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FROM “MOA” TO “NTP”: HOW MYANMAR IS STREAMLINING THE POWER PROJECT APPROVAL PROCESS

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.

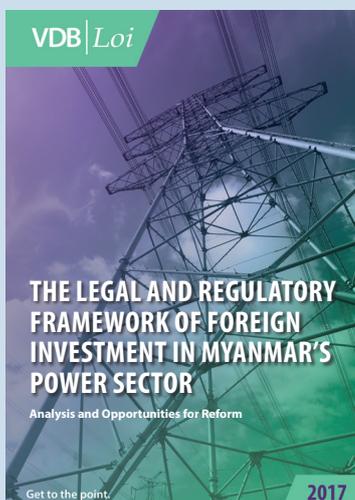
How long does this process take? There are projects that have been stalled for over a decade for environmental and social (E&S) reasons, such as is the case with nearly all coal and the majority of hydros. Even if there are no

Highlights of this note

- ▶ What is causing delays?
- ▶ But it is also a question of focus
- ▶ How do we fix this?
- ▶ Was the MOA abolished?
- ▶ MOEE and EPGE both sign the PPA?
- ▶ Draft and negotiate the MOA or the NTP and the PPA at the same time?
- ▶ Standardize the all power documents?
- ▶ Create an Inter-Ministerial taskforce to develop and negotiate power projects
- ▶ Create an experienced “Deal Team” to assist the Government’s taskforce
- ▶ In conclusion

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.

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



<https://goo.gl/WXNhVE>

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 NayPyiTaw from 9 am to 8 pm for a few days, and by the 4th 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 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, its 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:

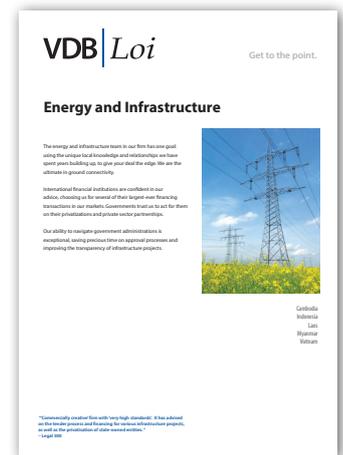


1. **More templates, and ask that the Government would publish them:** Current efforts underway by development partners should be coordinated within the development community (this has indeed happened to some extent) and with the private sector (this is underway at least for hydropower). The templates 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.

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Edwin Vanderbruggen is one of the most prominent foreign legal advisers in Myanmar, and he is widely recognized for his experience in the energy and infrastructure space in Myanmar. Edwin's experience working with the Myanmar Government is second to none, as he advises the Government on privatization transactions and PPPs in energy, transport and telecommunications. He and his team have uniquely extensive experience in electric power, and were involved in four out of five of the Myanmar gas and renewable projects concluded in March 2016, and he advised the Japanese Government on their investment in the Thilawa SEZ. Edwin worked on the planning, negotiation, documentation and financing for projects of all types of power generation, including gas, coal, hydro, solar, wind and W2E in Myanmar. He also advises four of the 'super majors' on oil and gas interests in Myanmar and on the first LNG terminal in the country. He lives in Yangon.

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The Energy team is led by Charles Magdelaine. Charles is a French lawyer qualified to practice in Paris educated in France, the United States and China. He has extensive experience in the documentation, financing and negotiation of energy projects in Southeast Asia, and Myanmar more in particular. Charles focuses on oil and gas, infrastructure, power and other natural resources projects.

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