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Legal Issues Subject to Review in Licensing Myanmar Power Projects

Presentation to the Union Office of the Attorney General

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Purpose:

- *To explain the reasons project risks are essentially allocated the same way for virtually all IPP Projects developed in emerging markets; and*
- *Describe how the allocation of projects risks is reflected in IPP power purchase agreements.*

Licensing Issues

- Technical Feasibility of the Project
- Consistency of Fuel Source with National Interests
- Project Location and Power System's Needs
- Commercial Viability
- Attractiveness of Tariff
- Reasonable Allocation of Project Risks
- Financial Feasibility
- Project Sponsors' experience
- Credentials of Management Team
- Development Benefits

Risk Allocation Driven By Form of Financing and Power Sector Structure

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- IPP Projects typically debt financed on a "project" or "limited recourse" basis; with project cost funded 30% by equity and 70% debt;
- With limited recourse debt financing, banks lend to a Project Company formed for the sole purpose of the development, ownership and operation of an IPP Project.
- Only security for debt are the Lenders' security interests in all the Project Company assets.
- Lenders have no recourse against Project Sponsors.
- Only Revenue available to Project Company is attributable to the "Power Purchase Agreement" with the Power Purchaser.
- In virtually all emerging markets, there is only one Power Purchaser to whom IPP Power can be sold; sales to multiple Power Purchasers is either not possible or not permitted.

Principles for Risk Allocation

FINANCING FACTS OF LIFE:

- Lenders take no risks over which they cannot exercise control.
- Note: Project sponsors are not the same and have different tolerances for project risk.

Resulting Allocation Principles:

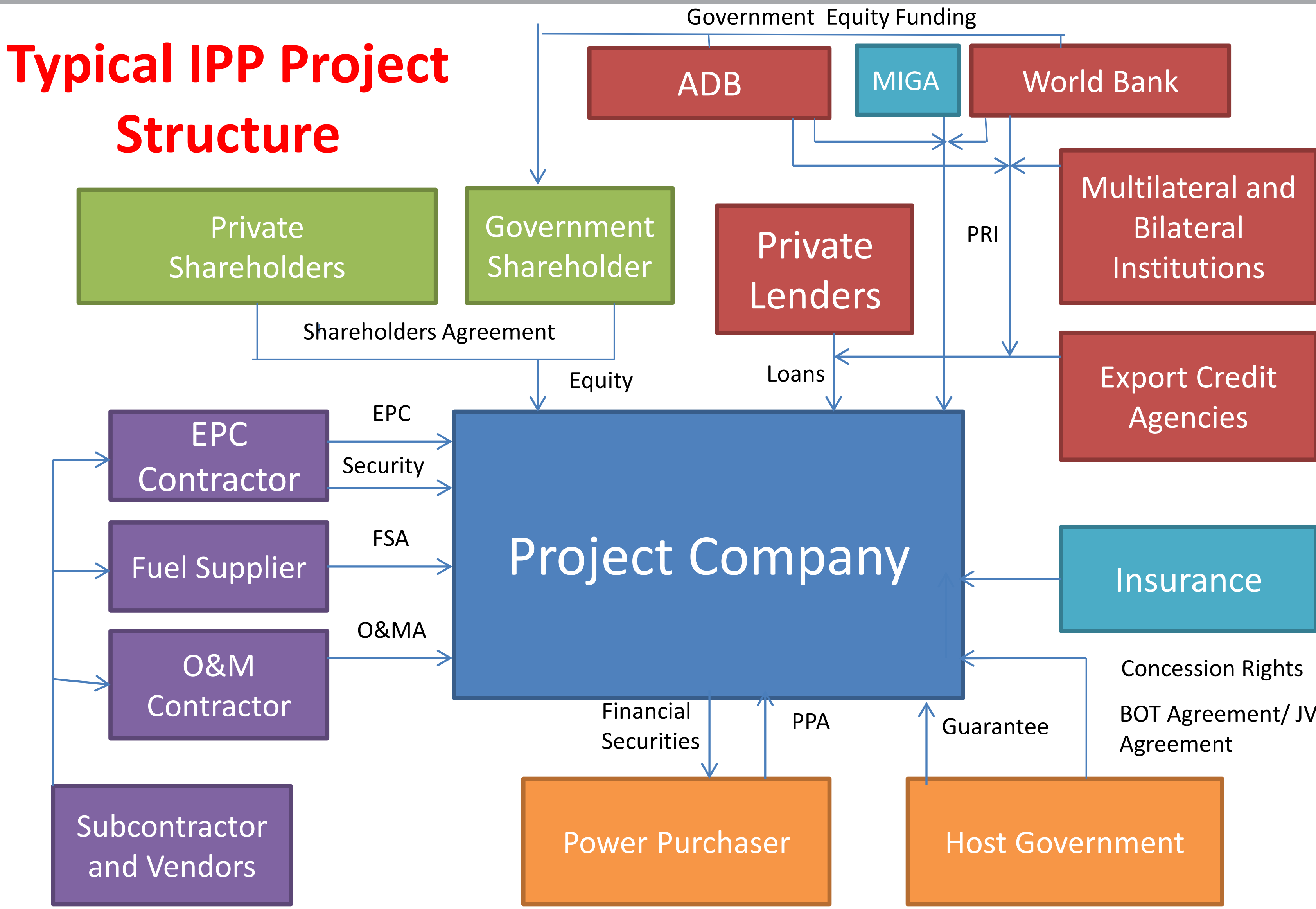
1. Allocate risks to the Party able to exercise control over such risks.

2. Allocate uncontrollable risks to the Party able to most cost effectively insure against such risks.

   Advice: Sometimes it makes sense to socialize risk than to obtain insurance.

3. Allocate uncontrollable and uninsurable risks to the Party best able to bear the financial consequences of such risks. that can “socialize” risk.

Project and Contractual Structure Required for Allocating Project Risks



PPA Provisions Addressing Risk Allocation: Conditions Precedent

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Conditions Precedent for PPA Effectiveness

- Execution of all key project documentation, including, in addition to the PPA, the concession or BOT Agreement, any JV Agreement, the land purchase or lease agreement, and fuel supply agreement if the supplier is state owned (protects both Project Company and Power Purchaser).
- Provision of any development security (bank guarantee) required by the PPA to be supplied to the Power Purchaser by the Project Company (protects Project Company in part from damages incurred due to delayed achievement of Financial Close and other milestones);
- Issuance of the legal opinion required to be provided by the equivalent of the Union Office of the Attorney General to address in part any legal uncertainties of concern to Lenders and the Project Sponsors. (Form of contents and attached to PPAs).

PPA Provisions Addressing Risk Allocation: Conditions Precedent *cont.*

- Issuance of any Government Guaranty required to be provided in order to address uncertainties about
  1. Power Purchaser's creditworthiness (by guaranteeing satisfaction of payment obligations of the Power Purchaser),
  2. Availability and enforceability of legal rights critically important to Project Sponsors and Lenders (by guaranteeing that specified legal rights have been obtained and can be enforced by the Project Company),
     - Repatriation Investment and Profits
     - Granting and enforceability of Security Interests Satisfactory to Lenders
     - Foreign Bank Accounts and Transactions with Foreign Currency
     - Availability of Foreign Exchange

Are Government Guarantees required for Myanmar IPP Projects?

- Payment Obligations of Power Purchaser - Probably Required But Not Always and Not Forever
- Receipt and Enforceability of Legal Rights - Probably Not Required
- Contractual Performance - Not Required

PPA Provisions Addressing Risk Allocation: Conditions Precedent *cont.*

- Achievement of Financial Close- Financial Close occasionally included as condition precedent. Works to the advantage of Project Sponsors by relieving them of the potential loss of development security due to failure to achieve or prolonged delayed achievement of Financial Close.

  Advise: Do not include Financial Close as it unduly protects Project Sponsors. However, to encourage the development of the first IPPs in an environment of legal uncertainties or uncertain project development process, it may be advisable to either include Financial Close as a condition precedent or only require development security to be provided at Financial Close.

- Failure to Satisfy a Condition Precedent:

  Failure to satisfy within contractually defined period permits the Party not responsible for satisfying such condition precedent to terminate the PPA.

  Failure to satisfy the conditions precedent is attributable to Project Company, then the development security is forfeited. BUT BEWARE: Seeking forfeiture of the development security will most likely result in Project Company seeking compensation when failure to satisfy a condition precedent is attributable to the Power Purchaser or another governmental institution.

PPA Provisions Addressing Risk Allocation: Development and Construction Arrangements

- Obligations to Construct

1. IPP PPAs include contractual obligations for the Project Company to:
   (a) construct and operate the IPP plant in accordance with applicable laws, prudent utility practices and specification contractually specified and then commission and achieve commercial operation by the Scheduled Commercial Operations Dates set forth in the Milestones,
   (b) commence construction of the IPP plant by the date specified in the Milestones; and
   (c) complete construction of the IPP Project switchyard by the Scheduled Energizing Date set forth in the Milestones.

2. IPP PPAs also require the Power Purchaser to build and commission the transmission facilities required to interconnect the IPP Plant to the transmission network in accordance with applicable law, specifications contractually specified and prudent utility practices. The Power Purchaser is required by the PPA to acquire the requisite property rights and complete construction and commission of such transmission interconnection facilities by Scheduled Energizing Date.

PPA Provisions Addressing Risk Allocation: Development and Construction Arrangements *cont.*

- Monitoring and Supervision
  1. Project Company commonly required to file monthly progress reports with the Power Purchaser and to provide copies of all technical progress reports prepared for the Lenders.
  2. Power Purchaser has contractual right to inspect construction site during all reasonable times and with reasonable notice.

- Energization of Connection Point
  1. The Project Company shall carry out the inspection and testing of the transmission interconnection between transmission facilities constructed by the Power Purchaser and the IPP Plant switchyard in accordance with contractually specified requirements.
  2. The Power Purchaser shall review the results of the inspection and testing performed by the Project Company. Upon being satisfied with such inspections and tests, the Power Purchaser shall issue a certification to that effect to the Project Company.

Advice: Disputes as to the readiness of the connection point and switchyard are ready for Energization can be most promptly resolved by submission to the independent Engineer for resolution.

PPA Provisions Addressing Risk Allocation: Development and Construction Arrangements *cont.*

- Commissioning and Commercial Operation
  1. Commissioning tests shall be performed by the Project Company in accordance with PPA specified requirements. Power Purchaser shall be provide notice and is entitled to have representatives attend such tests.
  2. Power Purchaser shall review and comment on the results of the commissioning tests performed by the Project Company.
  3. The Project Company is often required to provide the Power Purchaser with a certificate from the Independent Engineer confirming that the IPP Plant has been constructed in accordance with Prudent Practices and contractual specifications and that the commissioning tests have been properly conducted.

Advice: The date of issuance of such certificate by the Independent Engineer is a convenient means for determining the Commercial Operation Date.

PPA Provisions Addressing Risk Allocation: Development and Construction Arrangements *cont.*

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- Consequences of Delay In Commercial Operations:

  1. If the Commercial Operation Date does not occur by the Scheduled Commercial Operations Date for reasons attributable to the Project Company and its contractors, the Project Company shall pay liquidated damages for day of such delay.

  2. If the Commercial Operation Date does not occur by the Scheduled Commercial Operations Date for reasons attributable due to the Power Purchaser (such as its failure of the Power Purchaser to satisfy its obligation to acquire property rights and construction the interconnection transmission facilities by the Scheduled Energizing Date), the Power Purchaser often commences making payments to the Project Company commencing on the Scheduled Commercial Operations Date.

  3. If upon achieving the Commercial Operation Date, if the generating capability is less than the contractually specified value used to calculate capacity payments previously made to the Project Company, then the capacity payments paid previously shall be recalculated using the correct value for the generating capabilities of the subject IPP Plant.

PPA Provisions Addressing Risk Allocation: Purchase Obligation

- IPP PPAs are long term (20 to 30 years) purchase obligations whereby the revenue of the Project Company is not dependent upon being dispatched to generate power.
- <u>Thermal Power Plants</u>
- This objective achieved by the use of two part tariffs for most all IPP projects other than hydropower projects. With two part tariffs, the IPP is paid:

  (1) a capacity payment which is paid to the Project Company for the periods during which the IPP project is available to generate power even though it may not be dispatched to produce power, and

  (2) An energy payment paid for energy generated and delivered to the Power Purchaser.
- The capacity payment is structured to generate sufficient revenue to allow the Project Company to cover the costs of the development, construction and commissioning of the IPP project, repayment of debt, and recovery by the Project Sponsors of their equity investment and a reasonable profit thereon.

  ***<u>Advice</u>**: The negotiation of tariffs for IPP projects not selected by competitive solicitation will require the parties to agree on the projected cost of the IPP project and what is considered to be a reasonable profit for the Project Company and Project Sponsors; which usually requires protracted negotiations between distrustful parties. Tariffs determined by competitive solicitations need no such cost support.*

PPA Provisions Addressing Risk Allocation: Purchase Obligation *cont.*

- By divorcing project revenue from plant dispatch, the Project Company is relieved of the economic risks related to projecting the need for new generating capacity and becoming excess and unneeded generating capacity.

  Note: *Merchant Plants*. An alternative approach that has been pursued in more mature power sectors is the Merchant Plant approach whereby the Project Company is only paid for power dispatched and delivered and there is no minimum dispatch or purchase obligation; thus relieving the Power Purchaser and its customers of the economic risk of unneeded or uneconomic generating capacity. These types of projects require the implementation of competitive wholesale power markets in which IPP Project can sell to multiple power purchasers. This approach has not yielded any successful IPP projects in emerging markets.

- The Project Company is protected in part from F/X volatility by a PPA requirement that a percentage of the payments to be made to the Project Company must either be paid in US dollars (or some comparable currency) or subject to F/X adjustment. The percentage of payments subject to F/X adjustment has been based on the percentage of costs expected to be covered by foreign and local currency and the percentages of debt incurred internationally and locally.

  Advice: *It is not unusual for PPAs for the first IPP projects developed in an emerging market; particularly when the debt locally is limited, to require that 100% of payments to be required to be made to the Project Company to either be made in US dollars or subject to F/X Adjustment. Given the relative lack of precedents in support of the ease of converting local currency to foreign currency, the first IPP PPAs should probably require 100% of payments to be made in US dollars*.

PPA Provisions Addressing Risk Allocation: Purchase Obligation *cont.*

- The Project Company is protected in part from inflation by incorporating into the formula by which Energy Payments are calculated a cost of living adjustment on the cost components for fixed and variable costs.
- The risks of deficient engineering, construction, operation and maintenance is allocated to the Project Company (and then on to its contractors) by means of reductions to the capacity payments to be made to the Project Company due to interruptions or reductions in the availability of IPP Projects to generate power due to the deficient plant capabilities, prolonged or an excessive number of plant outages and operational problems with IPP plants.

<u>Hydropower Projects</u>

- Hydropower tariffs are one part tariffs with the Project Company paid a fixed rate for each KWh generated and delivered to the Power Purchaser.
- however, Hydropower tariffs achieve the stable revenue required to support limited recourse debt financing by paying Project Companies for energy imposing on the Power Purchaser a minimum dispatch obligation and energy not dispatched due to the failure of the Power Purchaser to satisfy the minimum dispatch obligation is deemed to have been generated and delivered to the Power Purchaser.
- As with thermal IPP Projects, the risks of deficient engineering, construction, operation and maintenance is allocated to the Project Company (and then on to its contractors) by means of the problems thereby caused reducing the kW/hrs. generated and delivered to the Power Purchaser.

PPA Provisions Addressing Risk Allocation: Fuel Supply Availability and Quality

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Thermal Project Fuel Risks	Competitive Fuel Sources	Non-Competitive Fuel Source
Availability	Project Company/Fuel Supplier	Fuel Supplier/Power Purchaser
Fuel Quality	Project Company/Fuel Supplier	Fuel Supplier/Power Purchaser
Transportation	Project Company/Fuel Supplier	Fuel Supplier/Power Purchaser
Following applicable to competitive and non-competitive fuel markets.		
Failure to Satisfy Minimum Fuel Take	Project Company responsible if attributable to Project Company or Natural Force Majeure	Power Purchaser responsible if attributable to Power Purchaser, Governmental Institutions or Government Force Majeure
In competitive fuel markets the Project Company is solely responsible for fuel risk unable to be off-loaded to fuel supplier and is responsible for obtaining replacement fuel suppliers.		
Hydropower Project Fuel Risks		
Availability	Project Company is responsible for having sufficient water to meet PPA requirements	

PPA Provisions Addressing Risk Allocation: Milestones and Delay Payments

- Most all PPAs include Milestones which are dates by which certain critical actions are scheduled to have been taken by one or both parties, but mostly the Project Company.

  Failure to achieve Milestones does not usually itself constitute an Event of Default unless expressly identified as such.

- Most common Milestones are:

  (1) Scheduled Financial Close Date

  (2) Scheduled Construction Commencement Date

  Establish by initiation of continuous construction activity, initiation of particular activity or by execution of major equipment procurement contracts

  (3) Scheduled Energization Date

  (4) Scheduled Commercial Operation Date

- Extension of Milestone Dates and Term

  1. Milestone Dates are extended by day for day for delay caused by Force Majeure or Governmental Force Majeure.
  2. Milestone dates extended day for day for delay due solely to the actions or omissions of the Power Purchaser; and
  3. PPA term is extended by day for day of Force Majeure or Governmental Force Majeure occurring after the Commercial Operation Date

PPA Provisions Addressing Risk Allocation: Liquidated Damages

- Liquidated Damages for Development Delays

1. Delays in achieving Certain Milestones

   Financial penalties are often required of the Project Company if any of the Milestones Dates are not satisfied for reasons other than Force Majeure and/or contractual default on the part of the Project Company.

2. Delays in Financial Closing Beyond Scheduled Financial Close Date

3. Delays in Commercial Operation Beyond Scheduled Commercial Operations Date

   If Commercial Operation fails to occur by the Scheduled Commercial Operation Date, Project Company to pay liquidated damages for each day of such delay. Such liquidated damages should equal a contractually specified amount per day (e.g. THB 4/kWh) multiplied by the number of days of delay in achieving commercial operation. Such payments are to continue until either the Commercial Operation Date is achieved or the date which is 240 days after the Scheduled Commercial Operation Date.

PPA Provisions Addressing Risk Allocation: Liquidated Damages *cont.*

- ## Liquidated Damages for Deficient IPP Plant Capabilities

  If the generating capability of an IPP Project established by commissioning testing conducted immediately before the Commercial Operation Date is less than a contractually specified amount, the Project Company shall pay liquidated damages to the Power Purchaser on a one-time basis (contractually specified amount (e.g. THB 4,000 per kW) multiplied by the difference between the contractually required amount of generating capacity and the tested generating capacity established by the commissioning testing).

- ## Right to Retain Development Security To Collect Liquidated Damages

  Unless a Milestone Date has not been met by the Project Company due to Force Majeure or PPA default on the part of the Power Purchaser, the Power Purchaser has the right to retain so much of the Development Security as is required to satisfy the Project Companies' liabilities for liquidated damages, plus accrued interest.

PPA Provisions Addressing Risk Allocation: Defaults

- Project Company Defaults
  1. Payment default of any undisputed amount and such default continues unpaid for a defined period (e.g. 60 days after date of default notice);
  2. the Financial Close Date fails to occur with defined period after the Scheduled Financial Close Date;
  3. Abandonment of engineering, design, construction, operation and/or maintenance of IPP Plant for defined period;
  4. the Commercial Operation Date fails to occur within defined period after the Scheduled Commercial Operation Date;

     And Project Company fails (i) to indicate within ten (10) days of receipt of default its intent to resume such activities within a period of time agreeable to Power Purchaser, and (ii) to resume such activities within such period.
  5. IPP Plant performance during contractually defined period falls below contractually specified standard of performance;

     Actual availability falls below percentage of availability able to be achieved if IPP Plant was available at its contracted capacity during such period, excluding periods when IPP Plant adversely affected by Force Majeure and contractual defaults of the Power Purchaser); and
  6. Project Company fails to comply with or operate in conformity with any material obligation under the IPP PPA.

PPA Provisions Addressing Risk Allocation: Defaults *cont.*

- Power Purchaser Defaults
  1. Payment default of any undisputed amount and such default continues unpaid for a defined period (e.g. 60 days after date of default notice); and
  2. Failure to comply with or operate in conformity with any material obligation of IPP PPA.

- Defaults Common to Both Parties

  Either Party (i) is dissolved or liquidated (other than voluntary dissolution or liquidation as part of a reorganization, privatization or reincorporation), (ii) is reorganized, privatized, reincorporated or is abolished by law or any other governmental action, without, in all cases, the successor thereto being capable of performing its IPP PPA contractual obligations; (iii) makes a general assignment of any of its rights under the IPP PPA for the benefit of its creditors, (iv) enters voluntary insolvency proceedings or is adjudicated bankrupt under any insolvency law.

PPA Provisions Addressing Risk Allocation: Default: Cure Periods and Step In Rights

- Cure Periods
  1. For remediable defaults, initial cure period of 60 days is usually provided, which can be extended to 180 days if unable to be cured within 60 days.
  2. For defaults unable to be remedied, termination can be exercised immediately upon notice of non-defaulting Party.

- Step In Rights
  1. Power Purchaser often has the right (but no obligation) to step in and assume operational control of IPP Plant when the default of the Project Company can be remedied by Power Purchaser.
  2. Power Purchaser not permitted to exercise step-in rights until applicable cure period afforded the Project Company has expired, provided step-in can occur earlier if Project Company is not diligently trying to remedy the applicable default.
  3. Throughout step-on period, Power Purchaser is entitled to reasonable compensation and shall have the same liability to the Project Company as would a third party operation and maintenance contractor;
  4. Power Purchaser may return operational responsibility for the IPP Plant to Project Company at any reasonable time, provided IPP Plant shall be returned in a condition no worse than when Power Purchaser exercised its step-in rights, ordinary wear and tear excepted; and
  5. Power Purchaser may terminate IPP PPA if at any time it reasonably determines that the Event of Default leading to the exercise of step-in rights cannot be cured.

PPA Provisions Addressing Risk Allocation: Default Termination

	Project Company Default	Power Purchaser Default
Pre-Financial Close	Power Purchaser Retains Development Security	Development Security Returned. No additional payment.
Pre-Commercial Operation	Power Purchaser may acquire IPP Plant for **Debt** **OR** Project Company pays Power Purchaser amount equal to Transmission Facilities Cost + Administrative Cost + CF + [Contracted Capacity * Lost Capacity Payment * (52-M)/52] – Residual Value of Transmission Facilities.	Power Purchaser must acquire IPP Plant for payment equal to **Debt** + Equity + Interest on Equity + Counterparty Outstanding Payments - Counterparty Outstanding Payments – Liquid Assets.
Post Commercial Operation	Power Purchaser has right to acquire IPP Plant for **Debt** **OR** Project Company pays Power Purchaser amount equal to Transmission Facilities Cost*(1-Y/25) + Administrative Cost + (Lost Capacity Payment* Registered Capacity) – Residual Value of Transmission Facilities.	Power Purchaser must acquire IPP Plant for payment equal to **Debt** + Equity *(1-Y/25) + Lost Equity Return + Counterparty Outstanding Payments – Project Company Outstanding Payments – Liquid Assets. LER equals the sum of the stream of dividends, as such dividends were originally projected for such period multiplied by the Historic Operating Performance Factor, discounted to its present value by applying the Discount Rate.

BUT other PPAs simply reference rights to recover damages under applicable Laws, but consequential damages always prohibited.

PPA Provisions Addressing Risk Allocation: Force Majeure - Definition

- **Definition**: Force Majeure is an event, condition, or circumstance and the effects thereof *beyond the reasonable control* and *without the fault or negligence* of the Party claiming Force Majeure, which, *despite all reasonable efforts* of the Party claiming Force Majeure to prevent it or mitigate its effects, causes a delay or disruption in the performance of any contractual obligation. Risk cannot be allocated based upon which Party is best able to control risk,

- Two Types of Force Majeure

  1. **Natural Force Majeure -** Excessive Weather, Earthquakes, Epidemic, Plague, Sabotage, Fire, Explosion, Strike or Work Stoppage. *Insurable*.
  2. **Government or Political Force Majeure** - Change In Law, Failure To Obtain or Renew Governmental Approval, War. Revolution, Embargo, Insurrection Expropriation or Compulsory Acquisition. *Either Not Insurable or Insurable At Great Expense*.

  Not always clear which category a set of circumstance falls: Terrorism, Civil Unrest, Foreign War Impacting Trade,

- Extends to Contractors Affected by Force Majeure

PPA Provisions Addressing Risk Allocation: Force Majeure - Types of Relief

- Suspends Contractual Obligation Whose Performance Adversely Affected
- Extends Period of Time Provided to Render Contractual Performance
  1. Pre-COD: Extends Milestone Dates
  2. Post-COD: Extends PPA Term
- Commencement or Continuation of Payments to Project Company During Certain Types of Force Majeure
- Compensation to Project Company When IPP PPA Terminated Due to Certain Types of Prolonged Force Majeure

PPA Provisions Addressing Risk Allocation: Force Majeure - Start and Continuation of Payments

	Pre-COD	Post-COD
Natural Force Majeure Affecting Project Company	No Payments (Insurance Relied Upon)	No Payments (Insurance Relied Upon)
Natural Force Majeure Affecting Power Purchaser	Debt Protected, Equity Not Protected. Compensation in an amount at least equal to servicing debt is paid when Natural Force Majeure affecting Power Purchaser delays Commercial Operation Beyond Scheduled Commercial Operation	Debt Protected, Equity Less Protected. Compensation in an amount at least equal to servicing debt is paid when Natural Force Majeure affecting Power Purchaser delays Commercial Operation Beyond Scheduled Commercial Operation But if continues for prolonged period, the Payments resume.
Government Force Majeure Affecting Project Company	Payments Start if Force Majeure Delays Commercial Operation Beyond Scheduled Commercial Operation	Payments Continue During Period of Force Majeure
Government Force Majeure Affecting Power Purchaser	Payments Start if Commercial Operation Delayed Beyond Scheduled Commercial Operation Due To Force Majeure	Payments Continue During Period of Force Majeure

PPA Provisions Addressing Risk Allocation: Force Majeure - Change In Law

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- Unique Type of Government Force Majeure
- Definition

  Any of the following events occurring after the Execution Date as a result of any action by any Governmental Authority: (i) a change in or repeal of an existing Law, (ii) an enactment or making of a new Law, and (iii) a change in the manner in which a Law is applied or in the application or interpretation thereof.

- Additional Relief: Tariff adjustment to compensate Project Company for Additional Costs Incurred To Preserve Unaltered Financial Position
- Includes changes to Tax Laws and Rates

PPA Provisions Addressing Risk Allocation: Force Majeure - Termination Compensation

	Pre-COD	Post-COD
Natural Force Majeure Affecting Project Company	No Compensation (Insurance Relied Upon)	No Compensation (Insurance Relied Upon)
Natural Force Majeure Affecting Power Purchaser	In some cases, generally no compensation. But if Force Majeure affects Interconnection Facilities, the Power Purchaser must acquire the IPP assets for an amount equal to **Debt** + Equity + Interest on Equity + Counterparty Outstanding Payments - Counterparty Outstanding Payments – Liquid Assets.	In some cases, no compensation.
	In other IPP PPAs, the Power Purchaser must acquire the IPP and pay an amount equal to Debt, Equity, Retained Earning (including statutory reserves) less any insurance proceeds obtained by the Project Company.	In other IPP PPAs, the Power Purchaser must acquire the IPP and pay an amount equal to Debt, Equity, Retained Earnings (including statutory reserves) less any insurance proceeds obtained by the Project Company.
Government Force Majeure Affecting Project Company	Power Purchaser must acquire IPP Plant for payment equal to **Debt** + Equity + Interest on Equity + Counterparty Outstanding Payments - Counterparty Outstanding Payments – Liquid Assets.	Power Purchaser must acquire IPP Plant for payment equal to **Debt** + Equity *(1-Y/25) + Lost Equity Return + Counterparty Outstanding Payments – Project Company Outstanding Payments – Liquid Assets.
Government Force Majeure Affecting Power Purchaser	Power Purchaser must acquire IPP Plant for payment equal **to Debt** + Equity + Interest on Equity + Counterparty Outstanding Payments - Counterparty Outstanding Payments – Liquid Assets.	Power Purchaser must acquire IPP Plant for payment equal to **Debt** + Equity *(1-Y/25) + Lost Equity Return + Counterparty Outstanding Payments – Project Company Outstanding Payments – Liquid Assets.

PPA Provisions Addressing Risk Allocation: Force Majeure - Limitations

- Force Majeure does not apply to Payment Obligations.
- Mechanical or electrical breakdown or failure of equipment due to operation and maintenance is not Force Majeure.
- Performance failures of contractors does not constitute Force Majeure.
- Force Majeure cannot be claimed simply because circumstances have occurred which have increased the costs of performance or other adverse economic consequences incurred through the performance of such obligations.
- Relief only available if affected Party is satisfying its duty to mitigate the effects and consequences of Force Majeure.

PPA Provisions Addressing Risk Allocation: Justification for Government Force Majeure

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Common Debate: Is Government Force Majeure appropriate when Power Purchaser is not government owned?

- Argument is that GFM appropriate because government owned Power Purchasers should be responsible for the Governmental Actions. If not government owned, why should Power Purchaser be responsible the financial consequences of government action. Example: Thai Domestic IPP PPAs.
- This argument misses the point of GFM. There are a category of risks (not limited to the adverse consequences of governmental action) the financial consequences of which must be covered from some source, and the source for these risks is the Party best able to cover such costs.
- In emerging markets such as Myanmar, where a competitive wholesale power market does not exist, the Power Purchaser is best able to cover these risks as they "socialize" such costs across their entire customer base.

  Note: No different that what is already occurring for power plants owned and operated by such Power Purchasers.

PPA Provisions Addressing Risk Allocation: Other Provisions to Protect Power Purchaser

- Review, Comment and Approval of IPP Plant Design
  1. Project Company to provide all drawings, reports and certificates with regard to the design, construction and completion of the IPP Plant
  2. Project Company to provide Power Purchaser with copies of executed contracts for the design and construction of the IPP Plant, for Fuel supply, and O&M Services

- Insurance Requirements
  1. Project Companies to obtain insurance coverage standard for limited recourse debt financing and as required by applicable law, financing documents and prudent utility practices for full PPA term.
  2. Project Company to submit documentation to show insurance in place.
  3. Project Companies generally not permitted to reduce the scope of such insurance without the prior written consent of Power Purchaser.

- Equity Ownership Transfer Restrictions

  PPAs often restrict the project sponsors' rights to sell. transfer their shares in Project Company to ensure project sponsors remain involved in project through achievement of Commercial Operation and usually one complete round of major maintenance.

PPA Provisions Addressing Risk Allocation: Other Provisions to Protect Power Purchasers *cont.*

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- Performance Security

- Requirements regarding O&M Contractor

  Project Companies are commonly required to submit monthly or quarterly reports from the O&M Contractor setting forth information contractually specified in IPP PPAs as well as all O&M Reports provided to Lenders.

- Environmental and Social Obligations

1. Project Company required to comply with all applicable environmental Laws and contractually specified environmental requirements and, for hydropower IPP projects, social obligations.

   Contractually specified environmental standards set forth the requirements of applicable Law and the environmental mitigation measures identified in an environmental assessment performed for the subject IPP Project.

2. For IPP Projects internationally financed in emerging markets with embryonic environmental Laws. Lenders will require such IPP Projects to comply with World Bank environmental standards and such requirements will also be contractually specified.

3. Project Company is required to comply with environmental requirements more stringent that are contractually specified, but such additional requirements are virtually always treated as “Change in Law.”

PPA Provisions Addressing Risk Allocation: Other Important Provisions *cont.*

- Assignments
  1. Parties to IPP PPAs are not permitted to assign any of their rights or obligations under IPP PPAs without the prior written consent of the other Party.
  2. This requirement may be softened by agreement that such consent shall not be withheld or delayed if the Party whose consent is required has been shown to its reasonable satisfaction that the proposed assignee has adequate legal, financial and technical capabilities to perform the assigned PPA obligations.
  3. Project Company is permitted to assign its right, title and interest in and to the Project assets to Lenders as security for loan repayment.

- Arbitration
  1. Dispute resolution usually requires amicable discussions. Absent amicably addressing a dispute, matters under IPP PPA are commonly resolved by final and binding arbitration in a neutral and in English using one of several international conventions. implemented according to one of several international conventions.
  2. Mediation is often used as an alternative available to be used by disputing parties.
  3. Arbitration awards must be enforced though the courts .
  4. Final and Binding are not always so.

PPA Provisions Addressing Risk Allocation: Other Important Provisions *cont.*

- Governing Law

  Interests of Project Company and Lenders protected against uncertain legal system within an emerging market by the specification of New York or English law as either the sole governing law or as a supplement to local law..

- Privatization

  1. IPP PPAs specify that new privatized entity have the same financial and legal capabilities as original state owned Power Purchaser. Relief: Termination.
  2. If no longer state owned following privatization, provisions requiring Power Purchaser to bear financial consequences of Governmental Force Majeure to be deleted subject to prior approval of Lenders.

- Indemnification

- Additional Forms of Contractual Relief

PPA Provisions Addressing Risk Allocation: Special Protections Afforded Lenders

- ## Substitution Without Consent

The Lenders may exercise their security interests and substitute themselves, their designee or appointee, or the third party which purchases the IPP Project without the prior consent of Power Purchasers; provided that PPAs will require such third party to (1) have sufficient legal, financial and technical capabilities to satisfy its PPA obligations, and (2) agree in writing to be bound by all the terms, conditions and provisions of the subject PPA.

Advice: Power Purchaser should have the right to reject such assignment or designation if it does not conform to the requisite conditions.

- ## Restrictions on Exercise of Step-In Rights

For so long as the Financing Documents remain in effect, Power Purchaser shall not exercise its step-in rights (i) without first obtaining the consent of the Lenders, or (ii) if operation of the Facility has been assumed by the Lenders or an approved designee of the Financing Parties.

PPA Provisions Addressing Risk Allocation: Special Protections Afforded Lenders *cont.*

- Payment Waterfalls and Requirements Re Dividend Payments
- Additional Cure Periods

  Lenders that have exercised their security interests and substitute themselves, their designee or appointee or the third party for the Project Company are given an additional period to remedy Project Company Default. Power Purchaser agrees not to terminate PPA until full cure period afforded Lenders has expired.

- Application of Insurance Proceeds

  For so long as the Financing Documents remain in effect, Lenders determine whether insurance proceeds are to be applied to rehabilitate damaged IPP Plant.

- Disclosure Not Subject to Confidentiality Restrictions

  Confidential information may be disclosed to Lenders.

- Subordination Agreement Between Power Purchaser and Lenders

Conclusions and Advice

- Conclusions
  1. Terribly Complex – Prolonged Negotiations
  2. Impossible to Get Perfect
  3. International Debt Financing Standards Must Be Met
  4. There are Standard Approaches Globally Recognized
  5. Not All Power Markets Have Same Allocation of Project Risks
- Advice
  1. Avoid Unnecessary Complexity
  2. Use Financed PPA From Another Country As Model
  3. Develop Standardized PPA (although loses distinguishing equity risk tolerances)
  4. Realistic Expectations (Emerging Market, Little Legal Precedent Non-competitive Fuel)
  5. World Bank and ADB Involvement Beneficial- But May Slow Process
  6. Three Principles of Risk Allocation Point the Correct Direction

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