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Allens & Linklaters

Vietnam Offshore Wind: Where to from here?

May 2020



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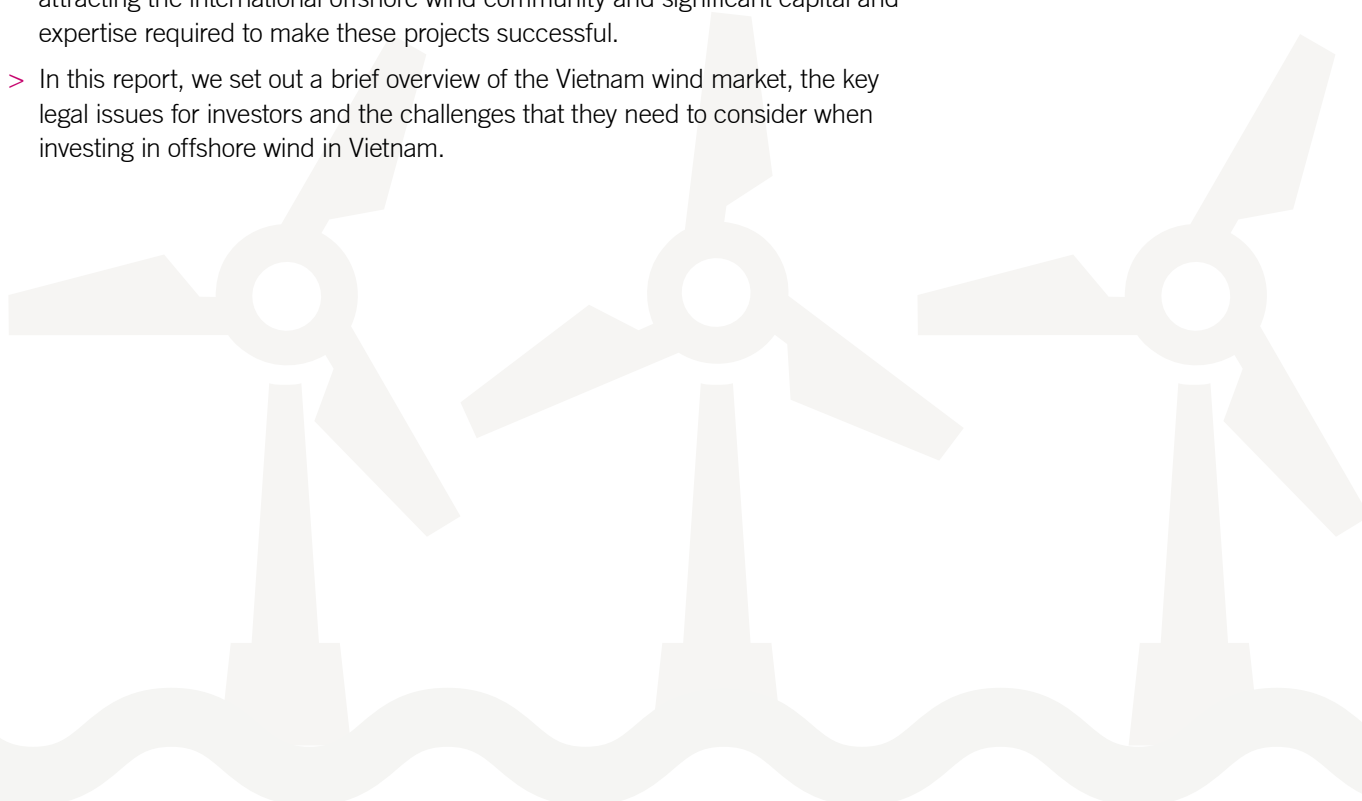


Executive summary

- > Asia's fast-growing offshore wind market has been drawing significant interest amongst developers, investors and financiers from across the world. At the centre of this dynamic region, Vietnam, with more than 3,000 kilometres of coast line and huge unexploited wind power potential, is emerging as a potential new hot spot for the global offshore wind industry.
- > In 2016, the Government of Vietnam updated its national master power development plan (Master Plan 7) setting out its vision for the power industry until 2030. Under this master plan, the Government took a big U-turn from its previous preference for coal and targeted that renewable energy projects, including small-sized hydro, wind, solar and biomass projects, would account for 9.9 per cent of the overall electricity capacity by 2020 and 21 per cent by 2030, generating 7 per cent of the nation's electricity in 2020 and 10 per cent in 2030. In particular, Master Plan 7 sets a target of 800MW of wind energy by 2020 and 6GW by 2030. The next master power development plan (Master Plan 8) which is currently under development for the period up to 2045 could increase the wind energy target to over 11GW by 2025.
- > In order to meet these targets, Vietnam's Government has rolled out a series of regulations aimed at clarifying the legal framework and incentives for the development of renewable energy projects, including a competitive statutory feed-in tariff. These policy developments, combined with a decline in global manufacturing costs for the technology necessary to leverage renewable energy sources, have generated significant interest among prospective investors.
- > That said, while relatively smaller onshore renewable energy projects are moving ahead, there remain a number of key hurdles for the development of largescale offshore wind in Vietnam and it is likely that further regulatory changes may be needed to propel Vietnam into the group of regional leaders in attracting the international offshore wind community and significant capital and expertise required to make these projects successful.
- > In this report, we set out a brief overview of the Vietnam wind market, the key legal issues for investors and the challenges that they need to consider when investing in offshore wind in Vietnam.



The Government of Vietnam is targeting to achieve 6GW of wind energy by 2030, which may be increased to 11GW by 2025





“

Vietnam is attracting significant attention from the global offshore wind industry, following the hugely successful development of the market in Taiwan, and the progress in the Japanese and South Korean markets. The right support from the Vietnamese Government will be critical to unlocking further investment in Vietnam.”

James McLaren, Partner, Global Energy Sector Leader, Hong Kong SAR

“

There is huge potential for offshore wind in Vietnam - boasting one of the region's best wind resources, the country is looking set to follow in the footsteps of the offshore wind powerhouses further north. The Government continues to be supportive and encouraging of foreign investment particularly in considering future energy needs in an increasingly carbon-constrained future. The time is ripe.”

Melissa Keane, Allens Partner, Hanoi





Opportunities

- > Huge unexploited wind capacity and ideal topography for development of offshore wind farms.
- > Competitive statutory feed-in tariff for offshore wind.
- > Favourable foreign investment rules support investment in the energy industry.
- > Track record in financing of large scale energy and infrastructure projects including with international banks and ECA participants.
- > Growing strength of local supply chain as Vietnam is already a global supplier to the energy sector.
- > Recent market developments appear to indicate recognition by the Government of the need for solutions to address certain regulatory impediments to development of the market, but are yet to be fully realised.



Challenges

- > Deadline to secure the current feed-in tariff is unlikely to be achievable by new projects without further extension.
- > Statutory form PPA for offshore wind contains certain changes from the conventional power PPA that some financial institutions may consider problematic. This will likely increase the importance of participation by multilaterals institutions such as the ADB and IFC.
- > Creditworthiness of EVN remains a concern in the absence of a sovereign guarantee.
- > Pace of permitting process continues to be an issue.
- > Upgrade of grid infrastructure and curtailment risk will need to be considered.
- > Weather risk will also need to be addressed (similar to its neighbours, Vietnam experiences a high number of tropical storms and typhoons).





Natural Conditions of Vietnam





1 Natural Conditions of Vietnam

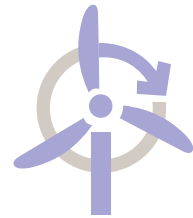
1.1 Geography and climate

Located on the Indochina Peninsula, Vietnam has a long and thin shape that spans from the 24th to the 8th parallel north. The country's extensive coastline, which borders the South China Sea to the East and the Gulf of Thailand to the South, runs over the course of more than 3,000km. This unique topography, along with reasonable water depths and promising offshore wind conditions near large load centres such as Ho Chi Minh City, mean there are significant opportunities for development of offshore wind power projects.

Vietnam lies in the monsoonal climate zone, with two monsoon seasons each year typically between May and October in the Southwest and between October and April in the Northeast. While this monsoonal climate is well suited for the production of wind energy, it could also present technical challenges for construction and maintenance, especially due to seasonal typhoons.

1.2 Wind potential

The mean wind speed in the top 10% of the windiest areas is 7.25m/s at 50-metres high, higher than neighbouring countries such as Cambodia (4.95m/s), Thailand (5.55m/s) and Laos (6.5m/s). Findings from the World Bank indicate that the total potential wind energy capacity in Vietnam at a height of 65 metres is more than 500GW. Wind potential is highest in the South and South Central provinces.



Vietnam has a coastline of over 3,000km with reasonable water depths and promising OSW conditions





Market Conditions





2 Market Conditions

2.1 National power development plan

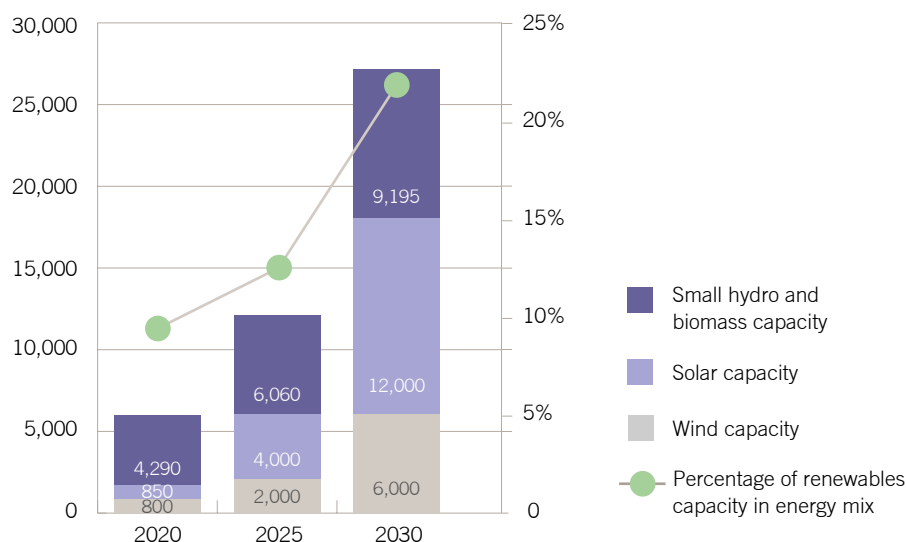
The demand for electricity in Vietnam is rising rapidly to power the growing economy. It has grown at a compound annual rate of 13% since 2000 and is projected to continue to grow at 8% through to 2030. To keep pace with demand, the Government carefully develops master power plans, which set out the vision and planning for power generation and transmission. The most recent national Master Plan 7, which was updated in 2016 and covers the period from 2011 to 2020 with a vision to 2030, envisions substantial expansion to the national power generation capacity. Under this master plan, the country's installed capacity is planned to rise from the 2015-level of 38.6GW to 60GW by 2020 and 130GW by 2030.

Although the energy mix in Vietnam in the foreseeable future will still be dominated by conventional sources (including coal, gas and large hydro projects), renewable energy sources, among them wind energy, have gradually, but steadily, entered the limelight. The graph below illustrates the Government's view under the master plan of the proportionate contribution of various forms of renewable energy to the overall energy mix by 2030. The current master plan (Master Plan 7) sets a target for installed wind power capacity by 2030 of 6GW. These targets are likely to be well exceeded with 4.8GW of wind capacity reportedly already approved for inclusion in the master plan as at 8 May 2020.

Currently the Government is in the process of developing a new Master Plan 8 that will cover the period from 2021 to 2030 with a vision to 2045. As part of this process, in June 2019, the Ministry of Industry and Trade (**MOIT**) issued a report on the implementation of Master Plan 7. According to this report, many planned power projects have fallen behind schedule, and Vietnam will experience severe electricity supply shortages as early as 2021. This conclusion highlights the urgent need for deployment of more power sources in the near future and may impact the Government's policies on energy in general and renewable energy in particular. Consistent with this conclusion, MOIT's latest recommendation to the Prime Minister is that a high renewable scenario be adopted in Master Plan 8 which would set the wind energy target by 2025 at over 11GW.



Renewable energy will account for more than 20% of the country's energy mix by 2030





2.2 Offshore wind market

So far, Vietnam has focused on onshore and nearshore wind energy deployment, with a number of projects already in development, construction or operation. Most projects are concentrated in the southern part of the country, with the top five provinces being Binh Thuan, Ninh Thuan, Soc Trang, Ben Tre and Bac Lieu.

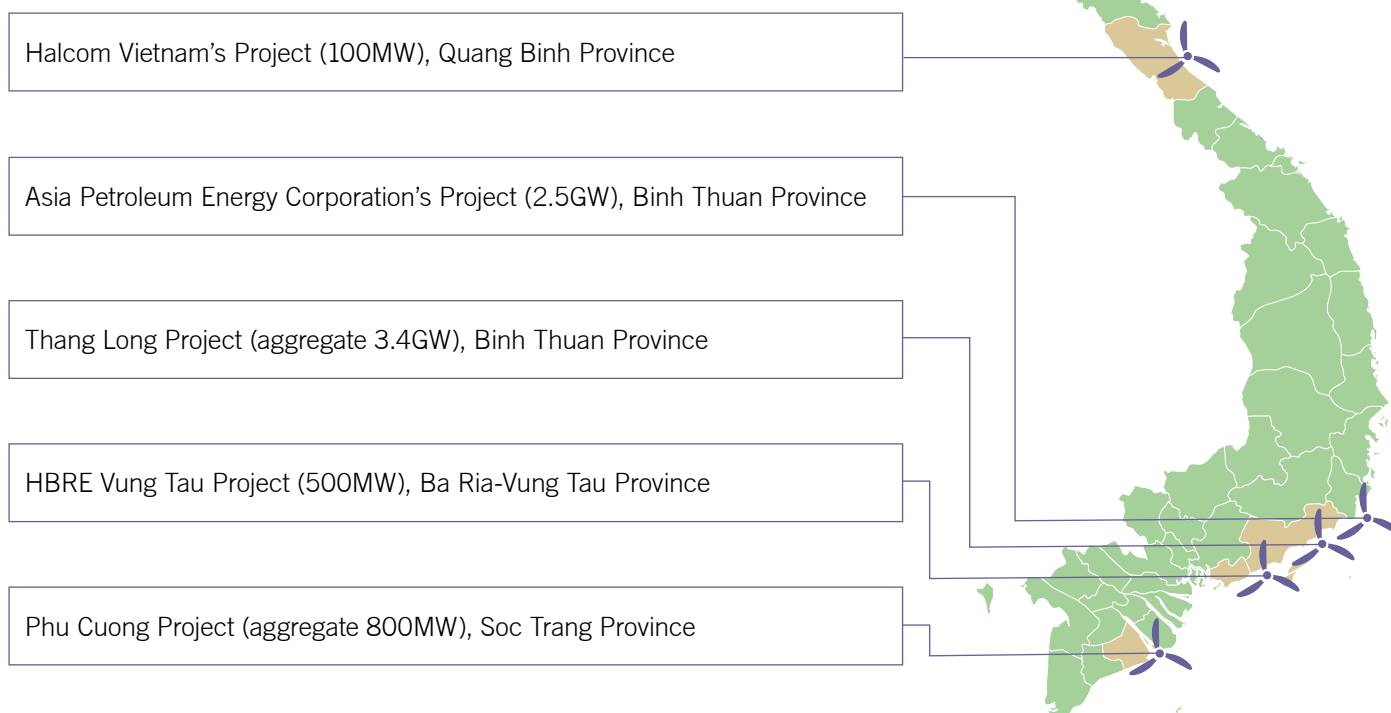
That said, Vietnam is opening itself up to offshore wind opportunities with a number of projects reported to be in development stage including the aggregate 800 MW Phu Cuong project led by Mainstream Renewable Power, the aggregate 3,400 MW Thang Long Project led by Enterprize Energy and the other projects listed below.

2.3 Foreign ownership and investment form

There is no generally applicable limitation on foreign ownership in the renewable energy sector. At present, foreign investors can own up to 100 per cent of equity in power projects in Vietnam.

Although some high-profile, foreign-invested, thermal power projects have been implemented in cooperation with the Government under the Build-Operate-Transfer (“**BOT**”) umbrella (a form of public private partnership), it does not appear that the Government will offer this kind of treatment for renewable energy projects as a general proposition (except, perhaps, for very prominent ones). Therefore, it is expected that most renewable energy projects will be carried out as independent power projects – the main implication being that there will be little room for investors to negotiate special terms or incentives or to obtain Government guarantees (see further below).

Offshore wind farms reported to be in development stage





Key Legal Considerations





3 Key Legal Considerations

3.1 Sale of electricity

Key point:

- > Government owned EVN is the only purchaser under current regime.

Currently, the national utility, i.e. Vietnam Electricity (“**EVN**”) and its subsidiaries, has a monopoly over the transmission and distribution of electricity in Vietnam, and acts as the only wholesale purchaser of electricity from generators. Investors will therefore have to sign power purchase agreements (“**PPAs**”) with EVN to sell electricity. The Government has set out its vision for a competitive power market, which will be fully implemented at the wholesale level by 2021 and at the retail level by 2023, though it remains to be seen if this transition will go on as planned.



Direct PPA

The MOIT has been cooperating with USAID and other consultants to develop the regulations and a pilot scheme for direct PPAs between renewable energy generators and customers, such as factories and industrial parks.

In January 2020, the MOIT submitted its draft decision on the direct PPA pilot program (**DPPA Pilot Program**) to the Prime Minister. Under this program, renewable energy generators and consumer offtakers would be able to participate directly in Vietnam’s wholesale electricity market and enter into contracts for difference at agreed long-term prices.

The DPPA Pilot Program targets renewable energy generators having wind or solar power plants connected to the national grid satisfying certain criteria (eg having an installed capacity greater than 30MW, having been approved in the power development master plan (prioritising projects located in areas with no or low risk of grid congestion) and having sufficient financial capacity, technical resources and experience in developing and operating renewable energy projects).

The DPPA Pilot Program is slated to be implemented nationwide and the total capacity permitted to be developed under this pilot program is limited to 400MW – 1,000MW during the period 2020-2022.

As to the contractual structure, the DPPA Pilot Program involves three types of contracts as follows:

- > a PPA between a renewable energy generator and the Electricity Company (one of the five EVN subsidiaries being the electricity wholesale buyers and retailers in designated geographical areas). Under this PPA, the Electricity Company guarantees to purchase 100% of the electricity that the generator generates to the grid. The generator is prioritised except in cases of overload or affecting the electricity system security. The price will be the spot price set periodically on the wholesale market.
- > a PPA between a private offtaker and the Electricity Company. The price under this PPA will comprise two elements. The first element is the price that Electricity Company periodically pays in the electricity wholesale market (having taken into account losses on the distribution grid). The second element is a DPPA service



fee calculated per electricity unit (covering transmission charge, distribution fee, electricity system operation fee, electricity market transactions operation fee and electricity market subsidiary service fee – all of which will be as regulated by the authorities).

- > contract for difference signed directly between the renewable energy generator and the private offtaker, under which the renewable energy generator receives the wholesale price (ie, spot price) from the Electricity Company and the difference between such spot price and the agreed price (ie the strike price) from the private offtaker under the contract for difference. As proposed by the MOIT, the term of such contract must be at least 10 years. The strike price and offtaking output are subject to negotiation of the parties. The MOIT does not plan to issue a model contract for difference but will provide some guidance on the main terms and conditions. For value-added tax purposes, a contract for difference is considered a financial derivative.

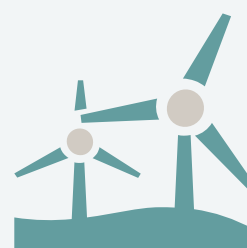
3.2 EVN

Key point:

- > EVN creditworthiness continues to be of concern.

Market observers have expressed concerns about EVN's creditworthiness, as EVN is the entity responsible for implementing massive levels of investment in electricity infrastructure, but currently struggles to make a profit from the low and highly regulated electricity retail tariffs. To alleviate these concerns, the World Bank has been assisting EVN to improve its financial standing and obtain its own credit rating. In June 2018, EVN was given 'BB' rating with a 'Stable Outlook' by Fitch, which aligns with Vietnam's sovereign rating. In June 2019, its power transmission arm, EVNNPT, also attained the same rating. These results have reinforced the creditworthiness of EVN and could give more comfort for investors.

International banks and ECAs have also used innovative financing solutions, working with local Vietnamese banks, to mitigate the credit risks.



The improved credit rating of EVN could give more comfort for investors



3.3 Feed-in Tariff

Key points:

- > Feed-in tariff is set by statute and non-negotiable.
- > Rate is adjusted by USD exchange rate, but not for other factors.
- > Current FiT requires COD by November 2021.

EVN must purchase power generated by wind power projects at the statutory feed-in tariff ("**FiT**") set by law. The FiT is denominated in Vietnamese dong (and electricity purchased by EVN will be paid for in Vietnamese dong) and is linked to the Vietnamese dong-US dollar exchange rate announced by the State Bank of Vietnam (which goes some way towards protecting investors from currency depreciation).

Once obtained, the FiT is applied for 20 years. Neither the law nor the template PPA (see below) contain any adjustment mechanism for inflation or rising production costs, meaning there is no legal guarantee for a FiT increase during the investment term (other than as adjusted for foreign exchange). In practice however, when the wind FiT was increased in November 2018, existing projects were also allowed to enjoy the higher tariff.

Currently applicable FIT

From 1 November 2018, the FiT for utility wind power projects is:

- > **9.8 US cents per kWh for offshore projects**
 - > having wind turbines erected outside the lowest sea level border (determined by average level over a 18.6-year period)
- > **8.5 US cents per kWh for onshore projects**
 - > having wind turbines erected on land or inside the lowest sea level border

The FiT is applicable for:

- > any wind power plant (or the relevant part of it) that achieves a commercial operation date ("**COD**") before 1 November 2021, in which case it will stand for 20 years from the COD; and
- > existing wind power projects that have generated power before 10 September 2018, in which case it will stand from 1 November 2018 for the remaining term of the relevant PPA.

FIT extension proposal

The MOIT sent an official letter to the Prime Minister on 9 April 2020 and again on 8 May 2020 proposing that:

- > the current FiT mechanism for wind power projects be extended to the end of 31 December 2023 (citing the impacts of COVID-19, Law on Planning issues, and difficulties for investors to meet the otherwise tight construction timeframe in order to meet the current FiT deadline, as the reasons behind the proposal);
- > the MOIT be assigned to calculate and propose the new FiT applicable to wind power projects reaching COD in the period from 1 November 2021 to the end of 31 December 2023, for the Prime Minister's consideration and approval; and
- > after 2023, competitive bidding and auction mechanism will apply.

The proposal remains under the consideration of the Prime Minister for now.



COD

COD is the day on which a part or the entire grid-connected wind power plant is ready to sell power to the power purchaser and satisfies the following conditions:

- > the initial tests (including reactive power test, AGC connection test and reliability test) have been completed for a part or the entire grid-connected wind power plant and interconnection facilities;
- > the plant has an electricity generation licence for the power plant; and
- > the seller and the purchaser have settled the meter reading to commence payment.



3.4 Power purchase agreement

Key points:

- > PPA form is set by statute and its basic contents cannot be varied by contract.
- > PPA terms contains certain changes from the conventional power PPA that some financial institutions may consider problematic.

In practice, EVN does not negotiate additional terms to negate the effects of mandatory terms.



Standard forms

Renewable energy generators and EVN must negotiate and conclude their PPA on the basis of the standard agreement forms provided by law. The latest and current standard form PPA for wind power projects was issued under Circular No. 02 of the MOIT on 15 January 2019. While the parties can agree on additional provisions to the standard form PPA, they cannot vary its 'basic contents'. This may cause some concerns since the standard form contains certain basic terms that allocate significant costs and risks to investors.



Rights of lenders not recognised

Unlike its predecessor, the current PPA contains no reference to rights of lenders, such as the right to step in and cure in the event of a breach by the seller, or the right to an assignment from the seller without the consent of the buyer. This is not to say that the investor cannot negotiate such terms with EVN, but in practice EVN does not generally consider inclusion of new terms not included in the standard PPA.



Governing law

The PPA is expressed to be governed by Vietnamese law. As Vietnamese law is still in development, it can lack the breadth and depth that more advanced legal systems offer for resolution of commercial issues. Moreover, many provisions are general and, in some instances, can have varying interpretations. These factors may undermine the predictability of contract enforcement.



Dispute resolution forum

Dispute resolution is subject to a two-stage process, seemingly wholly in control of the power industry regulators in Vietnam. Firstly, parties must negotiate a settlement, which may be overseen by the Electricity and Renewable Energy Authority under the MOIT. Failing that, the dispute will be adjudicated by the MOIT's Electricity Regulatory Authority (**ERA**) following a proceeding set by the MOIT. Only if either party still disagrees with the ERA's judgment is there then the possibility of court litigation.



Exchange rate risks

Even though the FiT is adjusted by VND/USD exchange rate, it will be paid in VND and there is no guarantee for same-day conversion to USD. This gives investors some exposure to short-term foreign exchange rate fluctuations during the period profits have not been converted from VND.



Buyer-friendly payment terms

The PPA contains payment provisions that are favourable for the power purchaser, including application of exchange rate on invoice date, long lag time (up to 25 business days) between invoice date and payment date, and late payment being charged at the interbank interest rate which is in effect lower than those payable under commercial loans.



Stabilisation

There is no clause that protects the seller against an adverse change in law. To this end, the Investment Law provides some protections for investors vis-à-vis the State of Vietnam in respect of changes to investment incentives. However they cannot be relied on for a claim under the PPA, which is a commercial contract with EVN.



Connection to the grid

The seller must bear the cost and risk of connecting the plant to the transmission grid and there is no deemed commissioning clause in the PPA to protect the seller when the plant is able to generate power but connection has not been completed. This can also affect COD timing and the seller's right to secure the favourable FiT. To this end, a failure to achieve COD in certain circumstances may give rise to a termination right by the purchaser.



Assignment by EVN

Under the law, EVN's rights and obligations may be assigned to another entity, however there is no provision requiring the consent of the seller. This is likely to provide for a potential restructuring of the electricity industry, e.g. for establishment of wholesale electricity market. In the long term, it poses a risk for the seller that the contract may be assigned to a party that they are not familiar with.





3.5 Master power plan

Key points:

- > Projects must be included in the master power plan.

A wind power project can only be developed if it has been included in the master power plan. Until 1 January 2019, this process was governed by the laws on electricity, which generally provide that the MOIT shall approve the addition of new projects having capacity of 50MW or less to the provincial power plan and the Prime Minister, acting on advice of the MOIT, shall approve the addition of new projects above that threshold to the national power plan.

From 1 January 2019, under a new Law on Planning, there will be a national power plan and, for each province, a provincial master plan with a section on power in line with the national power plan. While both plans need to be approved by the Prime Minister, the national power plan will be developed by the MOIT while the provincial plan will be developed by the province and appraised by the Ministry of Planning and Investment (**MPI**). While this initially caused some confusion for projects that were undergoing master planning process under the old law, creating a massive backlog of projects that could not be approved pursuant to the new law, the Standing Committee of the National Assembly has now issued a resolution to help move things forward. Pursuant to this resolution, master plans that were initiated under the old laws may still be finalised, approved and amended along with new master plans. As a result, projects under the existing master plans can continue to be approved and developed.

3.6 Grid issues

Key points:

- > Curtailment risk will need to be considered.

By June 2019 the Government had approved more than 10 GW of solar and wind capacity, around 4 GW of which had been connected to the grid. The surge of added capacity, which was not foreseen, and the concentration of new projects in a few provinces, has created enormous pressure on the power system and threatened grid disruption. As a result, a number of solar and wind projects were reportedly requested to curtail output without compensation from EVN. The Government is accelerating new power transmission investments and considering engaging private investors to assist with building the necessary infrastructure. Pending resolution of this issue, curtailment risk has become a factor that needs to be considered carefully by investors. Curtailment risk is higher in the central regions where most projects have been registered.

3.7 Government guarantees

Key points:

- > Typically no government guarantee is provided.

Apart from the general assurances provided under the Investment Law (such as no nationalisation, assurance of profit repatriation, protection of existing incentives in case of change of law, etc.), the Government does not provide specific guarantees for renewable energy projects, e.g. guarantee for the contractual performance of EVN as the power purchaser under the PPA, or guarantee of foreign currency availability to convert VND revenues into USD.



3.8 Investment incentives

Key point:

- > Wind projects may be eligible for various tax and other incentives.

Renewable (including wind) energy is classified as an especially encouraged sector. Therefore, some tax relief and other incentives are available for investors as listed below. Note that this is only a general description of potentially available incentives. The application of these incentives in specific circumstances will be subject to satisfaction of the relevant conditions.

Potential incentives

Category	Incentives
Import duty	Exemption for: <ul style="list-style-type: none"> > goods imported to form fixed assets; and > project materials, components, and semi-finished products that cannot be domestically manufactured.
Corporate Income tax	<ul style="list-style-type: none"> > Exemption for the first four years;^(a) > 50 per cent reduction for the following nine years, and > Preferred tax rate of 10 per cent for the first 15 years.^(b)
Land lease	<ul style="list-style-type: none"> > Exemption ranging from 14 years to the entire project life depending on the project location.

(a) Counting from the first year of generating taxable income or from the fourth project year, whichever comes first; new projects only.

(b) Counting from the first year of generating income; new projects only. Normal, non-preferred, tax rate is 20 per cent.



Investing in a Project





4 Investing in a Project

4.1 Key authorities and partners

Authority	Responsibilities
National level	
Prime Minister (PM)	> approving power development plans
Ministry of Industry and Trade (MOIT)	> developing national power plan > prior to 1 January 2019, approving provincial power plan
Ministry of Planning and Investment (MPI)	> appraising provincial master plan, including the power plan component
Ministry of Natural Resources and Environment (MONRE)	> assigning sea area in certain cases
State Bank of Vietnam (SBV)	> approving foreign loan registration
EVN	> signing PPA and buying electricity
Electricity Regulatory Authority of Vietnam (ERAV)	> issuing electricity generation licence
Local level	
Provincial People's Committee (PPC)	> giving investment approval > assigning sea area in certain cases > approving environmental impact assessment report
Department of Planning and Investment (DPI)	> issuing investment registration certificate > issuing enterprise registration certificate
Department of Natural Resources and Environment (DONRE)	> assessing environmental impact assessment report
Department of Industry and Trade (DOIT)	> assessing basic design in feasibility study and technical design
Department of Construction (DOC)	> issuing construction permit

4.2 Key project development steps

Stage 1 – Project preparation: decision on inclusion in the power master plan, issue of enterprise registration certificate and investment registration certificate;

Stage 2 – Preparing for construction:

- (i) (approvals) land use right certificate (LURC), environmental impact assessment (EIA) approval, decision for assignment of sea area, fire prevention and firefighting approval, construction permit;
- (ii) (agreements) metering agreement, connection agreement, SCADA agreement, power purchase agreement (PPA);

Stage 3 – Construction: EPC and O&M agreements; and

Stage 4 – Operation: electricity generation licence for the plant and operating licences for operational staff.



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Our team in Vietnam is a mix of foreign, overseas Vietnamese and locally qualified lawyers bringing together international expertise and local knowledge. The depth of our experience in Vietnam means that we can identify issues and find practical solutions efficiently, taking local sensitivities into account.



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