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FOUR THINGS TO WONDER ABOUT MYANMAR'S FOUR LNG/GAS TO POWER PROJECTS

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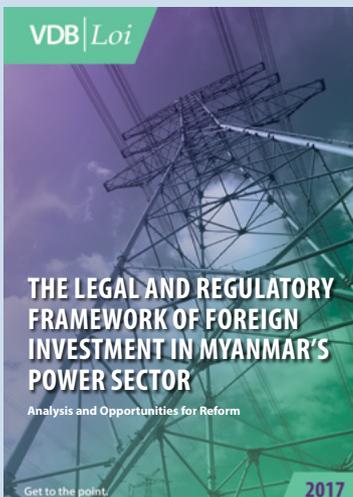
On 30 January 2018 the Ministry of Electricity and Energy (MOEE) held a ceremony in NayPyiTaw to sign four so-called "Notices to Proceed", each one for a planned LNG or Gas to Power project, in total nearly 3,000 MW. This unprecedented move has raised eyebrows in Myanmar's energy and financial community, 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

Highlights of this note

- ▶ What is a Notice to Proceed?
- ▶ Why a Notice To Proceed instead of a Memorandum Of Agreement?
- ▶ Why are there four NTPs?
- ▶ We are back in business

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?

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



<https://goo.gl/WXNhVE>





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 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.

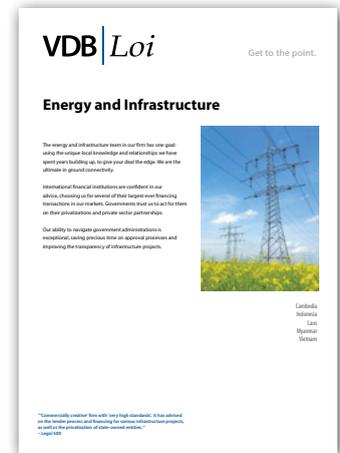
Not everyone will agree 3 Gig of LNG/Gas is the right call, but you cannot dispute the leadership is welcome. We need to see this followed up with progress on approvals and agreements both in gas and in renewables (and I already see some of that progress there as well), but for now, we are indeed back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

Edwin Vanderbruggen is the Senior Partner of VDB Loi and a leading legal advisor on energy projects in Myanmar.

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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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