

GENERAL COMMENTS

ON

DRAFT CIRCULAR ("Draft Circular")

on project development and model power purchase agreement for solar power projects ("Draft Solar PPA")

The draft of solar PPA template that the MOIT has released on its website has been assessed non-bankable and as such, it cannot attract financing for solar power projects in Vietnam, especially for medium and large-scale projects.

If the Draft Circular and the Draft PPA are not improved and the PPA template of the MOIT remains to be non-bankable, actual development and investment in solar power projects may be limited than expected or planned under the amended Power Development Plan VII, even though Vietnam remains to have a high potential for solar power investment.

In this situation, we would recommend that the MOIT adopt an international standard bankable PPA template, localized under Vietnamese law, to apply for renewable (solar and wind) power projects in Vietnam, especially for large-scale projects with capacity of 100MW. For smaller scale projects, application of an international standard bankable PPA template is also preferred. If the MOIT insists in using the solar PPA template (as it has drafted), then it must be significantly improved, taking into account the issues of such template and features of a bankable PPA as outline in this paper.

To support to our recommendation, we set out below our detailed analysis of issues of the MOIT's solar PPA template draft, as well as our comments and recommendations in detail, including:

- (a) General comments on the role and importance of the PPA and why the PPA needs to be bankable;
- (b) A table of key features of a bankable PPA in comparison with MOIT's solar PPA template draft; and
- (c) A table of comments and suggestions on specific clauses of the MOIT's solar PPA template draft (set out in a separate paper attached).

1. The role and importance of the PPA and why the PPA needs to be bankable

1.1 The role and importance of the PPA

The PPA for a renewable (solar or wind) energy project is the agreement that establishes and governs the project's primary revenue stream. In other words, the PPA provides the long term income for a project. Without a PPA, the project will not be able to pay its debts, owners or, if applicable, its employees. The PPA is therefore critical to the success of a renewable energy project.

The PPA is normally agreed between the project company that owns the renewable energy project (referred to as the "seller"), and the buyer of electricity from the project (referred to as the "buyer" or sometimes referred to as the "offtaker"). For most projects, there is just one PPA and just one offtaker.

Because a PPA is so important to the long term financial viability of a renewable energy project, it will be discussed early on during project development among the project participants. It will also be examined carefully by lenders providing financing to the project. Lenders know that without a good PPA, the project will not be successful. For this reason, lenders look for a "bankable" PPA. A bankable PPA is one that the lenders believe strikes the right balance of income and risk for the seller and the offtaker.

1.2 Why the PPA needs to be bankable

Project developers looking to attract lenders to project finance the development of a renewable energy project will need to demonstrate certainty of revenue to prospective lenders. The most effective means of demonstrating this is by agreeing and executing a "bankable" PPA that is long enough, and which has payment and risk provisions that reflect the key features identified in this paper.

Renewable power projects (especially for large scale projects) are usually financed under "project finance" structure. Under the form of project finance, there are almost not securities available for the lenders from beginning and a bankable PPA is a document of prime importance for the operation and generation of the revenue of the company which is in return used to pay for the lenders. A successful "project financing" relies in a large part on the revenues generated by the project company for its success. In the context of an IPP project, the sole revenue stream of the project company is derived from the PPA.

The main reasons why "project finance" structure is commonly used for power projects include:

- large capital expenditures: for developers/investors and project companies, debt capital is common and cheaper than equity owner's capital;
- risk allocation: risk is allocated across parties best able to manage the risk and private sector can bring specific expertise; and
- revenue certainty: power projects have a long term and predictable revenues.

"Project finance" is fundamentally defined by the financing being either:

- **Limited recourse** – a limited recourse loan, in an enforcement situation, only allows the lender to take assets named in the loan agreement or to claim from the sponsor any additional limited support they may have provided (i.e., supporting asset, committed equity or limited guarantee); or
- **Non-recourse** – under a non-recourse loan, the lender is only entitled to repayment from the cashflows/revenue of the project and/or the project assets which the loan is funding.

This is a feature to differentiate "project finance" to other types of financing (e.g., corporate lending where the borrower has some available assets to be used as securities to secure the loan). For corporate lending, lenders have full recourse to assets of the borrower and guarantee from sponsors, lenders rely on sponsors balance sheet and cash flows, and the economic basis for loans is credit of group / parent companies. On the other hand, for "project finance", lenders have limited or non-recourse to sponsors (as elaborated above), debts will be repaid by project cash, and the economic basic for loans is projected revenue. As noted, the sole revenue stream of the project company is derived from the PPA.

Thus, without a bankable PPA, it will be impossible or very difficult for developers/investors to be able to get or convince financing from international or foreign lenders on a "project finance" basis. If the Draft Circular and the Draft PPA are not improved to make it bankable, actual development and investment in solar power projects may be limited than expected or planned under the amended Power Development Plant VII, even though Vietnam remains to have a high potential for solar power investment.

2. Key features of a bankable PPA in comparison with MOIT's solar PPA template draft

The following table is intended to be read from left to right. The leftmost column lists the feature. The feature is then described in basic terms in Column 2. Column 3 provides an analysis of what issues a lender will consider in connection with such feature when deciding whether to invest in a particular project. The fourth and final Column describes the type of provisions that a lender will be looking to include in the PPA, in comparison with the MOIT's Draft PPA template draft.

Feature	Description	Discussion / Risk Analysis	Comparison to the MOIT's Draft PPA and Requirements for a "Bankable" PPA
<p>Price</p>	<p>Although project developers look for a "fixed" price, the fixed price may be adjusted seasonally or even daily to reflect the different energy profiles. Therefore, when we speak of a "fixed" price, we mean a price that does not vary day-to-day by reference to any market index, although market indexes may be used to determine how much the price should increase year on year. (Such increases, which may also be called "escalation" is considered in more detail in the requirements for a bankable PPA column, see right.)</p>	<p>The sum of (i) the price of electricity generated by the project and (ii) the quantity of electricity sold under the PPA (discussed in later entries), will determine the overall revenue available to discharge debt obligations and payments to equity participants.</p> <p>The price is therefore critical to project developers and lenders alike. The key question is 'what is right price'? There are some competing factors:</p> <ul style="list-style-type: none"> • Offtakers will want the price as low as possible to reduce the costs on ratepayers and the domestic economy as a whole. • Sellers need a price that is sufficient to cover the cost of operating the facility during all seasons. Project developers also need to consider the returns required by equity participants and lenders. • Equity participants and lenders require returns on their investments. If the returns are too low those investors they will invest their money elsewhere. Note that often the returns on investment that equity participants and lenders require are dictated by their internal investment rules, which include assessing risks associated with a project. A high rate of return is normally indicative of a project that is perceived by investors to be more risky. Put simply, investors are balancing risk vs. reward. 	<p>Lenders will look for a price that - taking into account offtake commitments (described below) - results in revenue that exceeds debt repayments, opex and returns by a significant margin, even on baseline / low generation scenario.</p> <p>Key features will include:</p> <ul style="list-style-type: none"> • Fixed tariff. The tariff may be adjusted seasonally or even daily, but such adjustments should be clear and fixed before the contract is signed. In other words, lenders will look for a clear price that they can put into their investment model, without having to worry about fluctuating electricity prices in the broader energy market. • Escalation provisions. The cost of operating a project may increase over time, because of inflation, increasing costs of labor and materials etc. Therefore lenders look for escalation provisions, particularly because PPAs are normally long-term (e.g. 20 years). Escalation may be fixed or by reference to an index, such as a consumer price index. • Adjustments upon extension. If a PPA includes a right to extend the initial term, it is a matter for negotiation as to whether the price for the extension term is different from the price during the initial term. <p>In this respect, under Decision No. 11 and the Draft PPA, the approved Feed-in-Tariff ("FiT") rate is VND2,086 per kWh (equivalent to USD cents 9.35 per kWh, exclusive of VAT). This price is converted from VND into USD based on the</p>

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			<p>central exchange rate of VND 22,316/USD announced by the State Bank of Vietnam on 10 April 2017 (not the exchange rate at the time of payment).</p> <p>We note that Decision No. 11 provides that the price "<i>shall be adjusted in accordance to the VND-USD exchange rate fluctuation</i>", but the Draft PPA does not include this provision.</p> <p>No escalation clause is provided in the Draft PPA. The Draft PPA does not include any indexation of the FiT by way of escalation in accordance with the Consumer Price Index (CPI) or the exchange rate, or any other provision to address inflation risks.</p>
Term	<p>The "term" of a PPA is the length of time that the seller is obliged to sell, and the offtaker is obliged to purchase, electricity from the project. In other words, the term of the PPA is the key factor that determines how long the project will continue to receive income from the offtaker.</p> <p>The term is normally expressed in a "number of years" from a start date specified in the agreement or a trigger event, e.g. commercial operation of the project.</p> <p>The term of a PPA may include an initial term with an option to extend. The extension option may be exercisable by one or both parties.</p>	<p>There are two basic questions:</p> <ul style="list-style-type: none"> • when does the term start? • when does the term end? <p>The answer to the first question may depend on the construction schedule of the project, i.e. the term will start when the project is ready to start commercial operation. However, the offtaker will normally seek to include a date by which time electricity must flow. Ultimately, construction delays risk termination of the PPA. The parties will also need to consider the offtake of "test" electricity, i.e. electricity generated during project commissioning.</p> <p>The answer to the second question is a matter for discussion but may be influenced by the length of the concession agreement and how much money needs to be repaid to lenders and other investors to meet their rate of return.</p>	<p>The "term" of a bankable PPA is likely to include the following features:</p> <ul style="list-style-type: none"> • A start date that takes into account the risk of construction delays. Lenders will look for a reasonable approach to possible construction delay, e.g. reasonable cure periods and the ability for the seller to make good the delay and so prevent the offtaker from terminating the contract. • An end date that is sufficiently far into the future to cover forecast debt repayments plus a "tail", i.e. a period beyond the scheduled final repayment of the debt, to address unforeseen circumstances. • Options to extend the term of a PPA is a desirable feature but is not essential. <p>In this respect, Solar Power Decision No. 11/2017/QD-TTg (Article 9.4) provides:</p> <p><i>"The term of the PPA with respect to solar power projects is twenty (20) years from the commercial operation date. After twenty (20) years, both parties may extend the PPA term or enter into a new agreement in accordance with the then current provisions of law."</i></p>

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			<p>However, no clause on conditions precedent is provided.</p> <p>The Seller/project company is obliged to obtain all permits, but ideally the Purchaser will assist and the Project Company will obtain relief if it has done everything required to obtain a permit but it is not granted).</p> <p>Article 10.2 of the Draft PPA is not entirely clear if it grants relief to the Seller if the permits cannot be obtained before the date of commercial operations. The Seller may need to be able to claim a force majeure event if permits cannot be obtained after the date of commercial operations. However, Article 5.1 of the Draft PPA (on the list of force majeure events) does not specifically include it, and thus, it is not clear if this relief extends to permits that should have been obtained before the date of commercial operation but were not.</p>
<p>Offtake Obligation, Curtailment and Dispatch</p>	<p>The term of a PPA (described above) sets the overall start and end date for the contract, but it does not tell you "how much electricity" an offtaker must purchase during the term.</p> <p>The "offtake obligation", "right to curtail" and/or "dispatch" provisions of a PPA each address the "how much electricity" question, which can be thought of in three parts:</p> <ul style="list-style-type: none"> • How much energy should the offtaker be obliged to accept during normal operation? Will the offtaker be obliged to accept <i>all</i> electricity that the plant produces, or just a <i>portion</i>, with a contractually-limited maximum? • Are there times when an offtaker can require the seller to reduce or stop delivering electricity to the point of interconnection? (<i>Curtailment</i>) 	<p>All but the simplest PPAs include provisions that limit in some way the offtaker's purchase obligations. This is because there will almost always be certain circumstances in which the offtaker itself is required to reduce delivery of electricity from the project to the grid or end-user by the electricity regulator. In these circumstances, the offtaker must pass through its obligations to the seller or it face financial penalties from the regulator or worse, de-stabilizing the grid.</p> <p>Assuming the offtaker does have the right, in certain circumstances, to instruct the seller to adjust the project's electricity output, the matter for negotiation is to agree to parameters for such adjustment.</p> <p>An offtaker typically has the right to instruct the seller to "curtail" the output of the project if the offtaker itself is instructed to do so by the regulator. An offtaker may also have a unilateral curtailment right.</p>	<p>Lenders will look for an offtake commitment that, taking into consideration the price for electricity (discussed above), is sufficient to cover debt repayments, operational expenditure and returns. The lenders will therefore seek adequate compensation for any limits on the project's electricity output.</p> <p>For renewable power projects in Vietnam, the general approach should be to follow a "take if delivered" model to mitigate the risk of a low offtake commitment:</p> <p>A "take if delivered" model requires the offtaker to take all electricity generated by the project, subject only to the right of the offtaker to curtail the project if it is instructed to do so by the regulator. Another model of projects that are dispatchable may follow a different approach called "take or pay". This approach sees the offtaker paying (i) a "availability" or "deemed energy charge", which is a fixed amount that is paid regardless of whether the facility is dispatched so long as the plant is actually available at the agreed minimum level; and (ii)</p>

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	<ul style="list-style-type: none"> Are there times when an offtaker can require the seller to increase its delivery of electricity to the point of interconnection (i.e. does the offtaker have full control over the project's electricity output)? (<i>Dispatch</i>) <p>Renewable projects in Vietnam should not be dispatchable. Specifically, the project is a technology that generates intermittent energy and does not allow dispatchable control over the project's electricity output. Wind power and photovoltaic solar power are good examples of this. In other words, although the operator might be able "turn off" the power output of a project, the operator has no ability to increase the output of the project beyond the availability of the natural resource. I.e. In the case of a wind farm, the operator may be able stop the project from generating power, by adjusting the direction of the turbines and the angle of their blades, but the operator cannot increase the power output of the wind farm in excess of its design output for any given wind speed.</p>	<p>In this scenario, the key issue will be the seller's right to compensation (if any) for adjusting the project's operation. Put simply, if the seller is required to adjust the output of a project downward from its operational capacity at any given time, then the seller will be receiving less revenue than the project is, in theory, capable of generating. In these circumstances, the seller will seek compensation and the PPA should govern the extent to which such compensation is required.</p>	<p>an "output" or "energy charge", which is an amount paid in respect of energy actually delivered. The availability or deemed energy charge is structured so that the seller can cover certain fixed costs (including debt service and fixed operating costs) as well as some return on equity.</p> <p>For this model, lenders will be sensitive to such curtailment rights, particularly if the offtaker has, or appears to have, influence on the regulator's ability to instruct curtailment.</p> <p>The PPA may include a contractually-limited "maximum" output of the project. Above this maximum, an offtaker may have discretion over whether it wishes to take the excess electricity and/or the price of the excess electricity may change.</p> <p>The lenders will need to be reasonably comfortable that, taking into account (i) resource risk, (ii) current supply and demand curves and (iii) the competitiveness of the price, the project is among the least cost alternatives in the sector plan as projected.</p> <p>In this respect, under Decision No. 11/2017/QĐ-TTg (Articles 9.1 and 12.1(a)) and the Draft PPA, Vietnam Electricity ("EVN"), as the State-owned utility, is delegated to purchase <u>all</u> electricity generated from solar power projects.</p> <p>However, under the Draft PPA (Article 4.2), the purchaser is obligated to make payments to the seller for the electricity <u>that has been received [by the purchaser] only</u>.</p> <p>The Draft PPA does not include a deemed production calculation. There is no concept of deemed commissioning to allow for the 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.</p>

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<p>Failure to Take or Failure to Deliver</p>	<p>In the normal course of events, the combination of "term", "offtake obligation" and "price" will be the key factors that influence the economic viability of a PPA. However, there are a number of other factors that lenders will take into consideration.</p> <p>Important among these are the contractual consequences of the seller or offtaker failing to discharge their obligations to sell and buy respectively. Almost all PPAs try and manage these consequences contractually, rather than leaving them to be assessed by the courts.</p> <p>For the seller in renewable power projects in Vietnam, a "failure to take" means that the offtaker is failing to accept delivery of electricity.</p> <p>For the offtaker, a "failure to deliver" means that the seller is failing to deliver electricity when the project is or should be capable of delivery. In this context, the PPA might provide for a minimum performance requirements, such as a guaranteed availability factor. A minimum performance requirement obliges the seller to make sure the facility is available for a minimum period during a predefined period (typically a year).</p> <p>Failures to take and failure to deliver may both be excused in certain circumstances, such as force majeure (discussed below).</p>	<p>The failure to take and failure to deliver can be a heavily negotiated element of a PPA, but the issues are quite simple.</p> <p>A failure to take by the offtaker puts the seller into a difficult position because it will not be receiving electricity revenues in circumstances when due. This puts pressure on the seller with respect to debt repayments, operating expenditures and, ultimately, returns to project investors. The seller will therefore seek compensation for the offtaker's failure.</p> <p>A failure to deliver by the seller puts pressure on the offtaker because it will be left with a shortfall of electricity to deliver to the grid or end-user. The offtaker may face penalties from the regulator or, worse still, may cause brownouts or blackouts to end-users. The offtaker will therefore seek compensation for the seller's failure.</p>	<p>The consequences of failing to take or deliver will vary from project to project. Generally, however, the aggrieved party (i.e. the party that is not at fault) will seek compensation so that it is put into the position that it would have been in had the failure not occurred. It is interests of all parties to make sure that the compensation payable to the aggrieved party can be calculated in a straightforward and transparent manner. To this end, lenders will ask the parties to agree upfront (i.e. during negotiation) the way damages are calculated. Agreeing the calculation methodology upfront makes it easier for the parties to ascertain monetary damages if a default occurs. Such damages are typically called "liquidated damages".</p> <ul style="list-style-type: none"> • Seller. The seller will seek, as a minimum, liquidated damages to cover certain fixed costs (including debt service and fixed operating costs). The simplest PPAs may include a specific "cost to cover" amount per megawatt hour. Other PPAs may include a more sophisticated calculation mechanism, taking into account costs that may vary over time. • Offtaker. The offtaker will seek liquidated damages for the cost of obtaining electricity from an alternative producer. This may be a specific "cost to cover" amount per megawatt hour. A different approach is to calculate the amount the offtaker would have paid under the PPA and the amount the offtaker would pay for replacement electricity. The seller must then pay the offtaker the difference. <p>The provisions for calculating liquidated damages must result in amounts that are reasonable and foreseeable; the calculation should not result in a "penalty". The damages provisions may include monetary caps that limit a party's exposure. Such caps typically serve as a link to termination for continued or</p>

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			<p>persistent breaches of the PPA (see termination, below).</p> <p>In this respect, under the Draft PPA, EVN as the purchaser is given the rights to stop purchasing electricity in certain circumstances.</p> <p>Specifically, the Draft PPA (Article 2.7) specifies that the purchaser is not required to purchase or take electricity in any of the following scenarios:</p> <ol style="list-style-type: none"> 1. the seller's power plant operates, maintains not in compliance with the provisions of operation of the national electricity system and standards, technical regulations of the electricity industry; 2. 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; 3. when the transmission grid or the distribution grid connected to the purchaser's grid has a problem or grid equipment directly connected to the purchaser's transmission grid or the distribution grid has a problem; and 4. when the purchaser's grid needs support to recover after the incident in accordance with the provisions of operation of the national power system and the standards, technical regulations of the electric industry.
<p>Foreign Exchange</p>	<p>For some projects, the currency that lenders use to finance the project may be different from the local currency, i.e. for projects in Vietnam, a lender may finance in US dollars even though the project is located in Vietnam that uses a different currency (VND). This raises potential foreign exchange (or FX) risk, where the "lending" currency moves upwards or downwards against the "local" currency</p>	<p>FX risk is a problem for lenders because it means that the revenue they receive may be less valuable than the finance they provide. Lenders do not typically accept such risk.</p>	<p>Lenders will ask for the price to be denominated in the "lending" currency, or, as an alternative, index-linked to the lending currency. That way, if a lender expects to receive \$1 in consideration for lending, the lender will know it will actually receive \$1, irrespective of the value of the "local" currency of VND.</p> <p>There are some foreign currency hedging products that may be</p>

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	of VND.		<p>available (including for catastrophic devaluation risk), but these are costly. Lenders (and sellers) would expect the offtaker to bear the FX risk and/or to be able to pass the cost through to the end-users.</p> <p>As a practical matter, lenders will seek to ensure that the seller is entitled to have offshore FX accounts and the ability to freely convert and transfer funds abroad.</p> <p>In this respect, under Decision No. 11 and the Draft PPA, the price of VND2,086 per kWh is converted into USD (i.e., equivalent to USD cents 9.35 per kWh, exclusive of VAT)) based on the central exchange rate of VND 22,316/USD announced by the State Bank of Vietnam on 10 April 2017 (not the exchange rate at the time of payment).</p> <p>We note that Decision No. 11 provides that the price "<i>shall be adjusted in accordance to the VND-USD exchange rate fluctuation</i>", but the Draft PPA does not include this provision.</p> <p>No escalation clause is provided in the Draft PPA. The Draft PPA does not include any indexation of the FiT by way of escalation in accordance with the the exchange rate / USD, or any other provision to address inflation risks.</p>
Credit Support and Collateral Requirements (Seller)	<p>The seller may be newly formed entity. As such, the seller may not have sufficient resources itself to satisfy an offtaker that it can meet all of its obligations under the PPA.</p> <p>The purpose of seller credit support and collateral requirements in a PPA is therefore to provide comfort to the offtaker that the seller can meet its obligations under the PPA.</p>	<p>The primary obligation of the seller is to generate electricity when it is meant to do so under the PPA. A seller will not allow an offtaker to take over the project (even if the offtaker wanted to do so), so credit support and collateral normally relates to obligations on the seller to pay, e.g. damages.</p>	<p>Credit support and collateral can take a variety of forms, e.g. letters of credit, bonds, cash collateral and parent guarantees. Lenders will seek a balanced approach to collateral, bearing in mind that the provision of credit support typically costs money (i.e. setting up a letter of credit will involve a fee, separate from the costs of drawing on it). Such costs will need to be taken into account in the financial model for the project, and may influence the project's economic viability.</p> <p>In addition, the lenders will need to be satisfied that the collateral granted by the seller under the PPA does not compromise the security package granted to the lenders under</p>

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			its financing arrangements for the project.
Credit Support and Collateral Requirements (Offtaker)	<p>The importance of the PPA to a project's success or failure is such that the seller will need to be sure that the offtaker can and will do what it is meant to do under the PPA, which is primarily to take and pay for electricity generated by the project.</p> <p>The purpose of offtaker credit support and collateral requirements in a PPA is to provide comfort to the seller that the offtaker has the financial resources to pay for electricity or discharge other payment obligations in the PPA.</p>	<p>PPAs are worth little if the offtaker does not have sufficient financial liquidity or resources to pay for electricity. Ultimately, the failure of an offtaker to pay for electricity results in losses for investors, i.e. lenders and equity participants who have invested cash or financed the project.</p> <p>Just as sellers may be newly formed entities, so too may offtakers be new entities formed for the purpose of buying electricity. Lenders will be particularly aware of credit risk in this scenario.</p>	<p>Similar to seller arrangements described above, offtaker credit support and collateral can take a variety of forms. For renewable power projects in Vietnam, this may include government guarantees. The form of collateral is a matter for discussion but lenders typically ask for collateral until (i) a specified date in the future, e.g. the date on which debt is repaid, or (ii) a specific event, e.g. the point in time where the offtake is independent and creditworthy on its own merits (which may be by reference to an independent credit score or assessed by the size of the offtaker and how many megawatts it controls). In certain cases, government credit may also need to be enhanced, at which point the parties may need to consider additional financial instruments to provide the required security.</p> <p>Having sufficient credit support and collateral will be a condition to the PPA's effectiveness. In other words, the seller will not be required to produce electricity until the required support is in place. This typically ties in with the existence of an acceptable concession agreement.</p> <p>In this respect, the Draft PPA does NOT include any such provisions on either:</p> <ul style="list-style-type: none"> (a) liquidity facility or security instruments, or (b) partial sovereign guarantee (or government guarantee, assurance or support to enhance the creditworthiness of EVN as the sole off-taker/purchaser).
Change of Law or Tax	<p>Changes of law or tax arrangements for the project can result in net project revenues going up or, more likely, down. For example, an increase in taxes that are payable by the seller may not affect the price of electricity that the seller delivers to the offtaker, but it will affect the profits or return that the seller can</p>	<p>The parties need to allocate the risk of changes in law and/or tax between them. Lenders are particularly sensitive in renewable power projects in Vietnam, because EVN and its affiliated entities as the offtakers are government entities and, by implication if not fact, may be able to influence laws or tax rules. Lenders will also</p>	<p>The PPA should ensure that the offtaker takes the risk of the law or tax regime changing after the date of the agreement in such a way as to diminish the economic returns of the transaction for the seller. In order for PPAs to be "bankable", most lenders require the offtaker to take this risk (usually in the</p>

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	<p>distribute to the lenders.</p>	<p>be particularly sensitive if the economic viability of a renewable energy project vs. a non-renewable energy project is contingent on tax incentives.</p>	<p>form of supplemental tariffs).</p> <p>In this respect, the Draft PPA does NOT include any specific provision on changes in law and/or tax or costs, or adjustments to the electricity payments.</p>
<p>Force Majeure</p>	<p>When is a breach of contract excusable? This is the question that the parties to a PPA must address in the force majeure provisions. Force majeure typically means an event beyond a party's control. If a force majeure event occurs, then the affected party is normally excused from any failure to perform under the PPA that flows from the event.</p> <p>Force majeure can take the form of a "natural" event, e.g. a major weather event, which may cause damage to a project, or a "political" event, e.g. political violence such as war or civil unrest.</p>	<p>Force majeure is concept that is included in all PPAs, but not all force majeure provisions are alike. In fact, the definition of force majeure, particularly political force majeure, and the consequences that flow from a force majeure event can be heavily negotiated.</p> <p>Political force majeure is a particularly challenging topic for renewable power projects in Vietnam because EVN as the offtaker is a government-linked entity. Lenders will not risk taking on force majeure risk where political events are perceived to be within the control of an entity that is related to the offtaker.</p>	<p>Key provisions will include:</p> <ul style="list-style-type: none"> • Appropriate extensions of time for a party affected by force majeure. This is particularly important for the seller as the consequences of force majeure can be long term (e.g. a wind turbine destroyed by a storm can take many months to repair). • Lenders will seek full payments, not just minimum payments, as a result of (i) political force majeure or (ii) natural force majeure events on the offtaker or grid system to which the project connects. • Lenders will also seek to include political force majeure events that are outside the country but that affect the project (e.g. an embargo in another country); this is not a risk that either party can control, but sellers are typically reluctant to accept it. • Termination rights for prolonged or catastrophic force majeure events, taking into consideration the need for appropriate extensions of time (discussed above). <p>In this respect, under the Draft PPA, there is no separation and distinction between Natural Force Majeure events and Political Force Majeure events (events broadly within government control).</p> <p>As there is no distinction between Natural Force Majeure events and Political Force Majeure events, the Draft PPA does not include any specific provision on payments as consequences of Political Force Majeure (e.g., recovery of additional costs and</p>

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			deemed energy payments) for the seller.
Natural Resources, Environmental	<p>Project developers work hard to assess the availability of the natural resources that will provide the natural energy to power the project (e.g. sun, wind, etc.). Project developers will also take great steps to assess environmental risks and the likely demand for the natural energy that they convert into electricity or other useful products.</p> <p>However, there is always a risk that the natural resources will not be available as forecast or that environmental problems arise.</p>	<p>Resource risk is project specific. Similarly, environmental risks (and problems) vary typically vary from site to site</p> <p>An important question to consider is the extent to which the offtaker has an influence on natural resources or environmental risk. For renewable power projects in Vietnam, the lenders may perceive the offtaker as having some influence on, and so should therefore bear responsibility for, the availability of resources, the environment (e.g. poor site selection that is mandated by the government).</p>	<p>As noted left, the risks described in this section may be project specific. As such, there is no one-size-fits-all answer. However, lenders will look for an appropriate balance of risk. This means that the greater the perceived influence or link between the offtaker and the natural resource or environmental risk, the more risk lenders will seek to allocate to the offtaker. This may be addressed in the provisions dealing with change of law (discussed above).</p>
Supply and Demand	<p>For renewable power projects in Vietnam, there is a risk that the government of Vietnam may do something (or fail to do something) that will cause an unanticipated supply and demand profile.</p>	<p>The lenders will consider the extent to which the offtaker has an influence on supply and demand. Put simply, the greater the influence of government on unanticipated supply and demand changes, the greater the responsibility the offtaker should have.</p>	<p>As noted left, the greater the perceived influence or link between the offtaker and the supply and demand changes, the more risk lenders will seek to allocate to the offtaker. This may be addressed in the provisions dealing with change of law (discussed above).</p>
Transmission / Interconnection Risk	<p>A renewable power project is useless unless it is connected to the grid that connects generators to end-users. Transmission and interconnection is therefore a critical part of the infrastructure and the risk of failure must be allocated accordingly.</p>	<p>Renewable energy projects are typically situated some distance away from the urban centres that they are intended to power. Wind projects need a stable supply of wind, etc. As such, a new project may need to connect to the existing grid. The parties will need to consider who has the most influence to make sure interconnection and transmission is ready to support commercial operation of the project.</p>	<p>The PPA should indicate which party bears the risk of connecting the facility with the grid and transmitting power to the nearest substation. The more significant these risks (due to terrain, distance, populated areas), the more the lenders will require the offtaker to bear all or a significant portion of the risk (even if the seller is tasked with their construction).</p> <p>In this respect, Article 8 of Decision No. 11 and Article 3.2 of the Draft PPA imposes liabilities only on the project developer/power seller, without any appropriate mechanism for allocation of costs and risks.</p> <p>Grid connection costs can be key to project feasibility. For</p>

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			<p>small projects, the grid connection cost may be a significant portion of total project cost. Smaller sized projects may need to be located next to existing transmission lines. Larger projects need to balance cheaper land rental and use costs in relatively unpopulated areas against increased cost to run transmission lines over longer distances.</p>
<p>Termination / Termination Payment</p>	<p>As with any contract, a serious breach of the contract should entitle the other party to terminate the PPA. The question is under what circumstances should a party be entitled to terminate a PPA.</p>	<p>For the seller in renewable power projects Vietnam, termination by EVN as the offtaker is likely to leave the project with nowhere to sell the electricity the project produces. The seller will therefore look to limit the rights of the offtaker to terminate against the PPA.</p> <p>Because termination of the PPA may leave the project without access to the market, the seller must also look protect itself financially from the consequences of termination.</p>	<p>The PPA should set out clearly the basis on which each party may terminate the PPA and the consequences that flow from such termination:</p> <ul style="list-style-type: none"> • Termination by the offtaker. The lenders will seek to limit offtaker termination rights to very significant breaches by the seller. The lenders will require meaningful grace periods and cure rights, including the ability to step in and cure breaches by the seller. • Termination by the seller. Once a project has achieved commercial operation, the key obligation on an offtaker is to pay for electricity. As such, the number of termination events in favor of the seller is naturally limited. The consequences of termination by the seller are, however, critical. • Termination Payment. The PPA should provide that if termination occurs, a termination payment becomes payable. Except if termination is a direct result of an unjustified seller breach, lenders will seek to ensure that the seller receives a termination payment by way of compensation that is at least equal to the full amount of the seller's outstanding senior debt. If the termination is a result of offtaker default or prolonged political force majeure, lenders will also seek compensation for their expected return on equity. <p>In this respect, the Draft PPA of the MOIT is not bankable, specifically:</p> <p><u>In case of Purchaser (EVN)'s event of default:</u></p>

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			<p>Under the Draft PPA (Article 7.5), in the event of termination due to the purchaser (EVN)'s event of default, the termination payment amount will be 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.</p> <p>The Draft PPA (Article 7.4) provides that 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.</p> <p>In EVN (purchaser) event of default, the Draft PPA does not provide for compensation to seller/sponsors as termination payment by way of compensation by EVN to recover for the project company / seller's outstanding debts, as well as expected return on equity capital.</p> <p><u>In case of Seller's event of default:</u></p> <p>In the event of the project company / seller's default, the Draft PPA does not provide for termination payment or protection for outstanding debts of the project company or initial equity invested by Sponsors.</p> <p><u>In case of prolonged force majeure:</u></p> <p>The Draft PPA (Article 5.4) does not include any specific provision for compensation in the event of termination of the PPA due to a prolonged force majeure event.</p>
Offshore Arbitration	If there is a dispute between the parties to a PPA, then the parties will need a forum to manage that dispute.	For renewable power projects in Vietnam, lenders may want a governing law of the PPA that is separate from the governing law of the country in which the project is located, but we understand that this is rarely achievable. To mitigate the risk of undue influence by the	<p>The PPA should provide for offshore arbitration, in a neutral location, under rules generally acceptable to the international community.</p> <p>In this respect, under the Draft PPA (Article 10.3), the interpretation and performance of the PPA shall be in</p>

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		<p>government in proceedings, lenders typically insist on arbitration in a foreign, typically neutral, venue.</p>	<p>accordance with Vietnamese law.</p> <p>In terms of dispute resolution, the Draft PPA provides and allows for EVN to bring disputes to Vietnamese courts for litigation and other State energy authorities of Vietnam for mediation or resolution.</p> <p>Specifically, the Draft PPA (Article 8) details the procedure for resolution of disputes over the PPA as follows:</p> <ol style="list-style-type: none"> 1. 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. 2. 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. 3. 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. 4. If the parties fail to reach an agreement, the parties may send a request to the General Directorate of Energy ("GDE") for support in the parties' dispute resolution process. 5. If the parties still fail to reach an agreement after the mediation by the GDE, 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. 6. In addition to resolution of disputes by the ERAV, the Draft PPA adds another option, namely "<i>another dispute resolution body to be agreed by the parties</i>" but this wording in the PPA may allow EVN to refuse any negotiation for other forums for dispute resolution. <p>The Draft PPA does NOT provide for international or offshore arbitration in Singapore / Hong Kong or any nearby country in English language.</p>

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<p>Assignment</p>	<p>In some circumstances either the seller and/or the buyer may want to assign or transfer their rights and obligations under the PPA. This is normally a matter for negotiation, with one exception, discussed in the columns to the right.</p>	<p>Lenders will want to make sure that the seller (as the owner of the project) has the ability to assign rights, title and interest to the project if the seller fails to comply with the terms of the PPA or the financing arrangements. This is protect the lenders' interests if a seller acts in breach of the financing arrangements.</p>	<p>The PPA should allow "collateral 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.</p> <p>The basic assignment provisions of the PPA should permit collateral assignment but additional rights and obligations will be included in separate direct agreements between (i) the offtaker and the lenders and (ii) the government and the lenders.</p> <p>In this respect, Article 9.1 of the Draft PPA provides some basic provisions on assignments, but the Draft PPA does not include any provision on a Direct Agreement (between EVN and the lender/security agent).</p>