

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



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PLANNING A RENEWABLE ENERGY PLANT

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Renewable energy is a major focus of Thailand's energy policy. The Ministry of Energy has announced a plan which aims to increase the proportion of renewable energy in total consumption to 20.3% by 2022. This represents a huge increase, considering that renewable energy accounted for about 1.5% of Thailand's energy consumption in 2009, depending on which sources one counts as renewable. Many investors are now considering establishing renewable energy plants here in Thailand, particularly given the generous incentives offered by the government. In pursuing such a development, however, there are many legal issues to navigate.

BOI incentives

As an industry targeted by the Board of Investment, renewable energy plants can qualify for certain benefits. These include corporate income tax holidays of up to eight years with no ceiling, as well as exemption or reduction of import duties on machinery and raw materials. In addition, developers can qualify for land ownership rights, permission to bring in foreign experts and technicians, as well as for long-term visas. Importantly, there is no restriction on foreign shareholding in this category of projects. To qualify for the tax holiday with no ceiling, energy from renewable energy must be at least 75% of the total energy used to generate electricity. Otherwise, the tax holiday has a ceiling of 100% of the total investment, excluding the cost of land and working capital.

Of particular interest to investors, the National Energy Policy Council sets subsidies for the production of renewable power sold to the Electricity Generating Authority of Thailand (EGAT). These take the form of "adders." Funded by the Thai government, they set a higher price at which EGAT will purchase electricity generated by power producers that use particular sources. Adder rates may vary based on energy source, capacity, and project location. For example, higher adder rates are offered for solar projects located in the south of Thailand than for biomass projects located upcountry.

Carbon credits

In addition, renewable energy plants in Thailand may qualify for carbon credits, or Certified Emission Reductions (CERs). Following Thailand's ratification of the Kyoto Protocol in 2002, the Thailand Greenhouse Gas Organization (TGO) was established by Royal Decree in 2007. TGO is the Designated National Authority (DNA) for the Clean Development Mechanism (CDM). It is responsible for formulating the procedures to review and approve CDM projects, as well as establishing criteria by which CDM projects are evaluated on their potential economic, social, and environmental benefits and how they align with national sustainable development policy. TGO's approval is necessary to receive CERs for projects in Thailand. In considering such projects, TGO looks at many indicators, categorized into four major groups including natural resources and environmental indicators, social indicators, development and/or technology transfer indicators, and economic indicators. Importantly, CDM projects must meet additional requirements in terms of finance, investment, technology, and

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environmental aspects. All the processes involving the development of a CDM project must be transparent, efficient, and accountable under independent auditing and verification.

Documents required for application include a letter of intent, self-assessment forms, 30 copies of the project design document, 30 copies of an approved Environmental Impact Assessment (EIA) or Initial Environmental Evaluation (IEE) report as applicable, and 30 copies of the public consultation report. Consideration can take up to 180 days. If a project is approved, a formal letter of approval is issued by the Permanent Secretary of the Ministry of Natural Resources and Environment, and appropriate notice is given.

Power purchase agreements

In establishing a renewable energy plant, one of the major issues is negotiating a power purchase agreement (PPA). A PPA is an agreement between an energy producer and an energy buyer, providing for the energy producer to sell electricity it generates to an energy buyer at particular pricing for the term of the agreement. In Thailand, the energy buyer is usually the EGAT. Terms in a PPA vary depending on the type of plant. For any plant, attention should be given to important terms including those relating to capacity, minimum output, and payment. Of particular importance is the *force majeure* clause. Given the extent to which unpredictable environmental factors can impact a renewable energy plant's completion and/or success, it is important to make sure that the *force majeure* clause accommodates such circumstances, and that the same such clause is used consistently in all the agreements pertaining to the plant. The PPA is particularly useful in that it defines the output of the generating assets and credit of related revenue streams, which goes a great distance toward arranging financing from banks or other lenders.

Engineering, procurement, and construction agreements

Similar review will be necessary with respect to agreements for engineering, procurement, and construction of the renewable energy plant. These plants are often approached as a package, meaning that the plant owner would contract with one entity to engineer the plant, procure the equipment, and complete construction. The advantages of this approach for the plant owner are that only one contract need be negotiated, and that the contractor is responsible for coordinating the various subcontractors and suppliers that will work on the plant. Some types of plants more often use an unbundled approach, whereby the plant owner would individually negotiate agreements with various subcontractors and suppliers. The costs of such an approach are generally

higher, and result in the plant owner having to negotiate more agreements, but the advantage is that the plant owner has more control over the subcontractors and suppliers used. In an unbundled approach, careful attention should be given to scheduling and coordination of the various subcontractors and suppliers in order to ensure that everything proceeds smoothly and on schedule.

Regardless of which approach is used, it is important to give attention to clauses on liquidated damages, contained in the agreements. Nearly every construction agreement contains clauses providing liquidated damages for delays and imposing standards on the quality of construction and materials used. However, with respect to some renewable energy plants, particularly wind plants, such agreements often also contain performance liquidated damages. This is because such a plant's performance is one of the main determinants of whether it is successful. Performance liquidated damages are usually based on results of testing and can relate to the entire plant, or to parts of it. Consideration should also be given to clauses that establish liability caps, as well as those

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that deal with warranty issues.

Fuel supplies

In planning a plant, consideration must also be given to fuel sources to be consumed by the plant. In the case of a wind or solar plant, this is determined, for the most part, by a plant's location. However, consideration should be given to potential obstructions that are within human control, in sites where that may become an issue. Depending on the specifics of the plant, such

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issues may need to be addressed in the applicable lease or land use agreement. Similarly, in the case of biomass and biofuel plants, it is important to provide for a long-term, reliable supply of fuel. These sorts of fuel supply issues can be addressed to

some extent in agreements with fuel suppliers, which should contain terms addressing the quality of the fuel to be provided, pricing, and transportation issues.

Many renewable energy plants have already been established in Thailand. In the near term, renewable energy is projected to make up only a small portion of Thailand's overall energy mix, but it is a rapidly growing area and, for certain plants, quite profitable. As renewable energy technology advances and as the cost of traditional fuels rise, renewable energy will only grow in use. 🌱