

THE ENERGY
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THE LAWREVIEWS

MYANMAR

Krishna Ramachandra, Priyank Srivastava, Wang Bei and Ken Tan¹

I OVERVIEW

The Myanmar energy market started legal reform in 2011, at a time when the country opened up to foreign investment after decades of isolation. An increase in 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.

In terms of the National Electrification Plan for Myanmar, the Ministry of Electricity and Energy (MOEE), intends to extend electricity access to the entire population by 2030. In the meantime, benchmarks are set for 2021, with the aim of providing electricity to 55 per cent of Myanmar's population, rising to 75 per cent in 2026. We understand that the MOEE has been working towards arranging for international funding, and allocating a national budget for implementation of the objectives for electrification.

The national grid currently produces 3,448MW, 2,400MW of which is produced by hydropower plants and 1,038MW by thermal power industries. According to the Asian Development Bank, Myanmar has an abundance of hydropower – in excess of 100,000MW – so the government's focus is naturally on upgrading and developing those plants.

The MOEE's announcement involving the National Electrification Plan is a highly positive development for Myanmar citizens and both local and foreign sponsors, as poor infrastructure is impeding the country's economic development. Currently, only 35 per cent of the population of Myanmar is connected to the electricity grid compared to a world average of almost 88 per cent; and the average annual per capita electricity consumption is 217kWh (8 per cent of the world average). Strengthening Myanmar's energy sector is crucial to reducing poverty and enhancing development prospects for the country. Social and economic progress depends on electrification, without which health, education and other key services will continue to suffer.

Other initiatives to bolster electricity efforts include bilateral cooperation with neighbouring countries. In January 2018, Myanmar and Laos signed a memorandum of understanding on power cooperation. Similarly, in March 2018, Myanmar, China and Bangladesh signed an agreement on trilateral power trade. Further, under the Myanmar Sustainable Development Plan (MSDP) 2018–2030, containing a long-term vision for Myanmar, the Myanmar Energy Statistics 2019 have been issued, which will help the government to estimate the volume of electricity required demographically.

¹ Krishna Ramachandra is managing director, Priyank Srivastava is a special counsel and Wang Bei and Ken Tan are associates at Duane Morris & Selvam LLP.

A new government came into power on 1 April 2016, led by the National League for Democracy (NLD). The NLD is headed by Daw Aung San Suu Kyi, who holds the newly created position of State Counsellor. The Presidency is currently held by U Win Myint.

Prior to the end of the reign of the Union Solidarity and Development Party (USDP) in Myanmar (between December 2015 and January 2016), more than 35 new laws were passed by the USDP. These laws include the new Arbitration Law enacted on 5 January 2016 (the 2016 Arbitration Act), which provides a domestic legal framework to fully implement and comply with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), which Myanmar signed and ratified in 2013.

Sanctions and key considerations

There are at present no sanctions in force against Myanmar (save for arms embargoes and penalties against certain military units and officials based on human rights abuses resulting from the Rohingya crisis) 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:

- a* lifts the import ban on rubies and jadeites of Myanmar origin into the United States;
- b* 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* 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* removes the requirement to comply with the State Department Responsible Investing Reporting Requirements. This is now voluntary.

II GOVERNMENT FRAMEWORK AND REGULATIONS

i Government 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:

- a* the Electric Power Generation Enterprise (EPGE) (formerly the Myanmar Electric Power Enterprise (MEPE) alongside the Department of Electric Power (DEP)), which operates and plans the Myanmar National Grid System, buys electricity from both public and private producers and then sells the electricity on to the Electric Supply

Enterprise and Yangon City Electricity Supply Board. The Yangon City Electricity Supply Board and other regional and state electricity supply boards assist the EPGE in the purchase and distribution of power; and

- b* the Hydropower Generation Enterprise (HPGE), alongside the Department of Hydropower Planning and the Department of Hydropower Implementation, which 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* the Electricity Supply Board (ESB) was formed in 1951 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 to 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 (MOE). The EPC was under the umbrella of the MOE;
- e* on 1 April 1989, the EPC was renamed the MEPE;
- f* in 1997, the MOE was extended and reorganised into the MOE 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 (MOEP) was reorganised as 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 the 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.

In addition to the role of the MOEE on power projects, there are a number of other government institutions that are important from the perspective of a foreign investor intending to proceed with a power project in Myanmar. We have categorised the related government authorities in terms of their relevance at the various phases of a power project.

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 some laws have become outdated while new laws 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, as amended up to 2016;
- g* the Union Tax Law, amended annually;
- h* the Myanmar Companies Law 2017;
- i* the Myanmar Constitution 2008;
- j* the Myanmar National Committee on Large Dams Law 2015;
- k* the Petroleum and Petroleum Products Law 2017;
- l* Presidential Notification 1/2013;
- m* Presidential Notification 1/2017;
- n* the Public Debt Management Law 2016;
- o* the Registration of Deeds Law 2018;
- p* the Stamp Act 1891 (and the Amendment of the Stamp Duty Act 2017);
- q* the SOE Law (and the Amendment of the SOE Law 1997);
- r* the Environmental Conservation Law 2012;
- s* the Environmental Conservation Rules, published in June 2014;
- t* the Electricity Law 2014;
- u* the Electricity Rules 2016;
- v* the Myanmar Investment Law of 2016 (MIL);
- w* the Transfer of Immovable Property Restriction Law 1987;
- x* the Transfer of Property Act of 1882;
- y* the Vacant, Fallow and Virgin Lands Management Law 2012 (and the Amendment of the Vacant, Fellow and Virgin Lands Management Law 2018);
- z* the Industrial Design Law 2019 (effective date yet to be announced);
- aa* the Trademark Law 2019 (effective date yet to be announced);
- ab* the Insolvency Law 2020; and
- ac* the Insolvency Rules 2020.

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 so as to instil confidence both domestically and internationally in the business community and, of equal importance, to attract local and foreign investment in support of the government's rapid energy reform initiatives.

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 only a directive, not actual law. Generally speaking, at present the Tender Directive is local and does not follow international standards.

The Tender Directive, while lacking substance, sets out the procedure to be followed by government departments, ministries and state-owned enterprises (SOEs), including the

establishment of procurement or tendering committees, open invitations to tender and public announcements of tenders. On 10 April 2017, the Union government issued Notification No. 1/2017 introducing a new tender procedure (the Tender Procedure) 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 a threshold of 10 million kyat for launching a tender for construction or procurement of goods and services. Importantly, irrespective of the fact that the participation eligibility for foreigners is not clear, foreign companies without any presence in Myanmar may participate in a 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 executing the contract with the relevant government department.

Currently, Myanmar has no specific public-private partnership (PPP) laws, guidelines 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 in any details with issues relating to tendering or procurement.

Any investor seeking to develop a self-proposed project will face difficulty, as this is not common in Myanmar.

V FOREIGN INVESTMENT IN THE ENERGY SECTOR

i Myanmar investment commission permit

A foreign sponsor must obtain a permit from the Myanmar Investment Commission (MIC), or investment licence, to develop a power plant (i.e., to carry out business activity) 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, which 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 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 the zone in which the project is located. Zone 1 includes the least developed areas of Myanmar, excluding Yangon and Nay Pyi Taw; Zone 2 (moderate) includes more developed zones, and Nay Pyi Taw, but still excludes Yangon; and Zone 3 (developed zones) includes Yangon and Mandalay. The income tax holidays are inclusive of the year in which the project company begins operations.

An 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 of the reserve being made;

- c* the right to deduct accelerated depreciation from the profit 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 exports of goods produced in Myanmar;
- e* the right to pay foreign employees' income tax at the rates applicable to citizens residing within the country;
- f* the right 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
- h* 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 following types of foreign currencies:

- 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 when a business is wound up, subject to approval by the MIC.

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

ii MIC endorsement

A foreign sponsor intending to make a small-scale power investment (with investment capital of less than US\$5 million) who desires a long-term lease right for a period exceeding one year must apply for an endorsement at an MIC regional office. If the investor's investment capital exceeds US\$5 million, he or she must apply for an endorsement at the MIC's head office.

It is not industry practice in Myanmar, nor is it recommended, for a foreign sponsor to obtain an endorsement only to develop a power plant. Rather, the tried and tested approach is that a foreign investor will obtain both an endorsement to secure long-term lease rights and an MIC permit to carry out the desired business activity. The authors would recommend that any sponsor intending to develop a power plant in Myanmar obtain an MIC permit.

Right to enter into a long-term lease

A foreign-owned company (i.e., sponsor) without an endorsement (as specified below) or MIC permit is only allowed to enter into a lease agreement for up to 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.

iii Processing time

MIC permits are granted case by case, 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 the same, although this was not the intent of the legislature.

Tenders are issued through the MOEE, and investors and sponsors can find up-to-date information about independent power producer (IPP) tenders on the MOEE website.²

VI INDIAN INVESTMENT IN THE ENERGY SECTOR

Aside from the Indian downstream entities (mostly publicly owned) that are dominant players in India's downstream petroleum sector, recent legislative developments 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. The government has been formulating programmes for the use of renewable energy resources such as wind, solar, hydro, geothermal and bioenergy for sustainable energy development in Myanmar. With various alternative fuel sources available in Myanmar, Indian private entities that have sophisticated technical skill sets in the energy and power sectors can look forward to Myanmar as a potentially rewarding market. India also benefits from its geographical location, as it can easily cater for Myanmar's energy requirements in the energy and power sectors.

VII CHINESE INVESTMENT IN THE 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. 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 SOEs and private Chinese investors developing Myanmar's energy sector; however, the majority of inbound Chinese investment into Myanmar's energy sector is largely led by the former.

According to official statistics released by the Directorate of Investment and Company Administration (DICA), China is ranked as the leading foreign investor in Myanmar, boasting a volume of almost 26 per cent of Myanmar's foreign investment value.

One of the key landmark projects 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 China's Yunnan province. This project was completed in 2014.

Three Chinese SOEs (China Electric Power Equipment and Technology Company Ltd, China Southern Power Grid Company Ltd (CSG) and 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 and Chinese President Xi Jinping met in May 2017 to discuss, among other things, Myanmar's energy sector and developing closer ties. The authors' understanding, based on information released by the MOEE, is that there have not been any further developments since those initial talks. The Chinese and Myanmar diplomatic meetings are the most encouraging cooperation to date since the suspension of the Chinese-backed Myitsone dam in 2011.

The authors expect China to be the leaders in the development of Myanmar's energy sector.

2 www.moee.gov.mm.

VIII BANKABLE PROJECT DOCUMENTS

Arguably, the project documents (e.g., memoranda of agreement, power purchase agreements, build-operate-transfer agreements, engineering, procurement and construction contracts, land lease agreements, security documents, fuel supply agreements) 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, a power deal of this magnitude had not been seen before.

If an 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 the requirements for having in place bankable collateral for meeting the lenders' requirements for the project. It has also been the authors' experience that foreign lenders usually push hard to enhance the recourse options by establishing liens on the interests or assets of the sponsors and shareholders of any project company. If the financing involves syndicated contributions from multilateral development financial institutions (multilaterals), this will create another hurdle. Sponsors need to be aware that multilaterals may show little inclination to negotiate any deviation from their standard project documentation.

IX 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 authors understand that 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).

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.

Under the standard MIGA contract of guarantee for shareholder loans, a 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, as mentioned in Section V, above, under the MIL the government guarantees that a business that acquires an MIC permit shall not be nationalised during the term of the contract or during the extended term of the contract. Further, 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. The guarantee provided under the MIL is yet to be properly tested in any Myanmar court or arbitral tribunal, and thus 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 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 that guarantee. If the guarantee is required to be issued in a foreign currency, the Ministry will consult the Central Bank of Myanmar (CBM). However, thus far, the authors are yet to witness guarantees issued by the state referring to the provisions of the PDML.

X PROJECT FINANCING

The difficulties involved in financing power projects to date mainly revolve around the CBM and MIC approvals (for companies with an MIC permit), and concern loan facilities and challenges in perfecting security interests, including:

- a* charges over shares (normally referred to as pledges of shares);
- b* fixed and floating charges (these typically include project accounts, movable plant and equipment, buildings and fixtures, and book debts);
- c* mortgages on immovable property. Typically, a separate land mortgage will be executed and this must be registered at the relevant Myanmar Office of Registration of Deeds; and
- d* assignments of contracts.

To comply with Myanmar property laws, foreign lenders often engage a local bank to act as an onshore security agent (OSA) (or collateral agent) to enable holding of charge over immovable property).

All 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 the lack of a modern legal mechanism allowing the government to facilitate registration of security. The first inroads were made under the Registration of Deeds Law 2018, which prescribes a more transparent two-way mechanism involving online registration with the DICA followed by registration with the Deed and Registration Office to properly record a security interest. However, there is no official land titles register or electronic database, making it difficult for investors to accurately determine the ownership of privately held plots of land. 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 conduct a careful due diligence process on landowners.

Use of an OSA is highly recommended to streamline the perfection of security processes, as there are few restrictions 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 that the OSA is not aware of other interests that would affect the security remaining perfected.

Section 229(a) of the MIL 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 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 DICA within 28 days of its creation, otherwise it is void against a liquidator and other creditors should a company be wound 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).

CBM approval is required for all offshore financings. Once CBM approval is obtained with the loan payment and repayment schedule attached, no further approvals are required for each payment made under the loan. For projects approved by the MIC, the creation of any charge or mortgage requires notification to the MIC.

Given the uncertainties regarding onshore security, lenders will also require sponsors based overseas to provide 'offshore' security over their interests in the Myanmar-based project company in the usual manner.

XI INVESTOR TIPS

i Myanmar and expatriate counsel

We recommend that an 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 in Myanmar. The process is long and requires the expertise of both skilled Myanmar and expatriate counsel to persist with the constant follow-up on 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 in the country; however, this does not mean that developing a large-scale power project and doing business in Myanmar is not without its challenges. According to a 2013 report published by McKinsey:

- a* the average productivity of a worker in Myanmar is US\$1,500 per year – about 70 per cent below that of benchmark Asian countries;

- b* average schooling in Myanmar is for four years;
- c* there will be an additional 10 million people to be absorbed into 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 the supply of utilities. Improvements to the country's infrastructure will take time. As Myanmar's reform process gains speed, many draft laws and amendments are awaiting consideration by Myanmar's parliament.

XII 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 1899 Myanmar Stamp Act, dated 1 August 2017, stamp duty of 0.5 per cent of the total loan facility is applicable.

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

The Income Tax Law provides that a DTA must be 'notified' before it is to override provisions of the Law. The details concerning whether a DTA has been notified are contained in the official government gazette. Accordingly, the terms of any DTA will be followed despite anything to the contrary contained in any other provisions of the Income Tax Law.³ The sponsor must follow an administrative procedure for claiming a tax exemption based on the DTA with the Internal Revenue Department (IRD). Under Myanmar law, application of the DTA is not automatic and is at the discretion of the governor of the IRD.

In terms of the tax concessions available for an MIC company, a five-year income tax holiday for an MIC company starts from the first day of commercial production. Typically, a project company would only incur expenditure without having any taxable income during its construction period. A project company's corporate income tax would be nil if it has negative taxable income. However, if a project company has taxable income during its construction period, it would be liable to pay corporate income tax at 25 per cent on its net profits.

XIII INSOLVENCY

The new Insolvency Law and Insolvency Rules (insolvency legislation) aim to protect both creditors and financially distressed companies, in particular, micro, small or medium enterprises. The insolvency legislation has adopted the United Nations Commission on International Trade Law Model Law in relation to cross-border insolvency. The new legislation

³ The Income Tax Law provides that if the government 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 agreement will be followed despite anything to the contrary contained in any other provisions of the Income Tax Law.

provides a model framework for solving financial distress for companies that have creditors or assets in more than one jurisdiction. In the case of financial distress, companies may choose to solve it by liquidation or rehabilitation.

XIV 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 (the EIA Procedure), which states that:

all 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.

XV 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 the DICA, which have offices in Yangon, all 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.

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

It is preferable to have a short agenda, 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 first day of the meeting.

Given these limitations, it is strongly suggested to have more frequent, shorter meetings as opposed to attempting a one-day marathon session with the government.

Despite most meetings being conducted in English, having a translator in attendance can ensure the meeting will run more efficiently.

XVI POTENTIAL DOWNSTREAM AND POWER PROJECTS

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

Recently, foreign investment has been liberalised by the Myanmar government for imports, storage and distribution of petroleum products in Myanmar under the Petroleum and Petroleum Products Law 2017 (PPPL). It has been a welcome move for potential downstream investors, and will create an opening in the downstream petroleum market for foreign investors in Myanmar.

The PPPL replaces the Petroleum Act 1934 and provides clarity on aspects on imports and exports, transportation, storage, refining, distribution, inspection and testing of petroleum and petroleum products. The PPPL also earmarks the authority concerned with issuance of relevant licences. However, the implementation of the provisions of the 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, there are three major refineries: Thanlyin, Chauk and Mann Thanpayarkan. With the promulgation of the recent regulations in the sector, foreign investment is possible in connection with loading, offloading, and operating and maintaining jetty facilities.

XVII CONCLUSIONS AND OUTLOOK

Myanmar has abundant energy resources – hydropower and natural gas in particular. Owing to underdeveloped legislation and a lack of financial and technical capacity, the energy sector 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 policy changes in foreign investment are indicative of the fact that the government is making greater efforts to create a more transparent atmosphere to attract foreign capital and technology. It is to be hoped that there will be significant growth in the energy sector in the near future.

ABOUT THE AUTHORS

KRISHNA RAMACHANDRA

Duane Morris & Selvam LLP

Krishna Ramachandra is managing director of Duane Morris & Selvam LLP in Singapore and of Duane Morris & Selvam (Myanmar) Limited. He is head of the corporate and technology, media and telecommunications (TMT) practice groups and serves as a team lead for the fintech industry group. His practice includes mergers and acquisitions (M&A) and capital markets, investments funds, private equity, financial technology and TMT. Krishna also has significant experience in Myanmar, Indonesia, Malaysia, Taiwan and Korea.

Krishna was named one of Singapore's top 100 lawyers by *Asia Business Law Journal* 2018. He is regarded as one of the most highly recommended lawyers in the practice areas of capital markets (foreign firms), corporate/M&A (local and foreign firms) and TMT (local firms) in Singapore by *The Legal 500 Asia Pacific* and *Chambers Asia-Pacific*. Krishna is also recognised as a leading individual for corporate and M&A (domestic) in Singapore by *Chambers Global* 2019. In Myanmar, he is regarded as a leading lawyer in corporate and M&A since 2016 and a recommended lawyer in projects (including energy) by *The Legal 500 Asia Pacific*. *IFLR1000* 2019 also named Krishna as a highly regarded lawyer in Singapore capital markets.

Krishna is an advocate and solicitor of the Supreme Court of Singapore and a solicitor of England and Wales.

PRIYANK SRIVASTAVA

Duane Morris & Selvam LLP

Priyank Srivastava is a special counsel in the corporate and energy practices with more than 10 years' experience of advising in the energy and project development/infrastructure/P3 sector. Priyank focuses his practice on upstream, midstream and downstream oil and gas, and liquified natural gas matters and the power sector. Having worked for more than eight years at India's largest exploration and production company, he is familiar with all the transactional aspects of global energy projects.

Priyank has considerable on-the-ground experience of advising clients in various sectors in Myanmar, including energy and power projects, infrastructure, telecommunications and project financing matters. He has rich experience of the local regulatory regime of Myanmar and has been actively involved in dealing with various government authorities.

Priyank's core areas of practice include cross-border mergers and acquisitions transactions in relation to oil and gas and energy and infrastructure projects. His practice

covers acquisitions, joint ventures, project development and project finance within the oil and gas, mining, power and infrastructure sectors. He is fluent in Hindi and English and knows elementary Burmese and Spanish.

WANG BEI

Duane Morris & Selvam LLP

Wang Bei is foreign associate based in the Yangon office. She has four years on-the-ground experience of advising local and international clients on various investment and other business arrangements involving sectors such as energy, banking, education, manufacturing, construction, distribution and retail. She is a native Mandarin speaker, is proficient in written and spoken English, and conversant in Korean.

KEN TAN

Duane Morris & Selvam LLP

Ken Tan is a foreign associate based in the Yangon office. He has been admitted to the Malaysian Bar and the Bar of England and Wales. He has on-the-ground experience of advising local and international clients in practice areas such as corporate and commercial transactions, construction law, data privacy, dispute resolution, franchise, intellectual property, mergers and acquisitions, mining and resources, real estate, securities and capital markets. He is proficient in written and spoken English, Chinese and Malay.

DUANE MORRIS & SELVAM LLP

16 Collyer Quay #17-00

Singapore 049318

Tel: +65 6311 0030

Fax: +65 6311 0058

kramachandra@duanemorrisselvam.com

psrivastava@duanemorrisselvam.com

bwang@duanemorrisselvam.com

kytan@duanemorrisselvam.com

www.duanemorrisselvam.com

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