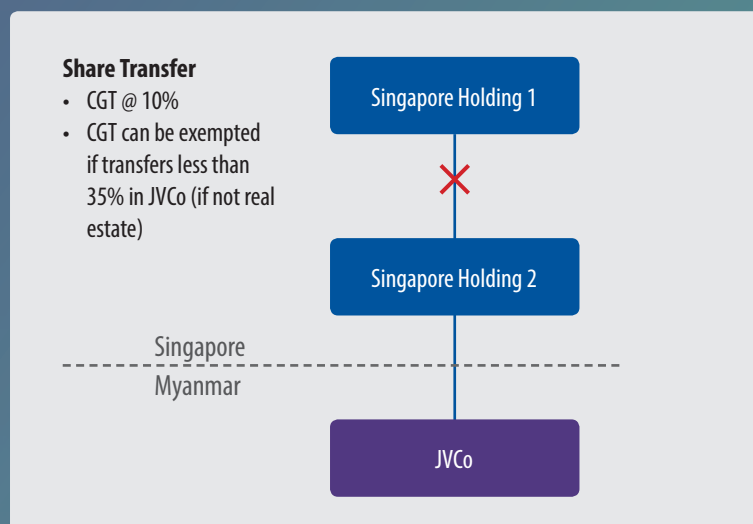
In all the other cases, the gain (if any) is only taxable in Singapore provided that the selling entity owns less than 35% shareholding in JVCo or transfers less than 20% during the fiscal year.

## 2. Double layer structure

The CGT provisions under Myanmar Tax Law are very broad and there is uncertainty whether the Myanmar CGT also applies to indirect offshore transfer of capital assets. We are aware that at the highest level of the tax authorities, some senior officials are of the view that Myanmar CGT can be applied to any realization of

gain on a Myanmar asset, regardless of some offshore entity is interposed. This has also been the view of tax authorities in China, India and Indonesia, so we believe that caution is of the essence in this respect.

If indeed CGT applies to an indirect offshore transfer, it will be useful or even crucial to be able to invoke tax treaty protection. For the investor to invoke treaty protection, the selling entity disposing of the shares that indirectly hold the Myanmar asset needs to be a tax resident of Singapore for tax purposes in the sense of Article 4 of the Myanmar-Singapore DTA.



To apply for benefits under the Myanmar-Singapore DTA, the tax authorities require a certificate of residence of the Singapore entity. We note that a shelf company without substance may not qualify as a tax resident of Singapore.

*“VDB really know the minutiae, but also the way that things really work in practice.”*  
- Chambers and Partners

VDB Loi and Phoe 'Bushido' Thaw Sinage Ceremony  
24 July 2018, VDB Loi Office, Yangon



Public Private Partnership  
15 June 2018, The Lake Garden - M



Power Purchase Agreement Workshop for MOEE  
9 May 2018, Nay Pyi Taw, Yangon



Union Tax  
10 May 2018, Pan P

Myanmar Energy, Infrastructure and Construction Update in Tokyo  
20 February 2018, Tokyo



Joint Ventures in Insurance Sector  
13 December 2017, VDB Loi Office, Yangon



Workshop for Myanmar Toll Roads  
Galleria Hotel (Sofitel), Nay Pyi Taw



Workshop on Law 2018  
Pacific Hotel, Yangon



Structuring Condo Projects Under the Condominium Rules  
27 February 2018, VDB Loi Office, Yangon



From MOA to Constitution  
15 December 2017, Shangri La Hotel, Yangon



Upcoming Deals and Opportunities in Myanmar  
13 September 2017, Park Royal Presidential Suite, Nay Pyi Taw



The New Law and Market Access for Petroleum Products in Myanmar  
18 August 2017, Shangri La Hotel, Yangon



# MYANMAR APPROVES 4 MAJOR LNG/ GAS-TO-POWER PROJECTS

The Ministry of Electricity and Energy (MOEE) has yesterday approved 4 large gas/LNG to power projects. The MOEE is using a new approval instrument which they call the “Notice to Proceed” (NTP). In a signing ceremony, the sponsors Total and Siemens, Zhefu and Supreme Trading, TTCL and Sinohydro and Supreme Trading were handed the NTP’s confirming the Government’s commitment to their projects. We saw several of these projects coming closer to some kind of an official approval, but the NTP issue was even news to some of the sponsors themselves up to last week.

Let’s go over the 4 projects that will reshape the landscape of Myanmar energy as we know it today.

## **Total & Siemens consortium at Kanbawk in Taninthary Region**

This one, we saw coming for a while. Probably the best known project of the 4 is the LNG to Power project Total and Siemens are developing at Kanbawk in Taninthary Region. Limiting ourselves to public information only, the project is reportedly a 1230MW gas fired power plant in Kanbawk as a prioritized project to be completed in the period between the fiscal years of 2019-2020 and 2021-2022 by the Ministry of Electricity and Energy. French energy giant Total has also started up their production from Badamayar project located offshore 220 kilometers south of Yangon in Myanmar. The Badamayar project involves the installation of a new wellhead platform connected to the Yadana production facilities, and the drilling of 4 horizontal wells to develop Badamayar gas field as a satellite of Yadana. The project also includes a new compression platform. Total is the operator of the project with a 31.2% interest. Its partners are Chevron-Unocal (28.3%), PTTEP (25.5%) and the national company MOGE (15%).

The project includes an FSRU, a CCGT facility and a transmission line from Kanbawk to Yangon. Currently there is a 230kV transmission line as far as Mawlamyine, but it does not continue to Tanintharyi Region.

The MOEE’s Dr Tun Naing said in parliament earlier this month that the first phase of about 600MW would be built in the 2019-22 period.

## **Ayeyarwady Region LNG to Power project**

One of the projects is a gas-fired power plant of 1,390 MW in the Ayeyarwady region, Patheingyi Township, Shwe Thauk Yan coastal region, near Milaunggyaik village tract and Jade Latt village tract. It is set to be completed in the period between the fiscal years of 2019-2020 and 2021-2022 according to the Deputy Minister of Electricity and Energy, Dr. Tun Naing. The project, valued at US\$2 billion, will be developed by three international firms; namely, Hong Kong-based Zhefu Group, Gunvor Group from Switzerland and Supreme Group of companies from Myanmar. Zhefu Holding Group Co., Ltd. is a Shenzhen-listed public company with a wide business scope, including hydropower, nuclear power, oil and gas, and microfinance, among others. The Supreme Group of Companies is based in Yangon, Myanmar, and its business is mainly water engineering, hydropower steel structures and construction.

Details of the investment were released by the project company along with environmental and social impact and assessment of the project by Ramboll Environ company from Denmark in Shwe Taung Yan Town at 4th July last year. Locals conveyed their general support for the project realizing that such a project could support the development of the region. Locals were also supportive of the condition that the Government remains responsible for the project.

Generated power from the project is intended to be transmitted to Ayeyarwady and Yangon regions for distribution and the project would include construction of large infrastructure including ports, breakwaters, FSRUs and transmission lines to Yangon. The investment companies said they will also implement CSR activities to help the development of the region's education, health, electrification and transportation sectors. Social media post suggest that the facility will be tied to Kyaukphyu, which is in Rakhine State but nearby to Mee Laung Chaing. Authorities say they will later extend the grid through Rakhine and Chin states and northern Ayeyarwady Region using power from Mee Laung Chaing.

#### **TTCL's LNG to power project at Ahlone, Yangon Region**

TTCL, a joint venture between Italian-Thai Development and Toyo Engineering Corporation is developing a 356 MW gas fired power plant as the second phase to their original 121MW combined-cycle power plant in Ahlone Township, Yangon. The project is listed in the priority projects to be completed in the period between the fiscal years of 2019-2020 and 2021-2022.

The company also planned to invest more than 6 billion to establish two coal-fired power plants, one in Mon state with production capacity of 1,280MW and one in Kayin State with production capacity of about 1280MW. The project in Mon state was suspended due to local opposition while their project in Kayin state is also facing the same problem. However, the Kayin project has proven to be controversial with critics pointing out that the MoU for the project, signed with the Kayin State Government, contravenes the Electricity Law. The Electricity Law requires large scale projects in excess of 30MW to be executed with the Union Government. Time will tell on how the \$3 billion ,1280 MW coal power plant project will unfold.

#### **Sinohydro and Supreme Trading for Kyaukphyu**

Not many details are known about a 135MW Gas to Power project slated for Kyaukphyu, Rakhine State. Kyaukphyu features a planned Special Economic Zone of 4,000 acres, developed by CITIC, and a deep sea port with heavy Chinese investment.

Based in Beijing, Sinohydro is one of the three brands of the Power Construction Corporation of China ("PowerChina"). Sinohydro partnered with GE in Sarawak for a CCGT project, illustrating its interest in gas fired generation in the region. Sinohydro was involved in Mong Ton hydropower project, on the Salween River, where Three Gorges and Sinohydro (alongside Egat International Thailand) were the lead investors. They were also involved in Hatgyi hydropower project in Kayin state and Yeywa hydropower project on Myitnge river in Shan State.



*"...very high standards."  
- Legal 500*

## A new procurement process Notice to Proceed (NTP)

The Ministry of Electricity and Energy (MOEE) is about to follow a new approval process for electricity generation projects, replacing the classic “Memorandum of Agreement” with a unilateral letter committing the Government to the project, calling this a “Notice to Proceed”. The change comes as both the Government and the IPPs seem to agree that the approval process for power projects takes too long. The Government wants projects to complete fast while sponsors complain about lack of decisions and stalled approvals. In a move illustrating the new drive forward, the MOEE changes up the approval process while giving its go-ahead to several large gas/LNG-to-power projects.

The established approval process in Myanmar (there are exceptions) takes, or took, the investor from a non-binding MOU, followed by a feasibility study, to an Memorandum of Agreement (MOA, the concession agreement, let’s say), the Environmental and Social Impact Assessment and finally to a Power Purchase Agreement (PPA) and other project documents.

How long does this process take? There are projects that have been stalled for over a decade for environmental and social (E&S) reasons, such as is the case with nearly all coal and the majority of hydros. Even if there are no particular E&S challenges, going from an MOU to an MOA and then all the way to a PPA can take, if we base ourselves on recent experience in Myanmar, at least three years or more. But the time period needed is really hard to gauge in Myanmar at this time. On the one hand, no MOAs or PPAs have been concluded, as far as we can tell, since March 2016. Progress has been slow.

### What is causing delays?

Drafting and negotiating MOAs and PPAs takes time in every country, even the ones where such deals are common for decades. It is not surprising at all that the challenges are greater in Myanmar, where until less than 5 years ago, there were no independent power producers (IPPs) at all. Even today, there are just a handful of IPPs in operation in Myanmar. For decades, producing, transmitting and distributing power was a pure state-owned operation.

There are many reasons why a power project is stalled, either at the Government side or at the sponsor side. In Myanmar, I have come across the following situations, in no particular order:

- There are questions in connection with the E&S situation of the plant site, and there is no timely decision on how to approach this;
- The project is on coal basis and the Government does not wish to proceed at this time;

- An MOU was granted years ago, but now, perhaps in the context of new plans or projects, it has become unclear if the Government still needs or wants a project of the nature anticipated in the MOU;
- The commercial terms are too far apart, such as on tariff, currency or guarantees;
- One of the parties is unsure whether to accept a proposed risk allocation or other legal terms in the contract;
- Different authorities defer to each other for key decisions on the project;
- There are legacy issues in connection with the project and the Government is unsure how to resolve them;
- The Government proposes to change a key element in the project, such as the site or the fuel type;
- One Government agency has approved the project but another one does not;
- The consortium of sponsors falls apart or requires renegotiation;
- The site is ill suited, which should have become apparent sooner;

### But it is also a question of focus

As was mentioned above, a lack of experience on the Government side, and I suppose a lack of familiarity with Myanmar on the sponsor side, is a commonly held notion to explain the slow progress. That is certainly true, but this is not the whole picture. A lack of experience, if there is a will to do so, can be fixed by bringing in outside skills. In Lao PDR, “the battery of South East Asia”, sponsors typically pay for the legal and technical consultants on the Government side while developing a project. Even without outside consultants for the Government, I can speak from personal experience that if the MOEE really wants a PPA agreed in a week, they can do it, and they have done so. On one project, the pressure was such at one point in time that parties basically locked themselves in a room in Nay Pyi Taw from 9 am to 8 pm for a

few days, and by the 4<sup>th</sup> day we had an agreed, balanced document. It is possible, also in Myanmar. So, it is just as much a matter of focus as of experience.

### **How do we fix this?**

We have just begun to transition out of a purely state-managed energy economy. The perceptions of the role the private sector should play in public infrastructure evolve over time. In the meantime, are there any practical measures we should consider to speed up the process? Over the years, some ideas have been floated such as:

- Abolish the MOA;
- Replace the MOA with a Letter of Intent or something similar;
- Change the PPA to include the MOA, signed by MOEE and EPGE;
- Draft and negotiate the MOA and the PPA simultaneously;
- Create template documents for the Government to follow;
- Create an inter-ministerial taskforce for power projects;
- Create a “deal team” with outside consultants.

### **Was the MOA abolished?**

Skipping the MOA altogether has in my experience been raised in a number of more urgent power projects, where electricity would have to be delivered in a manner of months. Remarkably, in my experience it is often the MOEE raising the prospect rather than the sponsor.

The MOA functions in Myanmar as a framework concession agreement between the sponsor and the MOEE. It is the first and sometimes the only legal document that is signed between the sponsor and the actual Government. In power deals, the Power Purchase Agreement (PPA) is concluded between the EPGE and the sponsor. The EPGE is not legally the same as the Government, although it is a

State-Owned Enterprise.

You may be able to skip or drop the MOA, but it is likely sponsors still need some document to be signed by the Government. The EPGE cannot approve a power project, only the MOEE can do so, with cabinet approval. So, if sponsors want a document at some stage, that they have or will receive such permission, either during the planning or before financial close, it will have to be with the MOEE. Besides, the Government has many obligations in a power deal which the EPGE, as a SOE, can simply not accept or deliver. The Government needs to approve land use, allow the import of plant, support tax incentives, allow borrowing from overseas, permit extracting profits, etc.

So, yes, the MOA can be abolished, but we would not save as much time as we think. It would have to be replaced anyway, sooner or later, with another document containing the concession rights from the Government, perhaps called a “BOT Agreement”.

Anyway, sponsors need to be reassured that they have a good chance the Government will approve their project before they are willing to spend a few years in development. That is one of the roles that the new NTP plays. It confirms the commitment of the Government to proceed with the project.

### **MOEE and EPGE both sign the PPA?**

A variation on cancelling the MOA would be to expand the PPA, and to have it signed not just by the EPGE but also by the MOEE itself. In a way, the PPA would integrate both the MOA's concession and the sale of electricity arrangements.

There are a number of problems with this. By merging the MOA and the PPA, with two signatories,

each Government party would normally speaking have to take on the other's obligations as well. The MOEE does not want to have the obligation to buy electricity and the EPGE does not want to have the obligation to help secure tax incentives. That can all be addressed by detailed drafting, I suppose, but what would be the point. As long as you still have pages and pages of dense text to review and agree on with two different Government agencies, would it really save time if those pages are in one or in two instruments? Probably not.

And then there is the lack of protection for the sponsors. The PPA will take the longest to draft and negotiate. With the MOA provisions only coming into force at the very end of the approval process, sponsors will have nothing to evidence the project is theirs until years later, when all the details of the PPA have been straightened out. Again, the NTP resolves this problem.

It's a valid thought, but given that we would have to split out the

obligations of the MOEE and the EPGE, what you save in sheets of paper may be lost again in complexity.

**Draft and negotiate the MOA or the NTP and the PPA at the same time?**

There really is no deal until all the project documents are in place. So, is doing the MOA and the PPA on a consecutive basis unnecessarily adding time to the process?


The longer you wait with commencing PPA negotiations, the longer it will take to get to a final agreement. There is nothing wrong with starting the PPA negotiations together with the MOA talks. We have tried this on some deals. We tried attaching a PPA to the MOA, on one deal, and we tried attaching a "term sheet" of the PPA as an annex to the MOA on others. In yet other power projects, we tried incorporating more commercial terms actually into the MOA. But in many cases, sponsors will sooner or later be tempted to keep the MOA or the NTP fairly basic and to just go for

the confirmation that "they have the project" as soon as possible, long before the much more detailed other project agreements are completed.

In conclusion, in practice you will likely have an MOA or now an NTP all done long before the PPA is in agreed state. Yes, it will save time to start with the PPA as soon as possible, but that does not necessarily prevent the MOA from being signed. What would help, is to include a few more commercial terms of the PPA in the MOA or the NTP, as many MOAs in fact do. But it's not really a streamlining solution because, by definition, if those terms are controversial, they will delay both the MOA or the NTP and the PPA anyway.

**Standardize the all power documents?**

As someone who was able to observe the granting of concessions of the onshore and offshore oil and gas blocks from up close and personal, I must say the differences with the process in electricity are massive. The Production Sharing



*"Edwin is very good at dealing with very difficult issues; he can push things through, make things work."*  
- Chambers and Partners



Contracts (PSC) are also complex documents. But based on its experience of many decades in dealing with private sector oil and gas companies, the MOEE scarcely wastes a few months to wrap up a PSC with an oil and gas company, compared to years with PPAs. The context is indeed very different. Bidders for oil and gas blocks know going in that the text of the PSC will virtually not be renegotiated. The biddable terms are laid out from the outset, and even the parameters of those are well set out by the MOEE. And, the standardization in oil and gas PSCs works because, although they are not perfect, the operators consider the risk allocation in the PSC to be at least more or less of international standard.

No such luck in electricity, until now. Most commercial issues have not been made uniform. The tariff, escalation, price structure are all agreed on a case by case basis, for now. Of course, there are so few PPAs that one really cannot speak of any uniformity yet. But given that at least the five March 2016 PPAs are all based on the

same template, the differences in commercial terms which nevertheless exist are remarkable. But, there is also reason for optimism. Many other important issues, such as force majeure, termination payments, disputes settlement are less re-litigated in PPAs thanks to the Myingyan effort of World Bank and IFC. Not everything from the Myingyan deal is being reused, but some things are and that is progress.

Standardizing the commercial terms, where possible, and the body of the MOA, NTP and PPA instruments is an obvious way to reduce the lead time on new projects. In theory, once the template has been agreed, the projects can just fall into place.

This is not a new insight. Many development partners have tried to create templates for contracts to be used in the Myanmar electricity sector. I know at least of 5 sets of templates, from various development institutions. And although we should be grateful of their contribution, after the 5th "template" for the same contract, we are going to have to

call it something else besides a template. Drafting a model PPA is a lot easier than getting the various Government agencies to actually agree and then stick to what it says. But without that, it's value is very limited.

In conclusion, yes, standardization of legal and commercial terms has already worked in Myanmar and is certain to deliver additional time savings. But for this to work effectively, the different Government agencies involved need to agree with and indeed adopt the template's terms. Some of the template efforts do not attempt deliver that, for one reason or another, but we certainly look forward to improvement in that area.

### **Create an Inter-Ministerial taskforce to develop and negotiate power projects**

Projects encounter delays if the Government decision makers are spread out over different departments and Ministries. To some extent we have always seen this in Myanmar between the MOEE (which negotiates



and signs the MOA and some other project documents) and the EPGE (and its predecessors), which negotiates and signs the PPA. On the oil and gas side this was in my experience less noticeable, although the MOGE is the signatory of the PSCs as well.

This problem of administrative coordination has become more prominent in the MOEE and Ministry of Planning and Finance (MOPF) relationship, and in the MOEE and State or Region Government relationship (where the rather counterproductive 30MW threshold set by the Electricity Law came into play in 2014).

It is not uncommon internationally that different agencies are involved in developing energy projects. A tested measure to curb possible delays resulting from this is to create an inter-Ministerial task force to push and facilitate decisions in an efficient manner. In fact, we have seen this happen in Myanmar on several projects where either on the Government's or on the sponsor's request, meetings happen simultaneous with the different Ministries involved. These case-by-case examples are a good basis to build a more organized, structured approach for energy projects. You need not just the meetings, but clear authority on who decides what, deadlines, one leadership role, a structured process for the agencies to follow so the pace is kept.

### **Create an experienced "Deal Team" to assist the Government's taskforce**

The process of developing a project would go a lot smoother if both the Government and the sponsors are helped by experienced financial, legal and technical consultants. For things to move fast, the "deal team" must have considerable experience with private invested and financed power projects, something which is simply new to Myanmar. The Government must have such resource available and, equally important, be comfortable to rely on it for all but the most strategic policy decisions. Politics aside, an efficient deal team can accelerate the deployment of bankable infrastructure manifold. As part of the regulatory reform for financing Public Private Partnership projects, we have proposed the formation of a such a deal team to facilitate a "crash-program" in Myanmar infrastructure.

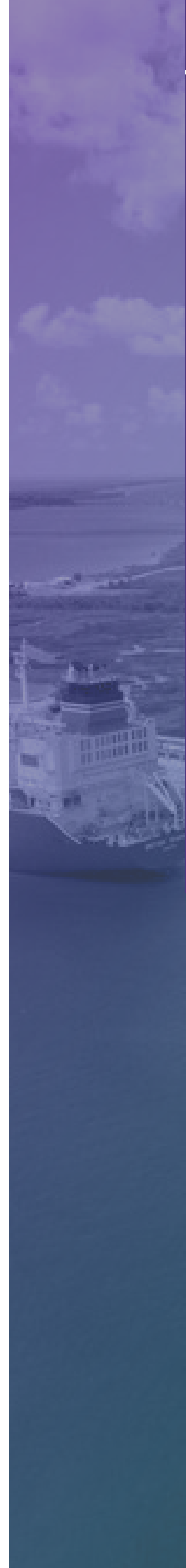
Resources to fund such a deal team are

readily available internationally and are minute compared to the benefits in GDP that result from a boost in the country's energy infrastructure.

### **In conclusion**

Both the public sector and the private sector stakeholders agree that the current approval process for power projects is, the way it works at present, not well suited to meet the extraordinary needs for Myanmar to catch up its energy infrastructure. Remodelling an airplane during mid-flight is always tricky, but there are some viable tested options available that I think should be explored:

- 1. More templates, and ask that the Government would publish them:** Current efforts underway by development partners should be coordinated within the development community (this has indeed happened to some extent) and with the private sector (this is underway at least for hydropower). The templates should have the Government's buy in to such degree that they can be published as official (but perhaps formally non-binding) model MOAs and PPAs.
- 2. Standardize commercial terms, at least to a large extent:** Not only the text but also the commercial terms should, to the maximum extent possible, be uniform and published, much like the commercial terms of Myanmar oil and gas PSCs. Something will always be left to case-by-case negotiations, but we want to narrow down the scope as much as possible to make individual projects go faster.
- 3. Adopt a "deal team" approach:** Delegate the power to negotiate nearly everything to a deal team with a decision maker from MOEE, MOPF, MONREC and the state/region involved, and rely on experienced consultants to do all the heavy lifting.



## EDWIN VANDERBRUGGEN DISCUSSES MYANMAR'S GROWING POWER NEEDS WITH CHANNEL NEWS ASIA



September 30, 2018

In light of the recent dam flooding in central Myanmar, Edwin Vanderbruggen discusses some of the problems of Myanmar's neglected infrastructure, and the opportunities for new hydropower projects in the country. As the government has improved environmental, social and safety standards around power projects, the country has started to attract new kinds of investors and partnerships that could help alleviate these kinds of disasters.

## MONREC ISSUES FIRST EVER ENVIRONMENTAL COMPLIANCE CERTIFICATE

The Ministry of Natural Resources and Environmental Conservation (MONREC) has just issued what we were told is their first ever Environmental Compliance Certificate (ECC). The ECC is in a letter format and confirms that the applicant's Environmental and Social Impact Assessment is in compliance with the requirements of the Law on Environmental Conservation (LEC). It is issued by the Minister's Office of MONREC.

Even though the LEC and its implementing regulations require an ECC before commencing business activity, in practice no ECC's were yet issued. This caused various difficulties for investors, who had trouble evidencing they were in order with Myanmar's environmental laws and regulations.

The ECC, which was issued on a power project advised on by VDB Loi, states a number of ongoing conditions the investors need to respect, as well as certain reporting requirements.

# TOLL ROAD PUBLIC PRIVATE PARTNERSHIPS PROJECTS IN MYANMAR

The Union Ministry of Construction, in coordination with the Union Ministry of Transport and Communication, and the Yangon Regional Government seeks to implement its first ever elevated expressway, the Yangon Elevated Expressway. The Government is planning to invite tender bidders this year.

The elevated expressway will run 40 km start from Strand Road in Down Town to Mingalardon Industrial Zone at the outskirts of Yangon, east of Yangon's Inner Ring Road, and 15 km from No.3 Road of Mingalardon Industrial Zone, connecting to Yangon-Mandalay Highway, and further to Hantharwady International Airport which is in the implemented plan.

Against this backdrop we have provided this preliminary issues memo to highlight some of the key legal and practical issues to consider for sponsors, lenders and Government stakeholders.

## **Situation of existing toll roads in Myanmar**

Myanmar has an exceptionally high percentage of toll roads among developing countries, 22,000 km of road in total are tolled in one way or another with private sector involvement. On most trunk roads in Myanmar users have to pay some kind of toll. There are also 170 tolled bridges. The first BOT contracts for toll roads were signed in 1996 (the AH14 Mandalay-Lashio-Muse). Approximately 90% of the roads with more than 1,000 vehicles per day, not including the expressways, are under BOT contracts. BOT roads are 14% of the total trunk road network and 31% of the national highway network.

There are two types of toll roads in Myanmar: BOT roads and "auction roads". In a BOT road project, the private sector contractor invests in road improvement and repair. With auction roads, there is some type of a tax farming structure, where the private contractor just operates the toll booth in return for an advance payment to the Government. Under this regime, the operation of the toll gates is auctioned off to interested bidders at 80% of the estimated traffic volume multiplied by the toll rates for the different vehicle types. Once the revenue exceeds the 80%, the private sector partner realizes a profit. There is no real bidding, but rather a lottery process.

Toll rates are determined by the Department of Highways' (formerly the Public Works Department) ("DOH") Production Section, and are reviewed every 2 to 4 years, or are set by the BOT contract on a "to be negotiated" basis. BOT toll rates are currently between 0.03US\$ (e.g. for saloon type cars) to 0.22US\$ (e.g. for very large trucks) per km, depending on the vehicle type, with rates for "auction roads" at one third or one fifth of BOT toll rates.

A thorough ADB study published in 2016 has observed that while user payments in Myanmar are large (estimated at 120M\$ per year), users are not getting value for money (ADB, Myanmar Transport Sector Policy Note Trunk Roads, 2016 p. 90). Most BOT roads are in poor or bad condition, sometimes making it necessary for users to slow down to as much as 20 km/hour. Improvements such as road widening, while agreed in the BOT contract, are not always implemented or enforced although tolls are still collected, the ADB study noted. Most revenue is concentrated on 20%-25% of the road network with significant traffic.

## **Myanmar has a lot of experience with toll road bot contracts, but not the right kind**

The template BOT contract used by the DOH has been described by the ADB as being "deeply flawed" and "often far removed from best practice". This is the case both from a legal and a commercial perspective. Some examples:

- The BOT contract requires the contractor to repair and widen the road in return for collecting toll for 40 year, which can be extended with three periods of 5 year.
- The contractor is required to maintain the road for the entire contract term, and to widen the road again in case the traffic reaches certain thresholds. However, the ADB estimates that the profitability for contractors is for most roads very low. The economics are not viable, which is probably the main reason for the lack of investments;

- The contractor provides a performance guarantee of 1% of the estimated investment cost;
- The Government receives a share in the gross toll receipts (between 5 to 20%, depending on the years of the contract);
- The Government is entitled to terminate the contract without compensation in case the contract defaults on the construction or maintenance obligations;
- There is a flawed termination payment framework; and
- Disputes are settled through negotiation or, failing agreement, by arbitration in Myanmar.

The legacy experience with domestic BOTs is not helpful to the socialization of a new PPP document in accordance with international best practices. We have extensive experience in explaining complex project documents to Government officials and persuading them of the benefits of an international standard document. These exercises generally take much longer than stakeholders expect.

#### **Flexibility will be needed in the project structure**

There are no specific laws on PPP or other laws or regulations imposing any particular structure for the Project in Myanmar. The Government is to a large degree free to decide how to structure the Project. For the IFC's project on creating a Model Toll Road PPP Document, a very typical structure for toll-road PPP projects was assumed and proposed. It includes the formation of a Concessionaire SPV project company concluding a concession agreement with the Ministry of Construction, Government support and a separate O&M provider. In the structure, the SPV will collect toll fees from users and, potentially, an availability payment from the MOC.

Based on our experience we believe it is entirely possible, even likely, that the MOC will consider several different structuring options before settling on a final solution. As you know, the MOC itself is still considering different options of implementing public infrastructure projects, such as through ODA loans in combination with operating concessions. Furthermore, other Government stakeholders will weigh in on the documents and the structure, such as the MOPF and the Attorney General Office. We have had experience on projects where this happened in relatively late stages, after documents have already been issued in the context of a tender.

*"...Highly praised by peers and clients alike as a seasoned and informed professional."*

*- Asia Law*

## How are government counterparts likely to perceive certain key commercial terms?

Many of the key factors of the Project have come up in prior infrastructure projects with private sector investment. Our experience in negotiating, explaining and documenting these will be a valuable asset to the Project, such as:

- **Availability payments versus use payments?** It is generally difficult to understand for Government officials that they might have to pay for something even if it is not being used. This principle was accepted, for example, in only 1 out of 5 PPAs signed in 2016 (we worked on 5 out of 5; 4 times for the sponsors, 1 for the lenders). But to some degree this is about semantics, and on how the matter is explained. On the PPAs without capacity payments, for example, instead a “minimum guaranteed offtake” was agreed, which was to some degree the same in combination with a comprehensive FM framework.
- **Foreign currency tariff?** This issue is closely watched by the Ministry of Planning and Finance (MOPF), and the Central Bank of Myanmar, which are concerned about further decline of the MMK. A new Directive of the Central Bank in December 2016 has put more pressure on Government departments and State-Owned Enterprises to pay only in MMK. But, in our recent negotiations with the MOPF in connection with a number of projects have resulted in a more pragmatic “multi-currency approach” (MMK and USD).
- **Foreign currency-linked toll fees?** Given the sensitivities associated with increasing toll rates for Myanmar users, it may be politically difficult to agree on formulas where the toll fees get hiked based on exchange rates. Nevertheless, lenders will have to be reassured about the foreign currency debt service, probably through some sort of Government support mechanism.
- **Bankable termination payments?** On several infrastructure projects, even when we were acting for the Government, we encountered significant push-back on termination payments. On the Yangon and Mandalay Dry-Ports PPP, for example, we were unable to get the Union Ministry to accept a bankable solution. On most of the energy deals we worked the Government did accept a bankable termination payment.

## Land rights of the project

The land use rights of the projects, as an elevated expressway, can be structured in different ways under Myanmar law. Chiefly, a right of way (ROW) in Myanmar can be created through a contract of license (which is not an immovable property right), an easement (which is an immovable property right), a long term lease (which is also an immovable property right in Myanmar law) or a transfer of a land use right (which is an immovable property right). The practice to date for oil and gas pipelines in Myanmar, all of which are “owned” by the MOGE, has been to create a ROW through a transfer of land use rights. In other fields such as for telecom towers, which are nearly all foreign owned companies, long term leases have been the standard, while for water pipelines and fiber optic cables owned by foreign owned companies, licenses have been used. To date, existing BOT contracts for toll roads, which are all agreements with local parties, do not provide in any separate right for the company to lease the land or own the construction on it.

One part of the problem is to establish in Myanmar which Government entity is the owner of a particular plot of land where one or more pillars will be erected. This should not be underestimated. In practice, there are rarely documents or surveys available to identify which entity, union level, state/region level or municipal level, actually holds the authority to provide a right of use to the Project company.

If the Project wishes to create an immovable property right which is opposable to all third parties, a registered lease is the most practical solution. However, this is unprecedented in Myanmar for publicly used assets. A lessee may not be able to close the toll road for public use, even if that is a common right for lessees in general.

Instead, the (proper) Government land owner can create a contractual right (a license) for the Project company to erect buildings on the land of the owner. The Project company would have the

contractual right to use the buildings for the duration of the contract. Such right can be assigned to a third party lender under the Transfer of Property Act.

### Direct agreement with the lenders?

So far only one project, an IPP has sought to obtain a direct agreement between the lenders and the Government. The negotiation was extremely lengthy. This issue must be handled differently on other

projects to avoid extreme delays. Furthermore, there is some uncertainty as to the boundaries in the scope of application of the Public Debt Management Law 2016 for “guarantees”, which require approval from the National Assembly. Although we think it is likely that a document establishing a contingent liability towards the project company does not fall into the scope of application, there is always the chance that there are different views on this.

### Overview of Tax and Other Aspects

1	Corporate Income Tax rate	25%
2	Corporate Income Tax holiday	3, 5 or 7 years depending on the location of the project in Myanmar
3	Import of capital goods, plant	Exempt from import taxes and customs duty during the construction period
4	Indirect tax on service provided by the project company to its customers	5% Commercial Tax, can offset input Commercial Tax on expenses
5	Additional income tax incentives	Reinvested profit, accelerated depreciation, profit from export
6	Dividend distribution	No withholding tax, no restrictions to dividend distribution
7	Tax on interest paid to lenders	Interest paid on cross border loans 15% withholding tax, reduced to 10% or 8% under some tax treaties. No withholding tax on local loans.
8	Foreign ownership restriction	No requirement for a local partner on most infrastructure activities
9	Debt to equity ratio	Generally 70/30 to 80/20 debt/equity permitted, special cases may be allowed
10	Foreign nationals as directors	Permitted. At least one director should be a resident of Myanmar, but no requirement for any Myanmar nationals on the board of directors
11	Local content requirement	Generally not applicable
12	Loss carry forward	3 year. Losses during tax holiday cannot be carried forward

*“..vast knowledge of the local culture and legal framework, and policies of the country.”*

*- Legal 500*

**Table: Trunk Road Lengths by Surface Type and State and/or Region, 2014**

State/ Region	Cement Concrete		Asphalt Concrete or Penetration Macadam		Water-Bound Macadam		Gravel		Earth		Track		Total	Of Which Paved
	km	%	km	%	km	%	km	%	km	%	km	%		
Kachin	25.3	1	587.9	16	541.9	14	970.7	26	967.4	26	693.4	18	3,786.8	16
Kayah	–	0	472.0	49	60.5	6	100.0	10	329.1	34	0.0	0	961.6	49
Kayin	–	0	831.8	46	87.6	5	176.2	10	723.5	40	0.0	0	1,819.2	46
Chin	–	0	555.6	28	528.3	27	–	0	861.6	44	26.6	1	1,972.0	28
Sagaing	32.2	1	2,091.5	47	519.9	12	716.0	16	1,124.2	25	0.0	0	4,483.8	47
Tanintharyi	–	0	744.7	55	323.3	24	206.6	15	81.9	6	0.0	0	1,356.5	55
Bago	263.2	12	1,467.8	66	199.6	9	122.3	6	158.1	7	0.0	0	2,211.0	78
Magway	–	0	2,586.3	73	341.4	10	352.3	10	260.7	7	0.0	0	3,540.7	73
Mandalay	203.0	9	1,861.6	85	98.8	4	12.2	1	23.1	1	0.0	0	2,198.7	94
Mon	–	0	729.8	83	2.4	0	65.4	7	82.3	9	0.0	0	879.9	83
Rakhine	36.4	2	991.4	53	439.3	24	182.3	10	215.9	12	0.6	0	1,865.8	55
Yangon	97.5	9	787.4	75	87.4	8	12.1	1	59.9	6	0.0	0	1,044.3	85
Shan (East)	2.2	0	2,116.3	55	336.2	9	799.3	21	563.0	15	0.0	0	3,817.0	56
Shan (South)	57.3	1	2,154.1	43	531.1	11	923.3	18	1,382.9	27	0.0	0	5,048.7	44
Shan (North)	6.4	0	632.6	30	368.9	18	419.7	20	660.4	32	0.0	0	2,088.1	31
Ayeyarwady	19.3	1	1,592.2	61	158.8	6	488.6	19	361.8	14	0.0	0	2,620.8	61
Nay Pyi Taw	191.5	44	223.7	52	–	0	–	0	18.5	4	0.0	0	433.7	96
Total (2014)	934.4	2	20,426.8	51	4,625.3	12	5,547.0	14	7,874.4	20	720.6	2	40,128.6	53
Total (2011)	638.4	2	16,622.9	44	5,561.8	15	5,636.0	15	6,087.1	16	1,409.8	4	37,785.3	46

– = not available, km = kilometer.

Source: ADB estimates based on Ministry of Construction data.

### Progress on the documentation

On some deals, such as Hanthawaddy International Airport, the parties were unable to move the documentation forward fast enough. Delays, indecision and a number of tactical errors at the side of the sponsors resulted in a near termination of the deal. On more recent projects we mitigate this issue by preparing documents way in advance, by simplifying international precedents and by drafting Myanmar-language summaries and term sheets.

### The new landscape for the sovereign guarantee

The legal framework of Sovereign Guarantees is in full development in Myanmar. In following of the Public Debt Management Law 2016, a wholly new legal context exists for such guarantees. Under this law, an actual sovereign guarantee in the sense of this law, can only be issued by the MOPF and within the terms and conditions set by the National Assembly.

In practice, line ministries including the MOEE have issued contractual commitments covering payment obligations of their SOEs in the guise of a Build-Operate-Transfer contract. Such a BOT has the effect of a guarantee. But, in fact, this structure was only done for one particular power project, and not for any of the others. So far.

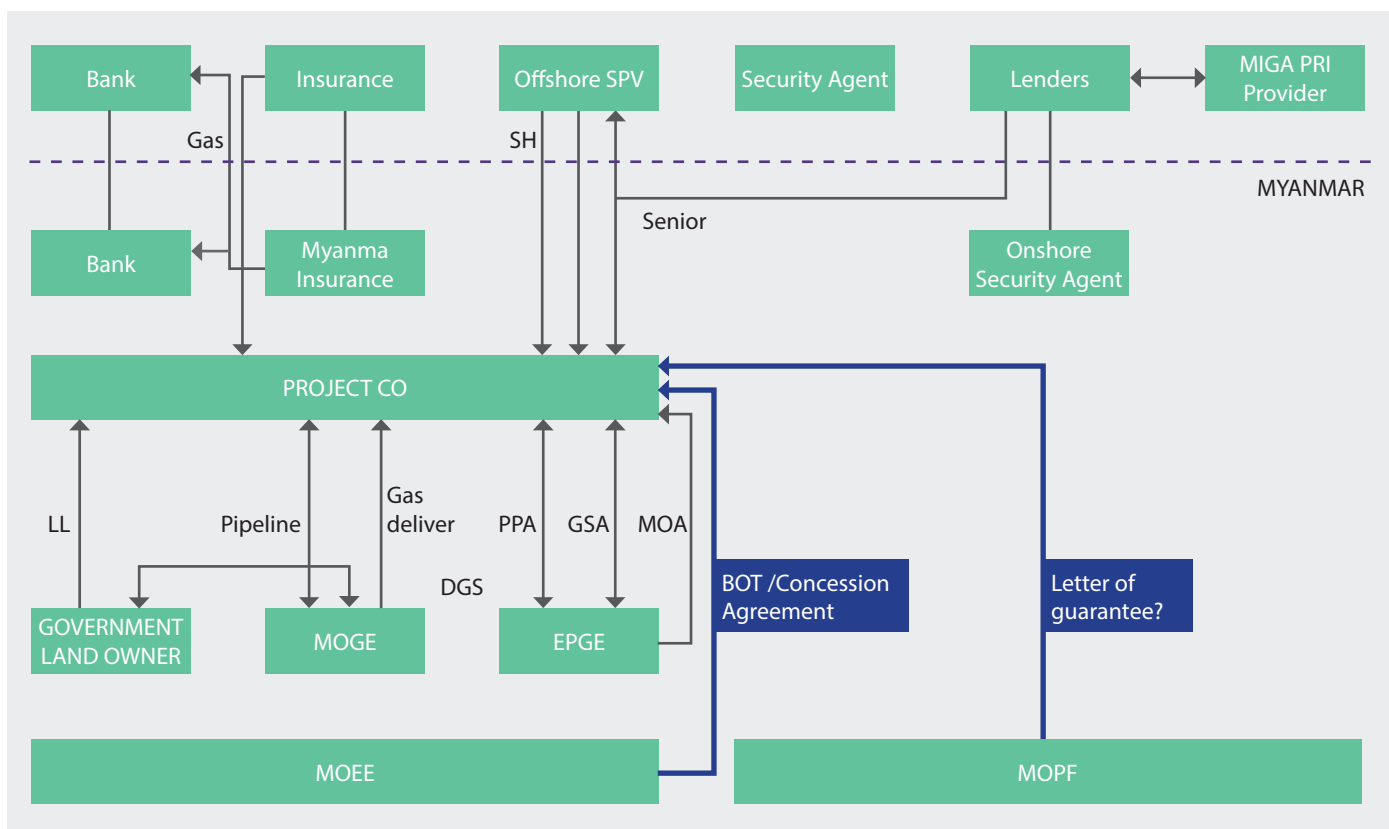
The MOPF is now in the late stages of considering an implementing regulation under the Public Debt Management Law 2016 for the financing of PPP projects. It contains a procedure, conditions and various other terms for issuing sovereign guarantees in Myanmar. The guarantee structure would use both contractual commitments (by the line ministry) and a letter of guarantee by MOPF, the letter acknowledging and confirming the contractual commitments of the line ministry (Note: VDB Loi drafted this regulation, and works with MOPF to finalize it).



Figure: Highways Traffic Load, as of 2013 (Vehicles per day)



Source: ADB estimates based on Ministry of Construction highway traffic data.



In the below structure, it is illustrated how the Government guarantee would work in a power project setting. The obligations of the Government contract parties EPGE (the electricity utility) and the MOGE (Myanmar Oil and Gas Enterprise) are backed by the relevant Union Ministry, in this case the MOEE (Ministry of Electricity and Energy) and confirmed by the guarantee issued by the MOPF. In the case of a toll road project where the Ministry of Construction is the contract party providing the concession, and not a state-owned enterprise such as EPGE or MOGE, the structure used for power projects will have to be adjusted.

Based on the most recent insights, the Government guarantee structure might, if approved thus look as follows:

1. **A contractual commitment by MOEE to pay on behalf of EPGE** in a project document between the Sponsors/the Project Company and the MOEE, most likely a document called the Concession Agreement or Implementation Agreement or MOA; and
2. **A letter of guarantee issued by the MOPF** under the (now in draft) Regulation on the Financing of PPP Projects.

### Investment incentives

Foreign investment in Myanmar is governed by the Myanmar Investment Law, which requires large projects such as PPP Projects to obtain an investment

license, known as a Myanmar Investment Commission (“MIC”) Permit. The MIC Permit is the key to investment incentives, including land use rights and tax benefits.

The MIC has issued a list of promoted investment activities which are eligible for tax incentives. The construction of new highways appears on the list, meaning investors can apply to the MIC to receive tax benefits including a corporate income tax holiday. The duration of the tax holiday depends on the location of the project, with investments in less developed zones benefiting from a 7 year holiday, while investments in urban areas benefit from 3 years. This holiday is not triggered until the project company is earning an assessable income, so often the holiday period will start from the COD of the project. The second type of tax exemption is an entitlement for the project company to apply for customs duty, commercial tax and advanced income tax exemptions on its imported machines, equipment and materials during the construction period of a project.

To obtain an MIC Permit, a detailed proposal of the project as well as various government approvals must be submitted to the MIC for consideration. Once a proposal is submitted to the MIC, a decision is usually made within 60 days. The Permit will set out the construction time line, any extensions to which will require approval from the MIC. Once the Permit is issued, an application for the eligible tax incentives can be made.

**Table: Actual Truck Loading and Axle Damage Factors**

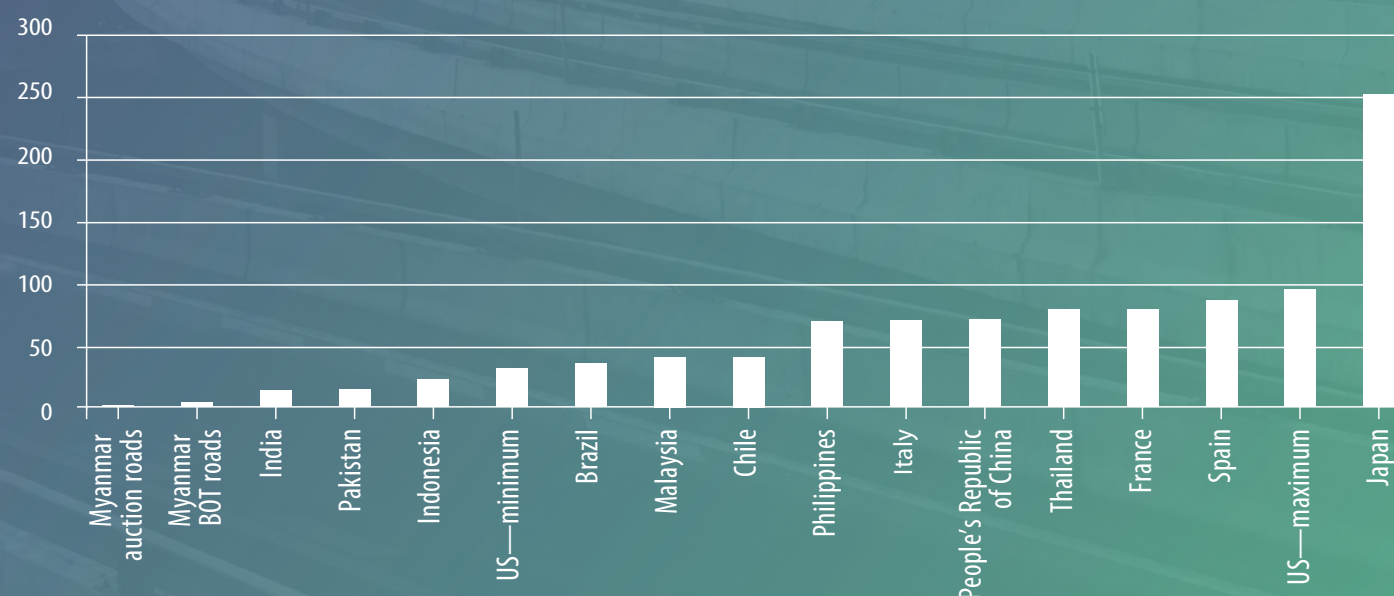
Responsible Agency	Length (in km)	Responsible Agency
National Highways		Ownership: Central government management responsibility— Ministry of Construction
Expressway	590	
International communication roads	5,918	Execution: Department of Highways (Public Works until 2015)
Union roads	4,837	
Region and states connecting roads	4,595	
<b>Total National Roads</b>	<b>15,940</b>	
Region and State Roads		Ownership: Central government management responsibility— Region and state
District and township connecting roads	11,824	
Township and villages connecting roads	12,309	Execution: Department of Highways
<b>Total Region and State Roads</b>	<b>24,113</b>	
Major city roads	9,475	Yangon, Mandalay, and Nay Pyi Taw City Development Committees
Army roads	10,426	Directorate or military engineers
Other roads	676	Ministry of Electrical Power
Rural Roads	Total 96,780	
	48,696	- Department of Rural Development (Ministry of Agriculture, Livestock and Irrigation)
	36,800	- Department of Progress of Border Areas and National Race Development (Ministry of Border Affairs)
	11,500	- Town development committees
<b>Total</b>	<b>157,059</b>	

km = kilometer.

**Note:** In this table, the national and region and/or state road length was computed based on the recorded length of each road as appearing in Ministry of Construction records. Figures obtained are different from aggregated Ministry of Construction records.

Source: ADB estimates based on Ministry of Construction data.


### Toll Rates for Cars (MK per km)



BOT = build–operate–transfer, km = kilometer, MK = Myanmar kyat, US = United States.

Source: ADB estimates compiled from various sources.

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