

Things To Consider Before You Invest In Myanmar

Law360, New York (October 25, 2013, 12:20 PM ET) -- Myanmar's emergence in the last 12 months as one of the world's most promising markets needs little introduction. With a population of around 60 million and a strategically advantageous geographical location, it presents significant opportunities across a broad range of sectors.

However, with only 26 percent of Myanmar's population having access to electricity and demonstrations last year against rolling power cuts, the power sector is a top priority for the government of Myanmar (GOM). The latest announced goal of the GOM is to increase capacity by 16,000 megawatts by 2030, with a master plan and regulations for the power industry currently under development and due for release in 2014.

Current Key Projects

Gas-fired projects have seen the most initial activity. Toyo-Thai (from Thailand) is currently developing a 120 MW gas-fired combined-cycle power project in Yangon, the most progressed independent power producer in the country.

Examples of other reasonably progressed projects are a 500 MW gas-fired power project in Tharkayta being developed by a Korean consortium (comprising Busan Korea Biotechnology Co., Korea Western Power Co., Hyundai E&C, Hana Daewoo Securities Co. and Hexa International Co.) and three locally developed power projects of 50 MW each.

Myanmar also has significant hydropower potential of around 100,000 MW, and although such projects remain less popular due to seasonality issues affecting power supply and resettlement issues, the sector is seeing some activity, with around 39,000 MW having so far been identified for possible development.

Renewables are also likely to play a significant role, particularly for smaller off-grid systems, with suitable sites for solar and biomass power projects having been identified throughout the country.

However, a successful renewables sector requires a solid underlying regulatory framework, and we are not aware of any plans as yet to implement a national feed-in tariff, for example.

Phases of a Project

Power projects in Myanmar may be broken down into four key phases, as follows:

- Preliminary phase — memorandum of understanding (MOU): The power sector is not yet subject to formal bidding procedures and projects will be granted to developers on the basis of bilateral negotiations with the Department of Electric Power (DEP), which falls under the Ministry of Electric Power (MOEP). If there is agreement on the potential for a project with the developer, the DEP will then execute an MOU with the developer.
- Feasibility study: Following execution of the MOU, the developer will undertake a feasibility study, in conjunction with an environmental and social impact assessment (ESIA). This phase can take around four months from engagement of advisers but varies from project to project.
- Memorandum of agreement (MOA): This will be granted by the MOEP and the DEP, usually within four to six months of completion of the feasibility study (although, again, this varies) and will specify, among other things, the length of the concession period granted, the time period for construction of the project, the manner for determining the tariff, the obligation of the GOM to provide the project site and any tax exemptions to be granted.

In order to achieve this key milestone, which is a binding agreement, a developer will usually require a clear funding strategy and reasonably developed financial model, a satisfactory ESIA (as referred to above) and a viable tariff proposal (although it should be noted that the MOU is nevertheless a relatively short-form document).

- Project documents and financial close: As with a project financing in any other jurisdiction, during this phase, the terms of the project documents will be finalized (including the power purchase agreement with the Myanmar Electric Power Enterprise (MEPE)), and lenders will undertake their due diligence on those project documents.

A financing term sheet will also be negotiated with the lenders, leading to the negotiation of the finance documents and, all being well, financial close. However, Myanmar has yet to see its first project financing (of any sort) since the suspension of international sanctions.

Cautionary Items for Foreign Investors

Whilst there are a host of factors a potential foreign investor in the power sector will need to take into account, the following are some of the more significant ones:

- Withholding tax: Myanmar imposes a 15-percent withholding tax on loan interest payments to overseas lenders payable by a Myanmar company, which can significantly impact the economics of a project. The project and financing will likely require structuring to avoid or reduce such payments. Singapore has the most advantageous double-taxation treaty, which brings the withholding tax rate down to 8 percent if the interest is received by a bank or financial institution.

- Lender security: Myanmar law does not allow foreign lenders to take security over land, and local law advice will be essential in establishing a robust security structure.
- Gas supply: Whilst Myanmar enjoys significant reserves of gas, a large proportion of it is already contractually committed to Thailand and China, and this will remain an issue for gas-fired projects until new gas fields come on stream, currently predicted to be around 2018.
- Security of off-take: The MEPE does not yet have a lengthy track record of off-take payments, which lenders can take comfort from; therefore, structuring the project to provide such comfort (through political risk insurance for example) will be key.

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