

Client Alert

September 2017

Should you wish to obtain further information or want to discuss any issues raised in this alert with us, please contact:

Fred Burke
+84 28 3520 2628
Frederick.Burke@bakermckenzie.com

Dang Chi Lieu
+84 24 3936 9341
ChiLieu.Dang@bakermckenzie.com

Nguyen Thanh Hai
+84 24 3936 9606
ThanhHai.Nguyen@bakermckenzie.com

www.bakermckenzie.com

Baker & McKenzie (Vietnam) Ltd.
12th Floor, Saigon Tower
29 Le Duan Blvd
District 1
Ho Chi Minh City
Socialist Republic of Vietnam
Tel: +84 28 3829 5585
Fax: +84 28 3829 5618

Baker & McKenzie (Vietnam) Ltd.
Hanoi Branch Office
Unit 1001, 10th Floor
Indochina Plaza Hanoi
241 Xuan Thuy Street
Cau Giay District, Hanoi
Socialist Republic of Vietnam
Tel: +84 24 3825 1428
Fax: +84 24 3825 1432

Bankability Concerns for Model Power Purchase Agreements for Solar Power Projects in Vietnam

Recent development

On 12 September 2017, the Ministry of Industry and Trade ("**MOIT**") issued Circular No. 16 with a set of templates for model power purchase agreements ("**Model PPA**") for grid-connected projects¹ and rooftop projects.²

The Model PPA for grid-connected solar power projects generally adopts similar template and terms as used in the existing model PPAs for wind, biomass and solid waste. Compared to the previous draft of this solar PPA, released in April 2017, Circular No. 16 removes specific provisions on lenders' step-in-rights. In addition, most of the MOIT's improvements to the previous draft are minor, leaving certain major issues unresolved, which may have an impact on the bankability of large utility-scale solar power plants on a "project finance" basis.

In relation to rooftop projects, Circular No. 16 includes separate templates of Model PPAs. These govern the sale and purchase of electricity under net-metering schemes for rooftop projects equipped with bi-directional meter systems.

Role of the Model PPAs

Circular No. 16 imposes a compulsory application of the Model PPAs to the sale and purchase of power with Vietnam Electricity ("**EVN**") as the State power off-taker / utility. The parties to the PPA can supplement the contents of the PPA to clarify the rights and obligations of the parties, but may not change the basic contents of the issued Model PPAs. This places a limitation on developers for negotiating for different terms of the PPA from those provided in the Model PPAs.

Specific Issues for Model PPA for Grid-connected Projects

Tariff structure

Circular No. 16 reinstates Decision No. 11's approved Feed-in-Tariff ("**FiT**") rate of VND 2,086 per kWh (equivalent to USD cents 9.35 per kWh, exclusive of VAT) for grid-connected projects. According to Decision No. 11, the FiT can be adjusted in accordance to the VND-USD exchange rate fluctuation.

However, the Model PPA does not include any escalation provisions by reference to an index, such as a consumer price index, to take into account the cost of operating a project that may increase over time, because of inflation, increasing costs of labor and materials.

The provided tariffs apply only to the part of the solar power plant that reaches commercial operation date ("**COD**")³ before 30 June 2019 and its application will be limited to a period of 20 years from the COD.

¹ Under Decision No. 11/2017/QĐ-TTg of the Prime Minister dated 11 April 2017 on the mechanism for encouragement of the development of solar power projects in Vietnam ("**Decision No. 11**"), "grid-connected project" is defined as a solar power project connected to the national power network or the power grid of Power Purchaser (being EVN or its authorized member entities), except for rooftop projects, as defined below.

² Under Decision No. 11, "rooftop project" is defined as a solar power project installed on the roof or attached to constructed facilities and connects directly to the power grid of Power Purchaser (being EVN or its authorized member entities).



Offtake Obligation, Curtailment and Dispatch

Under Decision No. 11 and also the Model PPA, EVN or its authorized member entity (as the offtaker / State power utility) is responsible for purchasing the entire power output from grid-connected projects at the FiT at the delivery point.

However, the Model PPA does not adopt the concept of the availability or deemed energy charge / deemed commissioning to allow for certain payments if the facility or a section is ready but EVN fails to construct grid connection or is otherwise unable to take the electricity produced. This leaves uncertainties as to whether the seller can be able to cover certain fixed costs (including debt service and fixed operating costs) as well as some return on equity in those circumstances.

Specifically, the Model PPA specifies that the purchaser is not obligated to purchase or take electricity in any of the following scenarios:

- during the time when the purchaser installs equipment, or it repairs, replaces, inspects or examines the grid directly related to its connection to the seller's power plant;
- when the transmission grid or the distribution grid connected to the purchaser's grid breaks down or grid equipment or facilities directly connected to the purchaser's transmission grid or the distribution grid breaks down;
- when the purchaser's grid needs support to recover after a breakdown or incident in accordance with the provisions of operation of the national power system and the standards, technical regulations of the electric power industry; and
- when the power plant of the seller operates or is maintained not in conformity with the regulations on the operation of the national grid and the power industry technical regulations and standards.

Termination payments

Under the Model PPA, upon termination of the PPA, the non-defaulting party can make a claim to the defaulting party for compensation of direct and actual damages. The non-defaulting party must prove any such damages caused by the defaulting party and any direct benefits that the non-defaulting party would have been entitled to in cases where there is no such default by the defaulting party.

In the event of termination due to the purchaser's default, the termination payment amount will be limited to the value of the seller's actually generated electricity output during the past one (1) year until the time of the termination of the PPA. No termination payment by way of compensation by EVN as the purchaser is provided to recover for the project company / seller's outstanding debts, as well as expected return on equity capital.

In case of seller's event of default or prolonged force majeure, there is no specific termination payment or protection for outstanding debts of the project company or initial equity invested by sponsors.

³ Circular No. 16 defines "Commercial Operation Date" as the date on which a part or the whole of a grid-connected solar power plant is ready to sell electricity to the Power Purchaser and meets the following conditions: (i) The power plant has completed the initial commissioning for a part or the whole of the grid-connected solar power plant and the connection facilities; (ii) The grid-connected power plant has been granted with a power operation license in power generation sector; [and] (iii) The Power Seller and the Power Purchaser have fixed the meter indices to commence the payment.



Governing law and dispute resolution

Under the Model PPA, the governing law to the PPA is Vietnamese law.

For resolution of disputes over the PPA, the Model PPA details the procedure as follows:

- In case of a dispute between the parties to the PPA, the party who raises a dispute must notify the other party in writing of the dispute and its demands.
- The parties will negotiate to settle the dispute within sixty (60) days from the date of receipt of the notice of the party who raises the dispute.
- The dispute resolution process related to the payment of electricity shall be conducted within fifteen (15) days from the date of receipt of a notice of the claiming party.
- If the parties fail to reach an agreement, the parties may send a request to the Electricity and Renewable Energy Department of the MOIT for support in the parties' dispute resolution process.
- If the parties still fail to reach an agreement after the mediation by the Electricity and Renewable Energy Department, the dispute shall be resolved by the MOIT's Electricity Regulatory Authority of Vietnam ("**ERAV**") in accordance with the procedure of Circular No. 40/2010/TT-BCT dated 13 December 2010 of the MOIT. At the end of the process, any party who disagrees with the decision made by the ERAV can bring the dispute to the Vietnamese courts for litigation or "another dispute resolution body to be agreed by the parties".

Currently, the Model PPA does not specifically provide for offshore arbitration, in a neutral location, under rules generally acceptable to the international community.

We note that, in addition to resolution of disputes by the ERAV, the Model PPA adds another option, namely "another dispute resolution body to be agreed by the parties". This can create a possibility for the seller to negotiate with EVN for other forums for dispute resolution (including offshore/international arbitration). Practically speaking, however, this vague wording in the Model PPA does not oblige EVN to agree on the use of international arbitration.

Assignment and lenders' step-in-rights

The Model PPA under Circular No. 16 is silent on lenders' step-in-rights, particularly, assignment of the agreement to the seller's lenders with the right to receive notice of any default and additional period in which to cure such default by the seller in case of the seller's failure to comply with the terms of the PPA or the financing arrangements. In fact, the previous draft of this circular includes some basic provisions in relation to these rights of lenders. Unfortunately, those provisions were finally removed from the Model PPA under Circular No. 16.

The Model PPA also does not include any provision on separate PPA direct agreements between EVN (or the government) and the lenders.

Force majeure

Under Circular No. 16, force majeure events is defined as unforeseeable and objective event which is non-remediable despite all reasonable and permissible preventive measures having been taken. Circular No. 16 also lists events of force majeure, including:



- Natural disaster, fire, explosion, flood, tsunami, epidemic or earthquake; and
- Riot, demonstration, insurrection, insurgence, destruction, embargo, surrounding, blockage, or any act of war or acts of public enemies whether or not war is declared.

However, the Model PPA does not provide for any specific provision on payment protection for the seller as consequences of political force majeure (e.g., recovery of additional costs and deemed energy payments) for the seller.

Credit support for the offtaker

Under Circular No. 16, there is no provision for any form of government guarantee, assurance or support to enhance the creditworthiness of EVN as the sole off-taker/purchaser. Thus, a special support will have to be negotiated or granted on a case-by-case basis.

Change of law or tax

Circular No. 16 does not include any specific provision addressing the risk of changes in law and/or tax (in the form of supplemental tariffs or otherwise) after the date of the PPA in such a way as to diminish the economic returns of the transaction for the seller. In this respect, currently, under the Investment Law, only a general assurance is provided for protection for existing investment incentives in case of change in law.

Transmission and Interconnection Risk

Under the Model PPA, the Seller is obligated to:

- invest in, operate and maintain interconnection equipment and facilities in order to connect the plant with the power transmission and power distribution grids; and
- bear the costs of assembling the metering system at transformer stations.

Net-metering scheme under Model PPA for Rooftop Projects

For rooftop projects, Circular No. 16 introduces two separate templates of Model PPAs, including:

- (i) one for residential life purposes or other purposes, using one-price meter ("**One-Price Meter PPA**"); and
- (ii) the other one for the purposes of manufacturing or trading, applicable electricity prices based on the time of daily electricity use, using three-price meters ("**Three-Price Meter PPA**")

Compared to the One-Price Meter PPA, the Three-Price Meter PPA takes into account peak hours, normal hours and off-peak hours to determine the tariff/price. Specifically, for the Three-Price Meter PPA, the net-metering scheme shall apply as follows:

- During the meter recording period, if the output electricity from the rooftop solar project in the peak hours is greater than consumed



electricity in the peak hours of the generator, the excessive electricity amount can be offset entirely in the normal hours.

- If the output of electricity generated from the rooftop solar project in the normal hours and the excessive electricity output which has not been offset fully in the peak hours are greater than the consumed electricity in the normal hours of the generator, the excessive electricity output can be offset in the off-peak hours.
- If the output of electricity generated from the rooftop solar project in the off-peak hours and the excessive electricity output which has not been offset fully in the normal hours are greater than the consumed electricity in the off-peak hours of the generator, then the excessive electricity output shall be offset in the normal hours of the following period.

For Circular No. 16's detailed guidelines on project development, [click here](#) to read the details in our separate alert.

If you would like to discuss opportunities for investment in solar power projects/systems in Vietnam or seek our detailed analysis on any of the issues and how our Firm can assist you, please do not hesitate to contact us.

This client alert provided by Baker & McKenzie (Vietnam) Ltd. is intended to provide our clients, and other interested parties, with an overview of the recent legal changes in the relevant area for information purposes only. The information contained in this client alert does not constitute legal advice or legal opinion, and should not be regarded as a substitute for detailed advice in individual cases. The information, as referred to in this client alert, is based on the laws, regulations, notifications, practice and policy at the time of its production. The laws, regulations, notifications, practice and policy may change from time-to-time and, therefore, the use of this client alert must be taken with due care. You are strongly advised that no use should be made of the information in this client alert without prior consultation with Baker & McKenzie (Vietnam) Ltd.. No portion hereof may be reproduced or transmitted, by any means, without the prior written permission from Baker & McKenzie (Vietnam) Ltd.. All rights reserved.

Baker & McKenzie (Vietnam) Ltd. is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. ©2017 Baker & McKenzie (Vietnam) Ltd. All rights reserved.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.