

TURNING ON THE LIGHTS IN MYANMAR

FOR A COUNTRY MARKED AS THE ONE OF THE LAST REMAINING FRONTIERS, IT MAY COME AS A SURPRISE THAT THREE-QUARTERS OF THE POPULATION OF MYANMAR – EQUIVALENT TO 45M PEOPLE – LIVE IN DARKNESS. STRENGTHENING MYANMAR’S ENERGY SECTOR IS THEREFORE CRITICAL TO ITS RAPID ECONOMIC AND SOCIAL DEVELOPMENT. BY **JEANETTE LUI** AND **NOMITA NAIR, BERWIN LEIGHTON PAISNER**.

Myanmar currently has an installed capacity of 3,495MW of energy generation – by way of comparison, the United Kingdom has around 25 times as much for a similar sized population – provided by 19 hydropower stations, one coal-fired power plant and 10 thermal power stations. Of this, only 56% represents firm capacity and one-tenth is ear-marked for export.

The country has traditionally relied on hydro-electric plants but these have proven unpopular due to frequent power cuts caused by seasonality and perceived negative environmental consequences. In many areas, people rely on expensive diesel generators.

As a result, the government of Myanmar has plans to modernise and rehabilitate the existing power infrastructure and also develop additional coal and gas-fired power plants to meet the burgeoning domestic energy demand.

The country’s power sector is based on a state-owned single buyer model, similar to Thailand. The Myanmar Electric Power Enterprise (MEPE) purchases electricity from public and private producers and then sells it to the Electricity Supply Enterprise (ESE) and Yangon Electricity Supply Board (YESB) for distribution to households, businesses and other users. A number of small private producers also supply directly to the end-customer.

This is all overseen by the Ministry of Electric Power (MOEP) which is vested with all operating

and management responsibilities relating to power generation, transmission and distribution.

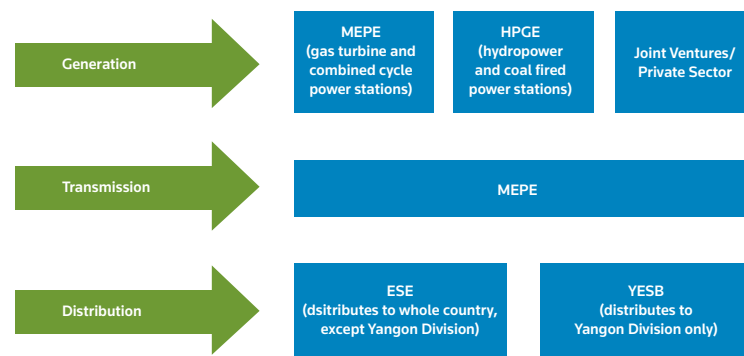
Legal framework

The existing legislation governing the power sector is mainly contained in the 1984 Electricity Law and the accompanying 1985 Electricity Rules. Historically, this legislation was administered by the Ministry of Industry and lacks many of the features of a modern electricity framework.

Under the Electricity Law, the government may grant rights to specified organisations, including foreigners, to participate within the sector. However, the law provides limited guidance on the rights and duties of the electricity licence holder and is silent on the responsibilities of public institutions, the licensing and approval process for investments in the sector, principles and procedures in tariff setting and dispute resolution.

In recognition of these shortcomings, the Government of Norway provided a technical assistance grant in November 2012 to the Asian Development Bank (ADB) to update the electricity laws. The grant is intended to support the drafting of electricity laws to, among other things, gradually unbundle generation, transmission, and distribution, provide a framework for private-sector participation in power generation, increase rural access to electricity, and establish an electricity regulator in accordance with international standards. We

MINISTRY OF ELECTRIC POWER



MEPE = Myanmar Electric Power Enterprise
HPGE = Hydropower Generation Enterprise

ESE = Electricity Supply Enterprise
YESB = Yangon Electricity Supply Board

understand that the MOEP is keen to develop the legislation in 2013, although it would still require approval by the Office of the Attorney General and President Thein Sein, and this may lead to further delays.

Investment framework and opportunities

Despite its relative under-development, the existing investment framework does permit foreigners to set up power generation facilities in Myanmar through the Foreign Investment Law 2012 (replacing the 1988 law) (FIL) and the accompanying rules and regulations that were issued in January 2013 (Rules). The FIL and the rules set out the types of investment activities that are excluded to foreign investors, those open to 100% foreign investment and those that can only be undertaken together with a local entity or government entity. The FIL also provides various incentives to foreign investors across multiple sectors, including tax holidays and guaranteeing that investments will not be subject to expropriation or nationalisation.

Unlike in Thailand and Indonesia – or Myanmar’s oil and gas sector – there is no formal bidding process for participation in the power sector. However, participation can follow the route of a build, operate and transfer arrangement or joint venture. No formal public-private partnership framework exists yet, though it is hoped that the new electricity laws will at least refer in principle to such a concept.

The current regime allows interested foreign investors to submit their proposals bilaterally to the government. The government can then invite the foreign investor to sign a memorandum of understanding for a fixed period during which time the foreign investor is required to conduct technical and financial feasibility studies. Once the project has been determined as feasible, the parties will then enter into negotiation of the project documents, such as a joint venture agreement or power purchase agreement. There are presently no standardised agreements and the allocation of risk is subject to negotiation on a case-by-case basis.

Historically, power projects have often featured North Asian investors. For example, the 270MW Htantabin coal-fired power plant is being jointly developed by Huaneng Lancangjiang Hydropower Co Ltd, a Chinese company, and HTOO Trading Co Ltd, a Burmese company. The 500MW Thaketa gas-fired combined cycle power station is being developed by a South Korean consortium led by Busan Korea Biotechnology Co. More recently, in January 2013, Mudajaya Group Bhd from Malaysia signed an MoU with the government to develop a 500MW coal-fired power plant in Mandalay.

To help attract further investment, Myanmar formed the National Energy Management Committee and the Energy Management Committee in January 2013. These committees are mandated to co-ordinate and develop Myanmar’s energy and electricity sectors and include representatives from various ministries including the MOEP and the Ministry of Energy. From a practical perspective, independent power

producers will now need approval from the NEMC as well as the MIC.

Challenges and looking ahead

● *Political and credit risks* – Myanmar’s turbulent political history has meant that political and corruption risks are still of major concern to many investors. To address the impact these issues have on the bankability of projects in Myanmar, a number of government-backed development and multilateral financial institutions including the Asian Development Bank (ADB) and arms of the World Bank – Multilateral Investment Guarantee Agency (MIGA) and International Finance Corporation (IFC) – have stepped up their involvement in the infrastructure financing space and are establishing offices in Myanmar.

Government off-taker credit risk is another key concern for investors in any project financing transaction, and even more so in the emerging markets. It is hoped that at some point in the future, the involvement of these organisations will lead to multilateral-backed government guarantees covering the payment obligations of the power purchaser, as is the case in Indonesia – where eligible independent power producers have been issued with government guarantees from the Ministry of Finance, to cover payment obligations of Perusahaan Listrik Negara for the purchase of power.

It is therefore encouraging to note that on a trip to Myanmar in February 2013, Michel Wormser, vice-president of MIGA, said: “We can work with the Government of Myanmar to provide risk guarantees to investors. This would help them obtain financing at competitive rates, speeding up project implementation.”

● *Financing and taking security* – Obtaining offshore financing and creating onshore security is generally not straightforward. Foreign investors seeking to enter into loans provided by foreign lenders or create security interests in favour of foreign lenders will need to obtain prior approval from, among others, the Myanmar Central Bank and the MIC if the foreign investor has set up its business under the FIL. The repayment of principal and interest on such loans may also only be made with the prior approval of the Central Bank. Under Myanmar’s tax laws, the borrower will be required to withhold 15% on any interest paid to a foreign lender.

In principle, security can be taken over land, rights under contracts, shares in a local company, and bank accounts. A foreign lender, however, may not be able to take any security over land or other forms of immovable property. If a foreign investor has obtained certain rights under the Electricity Law, it is not entitled to sell, mortgage, loan, exchange or in any other way transfer those rights, in whole or in part, without prior consent of the government.

● *Access to energy sources* – Myanmar is not short of energy resources – it has gas reserves totalling 11.8trn ft³ (with potential for further discovery) and estimated coal reserves of 488.7m tonnes.

However, a large percentage of Myanmar's natural gas production is destined for Thailand and China under long-term gas sales contracts. As it is unlikely that these contracts can be re-negotiated, the government has made clear that any new gas fields coming on stream will be channelled to meet domestic needs.

Until that happens, coal will be seen as the cheapest alternative source to plug the gap. However, reliance on domestic coal supplies may not be a viable option in the short term as many of the reserves remain untapped in Myanmar and much of the coal is classified as sub-bituminous, making it less suitable for power generation. The government has indicated that it is prepared to allow coal imports but this decision will be subject to overcoming environmental concerns.

- *Transmission and distribution* – A considerable portion of the power generated in Myanmar is lost in transmission and distribution. In part, this is because of an outdated and limited voltage power transmission network, with over half of the power cables in Myanmar transporting less than 230kV. Energy efficiency is therefore just as important as getting new capacity on-stream.

Significant infrastructure upgrades are purportedly being undertaken to improve and extend the transmission and distribution network, including the installation of a 420km 500kV power grid with overseas development assistance from Serbia, South Korea and Japan.

- *Electricity tariffs* – There is currently no standardised system of pricing electricity and natural gas, and the purchase price for electricity is subject to annual negotiation. In December 2012, the government announced plans to implement a system based on an international model and raised the price of electricity in Myanmar.

A household expending 200kW over one month is now charged 35 kyats/kWh (US\$0.04) while a household expending over 200kW is charged 50 kyats/kWh (US\$0.06). Industrial units expending between 10,000kW and 15,000kW per month are charged 75 kyats/kWh (US\$0.09).

However, electricity still remains hugely subsidised by the government. For example, in October 2012 the government agreed to purchase electricity at 80 kyats/kWh from private entities Diamond Star Company and Pacific Electric Company. It has been reported that the government will be raising prices again in 2013, following advice from various stakeholders, to help stimulate the necessary investment.

- *Royalties* – It is worth noting that for joint venture hydropower projects, the government is entitled to “free share” and “free power” (equivalent to royalties) in addition to income tax revenues. The free share and free power are negotiated on a project-by-project basis, but as a general rule, the free share is not less than 25% and the free power not less than 10%.

- *Foreign currency* – Paving the way for a more effective financial system, a number of exchange rate reforms were made in 2012, including the conversion of Myanmar's exchange rate system to a

managed floating regime, and the introduction of the Foreign Exchange Management Law 2012 (FEML). Pursuant to the FIL, companies registered under the FIL may open a kyat account and foreign currency account with banks within Myanmar having the right to carry out foreign banking services. Such foreign investors may invest their capital in foreign currency and repatriate any profits of the company after payment of taxes, at prevailing exchange rates. In practice, the repatriation of profits is not as straightforward, as such transactions need to be approved by the Central Bank.

- *Land acquisition* – Foreigners are restricted under the Transfer of Immovable Property Restriction Law 1987 from holding land and immovable property. However, the FIL permits foreigners to lease land from the government or authorised private owners for a fixed period. Such leases can have an initial term of up to 50 years and, subject to approval from the MIC, two further extensions of 10 years each. The MIC has discretions to approve a longer lease period where foreigners are investing in remote areas that assist in local development.

Prior to executing a land lease agreement, foreign investors are advised to undertake proper due diligence on the land and the title deed. Although ownership of and all registrable interests in land are required to be registered with the Office of the Registration Deeds, concerns have been raised over overlapping title deeds and recent reports of ownership documents having been illegally obtained.

Furthermore, a government commission set up to identify farmland ownership disputes has received about 4,000 reports of land grabs from farmers since its establishment in August 2012. As a general rule, foreign investors interested in leasing land in Myanmar should inspect or at least inquire as to who is or was in actual possession of the land, in addition to conducting a search of the public register and reviewing the title deed.

- *Environmental issues* – Myanmar passed its first Environmental Conservation Law (ECL) in March 2012. The ECL, among other things, defines the rights and responsibilities of the Ministry of Environmental Conservation and Forestry, environmental standards, process for obtaining prior permission, prohibitions, offences and punishments. The implementing rules and regulations, including guidelines for conducting environmental impact assessments, are likely to become available later this year. Under the implementing FIL rules, the MIC, may request that certain foreign investors conduct an environmental and social impact assessment prior to the issuance of an FIL permit.

- *Dispute resolution* – While there is certain local legislation governing international arbitration, these date from the colonial era and require comprehensive updating. Myanmar is also not a party to the New York Convention 1958, meaning that it is challenging to enforce a foreign arbitral award in Myanmar. However, there have been strong signals from the government that preparations for this are under way. ■