

THE ENERGY
REGULATION
AND MARKETS
REVIEW

SEVENTH EDITION

Editor
David L. Schwartz

THE LAWREVIEWS

THE ENERGY
REGULATION
AND MARKETS
REVIEW

SEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
David L Schwartz

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGER

Pere Aspinall

ACCOUNT MANAGERS

Sophie Emberson, Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCHER

Arthur Hunter

EDITORIAL COORDINATOR

Hannah Higgins

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Claire Ancell

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-37-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

MYANMAR

Krishna Ramachandra, Rory Lang and Bei Wang¹

I OVERVIEW

The Myanmar energy market started legal reform in 2011, when the country first opened up to foreign investment after decades of isolation. The recent optimism in Myanmar's economy is largely attributed to its abundant untapped resources, particularly oil, hydropower and natural gas. Presently, Myanmar's energy sector accounts for more than half of its export earnings and foreign direct investment.

On 15 January 2018, in Myanmar's parliament, the Deputy Minister for the Ministry of Electricity and Energy (MOEE), Dr Tun Naing, announced that the MOEE has committed to provide an additional 3,600MW in Myanmar within the next four years. The MOEE announcement is attributed to an expert ministerial report indicating that the consumption of electricity in Myanmar is expected to increase to 5,774MW by 2022 from the present rate of 3,189MW. Demand for electricity in Myanmar has progressively increased since 2012.

The MOEE has developed an aggressive plan to reach this goal. The plan includes:

- a* upgrading existing power plants;
- b* developing 10 new gas and hydropower plants located in Kengtawng, Upper Yeywa, Kyaukphyu, Kanbauk, Ywama, Patolon, Myanaung, Thilawa and Mee Luang Chiang by 2022;
- c* developing an additional 500 new transmission lines and substations from power generated by the following power plants, to be completed by 2019: the 4MW Yarzagyo hydropower plant, the 40MW Minbu solar power plant, the 118.9MW Thaton gas power plant, the 106MW Thaketa gas power plant and the 225MW Myingyan gas power plant; and
- d* purchasing additional power from neighbouring countries in China, Laos and India.

The MOEE 2018 announcement is a great win for Myanmar citizens and both local and foreign sponsors, as presently poor infrastructure impedes the economic development of Myanmar. Currently, 84 per cent of households in rural Myanmar have no electricity; only 30 per cent of the entire Myanmar population is connected to the electricity grid; and the average annual per capita electricity consumption is 160kWh (5 per cent of the world average). Strengthening Myanmar's energy sector is crucial to reducing poverty and enhancing

¹ Krishna Ramachandra is the managing director, Rory Lang is a senior associate and Bei Wang is an associate at Duane Morris & Selvam LLP.

development prospects for the country. Social and economic progress in Myanmar depends on electrification, without which health, education and other key services will continue to suffer.

Recently, foreign investment has been liberalised by the Myanmar government for the importation, storage and distribution of petroleum products into Myanmar, with the promulgation of the Petroleum and Petroleum Products Law 2017.

A new government of the Republic of the Union of Myanmar (the Union Government) started on 1 April 2016, ending over 50 years of control by the military, most recently under the Union Solidarity and Development Party (USDP) led by President U Thein Sein.

The new government of Myanmar is led by the National League for Democracy (NLD). The NLD is led by Daw Aung San Suu Kyi; however, she is constitutionally barred from holding the office of President because her children are British citizens. She is currently holding the newly created position of State Counsellor. The Presidency is currently held by U Win Myint.

Prior to the end of the USDP reign over Myanmar (in the period from December 2015 to January 2016), over 35 new laws were passed by the USDP. These new laws passed by the USDP included the new Arbitration Law (Union Law No. 5/2016; the 2016 Arbitration Act) enacted on 5 January 2016, which provides a domestic legal framework to fully implement and comply with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), which Myanmar signed and ratified in 2013.

In stark contrast, the NLD government has passed very little new legislation since taking office in April 2016, although the President's Office has made positive steps to combat bribery and corruption in Myanmar through issuance of new guidelines for the acceptance of gifts by public servants.

That said, there have been other sweeping changes inside the Union Government since the NLD assumed control from the USDP, including a complete reorganisation of the prior 36 Union Government ministries, reducing the overall number to 21, either by consolidation or elimination. The Ministry of Energy (MOE) and Ministry of Electric Power (MOEP) have recently been consolidated into the new MOEE. Although it is difficult to predict how the NLD will manage the MOEE portfolio, we remain optimistic.

i Lifting of sanctions and key considerations

There are presently no sanctions in force against Myanmar (save for arms embargoes) from the European Union, United Kingdom or Australia. On 7 October 2016, US President Obama issued an Executive Order (EO) on the Termination of Emergency with Respect to the Actions and Policies of the Government of Burma (the October EO), thereby terminating the national emergency declared in EO13047 of 20 May 1997 with respect to Myanmar and revoking the EOs previously issued to sanction Myanmar.

Notably, the October EO does the following:

- a* it lifts the import ban on rubies and jadeites of Myanmar origin into the United States;
- b* it lifts immigration restrictions on specified Myanmar nationals and removes all individuals from the Specially Designated Nationals List. However, this will not affect Myanmar nationals who are subject to separate sanction regimes (e.g., counter-narcotics sanctions);
- c* it terminates all Office of Foreign Assets Control restrictions on banking with Myanmar. This includes a suspension of a prohibition by the Financial Crimes Enforcement

Network (FinCEN) against US financial institutions maintaining correspondent accounts for Myanmar banks. However, it should be noted that the suspension is contingent on Myanmar's progress in addressing money laundering, corruption and narcotics-related activities. FinCEN will remove the prohibition entirely when Myanmar has made sufficient progress on this front; and

- d* it removes the requirement to comply with the State Department Responsible Investing Reporting Requirements. This is now voluntary.

Based on relevant Myanmar experience, that the process is more transparent and efficient than in some regional ASEAN countries; however, significant regulatory reform is still required to bring Myanmar's power sector to the standard of more developed jurisdictions such as Japan and Australia.

II GOVERNMENT FRAMEWORK AND REGULATIONS

i Governmental divisions

Under the state-owned Economic Enterprises Law of 1989 (the SOE Law), the Union Government has the sole right to carry out power generating services and is also empowered to grant exemptions. With the consolidation of the new MOEE, Myanmar's power sector remains regulated by a state-owned buyer model, with two key offtaking government entities, detailed below.

- a* the Electric Power Generation Enterprise (EPGE) (formerly the Myanmar Electric Power Enterprise (MEPE) alongside the Department of Electric Power (DEP)). EPGE operates and plans the Myanmar National Grid System, buys electricity from both public and private producers and then onells the electricity to distributors. The Yangon Electricity Supply Board and other regional and state electricity supply boards assist the EPGE in the purchase and distribution of power.
- b* The Hydropower Generation Enterprise (HPGE) alongside the Department of Hydropower Planning and the Department of Hydropower Implementation. The HPGE operates and maintains large-scale hydroelectric facilities for the public sector.

ii Legal history of the MOEE

The legal history of the MOEE from 1951 to 2018 is as follows:

- a* in 1951, the Electricity Supply Board (ESB) was formed under the then Electricity Act of 1948. The ESB was under the then Ministry of Industry and Handicraft;
- b* in 1972, the ESB was changed into the Electric Power Corporation (EPC);
- c* in 1975, the then Ministry of Industry and Handicraft was reorganised into the Ministry of Industry No. 1 and Ministry of Industry No. 2. The EPC was under the control of the then Ministry of Industry No. 2;
- d* in 1985, the then Ministry of Industry No. 2 was extended and reorganised into the Ministry of Industry No. 2 and the Ministry of Energy. The EPC was under the umbrella of the Ministry of Energy;
- e* on 1 April 1989, the EPC was renamed the MEPE;
- f* in 1997, the Ministry of Energy was extended and reorganised into the Ministry of Energy and the Ministry of Electric Power. The MEPE was under the control of the Ministry of Electric Power;

- g* in 2006, the Ministry of Electric Power was reorganised into the Ministry of Electric Power No. 1 and the Ministry of Electric Power No. 2. The MEPE was under the direct control of the Ministry of Electric Power No. 2;
- b* in 2012, the Ministry of Electric Power No. 1 and the Ministry of Electric Power No. 2 were merged to form the MOEE pursuant to Notification No. 63/2012;
- i* in March 2016, the MOE and MOEP were consolidated into the new MOEE; and
- j* in March 2016, following the reorganisation of the Union Government's ministries and departments, the MEPE was reformed as the EPGE.

III LEGAL SYSTEM

The legal system in Myanmar is based on English Common Law. Myanmar legislation includes 13 volumes of codified laws enacted from 1841 to 1954 and published in the Burma Code, as well as various other laws, notifications, rules and regulations passed from time to time. However, the current legal framework poses significant challenges for foreign investors as many laws are presently outdated and remain untested in the courts, providing little case law and guidance to both investors and lawyers on the ground.

The relevant laws governing Myanmar's power sector include:

- a* the Arbitration Law 2016;
- b* the Contract Act 1872;
- c* the Environmental Conservation Law 2012;
- d* the Foreign Investment Law 2016;
- e* the Farmland Law 2012;
- f* the Income Tax Law (ITL), as amended up to November 2011;
- g* the Myanmar Companies Act 1914;²
- b* the Myanmar Constitution 2008;
- i* the Myanmar National Committee on Large Dams Law 2015;
- j* the Petroleum and Petroleum Products Law 2017 (PPPL);
- k* Presidential Notification 1/2013;
- l* Presidential Notification 1/2017;
- m* the Public Debt Management Law 2016;
- n* the Registration Act 1908;
- o* the Stamp Act 1891 (and the Amendment of the Stamp Duty Act 2014);
- p* the State Owned Economic Enterprises Law of 1989 (the SOE Law);
- q* the Environmental Conservation Law of 2012;
- r* the Environmental Conservation Rules, published in June 2014;
- s* the Electricity Law of 2014;
- t* the Myanmar Investment Law of 2016 (MIL);
- u* the Transfer of Immovable Property Restriction Law 1987;
- v* the Transfer of Property Act of 1882; and
- w* the Vacant, Fallow and Virgin Lands Management Law 2012.

2 On 6 December 2017, Myanmar's former President U. Htin Kyaw approved the new Myanmar Companies Law 2017 (MCL), replacing the country's century-old Companies Act 1914. However, the implementation of the MCL is only expected to become effective on 1 August 2018.

The above laws are not an exhaustive list of all relevant legislation. Additional local legislation, regulations and customary practice may be relevant depending on the source fuel, project location and project complexity.

IV PROCUREMENT

The government understands the need for facilitating transparent procurement processes in order to instil confidence both domestically and internationally to the business community and, of equal importance, to attract local and foreign investment in support of the government's rapid energy reform initiatives for Myanmar.

Since 2013, via Presidential Directive No. 1/2013 titled 'Regulations to be abided by when issuing tenders for investment and economic activities' (the Tender Directive), government departments and ministries are required to hold public tenders for goods, major works, and services that they may require. The Tender Directive is the only guiding authority in Myanmar on procurement, and is often criticised because it is not actual law but only a Directive. Generally speaking, at present the Tender Directive in Myanmar is local and does not follow international standards.

The Tender Directive, while lacking substance, does set out the premise to be followed by the government departments, ministries, and state-owned enterprises, including the establishment of procurement or tendering committees, open invitation to tender, and public announcement of tenders. On 10 April 2017, the Union Government issued new Notification No. 1/2017 introducing a new tender procedure (the Tender Procedure) in order to 'eliminate waste of the State's fund, corruption and monopolizing tender' and to 'ensure just and fair competition, transparency, accountability and responsibility.' The Tender Procedure provides the threshold for launching a tender for construction or procurement of goods and services valued at 10 million Burmese kyat. Importantly, irrespective of the fact that the participation eligibility for foreigners is not clear, foreign companies without any presence in Myanmar may participate in the tender subject to the absolute discretion of the relevant department. In the event of a bid award to a foreign company, a subsidiary is required for the purpose of execution of contract with the relevant government department.

Currently, Myanmar has no specific PPP laws or regulatory framework dealing with the procurement of large-scale power projects or PPP projects. Pursuant to the Tender Procedure, specific tender procedures for PPP projects may vary depending on the nature of the bid. The MIL provides a basic framework for private foreign investors to obtain an investment permit and project approval. However, the MIL does not deal with tendering- and procurement-related issues in any detail.

Any investor seeking to develop a self-proposed project will face difficulty, as this is uncommon in Myanmar.

V FOREIGN INVESTMENT IN MYANMAR'S ENERGY SECTOR

i Myanmar Investment Commission Permit

A foreign sponsor must obtain a Myanmar Investment Commission Permit (an MIC Permit, or investment licence) to develop a power plant in Myanmar and obtain project consent. Apart from providing for project consent, an MIC Permit allows a foreign investor to benefit from certain investment incentives available under the MIL. Key incentives include:

- a* investment protection. The MIL guarantees that a company operating with an MIC Permit under the MIL will not be nationalised during the permitted investment period. There is also a further guarantee that investments with an MIC Permit will not be terminated before the expiry of the term of the MIC Permit without sufficient cause; and
- b* tax incentives. Income tax holidays are potentially available for foreign sponsors for periods of three, five or seven years, subject to MIC discretion and what zone the project is located in. Zone 1 includes the least developed areas of Myanmar excluding Yangon and Nay Pyi Taw; Zone 2 (moderate) includes more developed zones, but still excludes Yangon and includes Nay Pyi Taw; and Zone 3 (developed zones) includes Yangon and Mandalay. The income tax holidays are inclusive of the year the project company begins operations.

The MIC Permit may also grant one or more of the following exemptions and reliefs to any project company:

- a* exemption of internal taxes on imported raw materials within the first three to seven years of commercial production;
- b* exemption or relief from income tax on profits of the business kept in reserve funds and reinvested in the business within one year after the reserve is made;
- c* right to deduct accelerated depreciation from the profit after calculation of accelerated depreciation concerning machinery, equipment, building or other capital assets used in the business at rates set by Myanmar;
- d* relief from tax on up to 50 per cent of the profits accrued from the export of goods produced in Myanmar;
- e* right to pay foreign employees' income tax at the rates applicable to citizens residing within the country;
- f* rights to deduct from assessable income the expenses incurred with respect to necessary research and development carried out within Myanmar;
- g* exemption or relief from customs duty or other domestic taxes on imported machines and other equipment used during the period of construction of the business; and
- b* exemption or relief from commercial tax on any goods produced for export.

Right to transfer foreign currencies

A foreign sponsor has the right to transfer abroad the types of foreign currencies set out below:

- a* the amount of foreign currency brought into Myanmar as foreign capital; and
- b* the net profit after deducting all taxes and reserve funds by the party who brought in the foreign capital.

Foreign currency permitted for withdrawal includes the value of assets on the winding-up of a business, subject to MIC approval.

A foreign employee can transfer his or her salary and lawful income after deducting taxes and other living expenses incurred domestically.

Right to enter into a long-term lease

A foreign-owned company (i.e., sponsor) without an MIC Permit or Endorsement (as specified below) is only allowed to enter into a lease agreement not exceeding one year.

With an MIC Permit or Endorsement (as specified below), a foreign sponsor may be permitted to lease or use land for an initial period of up to 50 years, which may be extended for two further periods of 10 years each.

ii MIC Endorsement

A foreign sponsor intending to make a small-scale power investment (having investment capital of less than US\$5 million) who desires a long-term lease right for a period exceeding one year may apply for an Endorsement from the MIC. If the investor's investment capital exceeds US\$5 million it must instead apply for an MIC Permit, as it will unlikely be eligible for an Endorsement.

It is not industry practice in Myanmar, nor is it recommended for a foreign sponsor, to only obtain an Endorsement to develop a power plant. Rather, the tried and tested approach is that a foreign investor will obtain an MIC Permit. We would recommend any sponsor intending on developing a power plant in Myanmar to obtain an MIC Permit.

iii Processing time

The MIC Permit is granted on a case-by-case basis depending on the size of the power project. At a minimum, a sponsor should expect to wait at least six months to obtain an MIC Permit. Coincidentally, the period to obtain an Endorsement is also the same, although, this was not the intent of the legislature.

Tenders are issued through the MOEE, and investors and sponsors can visit the MOEE website³ for up to date information on independent power producer (IPP) tenders.

VI BANKABLE PROJECT DOCUMENTS

Arguably, the project documents (e.g., memorandum of agreement, power purchase agreement, build-operate-transfer agreement, EPC contracts, land lease agreement (LLA), security documents, fuel supply agreement) used for the Myingyan IPP Deal should be adopted as good practice for other IPP projects in Myanmar going forward. This is critical for foreign sponsors because, before the Myingyan IPP Deal, the scale of a power deal of this magnitude had never been done before.

If the energy deal is funded by way of project finance, the main challenge for foreign sponsors will be ensuring the documentation structure remains within the framework for limited recourse project financing. Sponsors need to consider in advance that foreign lenders will push hard to enhance the recourse to the sponsors and shareholders of any project company. Another hurdle will be if the financing involves syndicated contributions from

3 www.moep.gov.mm.

multilateral development financial institutions (multilaterals). Sponsors need to be aware up front that multilaterals may show little inclination to negotiate any deviation from their standard project documentation.

VII INVESTOR PROJECT APPROVAL

The investor project approval process involves many stages, and the process can be time-consuming. There rarely are any shortcuts or fast-track procedures afforded to any tendered project. It is a process that must run its course (a check-the-box type of process):

- a* Stage 1: preparation of application dossier;
- b* Stage 2: application processing by MIC;
- c* Stage 3: first technical meeting;
- d* Stage 4: MIC review of application;
- e* Stage 5: approval meeting;
- f* Stage 6: draft permit;
- g* Stage 7: condition sheet; and
- h* Stage 8: Permit to Trade (business licence) and certificate of incorporation issued.

VIII GUARANTEES

The government has been reluctant to provide sovereign guarantees in power projects to date. Perhaps as a signal of change, or given external pressures from the international business community, the government is providing contractual sovereign guarantees for the Myingyan IPP Deal (however the creditworthiness of the EPGE will remain an issue when dealing with project financing, as the sovereign guarantees on payment are merely contractual in nature without additional security in the form of bank guarantees provided by the government). For investors, the sovereign guarantee regards payment obligations only.

Myanmar became a member of the Multilateral Investment Guarantee Agency (MIGA) in 2013. MIGA provides political risk insurance (guarantees) for projects in a broad range of sectors in developing member countries, covering all regions of the world. In principle, this means political risk guarantees can be provided for investments in Myanmar, which can include MIGA coverage for breach of contract by the EPGE. As a guide, MIGA may insure up to US\$220 million per project, and if necessary more can often be arranged through a syndication of different insurers. Whenever a project exceeds MIGA's own capacity, MIGA reinsures itself, through a syndication process, with private and public sector insurance and reinsurance companies in order to meet the insuree's needs.

Under the standard MIGA contract of guarantee for shareholder loan, the guarantee holder shall, prior to or simultaneously with payment of compensation for a loss, assign and transfer to MIGA the right to a percentage of cover of the guarantee holder's *pro rata* share of the Project Enterprise's rights, as applicable, in the project agreement.

As a side note, there is also no specific protection in Myanmar against material adverse government action. However, under the MIL the government guarantees that a business that acquires an MIC Permit shall not be nationalised within the term of the contract or during the extended term of the contract. Basically, the government guarantees not to suspend any investment business carried out under the MIC Permit before the expiry of the permitted

term without ‘sufficient cause’. What constitutes ‘sufficient cause’ is not defined. However, the guarantee provided under the MIL is yet to be properly tested in any Myanmar courts or arbitral tribunal, and as such there is no guiding jurisprudence or commentary.

The Public Debt Management Law 2016 (PDML) was passed on 5 January 2016, essentially to regulate matters relating to the ‘financial liabilities’ of the Myanmar government. Of possible relevance to the energy projects would be the provisions of the PDML relating to guarantees issued by the state, although the precise realm of the PDML in that respect remains somewhat unclear.

The PDML provides that the Minister of Finance may issue guarantees for any person, entity or project on such terms and conditions as may be approved by the Myanmar government and the legislature. Prior to the issuance of a state guarantee and throughout the guarantee period, the Ministry of Finance shall assess the risk relating to such guarantee. If the guarantee is required to be issued in foreign currency, the Ministry shall consult with the Central Bank on the matter. However, thus far, we are yet to witness guarantees issued by the state referring to the provisions of the PDML.

IX PROJECT FINANCING

The difficulties involved in financing power projects to date mainly revolves around Central Bank of Myanmar (CBM) and MIC approval (for companies with an MIC Permit) of the loan facilities, and challenges in perfecting security interests, including the following:

- a* charge over shares (normally referred to as a pledge of shares, but since share certificates are not commonly used in Myanmar, there is nothing for the onshore security agent (OSA) to take physical possession of);
- b* fixed and floating charges (this usually includes the land mortgage, project accounts onshore in Myanmar (which is typically an operational account and basic petty cash account, because generally all revenue is eventually paid offshore), movable plant and equipment, buildings and fixtures). As part of the fixed and floating charge, commonly a separate land mortgage will be executed and annexed to the fixed and floating charge documentation and this will be required to be registered at the relevant Myanmar Office of Registration of Deeds; and
- c* assignment of contracts (generally this will include the assignment of the lessor’s rights under the LLA, over the location of where the power plant is situated. To comply with Myanmar property laws, foreign lenders often engage a local bank to act as an OSA to enable registration of the security interest).

All of the above securities are permitted under law; however, the registration of these security interests still remains enormously challenging owing largely to complicated Myanmar property laws and foreign ownership restrictions over land as well as a void of a modern legal mechanism allowing the government to facilitate registration of security. There is no official land titles register or electronic database, making it difficult for investors to accurately determine the ownership of privately-held land plots. When locals sell land, they often do not change the name of the title deed holder. Therefore, locals rely primarily on legal contracts, which state the transfer of land ownership after a sale. This could be confusing for investors. Hence, investors need to take care in conducting a careful due diligence process on landowners.

Use of an OSA is highly recommended to streamline the perfection of security process, as there are few restrictions in place regarding a Myanmar person (individual or corporate entity) taking the security interests listed herein. In terms of OSA responsibilities, it would be highly advantageous to request an annual declaration that the security interests remain perfected and the OSA is not aware of anything that would affect the security remaining perfected.

Section 109(1) of the Myanmar Companies Act 1914 provides for the granting by a Myanmar company of a fixed and floating charge (FFC) over its assets in favour of a lender, including book debts, cash flows, receivables, intangible assets, contractual rights and bank accounts. This is a flexible form of security that applies in the common law jurisdictions and can cover the following assets:

- a* a mortgage or charge for the purpose of securing any issue of debentures;
- b* a mortgage or charge on uncalled share capital of the company;
- c* a mortgage or charge on any immovable property wherever situated, or any interest therein;
- d* a mortgage or charge on any book debts of the company;
- e* a mortgage or charge, not being a pledge on any movable property of the company except stock-in-trade; or
- f* a floating charge on the undertaking or property of the company.

The FFC and any individual mortgage or charge over a company's assets must be registered with the company registration office within 21 days of its creation, otherwise it is void against a liquidator and other creditors of the company in a winding-up. It may be pertinent to mention that the mortgage of immovable property can only be in relation to the long-term lease of the land on which the facility is built (i.e., the right to lease the land, not the land itself).

The approval of the MIC is required for companies with an MIC Permit. Usually the MIC will obtain a CBM 'no objection' as part of the scrutiny process. If the project company holds an MIC Permit, the loan can be approved under an initial MIC Permit application or at a later date. This usually applies when the terms of the loan are not agreed at the time of the MIC application. Once MIC or CBM approval is obtained with the loan payment and the repayment schedule is attached, no further approvals are required for each payment made under the loan either from the MIC or from the CBM.

CBM approval is required for all foreign exchange remittances. All foreign exchange remittances made by the project company must be made through a local bank with an 'authorised dealers licence'. CBM Directives of 2012 and 2014 set out the documentary requirements that authorised local banks need to see before making any foreign exchange remittances out of the country. If in doubt, refer the matter to the CBM for approval.

Myanmar law does not provide much guidance in relation to refinancing during the life of the loan facility documents. Most foreign investors channel funds to their Myanmar companies via shareholder loans. Offshore loans into Myanmar are becoming more frequent. The first large bank loans deals are being done now, but usually on a full recourse basis.

Given the uncertainties regarding 'onshore security', lenders will also require overseas-based sponsors to provide 'offshore' security over their interests in the Myanmar-based project company in the usual manner, including offshore pledges of shares in the project company and an offshore (and secured) accounts structure.

X TAX CONSIDERATIONS

Investors need to account for local tax duties when costing out an IPP project in Myanmar. Stamp duty must be levied on all project documents and any security documents if third-party project financing is involved. Pursuant to the latest bill amending the Myanmar Stamp Act 1899 dated 1 August 2017, stamp duties can be excessive from 0.5 per cent to 2 per cent on the total loan facility depending on the type of agreement. Exemptions may be applied for and are permitted under law; however, there is no certainty that such exemptions will be granted.

Furthermore, certain tax reliefs may potentially be available under applicable tax treaties. Myanmar has tax double taxation avoidance treaties (DTAs) in force with eight countries. These countries include India, Korea, Malaysia, Singapore, Thailand, the United Kingdom and Vietnam, with a number of other DTAs in the draft phase.

The Income Tax Law (ITL) provides that a DTA must be ‘notified’ before it is to override provisions of the ITL. The details concerning if a DTA has been ‘notified’ are contained in the Myanmar Government Gazette. Accordingly, the terms of any DTA will be followed despite anything to the contrary contained in any other provisions of the ITA.⁴ The sponsor must follow an administrative procedure for claiming a tax exemption based on the DTA with Myanmar’s Internal Revenue Department (IRD). Under Myanmar law, the application of the DTA is not automatic and is at the discretion of the governor of the IRD.

XI ENVIRONMENTAL CONSIDERATIONS

Under Section 42(b) of the Environmental Conservation Law 2012, the Ministry of Environmental Conservation and Forestry has issued an Environmental Impact Assessment Procedure (EIA Procedure). The EIA Procedure states that:

[A]ll Projects undertaken by any . . . enterprise . . . which may cause impact on environmental quality . . . are required to undertake EIA to develop a project document to avoid, protect, mitigate and monitor adverse impacts caused by . . . operation . . . of a project.

In the power sector, issues concerning air quality and greenhouse gas (GHG) emissions are prevalent. An emphasis on reducing GHG emissions is vested in local regulations addressing control measures. International guidelines providing commentary on reducing GHG emissions highly recommend the use of less carbon intensive fuels, combined heat, power plants, higher conversion efficient technology as well as high monitoring levels.

Myanmar’s EIA Procedure is gradually developing in the face of increasing public expectations. Health and climate change-related issues, impacts on biodiversity and sensitive habitats are among other matters of growing significance.

4 The Income Tax Law provides if the Government of the Republic of the Union of Myanmar enters into an agreement with any foreign state or international organisation relating to income tax, and if the agreement is notified, the terms of the said agreement will be followed despite anything to the contrary contained in any other provisions of the Income Tax Law.

XII MEETINGS WITH THE REGULATORS

Meetings with any Ministry, department, division, or sub-department of the government will generally take place in Nay Pyi Taw. Aside from the MIC and Directorate of Investment and Company Administration (DICA), which have offices in Yangon, the government's principal ministerial offices are located in Nay Pyi Taw.

Meeting requests typically are requested in letter-form. Hard-copy originals must be sent to the relevant authority to arrange the meeting. Email communication remains uncommon in practice.

From our experience, meetings should be arranged at least seven business days in advance and the meeting request letters should state a preferred day and time and be accompanied by an agenda to allow the relevant authority to coordinate representatives from the MOEE, DEP, etc.

A short meeting agenda is preferable, as very frequently meetings are cut short, postponed or delayed. It is suggested, depending on the importance of the meeting, to stay overnight to afford the relevant authority more flexibility should unexpected changes occur on the initial day of the meeting.

Given these limitations, it is strongly suggested to have more frequent meetings in short duration as opposed to attempting a one-day marathon session with the Union Government, as rarely is that possible, and if so it tends to be unproductive.

Bringing a translator is recommended. Despite most meetings being in English, having a translator available can ensure the meeting is more efficient.

XIII INVESTOR TIPS

i Myanmar and expatriate counsel

We recommend that the investor engages experienced and skilled on-the-ground legal counsel (comprising a combination of Myanmar and expatriate counsel) to drive the entire project with the MOEE. One lead counsel acting for the sponsor is a must, considering the complications of power deals here in Myanmar. The process is long and requires the expertise of both skilled Myanmar and expatriate counsel to persist with the constant follow-up meetings and drafting of endless bilingual letters to the MOEE. This is an enormous task for even the most experienced emerging market lawyers.

ii Patience

Myanmar's recent political and economic reforms have been rapid and significant, paving the way for foreign investments into the country; however, this does not mean that developing a large-scale power project and doing business in Myanmar is not without its challenges. Foreign investors should also be aware of the following:

- a* the average productivity of a worker in Myanmar today is US\$1,500 – about 70 per cent below that of benchmark Asian countries;
- b* there are four years of average schooling in Myanmar;
- c* there will be 10 million additional people to absorb in Myanmar's large cities by 2030; and
- d* a total investment of US\$650 billion is needed by 2030 to support growth potential (US\$320 billion in infrastructure alone).

Investors must be prepared to deal with the current challenges of poor infrastructure, in terms of transport, telecommunications and utilities supply. Improvements to the country's infrastructure will take time.

It is not uncommon when visiting the offices of the government in Nay Pyi Taw for meetings to be cancelled, delayed, or postponed entirely. In addition, investors may experience long wait times from the original scheduled meeting time.

As Myanmar gains speed in its reform process, many draft laws are pending consideration by Myanmar's parliament. Investors are still eagerly awaiting the actual implementation of Myanmar Companies Law 2017. Myanmar is in the process of developing its legal system and one would need to prepare for changes as legislation is being adapted.

XIV POTENTIAL DOWNSTREAM AND POWER PROJECTS

The downstream sector, *inter alia*, involves refining of petroleum crude oil and the treating and purifying of natural gas, marketing and distribution of petroleum products.

Recently, foreign investment has been liberalised by the Myanmar government for the importation, storage and distribution of petroleum products in Myanmar. It has been a welcome move for the potential downstream investors, and will create the opening of the downstream petroleum market for foreign investors in Myanmar.

The PPPL substitutes the Petroleum Act 1934, and provides clarity on aspects on import and export, transportation, storage, refinery, distribution, inspection and testing of petroleum and petroleum products. The PPPL also earmarks the authority concerned towards issuance of relevant licences. However, the implementation of the provisions of PPPL are yet to be observed.

The MOEE has been in discussion with entities on construction of new refineries and revamping of the existing refineries in Myanmar. Currently Myanmar has three major refineries: Thanlyin, Chauk and Mann Thanpayarkan. With the promulgation of the recent regulations in the sector, foreign investment is possible in connection to loading, offloading and operating and maintaining of jetty facilities as well.

XV INDIAN INVESTMENT IN MYANMAR'S ENERGY SECTOR

Aside from the Indian downstream entities (mostly publicly-owned) that are dominant players in India's downstream petroleum sector, the recent legislative developments in Myanmar have opened up potential opportunities in Myanmar.

Myanmar's urgent need for power after years of political isolation has been well documented. Its potential for renewable energy resources is significant. Myanmar's government has been formulating programmes towards utilisation of renewable energy resources such as wind, solar, hydro, geothermal and bioenergy for sustainable energy development in Myanmar. With various fuel sources alternatives available in Myanmar, the Indian private entities that have sophisticated technical skill-sets in the energy and power sector, can look forward to Myanmar as a potentially rewarding market. India also benefits from its own geographical location – an advantage, as it can easily cater to Myanmar's energy requirements in the energy and power sectors.

XVI CHINESE INVESTMENT IN MYANMAR'S ENERGY SECTOR

Driven by the One Belt, One Road initiative, first introduced to the international community in September 2013, Myanmar has witnessed a massive inflow of Chinese investment into the country. China, like India, shares the advantage of bordering Myanmar, making it strategically well placed to support and benefit from Myanmar's fast-growing energy sector. There is a combination of Chinese state-owned enterprises (SOEs) and private Chinese investors developing Myanmar's energy sector. The majority of inbound Chinese investment into Myanmar's energy sector is largely led by Chinese SOEs.

According to Myanmar official statistics released by the DICA, China is ranked as the number 1 foreign investor in Myanmar, boasting investment volume of (26 per cent) of Myanmar's foreign investment value. The latest DICA statistics reveal that up to February 2018, the overall foreign direct investments in Myanmar's oil and gas sector from China hit US\$22 billion, followed by the power sector in second place with Chinese investments totalling over US\$21 billion.

One of the key landmark projects in Myanmar is the China-Myanmar oil and gas pipeline, linking Myanmar's deep-water port of Kyaukphyu (Sittwe) in the Bay of Bengal with Kunming in Yunnan province of China. This project was completed in 2014.

Three Chinese SOEs (China Electric Power Equipment and Technology Company Ltd, China Southern Power Grid Company Ltd (CSG), CSG's subsidiary Yunnan International Company Ltd) have proposed separate plans to plug Myanmar's national power grid into Yunnan's electricity network. Daw Aung San Suu Kyi met with Chinese President Xi Jinping in May 2017 to discuss, among other things, Myanmar's energy sector and developing closer ties. Our understanding, based on information released by the MOEE, is that initial talks have taken place but there has not been any further developments on point. The Chinese and Myanmar diplomatic meetings are the most encouraging cooperation to date since the suspension of the Chinese-backed Myitsone dam back in 2011.

We envisage China to be the leaders in the development of Myanmar's energy sector.

XVII CONCLUSIONS AND OUTLOOK

Myanmar has abundant energy resources – hydropower and natural gas in particular. Owing to underdeveloped legislation and lack of financial and technical capacity, the energy sector of the country is still underdeveloped. However, with the government's commitment to reform, foreign investment will have more access to this sector with simplified formalities. The recent regulatory and policies changes in foreign investment are indicative of the fact that the government is making greater effort to create a more transparent atmosphere to attract foreign capital and technology. We look forward to a remarkable uptick in the energy sector in the near future.

ABOUT THE AUTHORS

KRISHNA RAMACHANDRA

Duane Morris & Selvam LLP

Krishna is managing director of Duane Morris & Selvam LLP in Singapore and of Duane Morris & Selvam (Myanmar) Limited. He is head of the corporate, FinTech and TMT practice groups. His practice includes M&A and capital markets, investments funds, private equity, financial technology and telecommunications, media and technology. Krishna also has significant experience in Myanmar, having worked in Myanmar for over five years.

Krishna advises issuers, fund managers, investment banks, venture capitalists, listed and private companies, start-ups and high-net-worth individuals in Asia, Europe and the United States on a wide range of equity and debt securities issuances, compliance and regulatory matters. His extensive experience in mergers, acquisitions and takeovers, private equity participation and exit strategies has led to his being regularly cited by the reputable directories as a leading lawyer.

He is regarded as one of the most highly recommended lawyers in the practice areas of capital markets (foreign firms), corporate and M&A (local and foreign firms), and TMT (local firms) and capital markets (foreign firms) in Singapore by *The Legal 500 Asia Pacific 2018* edition and *Chambers Asia-Pacific* and *Chambers Global*, which regularly refer to 'his creative yet practical and client-focused approach' and his 'decisiveness and commerciality.' In Myanmar, Krishna is recognised as a 'leading lawyer' in corporate and M&A and a recommended lawyer in projects (including energy) by *The Legal 500 Asia Pacific 2018*. *IFLR1000 2018* also named Krishna as a 'highly regarded lawyer' in Singapore capital markets.

Krishna is a corporate lawyer with a very commercial approach. His practice develops according to the needs of his clients and currently due to Singapore's emergence as one of the world's leading FinTech hubs, he has more of a focus on the legal and regulatory advice relating to new financial technology business models, including crowdfunding, peer-to-peer lending platforms, blockchain technology, virtual and digital currencies such as BitCoin and Ethereum, e-wallet and trading platforms. As his clients' trusted adviser, Krishna has established himself as one of Singapore's 'go-to' lawyers for FinTech, having previously achieved a solid reputation in the TMT space, particularly in relation to telecommunications.

Krishna graduated from Christ's College, Cambridge with an LLM in corporate finance on a Freshfields Bruckhaus Deringer ('Freshfields') scholarship. He articulated and qualified with Freshfields in London prior to relocating to Singapore with Clifford Chance. He subsequently joined Selvam LLC and is now managing director of Duane Morris & Selvam LLP.

Krishna is an advocate and solicitor of the Supreme Court of Singapore and a solicitor of England and Wales. He previously sat on the Singapore Law Society's Corporate Practice Committee for mergers and acquisitions and insolvency, corporate commercial matters, and listing matters. He speaks regularly on a wide range of topics relating to M&A, corporate governance, listings, fund raising and establishment of an Asian presence at venues around the world. Born in Sri Lanka, Krishna speaks English and Mandarin.

RORY LANG

Duane Morris & Selvam LLP

Rory is an international corporate lawyer and senior associate at Duane Morris & Selvam LLP's offices in Yangon and Singapore. He practices in all areas of dispute resolution, banking and finance, capital markets, corporate, cross border transactions, commercial, M&A, real estate, employment, and energy and resources law. He has significant experience in all forms of foreign direct investments and cross border transactions. Rory provides ongoing legal assistance in relation to corporate structuring for investment; commercial contracts with local and international corporations and individuals; labour law; local regional compliance requirements; and real estate guidance for developers and hospitality providers.

Rory's clients regularly refer to 'his exceptional insight and understanding of the legal framework in Myanmar' as he provides 'good legal advice that helps to map our business plan and strategy'. Apart from corporate and project matters, Rory is also actively involved in pro bono services, which a client described as 'could not have been more attentive, kind and professional'. Rory is listed as a 2018 'next generation lawyer' in the practice areas of corporate and M&A by *The Legal 500 Asia Pacific*. He is also named as a recommended lawyer in projects (including energy) by *The Legal 500 Asia Pacific 2018* for his 'extensive experience in foreign investment, project finance and commercial contracts'.

Rory has more than nine years of experience in Australia and South East Asia, including over three years on-the-ground experience in Myanmar, Laos, Thailand and Singapore. He speaks regularly on market entry, M&A, employment law, energy, resources, insurance and property matters at conferences throughout the ASEAN region.

Rory is admitted to practise as a lawyer of the Supreme Court of Western Australia and as a solicitor of the Federal and High Courts of Australia. He is also a registered foreign lawyer in Singapore. Rory is a graduate of the University of Notre Dame Australia, where he was a member of the Notre Dame Law Students Society, and a masters of law graduate from the University of Western Australia.

WANG BEI

Duane Morris & Selvam LLP

Bei is an international corporate lawyer and associate at Duane Morris & Selvam LLP's office in Yangon. Bei practises in the areas of banking, corporate, commercial, capital markets, employment, energy and real estate law. Bei advises in relation to foreign direct investment, corporate structuring, M&A, commercial contracts, employment related matters and legal compliance for real estate development.

Bei is a graduate of the National University of Singapore. She is admitted to the Bar of the People's Republic of China and registered as a foreign lawyer in the Republic of Singapore.

Bei speaks fluent English and is also a native Mandarin speaker.

DUANE MORRIS & SELVAM LLP

No. 14, Kaymarthi Street (1)
Thriyadanar Yeikthar Housing
Quarter 3 Mi Kyaung Kan, Thingangyun Township
Yangon, Myanmar
Tel: +959 6359 3879
kramachandra@duanemorrisselvam.com
rjlang@duanemorrisselvam.com
bwang@selvamandpartners.com
www.duanemorrisselvam.com

Law
Business
Research

ISBN 978-1-912228-37-9