BRIEF OVERVIEW OF THE RECENT LEGISLATIVE DEVELOPMENTS WITH RESPECT TO SOLAR POWER PROJECTS IN VIETNAM

1. Decision No. 11/2017/QD-TTg of the Prime Minister dated 11 April 2017 on the mechanism for encouragement of the development of solar power projects in Vietnam

On 11 April 2017, the Prime Minister of Vietnam issued Decision No. 11/2017/QD-TTg on the mechanism for encouragement of the development of solar power projects in Vietnam (***Decision 11***). This decision has been long awaited, and finally provides the first cornerstone of a regulatory framework necessary for Vietnam to develop its production of solar energy. The further implementing legislation of Decision 11 has also been already circulated by the Ministry of Industry and Trade of Vietnam (***MOIT***) and is discussed in paragraph 2 below.

Central role of Electricity Vietnam

As expected, according to the framework designed by Decision 11, Electricity Vietnam (***EVN***), which is Vietnam's state-owned electricity company, will be the only purchaser of electricity produced from solar power projects in Vietnam. The sale and purchase will take place pursuant to a standard 20-year term power purchase agreement to be issued by the MOIT.

Key investment incentives contained in Decision 11

Decision 11 (which shall take effect as from 1 June 2017), provides foreign investors with crucial incentives for investing in solar power projects, including:

- A clear obligation for EVN to purchase all of the electricity produced by the sellers who meet the conditions for investment in solar power projects specified under Decision 11;
- Feed-in tariffs for solar electricity of VND 2,086/kWh (equal to 9.35UScents/KWh, exclusive of VAT), with the price to be adjusted according to the exchange rate

between Vietnamese Dong and US Dollars at the time of payment;

- A net-metering support scheme for rooftop solar power systems;
- Import tax exemption for goods which serve the implementation of the project, but cannot be produced inland;
- Corporate tax incentives for solar energy projects as provided under the current legislation (see below);
- Land use fee incentives for solar energy projects as provided under the current legislation (see below).

Other investment incentives applicable to the production of solar energy

It should also be recalled that, pursuant to Article 16.1(b) of the Law on Investment 2014, the production of renewable energy is included among the preferential investment industries, and is therefore entitled to a number of tax incentives, including:

- Corporate income tax (***CIT***) at 10% for 15 years, pursuant to Article 15.1 of Decree No. 218/2013/ND-CP providing detailed guidance on the new provisions of the Law on CIT and the Amended Law on CIT (***Decree 218***);
- Possible tax exemption of up to 4 years starting from the first profitable year, pursuant to Article 16.1 of Decree 218;
- Possible tax reduction of 50% for up to 9 years after the end of the exemption period, pursuant to Article 16.1 of Decree 218;
- Land rent exemption (if payable) for 3 years, pursuant to Article 19.3 of Decree No. 46/2014/ND-CP on the collection of land rent and water surface rent;
- Import duty exemption on goods imported in order to form fixed assets of the investment project (Article 5.2 of Circular No. 83/2016/TT-BTC of the Ministry of Finance providing guidance on the implementation of investment incentives specified in the Law on Investment and Decree 118).

Further implementing legislation

Finally, the draft implementing legislation of Decision 11, including the first draft of the standard solar power purchase agreement that investors will have to comply with, has already been made available (please refer to the section below), and hopefully will be issued shortly in its final form.

2. Draft circular providing detailed guidelines on the development of solar power projects in Vietnam (*Draft Circular*) and draft template of solar power purchase agreement (*Draft Solar PPA*)

Subsequent to the issuance of Decision 11 in April 2017, the MOIT has released the first draft of a circular providing detailed guidelines on the development of a solar power projects in Vietnam ***(Draft Circular***) and the draft template of solar power purchase agreement (***Draft Solar PPA***). This draft legislation is of crucial importance for solar power investors, as it provides a clearer picture of the legal framework under which they will be required to operate in the upcoming years.

The Draft Solar PPA is provided for in Appendix 3 of the Draft Circular. This template provides the basic terms and conditions of the agreement, including the terms and conditions on the delivery and purchase of solar energy, the term of the agreement, the treatment of breaches, the indemnification of damages, the termination of the agreement and the dispute settlement mechanism. In general the contents of the Draft Solar PPA are consistent with the provisions of Decision 11 and with those of the Draft Circular.

According to the mechanism envisioned by the MOIT, the Draft Solar PPA will have to be used by solar project producers in order to sell to EVN their electricity generated in Vietnam, and should only be subject to minimal changes during the negotiation phase. Unfortunately, however, the current version of the Draft Solar PPA does not adequately address a number of issues commonly encountered by foreign investors and therefore, if not satisfactorily amended, may end up discouraging foreign financial institutions from financing major solar power projects in Vietnam.

EVN's obligations to purchase electricity

According to the Draft Solar PPA, the State-owned EVN shall purchase for a term of 20 years all of the electricity generated from solar power producers at the specified feed-in-tariff rate (equivalent to 9.35 US cents/kWh). As mentioned above, this obligation is also contained in Decision 11. The Draft Solar PPA, however, also provides for a list of scenarios in which EVN is not obliged to purchase electricity, therefore in practice shifting the risk of certain disruptions on the solar power producers. In particular, pursuant to Article 2.7 of the Draft Solar PPA, EVN is not required to purchase electricity:

- if the operation and maintenance of a purchaser's power plant is not compliant with the provisions on the operation of the national power system and with the standards and technical regulations of the electricity industry in Vietnam;
- whenever EVN is installing equipment, inspecting or repairing the grid connection of the solar power plant;
- if there are problems with the transmission grid or distribution grid of EVN;
- if EVN's grid needs repair or maintenance after an incident.

The above provisions may therefore represent a reason for concern by foreign investors, since the solar power producers would bear the risk of a number of disruptions to EVN's system without being entitled to receive any compensation for their inability to sell the electricity produced.

Governing law and Dispute resolution

Under Article 10.3 of the Draft Solar PPA, the solar power purchase agreement shall be governed by the laws of Vietnam. In addition, the Draft Solar PPA provides for a dispute resolution mechanism that ultimately allows EVN to litigate disputes before Vietnamese courts. Article 8 of the Draft Solar PPA also provides for an *ad hoc* mediation procedure before the General Directorate of Energy and, in case the mediation is not successful, for the possibility of bringing the dispute in front of the Electricity Regulatory Authority of Vietnam. Unfortunately, however, the current draft does not mention the possibility for the parties to the PPA to agree to resolve their disputes through international arbitration. These provisions are therefore likely to represent a major obstacle for foreign investors interested in solar energy production in Vietnam.

Termination of the PPA

Another issue with the current Draft Solar PPA is that, in case the power purchase agreement is terminated due to EVN's breach, pursuant to Article 7.5 of the Draft Solar PPA the solar power producer is only entitled to recover up to the value of the electricity output actually generated by the producer in the 12 months prior to the termination. In addition, pursuant to Article 7.4 of the Draft Solar PPA, upon termination of the power purchase agreement, the claim of the non-defaulting party is limited to the direct and actual damages incurred, and the burden of proving such damages lies on the same non-defaulting party.

Other issues under the Draft Circular and the Draft Solar PPA

In conclusion, the Draft Solar PPA does not satisfactorily deal with a number of issues which, if appropriately addressed by the MOIT in subsequent versions of the draft, could increase the protection of foreign investors and the bankability of major solar power projects in Vietnam. Particularly crucial would be the provision of adequate protection mechanisms or government guarantees with respect to the performance by EVN of its contractual obligations under the power purchase agreement, as well as a power purchase agreement more suitable for undertaking international standard project finance transactions.

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