

**MYANMAR LEGAL**

# **Myanmar: Challenges for Independent Power Projects**

**November 2016**

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# Summary of Myanmar regulatory regime applicable to IPP Projects

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**1. Ministry of Electricity and Energy (MOEE) (formerly two ministries, merged in 2016)**

- ❖ Department of Electric Power Transmission and System Control (DEPTSC)
- ❖ Electricity Supply Enterprise (ESE)
- ❖ Department of Electric Power Planning (DEPP)
- ❖ Electric Power Generation Enterprise (EPGE) (formerly MEPE)
- ❖ Department of Hydro Power Implementation (DHPI)
- ❖ Yangon City Electricity Supply Corporation (YESC)
- ❖ Mandalay Electricity Supply Corporation (MESOC)
- ❖ Myanma Oil and Gas Enterprise (MOGE)
- ❖ Myanmar Petrochemical Enterprises (MPE)
- ❖ Myanmar Petroleum Products Enterprise (MPPE)

**2. Ministry of Natural Resources and Environmental Conservation (MONREC)**

**3. Ministry of Agriculture, Livestock and Irrigation (MOALI)**

**4. Ministry of Education (MOE)**

**5. Ministry of Industry (MOI)**

**6. Ministry of Planning and Finance (MOPF)**

**7. Myanmar Investment Commission (MIC)**

**New Commission to evaluate the hydropower projects on confluence, upper-reaches and basin of Ayeyarwady River was established in August 2016**

# NEMC: Natural Energy Policy

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The National Energy Management Committee (NEMC) has been dissolved. It is not known whether the policies stated below are still in force.

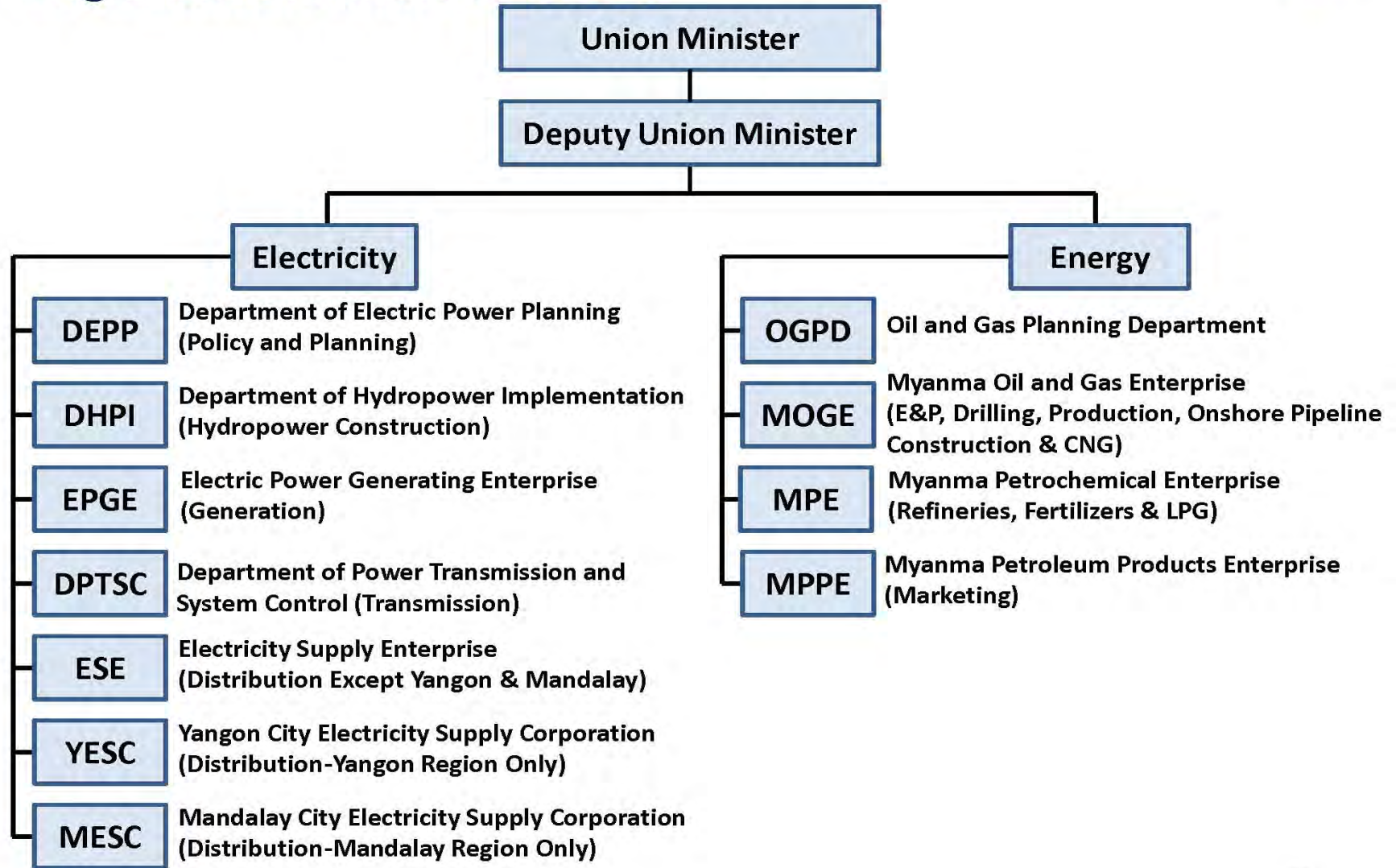
The NEMC announced the National Energy Policy on 6 January 2015 and it was based on the “Myanmar Energy Sector Policy Draft Working Paper” prepared by international and national energy sector experts under the ADB assistance and “Current Situation Analysis, policy, strategy and road map of each energy sub-sector” prepared by energy related Ministries. It included the following nine points:

1. To implement short term and long term comprehensive energy development plan based on systematically investigated data on the potential energy resources which are feasible and can be practically exploited, considering minimum impact on natural environment and social environment.
2. To institute laws, rules and regulations in order to promote private sector participation and to privatize State Energy Organizations in line with State Economic Reform Policy.
3. To compile systematic statistics on domestic demand and supply of various different kinds of energy resources of Myanmar.
4. To implement programs by which local population could proportionally enjoy the benefit of energy reserve discovered in the areas.
5. To implement programs on a wider scale, utilizing renewable energy resources such as wind, solar, hydro, geothermal and bio energy for the sustainable energy development in Myanmar.
6. To promote Energy Efficiency and Energy Conservation.
7. To establish Research, Development, Design and Dissemination (R, D, D&D) Institution in order to keep abreast with international practices in energy resources exploration and development works and to produce international quality products in order to manufacture quality products and in order to conduct energy resources exploration works in accordance with international standard.
8. To promote international collaboration in energy matters.
9. To formulate appropriate policy for energy product pricing meeting economic security of energy producers and energy consumers.

**Reference:**

- ❖ “ADB TA No. 8356 Final Presentation on Myanmar Energy Master Plan”, Stuart Thorncraft (IES) and Bruce Hamilton (ADICA), Nay Pyi Taw, 8 January 2016

# Organization Chart of MOEE



# Summary of Myanmar laws applicable to IPP Projects

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## 1. Laws governing the electricity sector

- ❖ Myanmar Companies Act (1914) (amendment in process) (draft new law is in DICA website)
- ❖ State-Owned Economic Enterprises Law (1989)
- ❖ Myanmar Electricity Law (2014) (pending new implementing rules, rules under Electricity Law (1984) apply)
- ❖ Electricity Rules (1985)
- ❖ Myanmar Investment Law (2016)
- ❖ Foreign Investment Rules (2013) (pending new implementing rules under MIL)
- ❖ MSEZL (2014)
- ❖ MSEZ Rules (2015)

## 2. New Myanmar Investment Law

The new Myanmar Investment Law ("MIL") was enacted on 18 October 2016, replacing the previous FIL (2012) and Citizens Investment Law (2013).

A brief summary of certain of the key changes under the new MIL follow below.

### ***MIC Application Process***

There will be a new type of MIC approval process, which for purposes of this note we call an MIC Endorsement. Consequently, it is expected that there will be two types of MIC approval under the new law, depending on the nature of the investment: either (i) approval by way of MIC Permit, or (ii) approval by way of MIC Endorsement (which is expected over time to be a more simple process than under the current investment regime).

### ***Tax Incentives***

Tax holidays and incentives are no longer automatic, and instead depend on the geographic location of the investment, the sector, and it appears to some extent, MIC's discretion.

- Investors must apply to MIC separately for any tax exemption. Tax exemptions under the MIL will still in theory be available, but instead granted to investors at the discretion of the MIC.

# Summary of Myanmar laws applicable to IPP Projects *(cont'd)*

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- A new zoning system is introduced, pursuant to which investments in certain regions or zones (the locations and details of which have not yet been issued) may be granted different corporate income tax exemptions. Under the new zoning system:
  - Zone 1 (representing the least developed areas of Myanmar), will attract the greatest potential income tax holiday of up to 7 years;
  - Zone 2 will attract an income tax holiday of up to 5 years; and
  - Zone 3 (representing the most developed areas of Myanmar) attracts the shortest potential income tax holiday of up to 3 years.
- Comments from DICA in October 2016 also suggest that any tax exemptions granted will also depend on whether the relevant project falls within a 'promoted sector'. However, as of 25 November 2016, further guidance on this matter have not been issued.

## ***Land use rights***

This basic prohibition that foreign invested companies cannot lease premises for more than one year still applies, with the following exceptions:

- A lease of up to 50 years, with option for two 10 year extensions, may be granted to MIC Permit holders and MIC Endorsement holders.
- Longer lease terms may also be granted in 'less developed and remote regions', although the details of this are not yet clear.

## ***Remittance of Funds***

The MIL clarifies the categories of funds which may be remitted offshore, provided that the company remitting the funds has complied with all tax obligations in respect of the funds transfer.

## ***Expropriation Guarantee***

The MIL expressly contains a guarantee against expropriation, as well as nationalization, although exceptions have also now been set out in the law, including for public interest.

## ***Employment***

Foreign investors now appear to have more flexibility in their approach to employees, since the required local employee hiring ratios of MIL have been deleted.

The MIL retains provisions on recruitment and capacity building of local employees.

## Summary of Myanmar laws applicable to IPP Projects *(cont'd)*

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### 3. New Special Economic Zone Law

On 23 January 2014 the Government enacted a new Myanmar Special Economic Zone Law (MSEZL), Law No. 1/2014 which applies to all Special Economic Zones, and which repeals to 2011 MSEZL and the Dawei SEZL.

The MSEZL provides for a Central Body, Central Working Body, and a Managerial Committee for each SEZ.

A SEZ may have several zones: Free Zone, Business Development Zone, Promotion Zone and other Zones.

The new MSEZL offers the following incentives to investors within a SEZ:

- ❖ 100% Foreign Ownership;
- ❖ The right to lease land for 50 years, with a 25 year renewable period;
- ❖ 7 year income tax exemption for businesses in "Free Zones" and for "Exempted Businesses"; 5 year income tax exemption for "Investment Businesses" in "Promotion Zones" or other businesses in a SEZ; 5 year income tax reduction of 50% following any exemption period, reduction can be extended for another 5 years for profits which are reinvested;
- ❖ No customs duties:
  - in "Free Zones";
  - for materials and equipment used during construction and exemptions or relief for other imported materials or equipment;
- ❖ "Investors" will pay customs on raw materials and goods used for production but can apply for reimbursement if the finished goods are used in the SEZ;
- ❖ The right to carry forward losses for five years after they were sustained;
- ❖ Certain reliefs and exemptions from VAT and Commercial tax;
- ❖ Right to open foreign currency accounts with approved banks.

# Summary of Myanmar laws applicable to IPP Projects *(cont'd)*

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## 4. MIC Notification No. 26 /2016 dated 21 March 2016

This Notification prescribes economic activities which are prohibited, which are allowed only in joint ventures with Myanmar nationals, or which are allowed only in accordance with specific conditions:

### List of Economic Activities under Prohibition

- ❖ 6 Administering electricity system
- ❖ 7 Inspection of Electrical Works

### List of Economic Activities to be allowed only in form of joint venture with Myanmar Citizens

- ❖ 20 Production of electric power by medium and small scale

### List of Economic Activities Permitted with Specific Conditions

- Item (b) 21: Production of electricity for the operation of rail transport

## 5. Income Tax Law, Rules and Regulations

- ❖ Income Tax Law Rules and Regulations (1974) and notifications from time to time. See Law Amending the Income Tax Law published 28 March 2014.
- ❖ 2016 Union Tax Law published 25 January 2016. Currently, progressive rates up to 25% for Myanmar companies, and 25% for branches of foreign companies.
- ❖ Commercial Tax Law (1990) (a turnover tax levied on goods and services, rates vary 5-120%). See amendments effective 1 April 2015.
- ❖ Personal income tax rates. Citizens and Resident Foreigners, 1-25% progressive.
- ❖ Stamp Act. See Law Amending the Stamp Act published 4 April 2014. Stamp duty payable on 65 types of instruments. Types not mentioned directly under 65 instruments are determined by verbal instructions of the concerned stamp duty officers. When enforced at court, the judge may order to impound the stamp duty with 10 times the amount of the proper duty.

## 6. Withholding Tax

- ❖ Ministry of Finance Notification No.41/2010 prescribes a withholding tax regime. Notification No. 167/2011 requires the payer of the following types of payments to deduct the applicable tax and remit to MOPF:
  - Interest: 0% for interest payments to residents and resident foreigners, 15% for non-residents;
  - Royalties for the use of licenses, trademarks, and patent rights: 15% on payments to residents, 20% to non-resident;
  - Payments for work done by foreign contractors: 2% on payments to residents, 3.5% to non-residents; and
  - Payments made to contractors for goods and services performed in the Union or purchase of goods from the Union: 2% on payments to residents, 3.5% to non-residents.



# Summary of Myanmar laws applicable to IPP Projects *(cont'd)*

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## 7. Labour Laws

- ❖ Formerly there were 21 labour laws, but following recent legislation there are 14 in use. On 28 March 2012, the Dispute Settlement Law relating to Labour Affairs was enacted, and the Trade Disputes Act (1929) was revoked. The Social Security Law (2012) was enforced on 1 April 2014 by Notification 15/2014 of the President's Office, which revoked the old Social Security Act (1954). Under the new Social Security Law, both employees and employers are required to contribute to the social security fund at rates set by the Ministry of Labor through notification.
- ❖ The Minimum Wages Law (2013) was enacted, and the Minimum Wages Act (1949) and Minimum Wages for Farm Workers Act (1948) were revoked. The Minimum Wage Law allows the government by notification to set the minimum wage per sector. Notification No. 2/2015 was announced on 28 August 2015 fixing a rate at 3,600 kyat for an 8-hour work day, excluding small businesses and family run businesses with less than 15 employees. Notification No. 84/2015 was announced on 3 July 2015 stipulating the severance payment.
- ❖ The Ministry of Labour, Employment and Social Security issued the Announcement No. 1/2015 on 31 August 2015 relating to signing the employment contract between employer and employee in accordance with the model employment contract drafted by the Ministry of Labour.
- ❖ The Law amending the Factories Act (1951) was enacted on 20 January 2016.
- ❖ The Shops and Establishments Law (1951) was revoked by the Shops and Establishments Law (2016) on 25 January 2016.

## 8. Double Tax Treaties

- ❖ India, Laos, Malaysia, Singapore, South Korea, Thailand, United Kingdom, and Vietnam.

## 9. Investment Promotion Treaties

- ❖ Bilateral investment treaties with China, India, Japan, Laos, the Philippines, Thailand, Vietnam, Republic of Korea, Kuwait, Indonesia, Israel and United States of America
- ❖ ASEAN Comprehensive Investment Agreement.

## 10. Arbitration

- ❖ Myanmar became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, effective on 15 July 2013.
- ❖ Myanmar Arbitration Act (1944) was revoked by the Arbitration Law which was enacted on 5 January 2016. This Law provides for enforcement of both domestic and foreign arbitral awards, and recognizes arbitration abroad. It was drafted in part on the UNCITRAL Model Law.
- ❖ ASEAN Comprehensive Investment Agreement (ACIA).

# Summary of Myanmar laws applicable to IPP Projects *(cont'd)*

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## 11. Environment

### Relevant legislation

- ❖ Constitution
- ❖ Environmental Conservation Law, 2012, Union Parliament Law No. 9, 30 March 2012. The Environmental Conservation Rules were issued on 5 June 2014, which provide for Environmental Impact Assessments (EIA; IEE; and EMP).
- ❖ National Environmental Quality (Emission) Guidelines were issued on 29 December 2015.
- ❖ Environmental Impact Assessment Procedure was issued on 29 December 2015.
- ❖ MIC Notification No. 50/2014 re Classification of Types of Economic Activities which require Environmental Impact Assessment" was abolished by Notification 80/ 2016 and requiring investors to comply with the EIA Procedures.
- ❖ Environment-related provisions of other existing laws (if not inconsistent with ECL 2012).

### Regulatory regime

- ❖ Ministry of Natural Resources and Environmental Conservation (formerly Ministry of Environmental Conservation and Forestry )
  - Planning and Statistics Department
  - Forest Department
  - Dry Zone Greening Department
  - Myanmar Timber Enterprise Department

### Current Absence of EIA regime

- ❖ Equator Principles: No Myanmar bank is an "adopting institution".

### Precedents for environmental and social programs:

- ❖ Yadana/Yetagun pipeline corridor Socio-Economic Program.
- ❖ MICCL program in vicinity of S&K copper mine.

### References:

- ❖ Slides presented on 20 January 2015 by Dr. San Oo, Director, Environmental Conservation Department, "Sustainability Roadmap for Myanmar (Environmental Perspective)."

# Procedures for IPP projects to be implemented on JV or BOT basis

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**The process leading to signing a JV agreement with the designated organization of the MOEP (merged to MOEE in 2016) was described as follows:**

**First phase:** sign a MOU after approval from Attorney General's Office (AG), Ministry of Planning and Finance (MOPF), Conduct a pre-feasibility study within 12 months of signing MOU and a feasibility study within 18 months of signing MOU.

**Second phase:** review and approve the feasibility study report, including financial analysis/evaluation, and prepare a draft agreement incorporating comments from AG and MOPF.

**Third phase:** submission of draft agreement to MIC for review and approval in accordance with the MIL. The investor will be asked to conduct EIA, SIA with recommendations for mitigation measures, and to submit the reports to Ministry of National Resources and Environmental Conservation (MONREC) for approval.

**Fourth phase:** submission of agreement incorporating EIA, SIA and approvals of Myanmar Investment Commission (MIC) and MONREC to the Cabinet. After approval of the Cabinet, MIC will issue permit.

**Fifth phase:** Signing of JV agreement between the investor and designated organization of the Ministry of Electricity and Energy (MOEE), with approvals of MOPF for establishing the JV, AG for the right to manage the project, and MOEE for the right to implement and operate the project.

**The Procedures were silent on forms of FSA and PPA with government counterparties, and other project documents required to implement an IPP and obtain international project financing.**

## References:

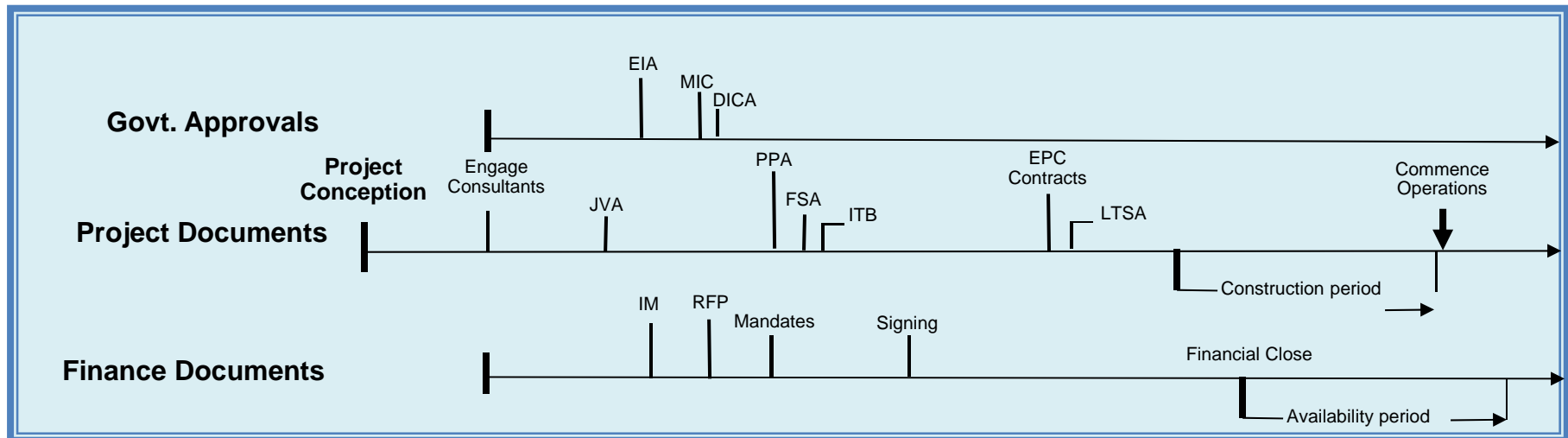
- ❖ The above 5 phases are excerpted from "Opportunities in Myanmar Oil/Gas and Power Sector" by Soe Myint, former DG, MoE, dated 17 December 2012. See DFDL slides, "Myanmar Clean Energy Power Projects Financing" by William Greenlee, 18 August 2015.
- ❖ DFDL "Current Legal and Tax Experiences in Myanmar' Energy Sector", 3 September 2013, especially slide no. 10 (How a deal gets done).
- ❖ DFDL "Lao PDR: a Hydro Concession Laboratory" , 2 March 2016.
- ❖ April 2014 issue of The Irrawaddy for an update on the power sector, including start up of Maxpower (Thaketa), a 50-MW gas-fired power plant, in August 2013 under a PPA signed with MEPE in February 2014.
- ❖ Allen & Overy, "Myanmar IPP: An important milestone in the development of Myanmar's power sector" dated July 2016. On March 29, 2016 the MOEP signed a PPA with Sembcorp Myingyan Power Co., Ltd. to develop the Myingyan power project, a 225 MW combined cycle gas-fired project
- ❖ On March 20, 2016 the MOEP signed a PPA with GEP (Myanmar) Co., Ltd. to develop the 220 MW Solar Power Project in Minbu, Magway Region.
- ❖ VDB / Loi, Client briefing note 3 May 2016, "Myanmar Concludes Five New Power Purchase Agreements".
- ❖ Duane Morris & Selvam, "Developing PPA and IPP in Myanmar's Power Infrastructure Sector", 4<sup>th</sup> Myanmar Oil, Gas and Power Summit, November 2016.

## Basic Contractual Guidelines for IPP Projects

1. Project Financings
2. Project Documents
3. Finance Documents
4. Contract Matrix

### References:

- ❖ DFDL, “Lao PDR: a Hydro Concession Laboratory” , 2 March 2016.
- ❖ DFDL, “Myanmar Clean Energy Power Project Financing – the Legal Perspective”, William Greenlee, 18 August 2015



# 1. PROJECT FINANCING

## Project Financings in Myanmar

MICCL	USD 90 million financing of MICCL's copper mine in Monywa (November 1998)
Shwe Pipelines	USD 2.5 billion financing of oil & gas pipelines from Kyaukphyu (Myanmar) to Kunming (China)
MPRL E&P office building	March 2014
Kempinski Hotel, Yangon	November 2014
GEP (M) Minbu Solar	October 2016

## Recent IPP Project Financings in Thailand and Laos

BLCP	USD 1.3 billion financing of BLCP Power's 2 x 717 MW coal fired power plant in Map Ta Phud (30 March 2004) ADB/JBIC)
KK2	USD 322.8 million and Baht 17.138 billion financing of Gulf Power's 1,468 MW gas fired power plant in Kaeng Noi formerly Bo Nok) (11 November 2005)
RPC	USD 578 million and Baht 11.5 billion financing of Ratchaburi Power's 1,400 MW gas fired power plant in Ratchaburi Province (formerly Hin Krut) (14 December 2005) (JBIC)
GHECO ONE	USD 460 million and Baht 9.96 billion financing of GECO ONE's coal fired power plant in Map Ta Phud (October 2008)
SIPCO	USD 196 million financing of 160 MW gas-fired SPP in Rayong Province (July 2008)
KEGCO 4	Project financing of 920 MW gas-fired power project in Nakhon Sri Thammarat Province (December 2013)
NT2	USD 1.25 billion financing of Nam Theun Power Company's 1,070 MW hydro power plant in Lao PDR (3 May 2005) 27 lenders including World Bank)
NN2	USD 585 million financing of Nam Ngum 2 615 MW hydropower project in Lao PDR (2006)
Hongsa	USD 2,762 million financing of 1,876 MW lignite fired power plant in Lao PDR (November 2010)
Xayaburi	Project financing of 1,285 MW hydropower project in Lao PDR (April 2012)
Xe-Pien Xe-Namnoy	Project financing of 410 MW hydropower project in Lao PDR (February 2014)

# Project Financings in Myanmar

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## Local banking practices

- ❖ Primitive banking system. Few individuals had personal bank accounts in 2012.
- ❖ The local banking sector does not provide financial services required to support major project financings.
- ❖ Prior to 2015, there was no branch or subsidiary of a foreign commercial bank. In 2015, preliminary approval was given to 9 foreign banks to open branch offices. The Central Bank of Myanmar announced that a second round be conducted in 2016, for foreign banks from jurisdictions which have no branch licenses. As of November 2016, 13 foreign bank branch offices are operating.
- ❖ 4 State owned banks, 24 privately owned banks and 45 representative offices.
- ❖ Financial Institutions Law (1990) was revoked by the Financial Institution Law which enacted on 25 January 2016.

## Regulatory approvals are required for foreign loans

- ❖ Approvals of MIC and Central Bank of Myanmar.
- ❖ 15% withholding tax rate on interest on offshore loans.

## Foreign exchange regime

- ❖ Until 1 April 2012, the official rate was US\$1 to 6 Kyats, but the unofficial rate US\$1 to approximately 800 Kyats. Dual exchange rates posed problems for accounting, determination of taxable income, etc. A new floating foreign exchange regime was adopted in April 2012. As of 25 November 2016, the floating exchange rate was US\$1 to 1,305 Kyats.
- ❖ Foreign Exchange Management Law requires prior approval by the Central Bank of Myanmar for remittances. Approval by the Myanmar Investment Commission is also necessary for companies operating under the Foreign Investment Law.

## Insurance

- ❖ In the past, insurance must be procured from the sole state-owned insurance organization, Myanma Insurance Corporation.
- ❖ Under the MIL and FIL Rules, an investor may procure insurance from any insurance company in Myanmar.
- ❖ Recently Myanma Insurance has issued a number of licenses to Myanmar companies. It is not clear whether standard cover for CAR, delay in start up and business interruption is available, nor what rules apply to reinsurance by foreign insurance companies.
- ❖ Myanma Insurance Law, Section 12 (c), permits re-insurance in and outside of Myanmar. Myanma Insurance Corporation provides re-insurance cover, according to the Ministry of Finance.

## Public – Private Partnership

- ❖ There is no PPP-enabling legislation governing contracts between a public sector regulator and a private party, in which the private party provides a public service or project, and assumes substantial financial, technical and operational risk.

## Project Financings in Myanmar (cont'd)

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### Forms of security available

- ❖ Forms of security available under British colonial law are provided for in the Burma Code. However, practice has taken over in many respects.
- ❖ Most forms of security must be registered and stamp duty affixed.
- ❖ MIC and Central Bank approvals must be obtained for offshore security.
- ❖ As general rule, foreigners are prohibited from owning or taking any interest in immovable property.
- ❖ Forms of security over immovable property.
  - Registered or equitable mortgage or a charge.
  - Six types of mortgages are provided for, with varying enforcement processes. In practice, the “Mortgage by deposit of title deed” and “Simple mortgage” are used.
- ❖ Forms of security over moveable property.
  - Mortgages
  - Charges
  - Transfer of actionable claims
  - Floating charges
- ❖ Other forms of security.
  - Negative pledge
  - Guarantees
  - Charge on shares
  - Offshore security

### Precedent "project financings"

- ❖ Yadana gas pipeline
- ❖ Yetagun gas pipeline
- ❖ MICCL S&K copper mine (1997)
- ❖ Shwe gas and oil pipelines (2010)
- ❖ MPRL E&P office building (March 2014)
- ❖ Kempinski Hotel, Yangon (November 2014)
- ❖ GEP (M) Minbu Solar (October 2016)

## Project Financings in Myanmar (cont'd)

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### Issues in project financings in Myanmar

#### Different types of land

- ❖ State owned Land
- ❖ Freehold Land
- ❖ Grant Land
- ❖ Farm Land; Vacant Land, Fallow Land, and Virgin Land
- ❖ Religious Land
- ❖ Town Land
- ❖ Village Land

#### Different laws applicable to land

- ❖ Transfer of Property Act 1882
- ❖ Land Acquisition (Mines) Act 1885 (Repealed) by Law No. 19/12 the Law revoking the Land Acquisition (Mines) Act, on 1/11/12
- ❖ Upper Burma Land and Revenue Regulations 1889
- ❖ Land Acquisition Act 1894, latest amendment issued on 13 July 2015
- ❖ Code of Civil Procedure 1908
- ❖ Water Power Act 1927
- ❖ Disposal of Tenancies Law 1948
- ❖ Transfer of Immovable Property Restriction Act, 1987
- ❖ Procedures Conferring the Right to Cultivate Land / Right to utilize Land for Agriculture, Livestock Poultry Farming and Agriculture Purposes 1991
- ❖ Forest Act 1992
- ❖ Constitution 2008
- ❖ Right to Use Land Notification 39/2011
- ❖ Farm Land Law 2012
- ❖ Vacant, Fallow and Virgin Management Law 2012
- ❖ Ward and Village Tract Administration Law 2012
- ❖ Myanmar Investment Law 2016, Section 50
- ❖ Foreign Investment Rules, Notification No. 11/2013, Rules 97–132

#### Different rules applicable to each sector

- ❖ In each project sector, there may be numerous laws, rules, regulations, orders and directives to be identified and complied with.

#### Absence of Environmental, Health and Safety Laws

- ❖ The Environmental Conservation Law was enacted in March 2012. Environmental Conservation Rules were issued in June 2014.
- ❖ No Myanmar bank has adopted the Equator Principles.



## Project Financings in Myanmar *(cont'd)*

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### Restrictions on rights of foreigners

- ❖ Mortgages of immovable property may not be available in project financings if a lender is a foreign financial institution. Transfer of Immoveable Property Restriction Law of 1987.
- ❖ Land owned by government that is leased to investors may only be mortgaged with the approval of the concerned government department. Government directive no. 3/90.
- ❖ Land within SEZ may be mortgaged or sold only with approvals of concerned government regulators.
- ❖ Foreign investors under the FIR Rules 62–64.
- ❖ 2016 MIL may mortgage leasehold interests in immovable property with the prior approval of the MIC. FIL Section 72;
- ❖ The transfer of shares to a foreigner is subject to approval of the MIC. FIR Rules 65 – 76.

## Project Financings in Myanmar (cont'd)

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### ❖ Current contracting issues in Myanmar

1. What is the model form of JVA with designated organization of MOEE?
2. What are model forms of FSA? And who will be government counterparty ?
3. What are model forms of PPA? And who will be government counterparty?
4. How will the new Arbitration Law, No. 5/2016 (based on UNCITRAL Model Law) be used in practice? What will be choices of venue for dispute settlement by arbitration?
5. What are choices of governing law?
6. Will Myanmar government guarantees of performance of Myanmar counterparties be available?
7. How will acquisition of land for pipeline and transmission lines be facilitated?
8. What is scope of business of the new branches of foreign banks which opened in 2015 and 2016?
9. Is there a requirement for mortgages of immoveables to be held by a Myanmar bank as security agent for foreign lenders?

### ❖ Due Diligence Challenges

- Access to DICA records of Myanmar companies
- Litigation searches
- Title deed searches
- Limited electronic capacity of regulators
- Translations (English / Myanmar)
- Failure to affix stamp duty (prior to or on date of document)
- Failure to register documents
- Pending new laws and implementing rules
  - Companies Law
  - Implementing rules under Myanmar Investment Law
- New regulatory practices after change of government

#### Reference:

- ❖ VDB / Loi, Client briefing note, 3 May 2016, "Myanmar Concludes Five New Power Purchase Agreements".
- ❖ A&O, Myanmar IPP: "An important milestone in the development of Myanmar's power sector", July 2016.

## 2. PROJECT DOCUMENTS FOR AN IPP PROJECT (International Model)

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### ❖ Major Project Documents

- Land lease agreement
- Project management agreement
- Joint Venture Agreement
- Fuel Supply Agreement (FSA)
- Power Purchase Agreement (PPA)
- EPC construction contract (plant, gas pipeline, transmission line)
- Long term service contract
- Insurance contracts

### ❖ Sponsors Arrangements

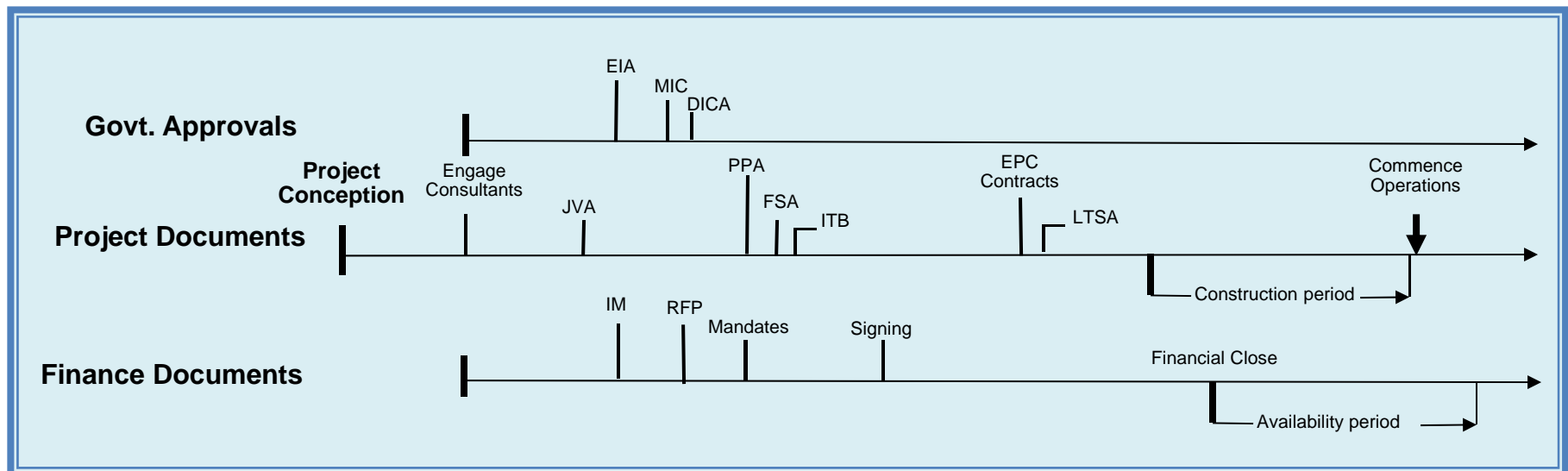
- Shareholders Agreement
- Equity commitments
- Other financial support
- Technical support

## Review of IPP Project Feasibility (International Model)

- ❖ Financial
  - ❖ Technical
  - ❖ Regulatory
  - ❖ Legal
  - ❖ Insurance
  - ❖ Environment
- Engagement of:
- Financial advisor
  - Technical advisor
  - Environmental advisor
  - Legal counsel
  - Project managers
  - Insurance advisor

### References:

- ❖ Tractabel Engineering, "Hydro Investment Challenges in Myanmar", Myanmar Energy Investment Summit, 3-4 September 2013, Yangon, especially slide no. 5.
- ❖ DFDL, "Lao PDR: a Hydro Concession Laboratory", 2 March 2016.

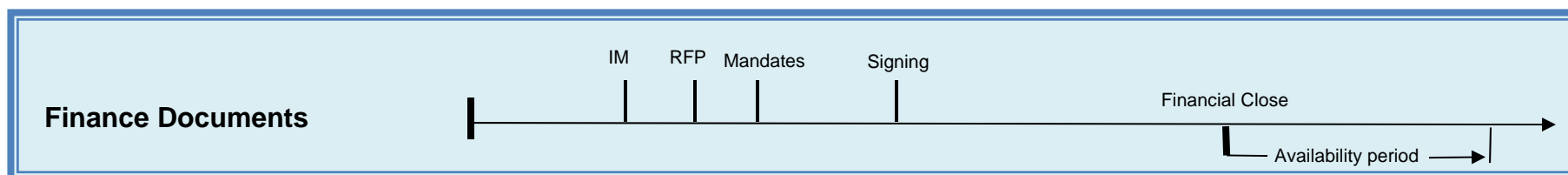


### 3. FINANCE DOCUMENTS FOR AN IPP PROJECT (International Model)

Finance Documents for an IPP Project evolve out of a process normally requiring 9 or more months. Below is a process checklist for a Project Sponsor:

#### A. Transaction Management

- ❖ Engagement of Advisors
- ❖ Kick-off arrangements with prospective Lenders
- ❖ Coordination with Lenders' counsel
- ❖ Preparation and updating of "information memorandum"
- ❖ Justification of project and transaction documents
- ❖ Review of "closing memorandum" for initial drawdown
- ❖ Drafting Myanmar law opinions for initial drawdown
- ❖ Signing formalities
- ❖ Pre-closing: monitoring conditions precedent and document management
- ❖ Closing formalities
- ❖ Post-closing work



## Finance Documents *(cont'd)* (International Model)

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### B. Facilitate Conduct of Due Diligence by Lenders

- ❖ Site and access road, including title search
- ❖ Licenses and permits
- ❖ Government approvals
- ❖ Rights-of-way to site and for gas pipeline and transmission line.
- ❖ Corporate searches on all contract counterparties.

### C. Negotiation of Finance Documents

- ❖ Mandate Letters and Confidentiality Agreements
  - ❖ Term Sheet
  - ❖ Common Terms Agreement
  - ❖ Loan Agreement(s)
  - ❖ L/C Facility Agreement
  - ❖ L/G Facility Agreement
  - ❖ Accounts Agreement
  - ❖ Security Agreements
  - ❖ Intercreditor Agreement
- Insurance program in CTA
  - Governing law issues
  - Dispute settlement provisions

## Finance Documents *(cont'd)* (International Model)

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### D. Adapt Project Documents to Lenders' requirements

- ❖ Land Purchase or Lease Agreement
- ❖ Project Management Agreement
- ❖ Joint Venture Agreement
- ❖ Fuel Supply Agreement
- ❖ Power Purchase Agreement
- ❖ EPC Construction Contract (plant, gas pipeline, transmission line)
- ❖ Long Term Services Agreement
- ❖ Insurance Contracts
- ❖ Others

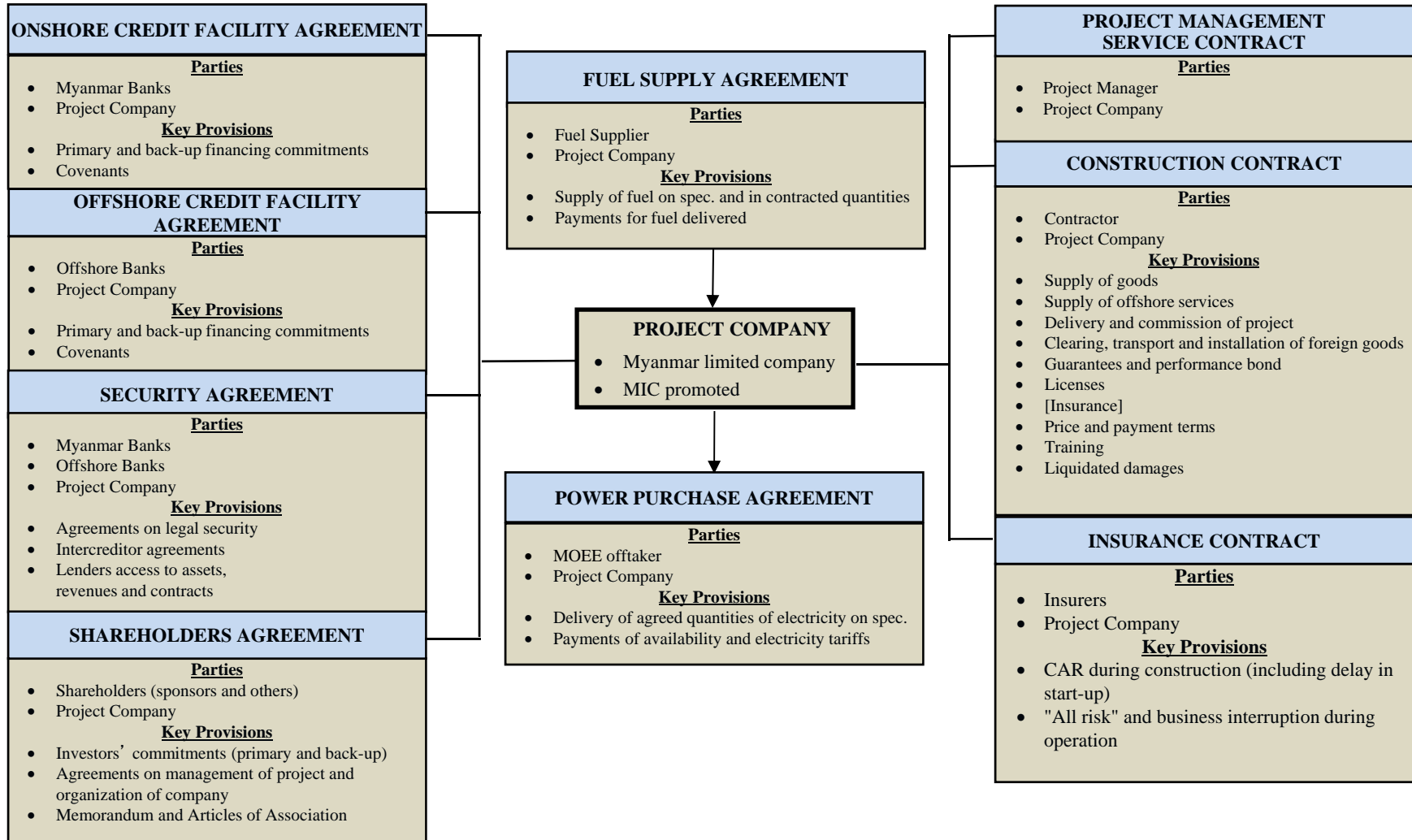
### E. Security Package

- ❖ On-Shore Security Agreement: fixed charge on specific Project Assets (including Project Documents), and a floating charge on all other assets (including inventory and receivables) located in Myanmar.
  - ❖ Off-Shore Security Agreement: fixed charge on specific Project Assets (including Project Documents) and a floating charge on all other assets (including inventory and receivable) located outside Myanmar.
  - ❖ Assignments of cash balances in designated bank accounts.
  - ❖ Written waiver of rights of set-off.
  - ❖ Agreement by shareholders to contribute equity, guarantee repayment, assign all amounts owing to it, pledge of equity interests, negative covenants re transferring shares and creating liens, and consent to arbitration.
  - ❖ Indemnity against certain costs.
  - ❖ Agreement by MOEE (government counterparty) not to sell any interest it may own in borrower or create any lien.
  - ❖ Assignment of insurances and designation of Lenders as "loss payee" under insurances.
  - ❖ Myanmar government guarantees of performance by Myanmar government counterparties.
  - ❖ Other security to be agreed.
- Breakdown between Myanmar-law security documents and foreign-law security documents
  - Assignments of performance security under Project Documents
  - SBLC's to secure equity commitments
  - Pledge of shares of holding companies
  - Issues re security in bank accounts
  - Issues re applicable stamp duty on loan agreements



# 4. CONTRACT MATRIX (International Model)

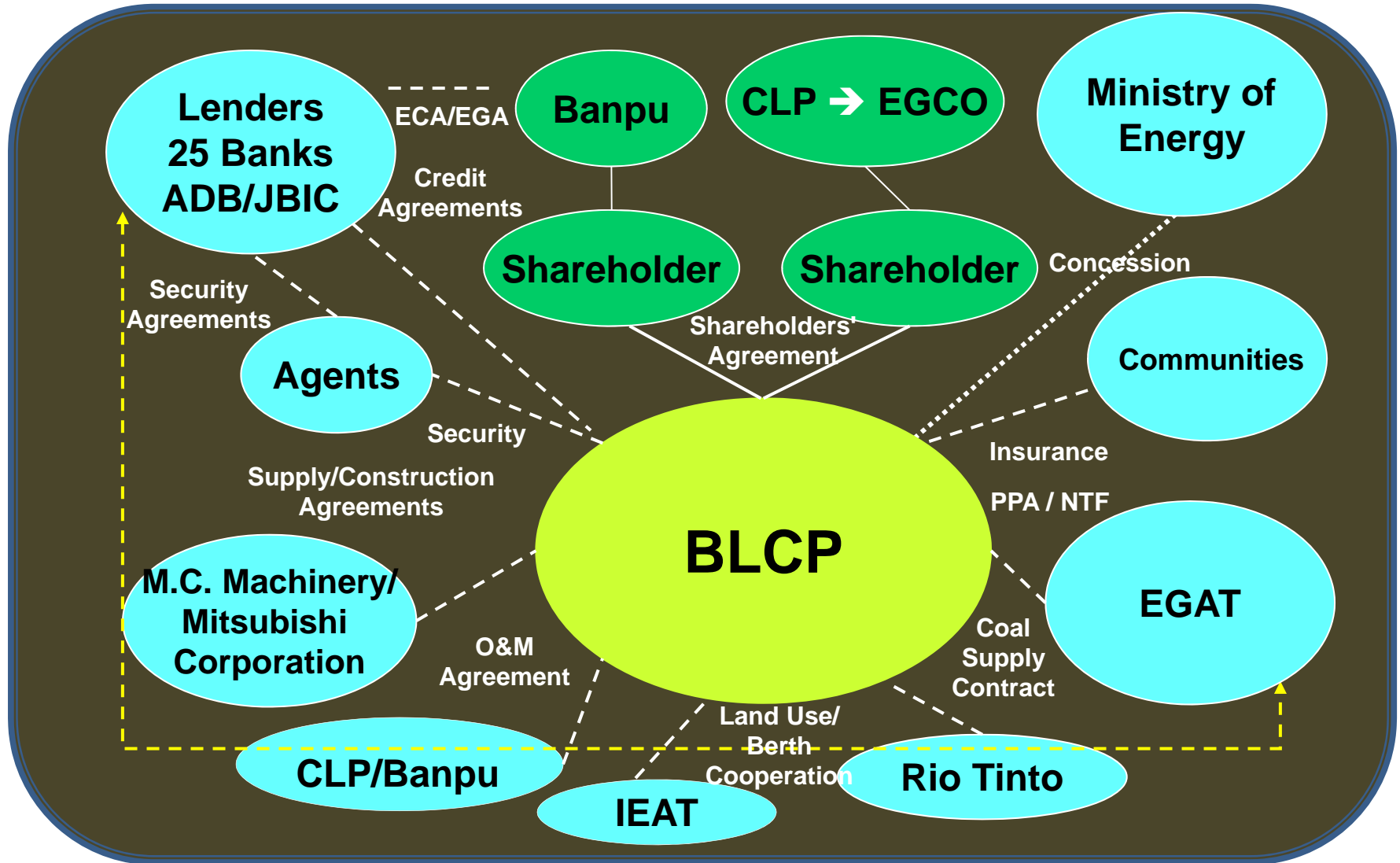
## MODEL MYANMAR CONTRACTUAL FRAMEWORK



# Contractual Matrix



Contracts & Parties – the Contractual Matrix - BLCP



# MLSL Profile

Myanmar Legal Services Limited (MLSL) has been in practice in Myanmar since 1998. The firm offers a broad range of legal advice and assistance on local and international commercial transactions, and on doing business in Myanmar.

The firm is committed to providing high quality, cost-effective legal services that achieve client business objectives – in every transaction. MLSL is recognized as a Top Ranked/Leading Firm by international commentators; by The Legal 500 Asia Pacific 2017 as a Top Tier Firm, by IFLR1000 (Financial & Corporate) 2017 as a Top Tier Firm, by Asialaw Profiles 2017 as Outstanding, and by Chambers and Partners Asia Pacific 2016 as a Top Ranked/Leading Firm. Chambers adds, "... Regularly advises on the acquisition of significant Myanmar assets and the financing of key energy and real estate projects." Daw Khin Cho Kyi, the firm's Managing Director, is ranked as a Leading Individual by legal researchers, and a client comments, "... an outstanding Myanmarese lawyer with a commercial understanding of what the client wants."

For further information, please visit [www.myanmarlegalservices.com](http://www.myanmarlegalservices.com), or contact either [info@mlslyangon.com](mailto:info@mlslyangon.com) or tel: (951) 650-740, 652-139.



## Disclaimer

This note provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or be a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein.