Q&A: Lincoln Legal Services on decommissioning in Myanmar

The announcement in late April that foreign stakeholders Petronas, PTTEP and Nippon Oil Exploration (Myanmar) will withdraw from the Yetagun offshore area has raised new questions about whether and how the project will be safely decommissioned.

For several years now, output from the offshore gas and condensate field has been declining rapidly, and commercial production is expected to cease in 2023.

To date, no decommissioning of an offshore field has taken place in Myanmar, and there is no existing law which specifically addresses the process. Production sharing contracts (PSCs) signed prior to 2013 are also thought to contain few requirements in this area.

Lincoln Legal Services last month published an overview of the existing legal framework for decommissioning in Myanmar. Established in 2016, the firm offers legal and tax services to a wide range of foreign and Myanmar companies and NGOs. Its key practice areas include energy and infrastructure, banking and project finance, telecommunications, real estate, transport and logistics, general corporate and labour law matters, litigation, and tax.

Recently, *Myanmar Energy Monitor* spoke in more detail with firm Managing Director Sebastian Pawlita and Director Nyein Chan Zaw about how decommissioning should work, challenges that can arise when the legal framework for this process is scant, and the outlook for Yetagun.

Our exchange is presented below.

In brief, what would the standard obligations of the operator/investors be in undertaking a decommissioning process structured in accordance with international best practice? How does this process work, theoretically, when it is done well?

Myanmar is a member of the UN Convention on the Law of the Sea (UNCLOS), which obliges coastal states to adopt a regulatory framework in line with international standards to prevent installations in the seabed from polluting the ocean.

To provide templates for national legislation, the ASEAN Council on Petroleum (ASCOPE), which is an association of the national oil companies of the member states, published decommissioning guidelines in 2012. As Myanmar has not adopted national decommissioning standards, responsible petroleum companies would probably base their decommissioning exercise on the ASCOM guidelines.

Generally speaking, the well must be plugged and the equipment cleaned. The platform (jacket and topside) should then be removed. The pile of cuttings from drilling the borehole and the shell mounds formed by mussels and other organisms falling from the platform during its life should be left (if not removed as part of the operation to remove the jacket), as should the export pipeline.

On a case-by-case evaluation, the platform may be (partly) left in place as an artificial reef. One would probably have to cut the top off deep enough to allow ships to pass over safely, or topple the installation. We understand that keeping a platform as an artificial reef costs only half of what it would cost to completely dismantle it, but the decommissioning guidelines only allow it if the structure stands more than 75 metres deep in water (more than 100 metres if the structure was installed after 1 January 1998) or weighs more than 4,000 tonnes in air.

How common is it for countries to have a vague or non-existent legal framework for decommissioning? In such situations, what kinds of challenges can arise for investors, operators and governments when the task of decommissioning a field comes around for the first time?

With the exception of Myanmar, the oil producing ASEAN states all have some legal frameworks in place which, however, vary in terms of detailedness and their level of development. The problem is that it is far from certain whether old projects are covered by new laws and regulations. This is because high-value, long-term contracts with governments, such as those in the oil and gas industry, usually contain a stabilisation clause which, in essence, in one way or another, protects investors from future legislation that might impose new obligations on them. Whether old projects are covered by subsequent decommissioning legislation requires a case-by-case analysis.

Decommissioning is an activity without a return on investment, and where there is no express legal or contractual obligation of the operator to rehabilitate the site, the site may either remain a hazardous industrial ruin, or the national oil company – to whom the site will usually revert after operator and investors have abandoned it – may end up footing the bill for its restoration.

Site decommissioning may be socially desirable, but managers of oil and gas companies might, in the absence of a clear framework imposing hard obligations, be prohibited from spending millions of the company's money on socially desirable activities if the company's shareholders (whose money it is after all) don't approve.

Conversely, socially responsible companies willing to restore a gas field to its original condition might be faced with unprepared government authorities. In Myanmar, any decommissioning plan would certainly have to be approved by the Myanma Oil and Gas Enterprise (MOGE), not least because MOGE owns the assets as per the PSC. Other authorities, such as the Environmental Conservation Department, Department of Marine Administration or Myanma Port Authority, will probably have to be involved as well, but it will take an effort to find out which ones. It is also uncertain whether the officers from these authorities will know what to do if there is no regulatory framework.

Other points of contention might include the scope of required decommissioning activities (such as, whether to dismantle a platform or leave it in place as an artificial reef) or whether or in what amount the national oil company may request a deposit from operators or investors withdrawing from a site to cover future decommissioning costs. Furthermore, costs are more difficult to estimate if the regulatory framework is underdeveloped.

As far as we know, PSCs in Myanmar signed prior to 2013, including those for all four producing offshore areas, include no specific requirements for decommissioning. What existing laws or other contractual agreements could MOGE use to require operators to undertake a decommissioning process for these projects?

We are not aware of any laws in Myanmar that would oblige an operator with a production sharing contract to rehabilitate a site.

There is a halo of related contracts around the PSCs (to implement the PSCs, let in new investors, and operate the export pipeline), and MOGE's position – expressed some years ago in a presentation – appears to be that clauses in some of these related contracts oblige the operator to pay for abandonment costs, and to provide security "5 years prior". This is hard to verify as these related contracts are not in the public domain, and we also do not know whether the parties have renegotiated the abandonment clauses since.

It would, however, certainly be unwelcome news to many if the contracts indeed allowed MOGE to request a deposit or other payment for decommissioning, at least if the contracts did not provide for payment into an escrow account, as this would oblige a leaving operator to supply MOGE with funds, something that many want to prevent.

Of note, direct payments to MOGE of decommissioning costs may be permissible under EU sanctions (so far, MOGE has been sanctioned by the EU, Norway, Iceland, Switzerland and Liechtenstein), as the

competent authorities of an EU member state may authorise the supply of funds or economic resources for tasks related to the decommissioning of oil and gas wells.

One shortcoming of both the 2013 PSCs and earlier PSCs is that they don't include a requirement to create a decommissioning fund, at least to public knowledge. Why is this requirement important to have on the books, and how could the absence of such a fund impact a decommissioning process?

Of course, a fund is only as good as the environment in which it is created. A fund held with a bank in Myanmar would not be worth very much at the moment.

In principle, however, the fund would be built up over time during the production period so that money is available to cover the decommissioning costs after production has ceased. Depending on its design, it would be cost-recoverable for the operator, which means that the operator could deduct its contributions to the fund from the value of the gas produced before the remainder is split between the operator, the other investors and MOGE.

Without a fund, there may not be any money to pay for decommissioning in the following circumstances, which in turn may end up converting the site into a hazard for the environment and shipping:

- The operator and all other investors left the project (to the extent that we know, they can do this by simply giving 90 days notice), leaving MOGE alone with it; MOGE may have no budget for decommissioning.

- The operator and/or other investors are still there, but refuse to pay, arguing that they are under no legal or contractual obligations to decommission the field (an argument that might only hold water for pre-2013 PSCs, as the 2013 PSCs oblige the operator to remove equipment and restore the site in case of expiry, termination, relinquishment or abandonment).

- The operator and/or other investors are bankrupt.

The last scenario might in particular play out if the original operator and/or investors sold their interests to less financially potent players, as there is no basis in Myanmar's laws to hold former parties liable for decommissioning costs arising after their exit. This fate befell Australia in 2019, forcing the country to pay for the removal of oil platforms in the Timor Sea and prompting it to change its laws to introduce a "trailing liability" to keep former operators on the hook.

In Myanmar, the sale of an interest in an oil or gas field requires MOGE's approval, but we would not know whether MOGE would make this approval contingent on the seller providing a guarantee to cover decommissioning costs if the buyer or any successor is unable or unwilling to meet them.

If I understand correctly, the Petroleum Concession Rules of 1962 do include a requirement for decommissioning oil/gas concessions, but only after their expiry, revocation, return or abandonment. By pulling out ahead of time, will the foreign parties in Yetagun be able to avoid this requirement? What will happen if MOGE is the only remaining party in the project when the PSC expires?

We somewhat doubt that the 1962 rules would even apply to a PSC as there is a substantial difference between the concepts behind a concession and a PSC, at least in theory.

A concession confers title to all oil or gas produced to the (often foreign) petroleum company and reduces the host country to being a mere recipient of royalties, whereas with a PSC, the host country in essence hires a contractor to extract the nation's oil or gas, retaining title to all of it until it is split with the operator, and retaining all rights to manage the operation – which is why switching from a concession to a PSC system is sometimes a matter of national pride.

Furthermore, a concession is defined as an "exploring license, prospecting license, [or] mining lease conferring the sole right to mine for petroleum, all issued according to the provisions of [the 1957 Petroleum Resources (Development Regulation) Act]". Now, operators under a PSC do have a permit from the Ministry of Energy in addition to the PSC, but this permit is issued under the State-Owned Economic Enterprises Law, a later, different piece of legislation.

Unlike definitions in the 1918 Oilfields Act which were amended in 2010 to encompass PSCs, legislation on petroleum concessions does not seem to have undergone a corresponding update.

All said, we do not really think that the 1962 Petroleum Concession Rules – which indeed impose decommissioning obligations on holders of a petroleum concession – would apply to a PSC, which leaves a legislative gap in this respect.

As far as we know, an operator or other investor may pull out by simply notifying the other parties 90 days in advance. This may leave MOGE alone with the open well and the oil platform. If MOGE in this scenario does not take care of decommissioning, the site will turn into an environmental and safety risk.

What are your thoughts on the Ministry of Energy's tender seeking a new operator for Yetagun? Is it likely to see any interest? What is the logic of the tight bidding timeline?

The SAC's Ministry of Energy published the invitation to bid in the state-owned press on 14 May 2022, requesting the submission of expressions of interest by 20 May and of proposals by 27 May 2022. At the very least, it would appear that this timeline breaches the 2017 tender directive which the SAC does not seem to have revoked and which obliges authorities to prominently announce big tenders for "construction, purchase, and procurement of services" at least one month ahead of the tender opening date.

The timeline markedly contrasts with an invitation to bid for an onshore block that the ministry announced around the same time where bidders are given a month just to submit the expression of interest.

We do not know whether the ministry received any bids and can only speculate as to the reason for the tight timeline. An explanation that immediately springs to mind is, of course, that the ministry might already have found a candidate and called the tender only as a formality with the timeline designed to dissuade other bidders.

However, the Yetagun gas field is reportedly expected to cease commercial production by 2023, so we would not know what value a potential operator might see in it. It might be possible to still squeeze some money from it in the short remaining time as the new operator would not have to make much capital investment.

What are the potential consequences, environmental, economic or otherwise, if the decommissioning of Yetagun or, in a few years, Yadana, is not done properly?

There is a high risk that oil or gas from abandoned wells leaks into the environment. This is a danger to marine life and, in the case of gas, may also contribute to climate damage if methane escapes into the air. Gas bubbles and gas liquids made up from thin crude oil are toxic, and hydrogen sulfide in leaked gas may react with oxygen in the air and ignite. Additionally, methane, if consumed by microbes in large enough quantities, may locally acidify the sea.

Furthermore, an abandoned platform is a safety risk to shipping as it is an obstacle and parts may come loose in a storm.