

WATSON FARLEY & WILLIAMS

BRIEFING

A NEW PPA TEMPLATE FOR VIETNAMESE WIND PROJECTS

JUNE 2019

- CIRCULAR 02 REPLACES ITS PREDECESSOR CIRCULAR 32 AND PROVIDES A NEW WIND PPA TEMPLATE.
- FOR THE FIRST TIME THE WIND FIT IS SPLIT BETWEEN ONSHORE AND OFFSHORE, WITH OFFSHORE RECEIVING A HIGHER FIT THAN ONSHORE.



As a sequel to our previous briefing "[New Guidance on Vietnamese Wind Projects](#)", this briefing outlines the key changes to the terms of Vietnam's wind power purchase agreement ("PPA") under the new Circular No.02/2019/TT-BCT ("Circular 02") which took effect on 28 February 2019. Circular 02 replaces its predecessor Circular No.32/2012/TT-BCT ("Circular 32") and provides a new wind PPA template.

Key changes to the wind PPA

	Area	Updates from Circular 02	Comments
1.	Commercial Operation Date ("COD")	<p>The revised PPA adopts the exact wording for COD provided under Decision No. 39/2018/QD-TTg dated 10 September 2018 ("Decision 39"). For details about Decision 39, please refer to our briefing dated October 2018 ("October Briefing").</p> <p>What is new from Circular 02 is the additional regulation in respect of the determination of COD. In order for the parties to agree on the COD and the volume of electricity for commissioning of the power plant, sellers ("Sellers") are now responsible for sending buyers ("Buyers") the draft commissioning process of the power plant 90 days prior to the scheduled COD.</p> <p>The revised PPA has an additional appendix for the parties to agree on the requirements before COD, including (i) scheduled COD, (ii) agreement on procedures for initial trial</p>	<p>As with Decision 39, the revised PPA determines the COD more objectively. While developers now enjoy higher feed-in-tariffs ("FiTs"), they are also subject to certain requirements before they become entitled to the revenues.</p> <p>The additional appendix is in line with the definition of COD under Decision 39 and the revised PPA. By breaking down the</p>

		tests and (iii) commissioning of the plant for commercial operation.	conditions to COD, the new template provides greater certainty to developers.						
2.	Removal of reference to "lenders"	<p>The previous PPA includes "lenders" in its definition section and provides for the right of lenders to step in, in the event of a breach of contract either by appointing a third party or by replacing the breaching party itself ("Step-in Right").</p> <p>The template in Circular 02 has removed all references to "lenders" and the provisions for the Step-in Right.</p>	This means the Step-in Right is no longer built in to the PPA. Developers will have to negotiate with Buyers if they want to keep this right.						
3.	FiTs	<p>Circular 02, consistent with Decision 39, applies different FiTs to projects with different COD timelines (unlike Circular 32 which provided for a general FiT of 1,614 VND/kWh (equivalent to 7.8 US cents/kWh)).</p> <table border="1"> <thead> <tr> <th>COD</th> <th>FiT (VND/kWh)</th> </tr> </thead> <tbody> <tr> <td>From 1 November 2018 to 1 November 2021</td> <td> <p><u>For onshore projects</u> 1,928 (equivalent to 8.5 US cents/kWh).</p> <p><u>For offshore projects</u> 2,223 (equivalent to 9.8 US cents/kWh).</p> </td> </tr> <tr> <td>From 1 November 2021 onwards</td> <td>To be agreed by the parties and included in the PPA according to guidelines to be published by the competent State agency.</td> </tr> </tbody> </table> <p>For wind projects with a COD prior to 1 November 2018, the new circular provides an option to the parties to re-sign the PPA and enjoy the higher FiT under Decision 39 until the expiry of the residual term of the signed PPA.</p> <p>Monthly Exchange Rate Calculations While the FiT is stated in USD equivalent, it is paid to developers in VND. The actual amount is calculated by multiplying the FiT rate in USD by the exchange rate. Accordingly the determination of the exchange rate impacts the revenue received by the developer.</p> <p>Under Circular 02, the exchange rate is adjusted according to the central exchange rate between VND-USD, announced by the State Bank of Vietnam ("SBV") on the date of the power payment invoice ("Invoice") issued by the Seller. Previously the exchange rate was adjusted according to the rate of the Bank for Foreign Trade of Vietnam JSC ("Vietcombank") and based on the payment date.</p>	COD	FiT (VND/kWh)	From 1 November 2018 to 1 November 2021	<p><u>For onshore projects</u> 1,928 (equivalent to 8.5 US cents/kWh).</p> <p><u>For offshore projects</u> 2,223 (equivalent to 9.8 US cents/kWh).</p>	From 1 November 2021 onwards	To be agreed by the parties and included in the PPA according to guidelines to be published by the competent State agency.	<p>An important development is for the first time the wind FiT is split between onshore or offshore, with offshore receiving a higher FiT than onshore.</p> <p>In addition, the revenue received from the Seller now only comes from EVN. Previously the revenue source was split between EVN and the State which resulted in a less efficient and streamlined process.</p> <p>We anticipate that this will be an attractive option to relevant developers.</p> <p>The SBV rate has historically been lower than the Vietcombank rate. Combined with the exchange rate being calculated on an earlier date (the Invoice date vs the payment date) which given the VND-USD typically depreciates, as well as the extension of Payment Due Date (see below), all subject developers to higher currency fluctuation risk.</p>
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4.	Payment	<p>Payment Due Date Circular 02 extends the deadline for the Buyer to settle the Invoice issued by the Seller from 15 days to 25 business days from the Buyer's receipt of the Invoice ("Payment Due Date").</p> <p>Timelines and Requirements for Payment In addition to the extension of the Payment Due Date, additional milestone dates and requirements for payment are included:</p>	<p>The change of Payment Due Date means it now takes longer for developers to receive payment.</p> <p>The revised timeline and requirements have however increased transparency and certainty of the payment mechanism. Developers should take note of these</p>						

		<p>a. <u>Before the fifth day of each calendar month</u>, the Seller shall send a payment dossier (“Payment Dossier”) of the previous month with a payment notice to the Buyer;</p> <p>b. <u>Within five business days from the date of receipt of the Payment Dossier</u>, the Buyer shall provide a written notice to the Seller if there is any error. Otherwise, the Buyer will be deemed to have accepted the Payment Dossier;</p> <p>c. <u>Within three business days from the acceptance of the Payment Dossier</u>, the Seller shall send the Invoice to the Buyer;</p> <p>d. <u>Within 25 business days from the date of receipt of the Invoice</u>, the Buyer is obliged to pay the Seller the total amount recorded in the Invoice through bank transfer.</p>	changes to avoid breaching them unknowingly.
5.	Disputes over Invoice amounts	<p>When a dispute arises in relation to the Invoice amount, the party which received the successful ruling is entitled to be compensated the disputed amount, together with interest compounding monthly and accruing from the Payment Due Date, until the date of actual payment of the compensation.</p> <p>Previously the applicable interest rate was the basic interest rate published by SBV, whereas under Circular 02 it now applies the average interbank interest rate.</p>	<p>This change stems from the fact that SBV no longer publishes the basic interest rate.</p> <p>The “average interbank interest rate”, now serves as an alternative. The average interbank interest rate is the average interest rate at which banks lend to and borrow from one another in the interbank market in Vietnam, which is published by SBV.</p>
6.	Force Majeure	<p>Definition The revised PPA adds the language “<i>including but not limited to</i>” in the definition of “<i>Force Majeure events</i>” (“FM Events”).</p> <p>Certain government acts are no longer FM Events by default The PPA specifically no longer provides (i) acts of authorities affecting performance of the PPA (ii) non-issuance of licenses or approvals for the Seller despite using reasonable efforts (iii) nationalisation of the Sellers’ property and (iv) government appropriation as examples of FM Events.</p> <p>Consequences of FM Events Under the previous PPA, the party affected by the FM Event (“Affected Party”) could be exempted from its obligations under the PPA. This provided an excuse for Buyers, when as the Affected Party, to delay payments after a FM Event occurs (“Loophole”). To plug the Loophole, the revised PPA makes clear the following:</p> <p>a. the exemption from obligations as a result of a FM Event does not apply to “<i>obligations relating to payment of amount due under the PPA prior to the occurrence of a FM Event</i>”; and</p> <p>b. the Affected Party can be exempted from its obligations as a result of a FM Event only after it has taken all required measures under the PPA.</p>	<p>The widened definition implies that more events may be caught as FM Events.</p> <p>Such events will no longer be deemed FM Events by default, and instead the burden is now on the party affected by any such government acts to prove that the event was unforeseeable, uncontrollable and cannot be reasonably mitigated.</p> <p>The clarification on the consequences of FM Events protects developers from Buyers’ abuse of the Loophole.</p>
7.	PPA term	<p>The previous PPA had a fixed term of 20 years.</p> <p>The revised PPA now states that “<i>unless this PPA is extended or terminated prior to expiry of the PPA term in accordance with the provisions of the PPA, the term is 20 years from COD</i>”.</p>	This revision allows room for both parties to negotiate on the term of the PPA.

8.	Termination of PPA	<p>The previous PPA provided that if the Seller terminates the PPA due to a breach of contract and suspends the performance of its obligations, the damages payable by the Buyer shall be the actual electricity output value of the Seller in the preceding year up to the time of suspension ("Damages").</p> <p>The revised PPA under Circular 02 has removed provisions relating to termination and no longer fixes the calculation of the damages in such scenario. Instead, therefore, damages will be calculated based on actual and direct loss suffered.</p>	<p>The calculation of the Damages was always considered as a bankability issue for developers as they believed it did not reflect the actual losses they had suffered. The removal of such provision addresses developers' concern and is a large improvement.</p> <p>From both the developers and lenders perspective the quantification of damages should be largely straightforward given the fixed FiT. In fact this position is arguably better for developers than that seen in conventional power projects which have a capped amount for damage claims.</p>
9.	Curtailment	<p>Both the previous and revised PPA set out scenarios where the Buyer has no obligation to purchase or receive power but it is now clarified under the revised PPA that (i) the carrying out of electrical equipment installation, repairs, replacements, inspections or testing directly relating to the connection of a power facility and (ii) the local power grid transmission or distribution and the operation regime must comply with the regulations on operation of the national electrical power system and the technical regulations and standards of the power industry.</p>	<p>Such clarification helps to reduce curtailment risks arising from works done to the grid.</p>
10.	Dispute Settlement	<p>Circular 32 limited the dispute settlement mechanisms to amicable negotiations or resolution complying with the provisions of Circular 40/2010/TT-BCT ("Circular 40"), whereas the revised PPA now further provides that dispute resolution can be in accordance with "<i>relevant provisions of law</i>".</p>	<p>This is an improvement in the revised PPA. The inclusion of "<i>relevant provisions of law</i>" makes it clear that there is now room to negotiate to include an arbitration clause and leaves room for future amendments or supplements to Circular 40.</p>

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Closing thoughts

The bankability of the PPA has long been a major concern for developers and lenders. Although certain changes to the PPA are buyer-friendly, and the fact that lenders step in rights are no longer automatically included is a backward step, there are certain improvements for developers to take comfort from. These include the split between onshore and offshore FiT, the closure of payment loopholes after a force majeure event, the calculation of damages on a termination, improved oversight on curtailment and the ability to request arbitration to be included as the dispute settlement regime.

The question that remains, however, is whether the international market believes these changes have gone far enough, and as the size of projects continues to increase, if further amendments will be required.

Watson Farley & Williams LLP is recognised globally for its renewable expertise and frequently advises a range of clients in the sector. Our Hong Kong office works closely with our Vietnam office WFW LVN to provide local and international legal advice to our clients.-WFW has extensive experience in the Vietnamese and Asian energy sector, with Linh Doan and her team having advised on numerous conventional and renewable power projects in the region.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams LLP.



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