

Vietnam: Legal considerations for the development of LNG-to-power projects in Vietnam

This client update provides an overview of the current LNG-to-power sector in Vietnam and legal analyses on key legal issues that investors may need to consider during the development and operation of LNG-to-power projects in Vietnam.

LNG-TO-POWER MARKET UPDATE

Under the national power development master plan for the period of 2021 to 2030 with a vision to 2050 (PDP8), as approved by the Prime Minister under Decision No. 500/QĐ-TTg dated 15 May 2023, the total installed capacity of LNG-to-power in Vietnam is planned to reach 22,400 megawatts (MW) by 2030.

To achieve this target, the PDP8 provides a list of 15 LNG-to-power projects that will be developed during the period of 2021 to 2030, as set forth in Table 1 below. The PDP8 also provides that, other than those 15 projects, the potential locations (including those in Thai Binh, Nam Dinh, Nghi Son, Quynh Lap, Vung Ang, Chan May, Mui Ke Ga, Hiep Phuoc 2, Tan Phuoc, Ben Tre and Ca Mau) will be further studied as a backup plan for any LNG-to-power projects that cannot be implemented or whose development is delayed. Under the PDP8, the investors of some coal-fired thermal power projects that are facing difficulties in capital mobilization are also

proposing to convert these projects into LNG-to-power projects.

Table 1. List of LNG-to-power projects under the PDP8¹

No.	Name of the LNG-to-power project	Installed capacity (MW)
1	LNG Quang Ninh	1,500
2	LNG Thai Binh	1,500
3	LNG Nghi Son	1,500
4	LNG Quang Trach II	1,500
5	LNG Quynh Lap	1,500
6	LNG Hai Lang — Phase 1	1,500
7	LNG Ca Na	1,500
8	LNG BOT Son My II	2,250
9	LNG BOT Son My I	2,250
10	LNG Long Son	1,500
11	Nhon Trach 3 and 4	1,624
12	LNG Hiep Phuoc — Phase I	1,200
13	LNG Long An I	1,500
14	LNG Long An II	1,500
15	LNG Bac Lieu	3,200

Until the date of this client update, the state authorities were in the process of initiating the investor selection process of some LNG-to-power projects, including LNG Nghi Son and LNG Ca Na.² Under the current legal framework, there is no statutory requirement that investors of power projects (including LNG-to-power projects) must be selected via bidding,³ except for where two investors or more submit valid applications proposing the implementation of a project in the same location.⁴

LNG-TO-POWER PROJECTS' PARTICIPATION IN THE VIETNAM WHOLESALE ELECTRICITY MARKET (VWEM)

The VWEM has been put into operation under MOIT Circular 45.⁵ Gas thermal power plants (including LNG-to-power plants) with the installed capacity of 30 MW or higher (except for, among others, Build-Operate-Transfer (BOT) power plants, gas thermal power plants with requirements to maximize the gas utilization to ensure national interests, and plants of industrial parks that only sell a part of their generated electricity to the national grid) must directly participate in the VWEM.⁶

In the VWEM, there is currently no certainty that the power producer ("**Producer**") will be dispatched at a specific level. When participating

¹ Table 1 of Annex II attached to the PDP8. The accurate installed capacity of these power plants will be determined in detail according to the capacity of the generators during the project development stage.

² Table 1 of Annex III attached to Proposal No. 644/TTr-BCT dated 26 January 2024 of the Ministry of Industry and

Trade (MOIT) on the issuance of the plan to implement the national power development master plan for the period from 2021 to 2030 with a vision to 2050.

³ Please find more detail in our client alert on the new Bidding Law and its impact on investor selection for power and other infrastructure projects through [this link](#).

⁴ Article 29.7 of Decree No. 31/2021/ND-CP (as amended and supplemented).

⁵ Circular No. 45/2018/TT-BCT dated 15 November 2018 of the MOIT on operation of the VWEM (as amended and supplemented) ("**MOIT Circular 45**").

⁶ Article 4 of MOIT Circular 45.

in the VWEM, the power plants will be dispatched based on the VWEM's mechanisms and principles. Specifically, for each trading interval, the Producer is entitled to offer the electricity sale price within a statutory range to the spot market. Based on the offers made by Producers, the National Load Dispatch Center (EVNNLDC), as the power system and market operator, will arrange offers by price from low to high until meeting the load needs and constraints of the national power system to determine the dispatched capacity of each power plant.⁷ In the VWEM, the Producers are entitled to two separate payments: (1) the spot market payment and (2) a contract-for-difference (CfD) payment. While the spot market payment is calculated based on, among other things, the FMP⁸ and metered outputs, the CfD payment is calculated based on the contract outputs for the difference between the contract price (i.e., the power purchase agreement (PPA) price) and the FMP.

Under the current regulations, in the VWEM, the Producer and electricity purchaser (i.e., Vietnam Electricity or its subsidiaries) (EVN) shall sign a PPA in the CfD form with the template stipulated under Annex 3, attached to MOIT Circular 57 ("**Model PPA**").⁹ Under this PPA, the Producer and a Power Corporation (which are under EVN's authority) agree on the contract price and contract output for the CfD payment calculation. The contract output agreed under the PPA is not a physical offtake commitment or the output to be

actually dispatched by EVNNLDC; instead, it is a financial commitment.

Having said that, participating in the VWEM may potentially impact the Producer's approach to LNG supply since the Producer needs to make proper LNG procurement arrangements and contractual terms and conditions of LNG supply agreements to ensure that the LNG supply would be able to match the actual demand for electricity generation.

SELECTION OF LNG SUPPLIERS

Under the current regulations, the Producer must organize a tender to select LNG suppliers and/or transporters pursuant to the bidding law and other related regulations, except for where the Producer has signed medium- and long-term LNG supply agreements with LNG suppliers.¹⁰ However, the current bidding regulations appear inappropriate with international LNG trading specifics and customs.

If the Producer is unable to organize a tender to select a transporter (except for the exceptional case mentioned above) due to special reasons, the Producer must agree with the fuel supplier(s) or transporter(s) on the unit price issued by the competent authority. When the unit price has not been issued by the competent authority, the Producer must agree with the supplier(s) and/or transporter(s) on the following principles:

- The unit price must be calculated based on the selected fuel transporter's internal unit price.
- The efficiency and competitiveness must be ensured.
- The agreed unit price must not be higher than that of other entities using the same mode of transport (if any).
- The price of fuel delivered to the Producer's warehouse/facilities is not higher than the price of the same type of fuel provided by another entity (if any) at the Producer's warehouse/facilities.

Before executing the LNG transportation agreement with a transporter that is not selected via bidding, the Producer must provide relevant documents to EVN as agreed under the PPA. Within 20 days from the Producer's provision of the complete documents, if EVN does not provide any comments or opinions regarding the selection of the transporter, the Producer will be permitted to sign the LNG transportation agreement as agreed with the transporter.¹¹

LNG PASS-THROUGH MECHANISM

Vietnamese laws currently lack clear guidance on the pass-through mechanism. As an international custom of long-term LNG supply agreements, the Producer is typically required to commit to

⁷ Article 3.68 of MOIT Circular 45.

⁸ In the VWEM, the full market price (FMP) is equal to the system marginal price plus the capacity add-on price.

⁹ Circular No. 57/2020/TT-BCT dated 31 December 2020 of the MOIT on methods to determine the electricity generation price and power purchase agreement (as amended and supplemented) ("**MOIT Circular 57**").

¹⁰ Article 25.7 of MOIT Circular 57.

¹¹ Article 25.7 of MOIT Circular 57.

purchase a minimum quantity of LNG per month or year. The LNG-to-power Producers would expect to enjoy the pass-through mechanism to satisfy international project financing requirements and ensure sustainability of the LNG supply. In the pass-through mechanism, the Producer would pass through its offtake obligation under the LNG supply agreement to EVN under the signed PPAs. Accordingly, EVN would commit to purchase electricity at a certain level that can ensure the Producer's fulfillment of its offtake commitment under the LNG supply agreement. If EVN fails to satisfy this commitment through no fault of the Producer, EVN shall pay the Producer an amount corresponding to the amount the Producer paid to satisfy its offtake commitment under the LNG supply agreement.

In the VWEM, as mentioned above, the LNG-to-power plant's output to be dispatched by EVNNLDC is not committed since it would be determined based on, among other things, the price offered by the Producer in the spot market. Therefore, the CfD payment would provide a potential mechanism for the LNG costs to be covered in the payment made by EVN.

Under the current regulations, the CfD payment is based on the following contract price and contract output:

- **The contract price:** The contract price at the time of the electricity payment is equal to the

sum of (1) the fixed price for the relevant year, (2) the operation and maintenance price for the relevant month, and (3) the variable price for the relevant month.¹² The variable price in a specific month is calculated based on, among other things, the price of the main fuel (e.g., LNG) in the payment period, which is equal to the weighted average by volume of invoices during the relevant month (excluding VAT).¹³

- **The contract output:** Under the current regulations, for a power plant that is bound by a fuel offtake agreement and for which the competent state authority has allowed the fuel offtake obligations under the fuel offtake agreement to be passed through to the PPA, the annual contract output to be agreed between the Producer and EVN must not be lower than the output corresponding to the annual fuel quantity committed to be purchased under the fuel offtake agreement (taking into account the power plant's availability during the relevant year).¹⁴ However, MOIT Circular 45 does not clarify which state authority has the power to approve the pass-through mechanism to be applied to a Producer. In practice, the Prime Minister has approved the pass-through mechanism to be applied to the LNG Nhon Trach 3 and Nhon Trach 4.¹⁵

GOVERNMENT GUARANTEES AND UNDERTAKINGS (GGU)

Government guarantees and support measures are crucial for lenders to agree to finance projects on a nonrecourse basis in most large-scale foreign-owned Public-Private Partnership (PPP) / BOT power projects in Vietnam. However, there is no confirmed mechanism for private investment power projects to obtain a GGU. With respect to private investment LNG-to-power projects, based on (1) the socioeconomic development conditions and requirements for attracting investments in each period and (2) the objective, scale and nature of an investment project, the Prime Minister may consider and decide the form and contents of the state's guarantees to implement the following investment projects:¹⁶

1. Projects of which the investment policy must be approved by the National Assembly or Prime Minister.
2. Other important infrastructure development projects as requested by a ministry, ministerial equivalent agency or a provincial people's committee.

A private investment LNG-to-power project can only be considered to be granted with a GGU if it falls within either of the circumstances above. However, according to the assessment of the Ministry of Industry and Trade (MOIT), LNG-to-power projects under the PDP8 do not fall within

¹² Item I.1 of Annex V attached to the Model PPA.

¹³ Item I.1.3(a) of Annex V attached to the Model PPA.

¹⁴ Article 16.1 of MOIT Circular 45.

¹⁵ Article 1.9 of Decision No. 234/QĐ-TTg dated 27 February 2019 approving the investment policy of the Nhon Trach 3 and Nhon Trach 4 power plants.

¹⁶ Article 3.1 of Decree No. 31/2021/ND-CP.

the National Assembly's or the Prime Minister's authority to approve investment policies.¹⁷

The LNG-to-power projects that do not fall within the scope of projects entitled to the GGU as above would be unlikely to be able to obtain any state's guarantees (including foreign currency convertibility and availability).

LAND USE RIGHT AND SEA AREA AS SECURITY

The development of LNG-to-power projects would require substantial investment capital. Land-use rights are important assets of the investors and project companies and would be expected to be used for securing the investors' and project companies' debt repayment obligations. In some previous BOT power projects in Vietnam, as part of the government's guarantees and undertakings, the foreign-owned companies (i.e., project companies) have been allowed to mortgage their land use rights (LUR), and an onshore lender has acted as an agent for foreign lenders to hold the LUR as a security asset. However, this is not expressly allowed with respect to private investment power projects under the current regulations.

Under the Land Law 2024, which was adopted by the National Assembly on 18 January 2024, foreign-invested companies are permitted to mortgage the LUR and assets attached to land to credit institutions operating in Vietnam. However, the LUR and assets attached to the LUR cannot be mortgaged to offshore lenders. A

foreign-invested company is defined under the Land Law 2024 as a company that shall satisfy conditions and follow investment procedures applicable to a foreign investor under the Investment Law 2020 (e.g., a foreign-invested company with foreign investor(s) holding more than a 50% shareholding).

Furthermore, Vietnamese and foreign-invested companies can only mortgage if the land rent for using the land leased from the state has been paid in full and up front. Under the Land Law 2024, the investor of an LNG-to-power project is entitled to choose to pay the land rent by either a lump-sum payment or annual payments.¹⁸

If a sea area is required for the project development, a sea area may be allocated to the project company under a sea area-allocation decision issued pursuant to Decree No. 11/2021/ND-CP. However, Vietnamese law is currently silent on whether the project company is permitted to mortgage the allocated sea area in favor of a third party (e.g., domestic credit institutions or foreign banks).

GOVERNMENT EVENTS AND CHANGE-IN-LAW

Under the current regulations, LNG-to-power projects in the private-investment form must follow the Model PPA issued by the MOIT. However, there are some concerns that this template does not meet offshore lenders' expectations for nonrecourse project financing.

Under the Model PPA, if a force majeure event impacting EVN occurs, which includes, among others, riot, protest, revolt, rebellion, war activities (whether or not war has been declared), hostile activities, terrorism, sabotage, embargo, blockade, quarantine or similar events, EVN will be exempted from its liabilities. This issue has been addressed for some previous large-scale BOT projects, in which the Vietnamese government provided assurances and undertakings that the investors will be compensated if an adverse government event occurs. Investors of LNG-to-power projects may also attempt to build on those precedents to include government events in their project documents — which is subject to negotiation between the state authorities and the investors.

Another concern regards changes in law. The Investment Law provides general assurances to protect existing investment incentives that the investors have already been entitled to before the change in law. However, the current regulations remain silent on a mechanism to protect the investors' rights when there is a change in law that adversely affects the project's revenue streams. In that case, under MOIT Circular 57, the Producer and EVN are entitled to renegotiate and agree on the tariff.

GOVERNING LAW OF THE LNG-TO-POWER PPA

MOIT Circular 57 allows the Producer and EVN to supplement provisions in the Model PPA

¹⁷ Official Letter No. 9323/BCT-DL dated 29 December 2023 of the MOIT.

¹⁸ Articles 9.3(e) and 120.2(b) of the Land Law 2024.

according to the actual conditions of the relevant power plant. However, the regulations remain silent on whether it is possible to substantially amend the Model PPA.

Under Article 19.7 of the Model PPA, the interpretation and implementation of the PPA shall comply with Vietnamese law. In practice, EVN is typically reluctant to accept PPAs governed by foreign laws unless the government allows otherwise. However, it would be challenging to obtain the government's acceptance in practice.

FINAL REMARKS

The government of Vietnam has indicated its continued commitments to developing LNG-to-power projects in the long-term development policies. The prospects for LNG-to-power project development will, however, need time for the Vietnamese decision-makers to test and adjust the country's first projects and, at the same time, adjust key legal regulations. Investors are, therefore, advised to attend to the development of advanced LNG-to-power projects currently in the private-investment form, since these projects may create precedents for the next projects.

If you would like to discuss further details of LNG-to-power project development, please feel free to contact us at thanhhai.nguyen@bakermckenzie.com or thiyenly.le@bakermckenzie.com.

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