



Legal Environment for Responsible Investment –
Case Study on Power Contracts
Project Finance: Project Contracts Structure and Risks Allocation

21 November 2013

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Partner

Yangon Myanmar

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Brief Introduction to DFDL

2

Overview of Typical Contract Structure

3

Project Risk Assessment and Risk Allocation in Contracting Structure

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Brief Introduction to DFDL

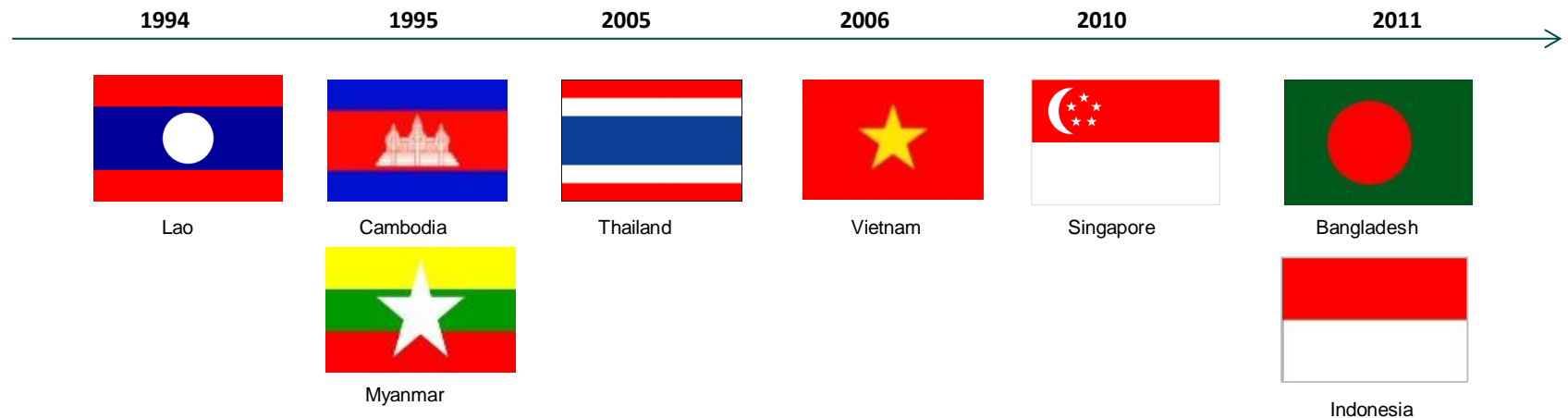
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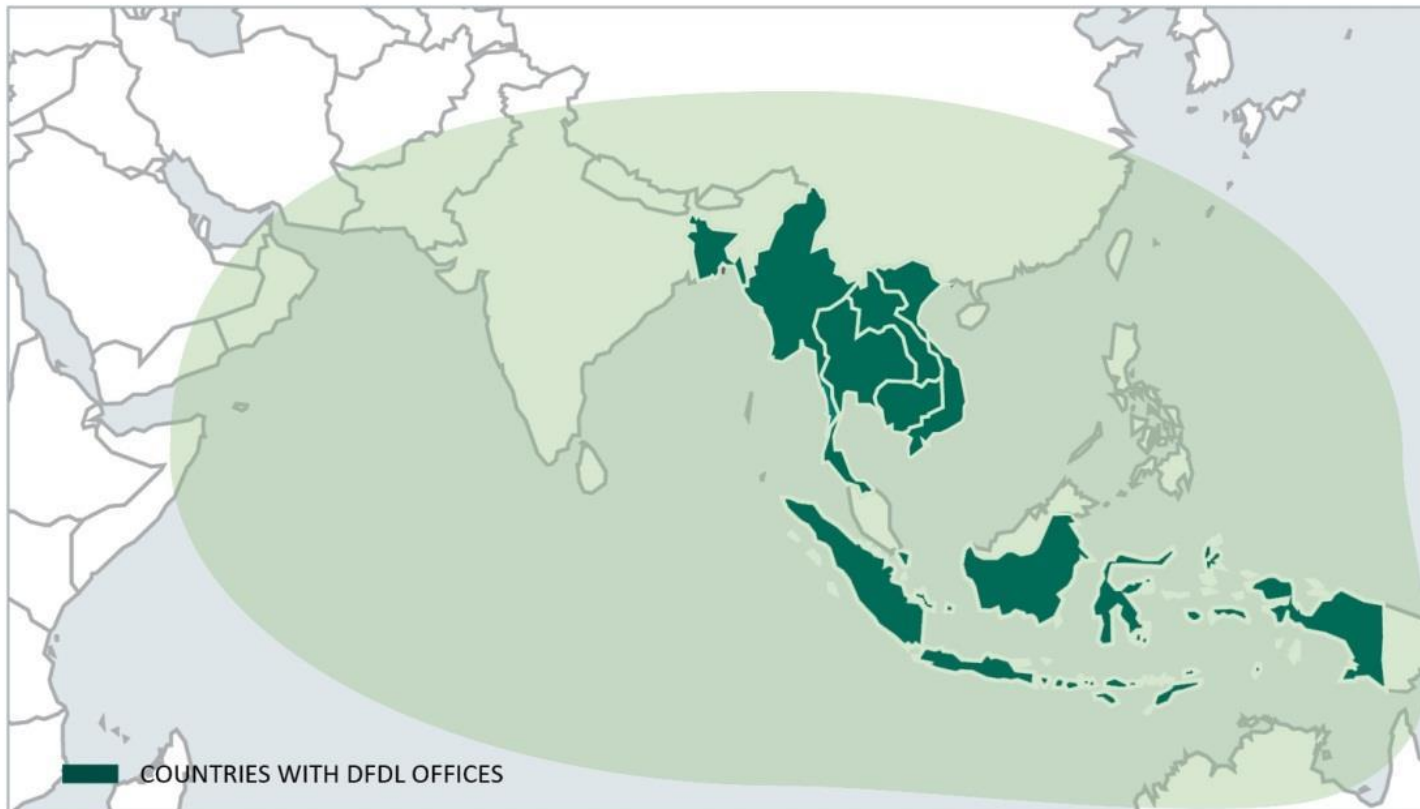
“We are pioneers in emerging markets”



Our Strategy

Not “Go Where our Clients Go”, BUT “Go BEFORE you Go”.

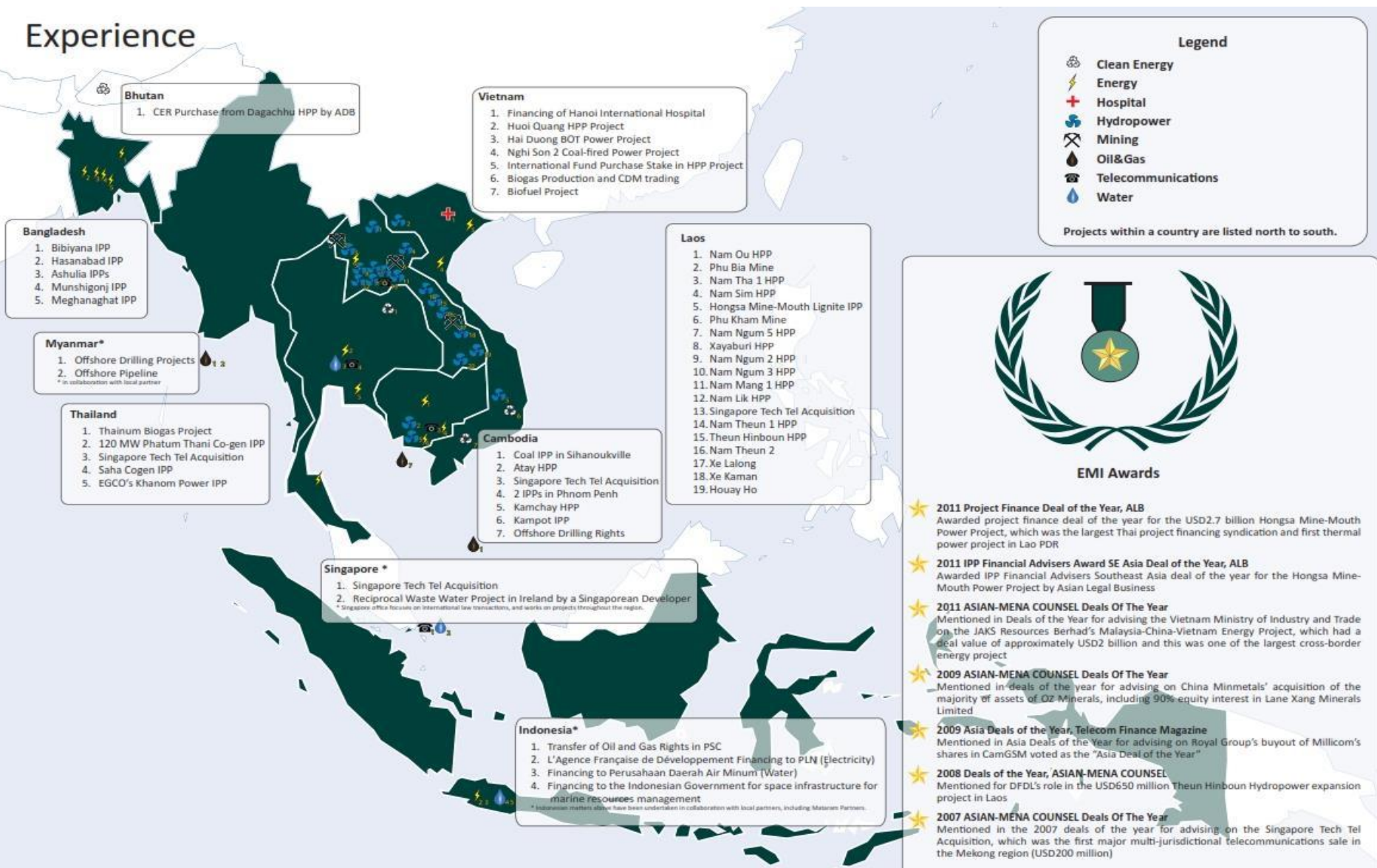
From Southeast Asia to the Middle East



- **250 staff**
- **120+ advisers**
- **8 countries**
 - Bangladesh
 - Cambodia,
 - Indonesia*
 - Myanmar
 - Laos
 - Singapore
 - Thailand and
 - Vietnam
- **12 offices**
 - Dhaka
 - Phnom Penh
 - Yangon
 - Naypyidaw
 - Vientiane
 - Jakarta
 - Bangkok
 - Koh Samui
 - Phuket
 - Hanoi
 - Ho Chi Minh City
 - Singapore

Regional experience

Experience



Legend

- Clean Energy
- Energy
- Hospital
- Hydropower
- Mining
- Oil&Gas
- Telecommunications
- Water

Projects within a country are listed north to south.

EMI Awards

- 2011 Project Finance Deal of the Year, ALB**
Awarded project finance deal of the year for the USD2.7 billion Hongsa Mine-Mouth Power Project, which was the largest Thai project financing syndication and first thermal power project in Lao PDR
- 2011 IPP Financial Advisers Award SE Asia Deal of the Year, ALB**
Awarded IPP Financial Advisers Southeast Asia deal of the year for the Hongsa Mine-Mouth Power Project by Asian Legal Business
- 2011 ASIAN-MENA COUNSEL Deals Of The Year**
Mentioned in Deals of the Year for advising the Vietnam Ministry of Industry and Trade on the JAKS Resources Berhad's Malaysia-China-Vietnam Energy Project, which had a deal value of approximately USD2 billion and this was one of the largest cross-border energy project
- 2009 ASIAN-MENA COUNSEL Deals Of The Year**
Mentioned in deals of the year for advising on China Minmetals' acquisition of the majority of assets of OZ Minerals, including 90% equity interest in Lane Xang Minerals Limited
- 2009 Asia Deals of the Year, Telecom Finance Magazine**
Mentioned in Asia Deals of the Year for advising on Royal Group's buyout of Millicom's shares in CamGSM voted as the "Asia Deal of the Year"
- 2008 Deals of the Year, ASIAN-MENA COUNSEL**
Mentioned for DFDL's role in the USD650 million Theun Hinboun Hydropower expansion project in Laos
- 2007 ASIAN-MENA COUNSEL Deals Of The Year**
Mentioned in the 2007 deals of the year for advising on the Singapore Tech Tel Acquisition, which was the first major multi-jurisdictional telecommunications sale in the Mekong region (USD200 million)

Bhutan
1. CER Purchase from Dagachhu HPP by ADB

Vietnam
1. Financing of Hanoi International Hospital
2. Huoi Quang HPP Project
3. Hai Duong BOT Power Project
4. Nghi Son 2 Coal-fired Power Project
5. International Fund Purchase Stake in HPP Project
6. Biogas Production and CDM trading
7. Biofuel Project

Bangladesh
1. Bibiyana IPP
2. Hasanabad IPP
3. Ashulia IPPs
4. Munshigonj IPP
5. Meghanaghat IPP

Myanmar*
1. Offshore Drilling Projects
2. Offshore Pipeline
* in collaboration with local partner

Thailand
1. Thainum Biogas Project
2. 120 MW Phatum Thani Co-gen IPP
3. Singapore Tech Tel Acquisition
4. Saha Cogen IPP
5. EGCO's Khanom Power IPP

Cambodia
1. Coal IPP in Sihanoukville
2. Atay HPP
3. Singapore Tech Tel Acquisition
4. 2 IPPs in Phnom Penh
5. Kamchay HPP
6. Kampot IPP
7. Offshore Drilling Rights

Laos
1. Nam Ou HPP
2. Phu Bia Mine
3. Nam Tha 1 HPP
4. Nam Sim HPP
5. Hongsa Mine-Mouth Lignite IPP
6. Phu Kham Mine
7. Nam Ngum 5 HPP
8. Xayaburi HPP
9. Nam Ngum 2 HPP
10. Nam Ngum 3 HPP
11. Nam Mang 1 HPP
12. Nam Lik HPP
13. Singapore Tech Tel Acquisition
14. Nam Theun 1 HPP
15. Theun Hinboun HPP
16. Nam Theun 2
17. Xe Lalong
18. Xe Kaman
19. Houay Ho

Singapore *
1. Singapore Tech Tel Acquisition
2. Reciprocal Waste Water Project in Ireland by a Singaporean Developer
* Singapore office focuses on international law transactions, and works on projects throughout the region.

Indonesia*
1. Transfer of Oil and Gas Rights in PSC
2. L'Agence Française de Développement Financing to PLN (Electricity)
3. Financing to Perusahaan Daerah Air Minum (Water)
4. Financing to the Indonesian Government for space infrastructure for marine resources management
* Indonesian matters above have been undertaken in collaboration with local partners, including Master Partners.

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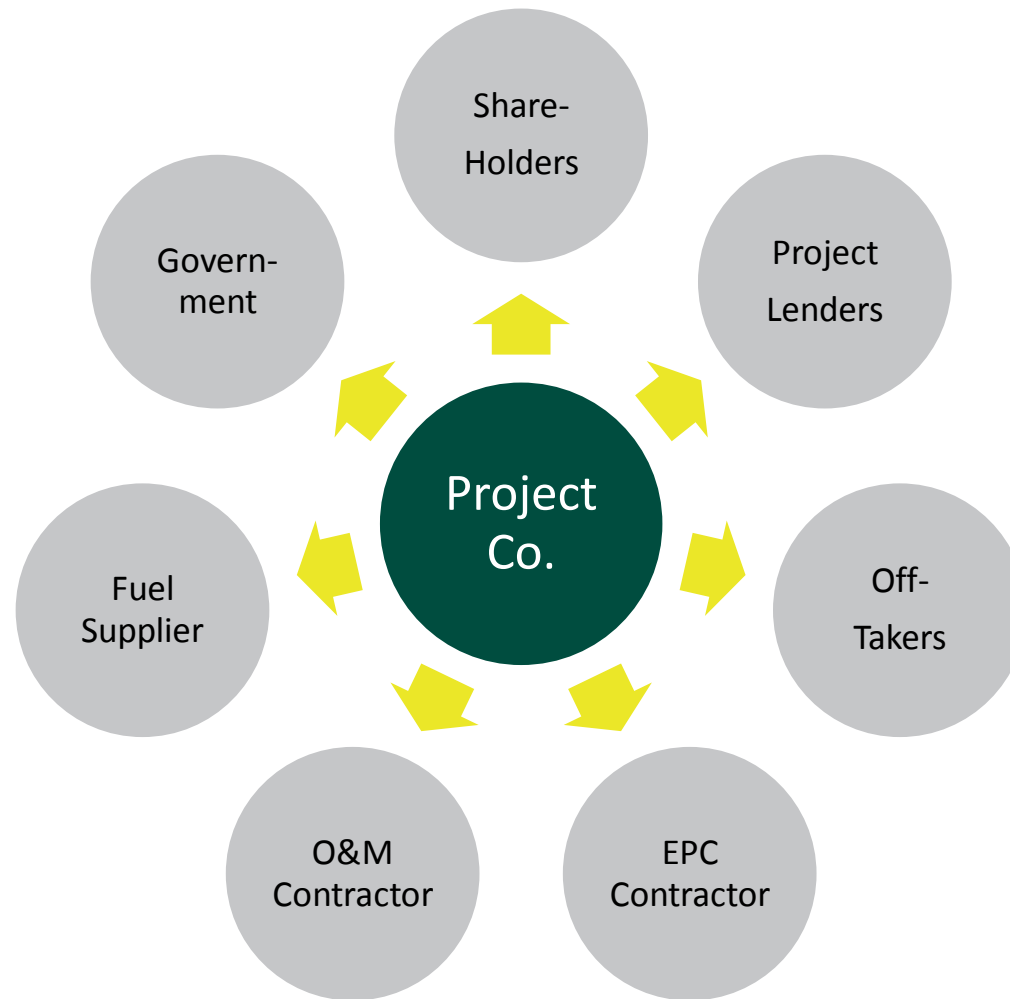
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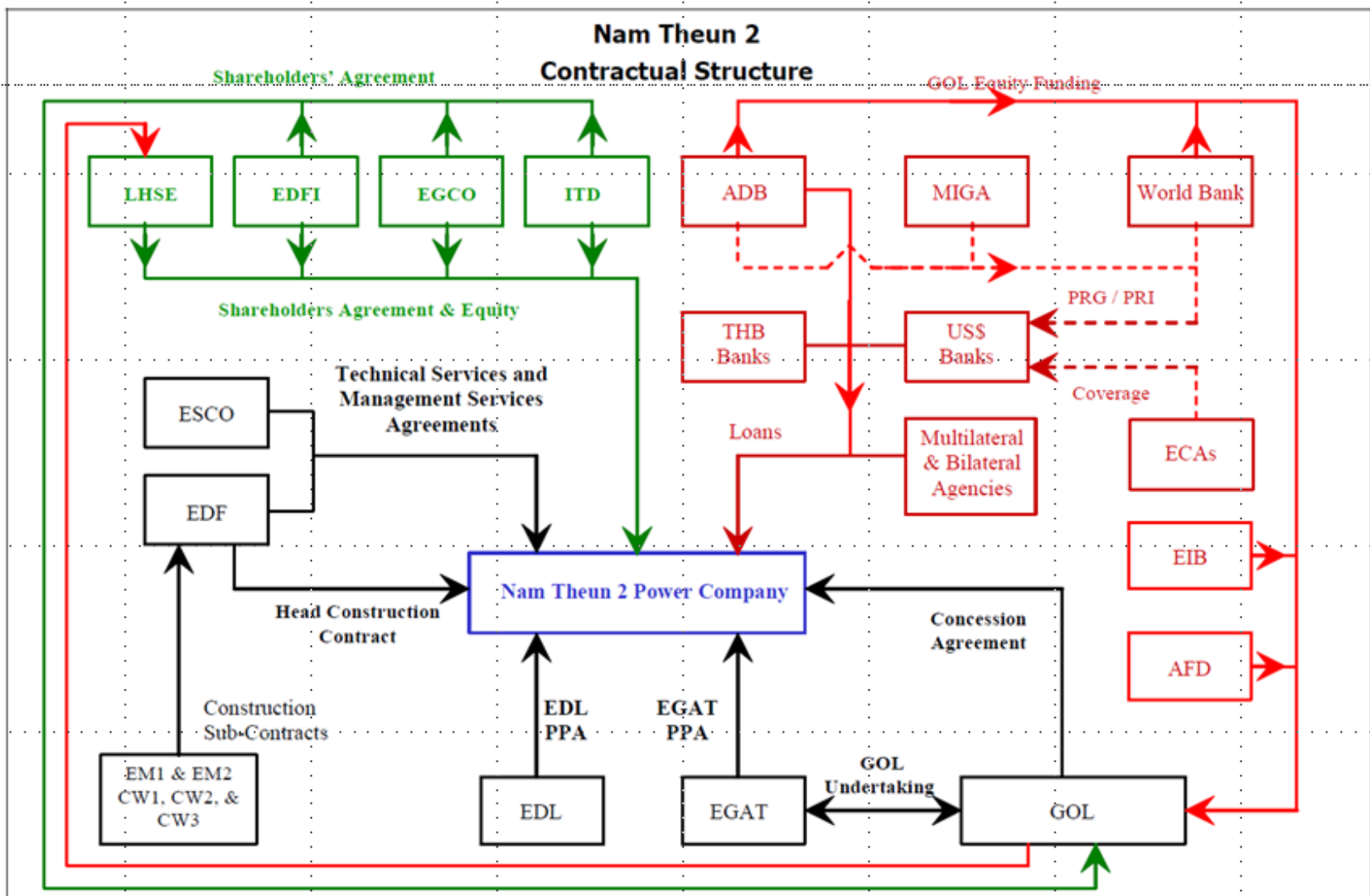
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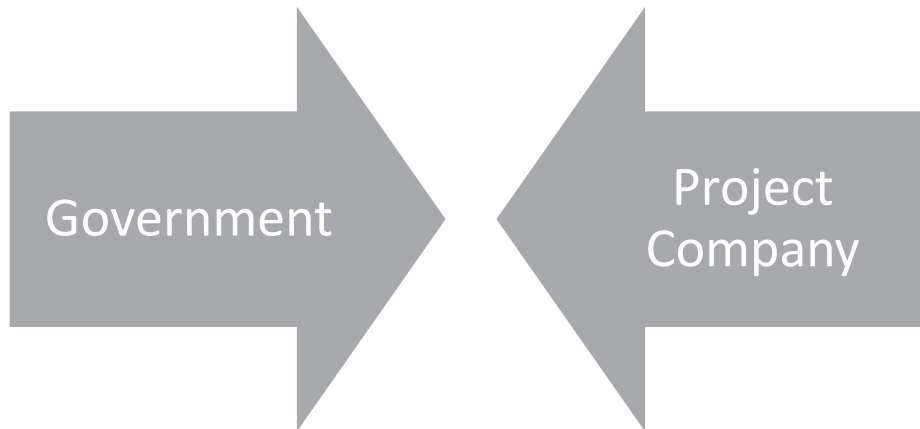
Project Risk Assessment and Risk Allocation in Contracting Structure

- Power projects (and in many other forms of infrastructure projects) are often project financed
- Project financed projects are funded on a non or limited recourse basis
 - Meaning lenders look only to the project revenues and which thus must be very certain and secure
- Multiple parties involved, with risks having to be properly allocated among such parties
- Who takes the risks unable to be controlled or insured against?

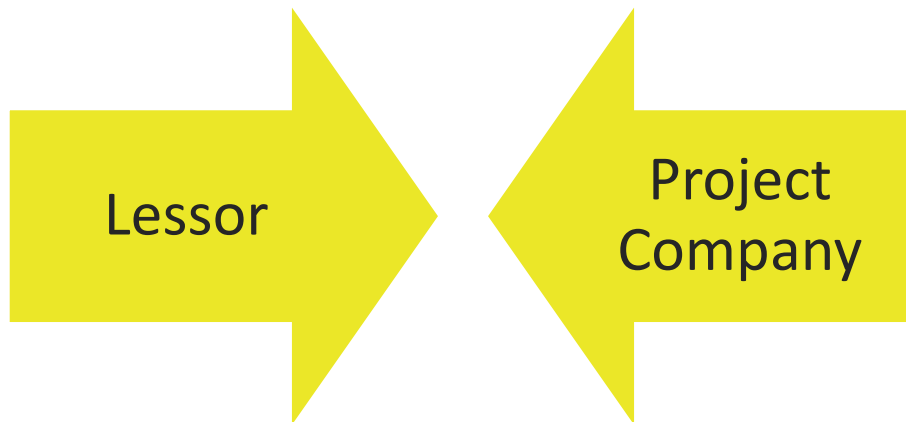


NT2 Contract Structure

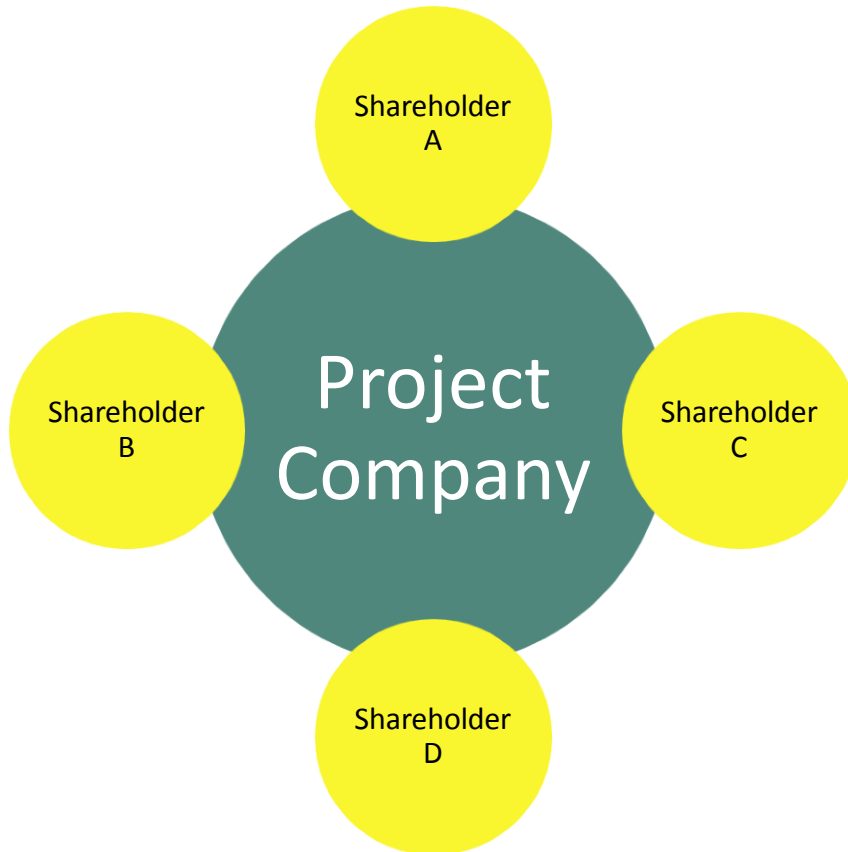




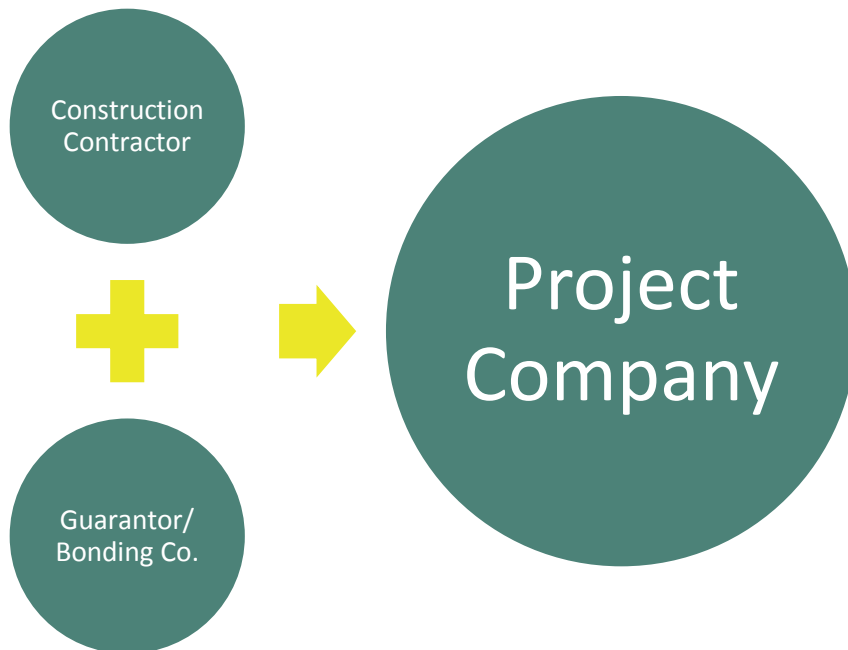
- Concession Agreement/Permits:
 - Grant of Exclusive Project Rights
 - Stated Term
 - BOT
 - Royalties and Taxes
 - Social Benefits
 - Environmental Duties



- Site Ownership (permitted?)
 - Title Search/Insurance
- Site Lease
 - Term
 - Rental Fees
 - Scope
- Easements/Licenses
 - Transmission Lines
 - Access Roads
 - Gas Supply Lines

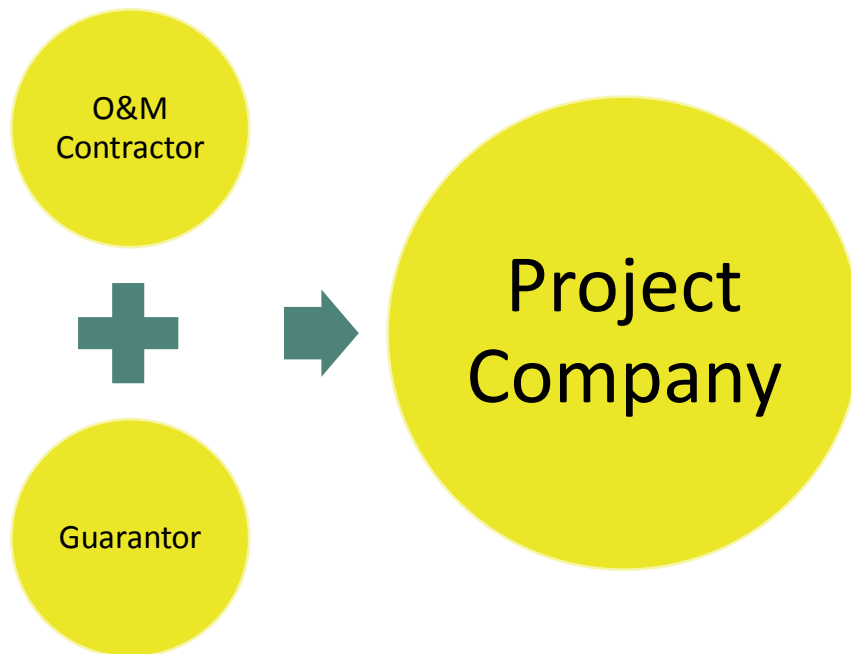


- Shareholders'/JV Agreement
 - Term
 - Equity Contributions
 - Loan Contributions
 - Voting Rights
 - Minority Rights
 - Management
 - Pre-emptive Rights
 - Transfer of Shares
 - Dissolution

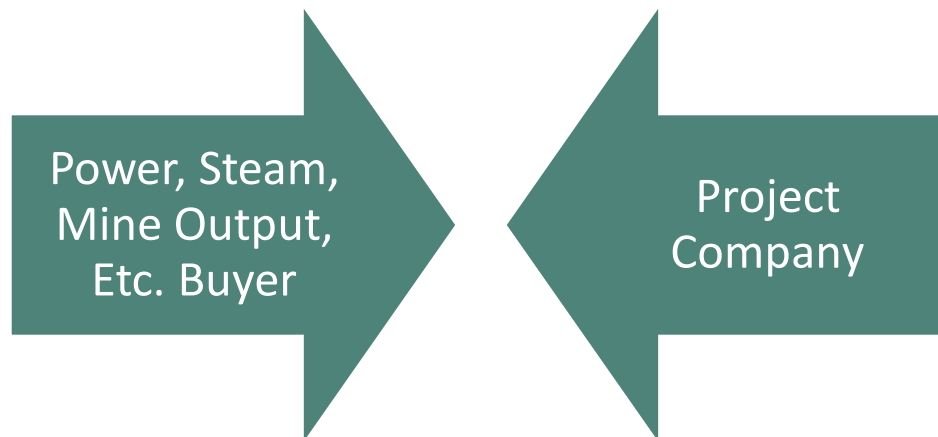


■ Construction Agreement

- EPC?
- Scope
- Schedule
- Payment Milestones
- Delay Damages
- Performance Guarantees
- Warranties
- Indemnities
- Limits on Liability

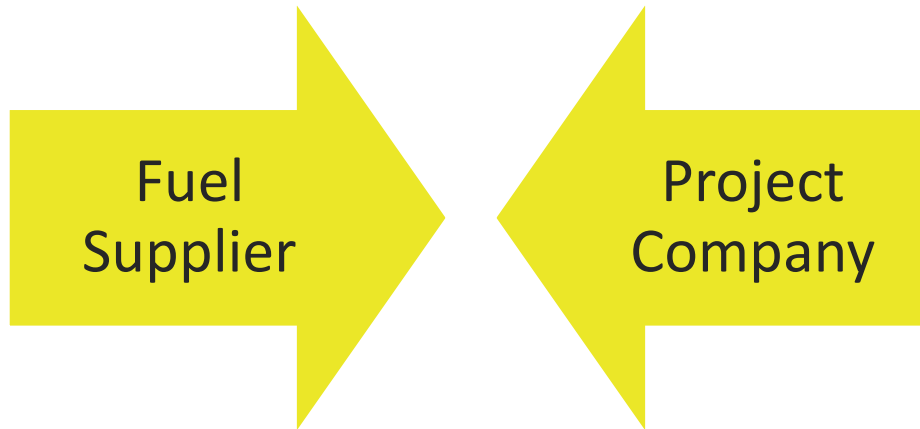


- O&M Agreement
 - Term
 - Price
 - Scope
 - Performance Guarantees
 - Indemnities
 - Limits on Liability
 - Parent Guarantee



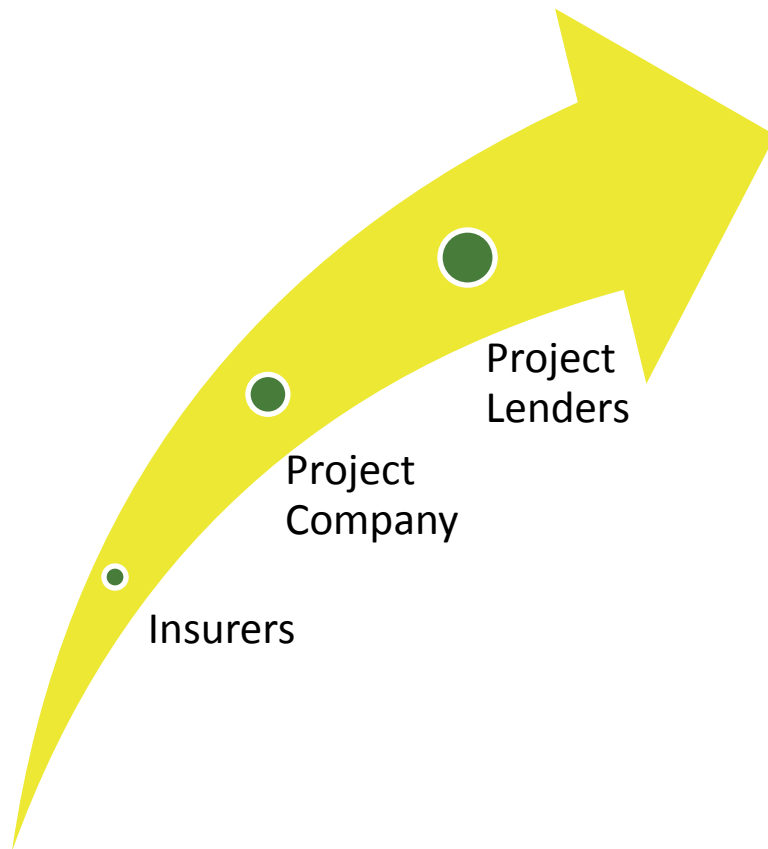
Off-Take Agreement

- Term
- Price/Tariff
 - Energy
 - Capacity
 - Back-Up Power
- Minimum Take
- Max/Min Supply
- Delivery Point
- Transmission



Fuel Supply Agreement

- Fuel Specification
- Quantity: Requirements?
- Quality/Rejection
- Price
- Take-or-Pay?
- Delivery Point



Insurance

- Construction Risks
 - Hazards
 - Delayed Opening
- Commercial Risks
 - Operating Hazards
 - Natural Force Majeure
 - Business Interruption
 - Off-Taker Risk
- Political Risks
 - Debt
 - Equity
- Terrorism/Sabotage

PROJECT COMPANY

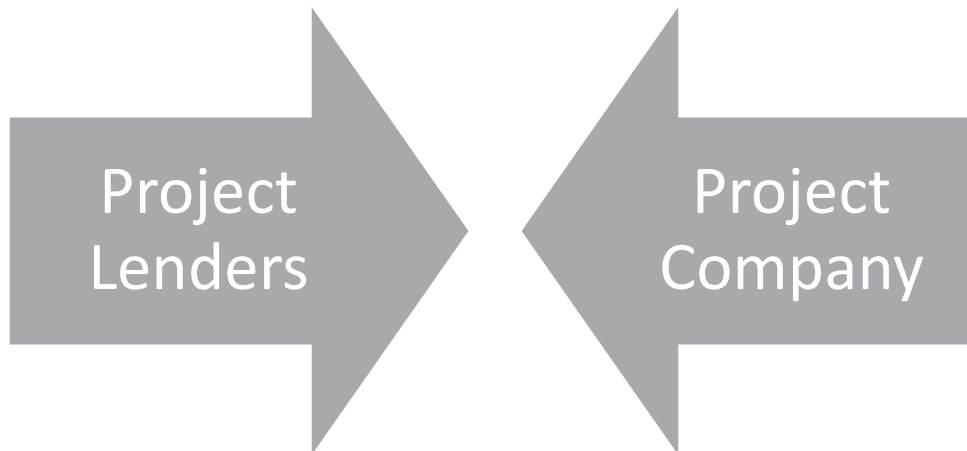
- Licenses:
 - Investment
 - Incorporation
 - Tax Registration
 - Seal

PROJECT

- Feasibility Study
- Environmental
 - EIA, SIA
 - Mitigation Plan
- Construction
- Operations

EXEMPTIONS

- Tax and Investment Incentives
- Operating Issues: Foreign Staff, etc.
- Accounting Issues

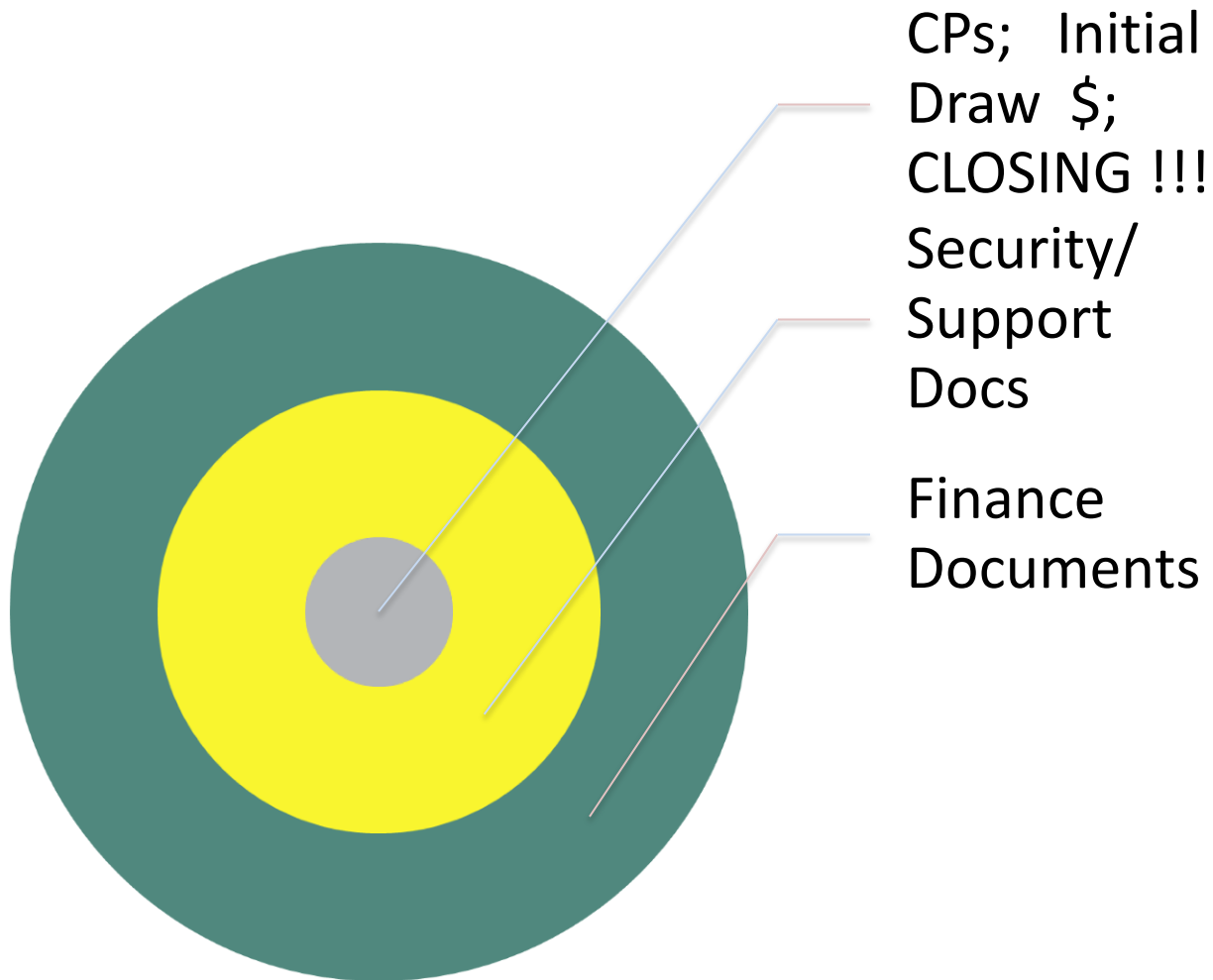


- Financing Documents
 - Tenor
 - Interest Rate
 - Non or Limited Recourse
 - Guarantees
 - Sponsor Support
 - Hedging:
 - Interest Rates
 - FX
- Security Documents
- Supporting Documents

- Common Terms Agreement
- Facility Agreement/Loan Agreement
 - Loan Tranches: USD, Kyat, Working Capital, etc.
 - LC/Back-Up Financing Tranches
- Accounts Agreement: lock-box and water-fall
- Intercredit or Agreement
- Subordination Agreements
- Hedging Agreements
 - ISDA Master Agreement and Schedules
 - Hedge Allocation Agreement
- Equity Contribution Agreement: Over-runs

- Must include local law documents
- May include English, Myanmar, Singapore law, etc. documents:
 - Immovable Assets Security Agreement/Mortgage
 - Pledge of Movable Assets
 - Pledge of Accounts (might be included in Pledge of Movables)
 - Share Pledges: from all shareholders
 - Pledge of Subordinated Debt: from all shareholders
 - Guarantees
 - Base Equity Contributions
 - Cost-Overruns
 - EPC Contractor Guarantees

- Direct Agreements
 - Concession Agreement
 - EPC Contractor
 - Off-Taker
 - Fuel Supplier
 - O&M Operator
- Reinsurance: Assignment of Proceeds; Cut-Through
- Closing Legal Opinions



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Project Risk Assessment and Risk Allocation in Contracting Structure

- Long term project – many uncertainties
- Investors make decisions based on risk analysis and do not want to use their balance sheets
- Financing on a non- recourse or limited recourse basis, i.e. lenders look only to the project revenues which thus must be very certain and secure
- Legal and regulatory framework provides can provide much of the necessary certainty by ensuring that commitments can be enforced
- Often in emerging markets such framework may be developing and thus does not provide sufficient certainty thus parties must create such certainty via the various relevant agreements

Allocate the Risk to the Party Best Able to Manage the Risk

- The contractor assumes the design and construction risk
- The operator assumes the operations and maintenance risks
- The lenders assume the financial risks
- The insurers assume the insurable risks
- The State assumes the political risk, change in law, acts of governmental entities and political force majeure
- The power purchaser assumes the market, tariff and regulatory risks and the timing risk
- The investors assume the development risk and any residual commercial risks

- Development
- Financing
- Design and Construction
- Operation
- Maintenance
- Fuel Supply (unless “tolling”)

- Regulation
- Consents and permits (environmental, imports, etc.)
- Change of law and tax
- Force Majeure
- Restructuring of the industry
- Re-negotiation
- Expropriation
- Immigration controls
- Security and local opposition
- Foreign currency

- Regulatory discretion, inconsistency and changing the rules are the key elements of the risk because they can affect cost recovery, ability to earn profits and potential increases in costs
- Dealt with substantially in licences and legal framework, however in emerging markets it is dealt with contractually as there is a lack of a regulatory framework
- An issue for both the private and the public sector
- Licences can anticipate change over a long period
- Transparency needs to be institutionalised in licences and all other activities of the Regulator
- “Comfort letters” are often issued to lenders and investors
- BUT the role of the regulator is important – the interests of the investors and the consumers have to be balanced fairly

Should deal with:

- Consents and permits
- Change in law and tax (PPA)
- “Political” force majeure
- Expropriation (MIGA)
- Immigration
- Security and local opposition

Thank you



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Head of China Desk*

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