

Go Green With New Solar Regulations And A Refreshed Model PPA For Solar Power Projects To Join The Vietnam Energy Mix

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Solar power market in Vietnam has witnessed a rapid growth and significant investment potential in the recent years. In light of the recent attempts to boost the solar power development from the Government of Vietnam, Ministry of Industry and Trade of Vietnam (“**MOIT**”) has issued Circular No. 18/2020/TT-BCT (“**Circular 18**”) dated 17 July 2020 on project development and attaching standard form of power purchase agreements (“**Model PPA**”) applicable to ground based, floating and rooftop solar power projects.

The new Circular 18 provides detailed guidance for the implementation of Decision 13/2020/QD-TTg dated 06 April 2020 of the Prime Minister of the government of Vietnam (“**PM**”) on incentives for development of solar energy in Vietnam (“**Decision 13**”). Circular 18 further aims to fill the gaps of earlier Circular No. 16/2017/TT-BCT dated 12 September 2017 (“**Circular 16**”).

This Article shall provide a set of notable key points under Circular 18 for the energy sector businesses to have a crystal clear and detailed insight into the e new solar regulations provided under Circular 18:

I. Key points under Circular 18

1. Grid-connected (ground based and floating solar power projects)

1.1. Grid-connected solar power projects, which have obtained the in-principle approval before 23 November 2019 and achieve commercial operation date (“**COD**”) of the project or a part of the project during the **period from 1st July 2019 to the end of 31st December 2020**, shall be eligible for the feed-in tariff (“**FiT**”) rates under Decision 13[1]

1.2. Removal of regulation on “Provincial solar power development planning”, which aims to enhance centralized master planning for power sector. It blends with the vision of the Vietnamese government to maintain a centralized master planning in the power sector and have better synchronization from planning perspective to support precise implementation of the upcoming Power Development Plan No. 8 (“**PDP 8**”) which is expected to shape-up as a policy by Q1 of 2021.

1.3. Circular 18 had removed the minimum requirement for the equity capital under the past regulation (i.e. Circular 16). However, this removal shall not make any remarkable change since the domestic land laws still requires that an investment project must have equity capital of at least 15% to 20% of total investment capital, depending on the project land area[2].

1.4. Land and water surface areas under time-bound use of the project must not exceed 1.2 ha/01 MWp.

1.5. The contents of the basic design document of a solar power project should comply with the current laws and must be in line with certain requirements as below[3]:

- Characteristics of the area, solar potential radiation of the project;
- Impact assessments of the connection plan of the solar power project for safe and stable operation of the power system in the area;
- Availability of equipment to be connected to the SCADA system or load dispatch information for providing the authorized load dispatch agency with forecast on hourly generation capacities.

2. Rooftop solar power projects

2.1. A **third party** [other than Vietnam Electricity (“EVN”) and its authorized member unit(s)] is now allowed to directly purchase power generated from rooftop solar power system of the investor. **Private wire is introduced** under Circular 18[4] and which is a long awaited policy development to see the day light finally.

2.2. In case the power purchaser is not EVN and its authorized member unit(s), Circular 18 allows parties to negotiate upon the purchase price of the power generated from rooftop solar power system. Thus, allowing more freedom to do business for the parties involved.[5]

2.3. The step-wise sequence of implementation for the rooftop solar power system has been detailed for the parties to follow in order to carry out a solar rooftop power project.[6]

2.4. Power purchase agreements of rooftop solar power projects are required to follow the Model PPA applicable to rooftop solar power project and attached to Circular 18. It is noted that the Model PPA for rooftop solar power project is a simple vanilla agreement with standard clauses based on the market practices.

3. Electricity permit

Rooftop solar power project having capacity up to 1MW and 1.25 MWp is exempt from obtaining electricity operation license. Although, an upper cap for 3MW was strongly suggested by the industry stakeholders to be eligible for such exemption but the new policy document sticks to its predecessor.

4. Responsibilities of state management agencies

Circular 18 has inherited the same approach from Decision 13 on emphasizing the role and responsibilities of local People’s Committee (“PCs”).

Specifically, local PCs are required to report in writing in accordance with standardized form in Appendix 3 of Circular 18 to the MOIT on an annual basis, on the implementation of solar power project within the local province. [7] This regulation (i.e. Appendix 3 on the standardized form for Local PCs’ annual reporting) is a new policy development under Circular 18.

This regulation shall increase the effective management and local PCs’ responsibilities on the development of solar power sources in their province. Further, it will allow MOIT to act as an efficient watchdog and monitor overall solar power development in local provinces and have timely guidance from the central level.

The synchronization between the State agencies shall greatly benefit the investment scenario, as investors will have a clear guidance and assistance from the competent authorities’ right from inception of their investment plan to completion.

5. Amendment to the Model PPA

Circular 18 shares the same approach with Circular 16 on limiting the room for relevant parties to amend the Model PPA. Specifically, parties are allowed to revise contents of the Model PPA in order to clarify their responsibilities and obligations without altering the basic structure of the Model PPA.[8]

6. Clearance and return of the site

The responsibility on clearance and return of the site vests on the electricity seller.[9] Investor should take this into account while budgeting for the project. This condition follows international practices and ensures reinstatement of the State property after the completion of the project term.

7. Transitional Provision

Circular 18 permits the grid-connected solar power projects which in part or full have achieved COD before 1st July 2019 to follow their signed power purchase agreements (i.e. by 30th June 2019 being the date on which the past Decision 11/2017/QD-TTg on FiT mechanism for solar power projects issued by the PM expired and its successor Decision 13 was promulgated in April, 2020).

In the cases where grid-connected solar power projects (including a part or the whole project) and rooftop solar power system, which have their power purchase agreements signed and are put into commercial operation during the period from 30th June 2019 to the effective date of Circular 18 (i.e. 31st August 2020), the power purchaser and the power seller are required to re-sign or amend, supplement the existing power purchase agreement in accordance with the Model PPA.[10]

We can see a loophole under Circular 18 and note that it fails to address the scenario where a grid-connected solar power project signed the power purchase agreement in accordance with the terms of Circular 16 but had not achieved COD before 31st August 2020, the transitional provisions under Article 9 of Circular 18 has not expressly dealt with such situation where the power purchase agreement was signed before 30th June 2019 however, the COD is expected to be achieved post 31st August 2020. MOIT may consider brainstorming on this matter to clear the air from policy perspective and issue a guidance to extinguish any possible ambiguity opening doors for interpretation on a case-to-case basis at the provincial levels.

II. Model PPA for grid-connected (ground based and floating) solar power projects

1. Definitions

The Model PPA for grid-connected solar power project provides the definitions for (i) Metering system;^[11] and (ii) Metering point,^[12] which describe the system of metering equipment; and such physical point of circuit that the metering system is applied.

2. Inter-bank average interest rate

Inter-bank average interest rate can now refer to the inter-bank average interest rate for a term of 01 (one) month announced by the State Bank of Vietnam (“**SBV**”) at the time of payment or before the latest time of payment if at the time of payment, the SBV does not announce the inter-bank average interest rate (if there is no such rate at the respective time of payment).^[13]

3. Initial commissioning

Initial commissioning as part of the definition for COD now includes three factors:

- (i) Testing the ability to transmit / receive the reactive capacity;
- (ii) Automatic generation control (AGC) connection test;
- (iii) Trust reliability.

4. Change of COD

The Model PPA provides a new term for confirmation of change in the COD, which is from 01 (one) month to 03 (three) months before the expected COD prescribed under Appendix B on specifications of the power plant as attached to the Model PPA.^[15]

5. Interruption in power receipt and purchase

Under the Model PPA, the power purchaser is entitled to stop purchasing power in the certain cases: [16]

- (a) The power plant of the electricity seller operates or is maintained not in conformity with the regulations on operation of the national grid and the power industry technical regulations and standards;
- (b) During times when the power purchaser installs equipment or repairs, replaces, inspects or examines the grid directly related to its connection to the power plant of the electricity seller;
- (c) When the transmission grid or the distribution grid connected to the grid of the power purchaser breaks down, or grid equipment or facilities directly connected to the transmission grid or distribution grid of the power purchaser break down;
- (d) When the grid of the power purchaser needs support to recover after a breakdown, in accordance with the provisions on operation of the national grid and the power industry technical regulations and standards.

However, Model PPA do not detail much on the scenarios where those incidents in item (b); (c) or (d) mentioned above are caused due to a breach by the power purchaser or a force majeure event affecting or attributable to the power purchaser.

6. Billing and payment

Circular 18 details on the payment timeline for the parties to follow comparing to Circular 16 (e.g. the power purchaser shall make payment to the electricity seller within twenty-five (25) working days from the date of receiving a valid and correct invoice issued by the electricity seller).[17]

7. Indemnity

The Model PPA provides a detailed method to calculate indemnity. Specifically, the indemnity shall include (i) the actual and direct value of losses which the indemnity holder shall suffer due to the acts of the indemnifier; and (ii) the direct benefits which the indemnity holder shall receive in case there is no breach to the terms of the signed power purchase agreement.[18]

The indemnity holder shall demonstrate its loss and degree of loss caused by the breaches and the direct benefits which the indemnity holder should have received if there were no breach of the power purchase agreement terms. [19] However, it is noted that the Model PPA fails to specifically recognize on the lender's step-in rights which has been a prolonged bankability issue since the inception of solar policies in Vietnam.

8. Consequences of force majeure events

The Model PPA under Circular 16 provided that, taking the required measures following the occurrence of a force majeure event shall exempt the defaulting party from liability relating to failure to discharge its obligations under the power purchase agreement.[20] This regulation created risk from the power purchaser and enabled it making a force majeure claim to delay energy payments to the electricity seller.

Thus, Model PPA under Circular 18 has clarified that such exemption from liability will not include "*liability in relation to payment of amounts due under the power purchase agreement before the point of time when such event of force majeure occurs.*"

9. Change in law

The Model PPA follows the footsteps of the past Model PPA under Circular 16 and does not specifically address change in law risk. It is a major concern from lenders' and investors due to frequently changing policies in Vietnam being a developing economy attaining maturity with new experiences. However, the investors and lenders may consider exploring better security to enhance the bankability of their investment project by referring to the protection provided to the investors for their investment project in Vietnam and in relation to change in law circumstances under the investment laws of Vietnam.

10. Dispute settlement and governing law

In case a dispute is arisen between the parties, Model PPA under Circular 18 provides that parties shall settle the dispute through negotiation first before adopting any other means of dispute resolution, following the timeline specified under the Model PPA (i.e. Article 8.1).

Where the dispute cannot be settled through negotiation or one of the parties fails to comply with the result of negotiation, either party may request for dispute settlement in accordance with the provisions under Circular 40/2010/TT-BCT ("**Circular 40**") of the MOIT. It is noted that the dispute settling agency under Circular 40 refers to the Electricity Regulatory Authority of Vietnam ("**ERAV**") under the MOIT.

This regulation is once again silent on whether parties can choose international arbitration as an alternative dispute resolution method. However, in practice the investors can rely on the investment laws of Vietnam and push for having an international arbitration under the power purchase agreement or opt for Vietnam International Arbitration Center (VIAC) subject to mutual assent between the parties to the power purchase agreement.

The Model PPA provides for mandatory choice of Vietnamese law as the governing law which affects risk appetite of international lenders. However, investors and lenders may consider sharing risks with local banks and approach towards project financing as a syndicate.

11. Trust, transfer and restructuring

Model PPA under Circular 18 removes (i) the regulations on the power seller's right on choosing to participate in electricity market; and (ii) the concept of "competitive electricity market" under the trust, transfer and restructuring provision.

Specifically, past model PPA for grid-connected projects under Circular 16 gave a right to the electricity seller to either choose to continue the signed power purchase agreement for the rest of its term or choose to enter into a competitive power market by terminating the signed power purchase agreement.[22]

Since the aforementioned right is extinguished under the Model PPA, the risk for the electricity seller may be elevated as they have no clear recourse for the change in laws that could affect the project in the future. Especially when Vietnamese policies in the power sector have taken a dynamic shift in the past three years and many major policy changes are expected to come into effect in the upcoming time (e.g. the introduction of Direct PPA mechanism and Vietnam wholesale and retail electricity markets).

III. Model PPA for rooftop solar power projects

1. Power sale and purchase

The power that the electricity seller receives from the power purchaser's grid shall be agreed and signed under a separate power purchase agreement which is not under the scope of the Model PPA for rooftop solar power projects. [23] We note that it is in compliance with the rooftop solar policies and eliminates the issue which occurred in the past when Vietnam followed net-metering scheme and applied Model PPA under MOIT's Circular 16 which was later amended by Circular 05/2019/TT-BCT ("**Circular 05**") of the MOIT.

2. Billing

The Model PPA for rooftop solar regulates on the VAT calculation method, which is a new development comparing to the past regulation (i.e. Circular 16 and Circular 05). This regulation is included to avoid issues relating to VAT applicability.[24]

3. Payment in case of metering system breakdown

Model PPA for rooftop solar power project regulates on the procedure for payment in case of metering system breakdown due to fire, failure, loss or improper operation.

Specifically, if the metering system fails due to the above stated reasons, the electricity seller needs to immediately notify the power buyer on the malfunctioning of the metering system. The parties then shall make a record of the incident and make agreement on the electricity seller's power output transmitted to the power buyer's grid on the basis of the output of the payment period or the previous year or the previous month or the previous week.

4. Payment

The Model PPA for rooftop solar power project provides new regulations on the payment documents required during the payment procedure for the power seller and the power purchaser. Specifically, different payment documents are required for different subjects (i.e. payment document in case the electricity seller is an enterprise issuing monthly invoices;[26] payment in case electricity seller is an organization or an individual not issuing monthly invoices).[27] This is a new provision comparing to the past regulation (i.e. Circular 16).

5. Late payment interest

The Model PPA lets the parties decide on late payment interest in accordance with the Law on Commerce 2005 and ensuring of the legal rights of the electricity seller.[28]

6. Dispute settlement

Model PPA for rooftop projects shares the same approach with Model PPA for grid-connected (ground based and floating) projects on the dispute settlement procedure. Specifically, parties shall settle the dispute through negotiation first before using any other means of dispute resolution, following the timeline specified under the

Model PPA.[29]

Specifically, if parties cannot reach an agreement through negotiation, Model PPA for rooftop projects provides that they have the right to send documents to the competent State authority to assist the parties in resolving the matter. [30] If the dispute cannot be settled through negotiation or one of the parties fails to comply with the result of negotiation, either party may request for dispute settlement by sending a written request to the superior electricity unit of the power purchaser or MOIT for consideration and settlement.[31]

It is seen that the law is silent on which exact State agency has the authority to assist parties in resolving the problem. The ambiguous regulation may create unnecessary hardship for the investors in the future and potential delays can be foreseen during the dispute settlement procedure.

Alongside with the Model PPA for ground based and floating solar power projects under Circular 18 we note that this Model PPA is silent on whether parties can choose international arbitration as an alternative dispute resolution method.

The government of Vietnam is liberalizing by increasing the competition of the market and solar power sector has created a benchmark in Vietnam's economy as evident from tremendous growth in this sector where the market saw an unprecedented 4.5GW of solar capacity being added to the grid.