

LATIN LAWYER REFERENCE ELECTRICITY PROJECTS & REGULATION 2019

---

# Panama

Estif Aparicio  
Arias, Fábrega & Fábrega

AUGUST 2019



LATIN LAWYER  
INSIGHT

## 1 What are the principal power sources in your jurisdiction?

The principal power generation sources in Panama are hydro and thermal power plants. In recent years, however, renewable sources of energy such as wind and solar generation power facilities have gained some ground as part of a government strategy to diversify the country's energy matrix.

## 2 What are the current trends affecting the energy mix in your jurisdiction?

The current trends affecting the energy matrix in Panama are:

- Increased interest in renewable sources of energy. In 2011, 2012 and 2013, the National Assembly enacted three statutes that set forth tax and other incentives, respectively, for wind-based, natural gas-based and solar-based power generation of facilities.
- Participation of private equity firms in the energy sector. During the privatisation process of the 90s, foreign investors were mainly represented by foreign power generation companies. In recent years, however, private equity firms, specialised in investing in energy projects, have taken a leading role as investors in the energy sector.
- No more construction of reservoir-based power hydroelectric plants. During the 70s, 80s and the 90s, Panama pursued the construction of large reservoir-based power generation plants. Nowadays, however, the only reservoir-based power generation plant expected to be constructed is the AES Changuinola II. This project is in the process of tendering. The authorities have signalled that, aside from this project, no other reservoir-based power generation facility will be authorised given the significant environmental, social, resettlement, cultural and archaeological issues that usually arise in connection with these projects.
- Interest in promoting natural gas-based projects. In recent years, the government has shown an interest in promoting power generation plants fuelled by natural gas. In 2012, a law was passed by the National Assembly establishing certain tax benefits and other incentives for this particular power generation technology. AES Group, along with a local partner, is currently entering the initial testing of a newly built 380Mwh natural gas based power generation plant along with an LNG storage terminal that, when operational, will become the largest generation facility in the country. Recently, there are some Agreements with private companies to obtain geophysical information regarding the potential of oil and gas in the Caribbean Sea.
- Increased importance of cross-border sales of capacity and energy within Central America. As described elsewhere in this report, Panama is a member of the Central American Regional Electric Market (MER) established by an international treaty to which the country is a party. The treaty created the necessary supranational legal framework for the construction of a Central American power transmission line that allows the sale and purchase of capacity and energy within the Central American market. Commercial operation of the MER started in 2013.
- Possible interconnection of Panama and Colombia's transmission lines. Similar to the MER initiative, Panama and Colombia incorporated a company, owned by the two governments, to build and operate a power transmission line that would interconnect Colombia with Panama's power grids thus resulting, in practice, in the interconnection of the Colombian and Central American markets. Differing from the MER initiative in which the legal framework was laid out in a treaty, the Panama and Colombia interconnection relies more on harmonisation and coordination between both governments.

## 3 What are the current forecasts for electricity demand in your jurisdiction?

Over the past decade Panama has been one of the fastest growing economies in Latin America. As a result of this reality, demand for power has grown significantly during this period and, in recent years, has even outpaced the growth of the energy supply curve.

## 4 Is there an open electricity market in your jurisdiction? Are any activities in the electricity market reserved for the government only? Are private entities allowed to build and operate power plants and transmission and distribution lines?

The electricity market is open to private investors, whether national or foreign. By way of exception, the state's participation in the energy market is limited to the following:

- By statute, power transmission services must be provided solely by the state-owned company Empresa de Transmisión Eléctrica, SA (ETESA).
- Prior to the privatisation of the distribution and generation assets of IRHE, the state-owned vertically integrated public monopoly that used to provide transmission, distribution and power generation services in the country, the government

incorporated four power-generation companies to take over IRHE's generation assets. Thus, the privatisation of power generation in Panama in the 90s took the form of a sale by the government of a controlling stake in each of these four companies. Although the state retained an important minority position in the companies, full corporate and operational control was granted to the private investors that purchased a majority stake in the power generation companies.

- Similar to the case described above for IRHE's generation assets, during the 90s the government also incorporated three power distribution companies, namely, Empresa de Distribución Eléctrica Metro-Oeste, SA, Empresa de Distribución Eléctrica Chiriquí, SA y Elektra Noreste, SA, to receive and own IRHE's distribution assets. Although the state retained more than a 50 per cent stake in some of these distribution companies, the law and the company's articles of incorporation granted full operational control to the investors that bought a minority stake as part of the privatisation process.
- ETESA runs and operates the national dispatch centre responsible for the integrated operation of the electricity system.

Under the law, any entity that intends to build and operate a power generation plant must obtain first either a concession (for hydroelectric and geothermal generation) or a licence (for all other kinds of projects) granted by the National Authority of Public Services (ASEP). Similarly, ASEP grants concessions to any entity that intends to provide power distribution services. There are no investment restrictions for foreign private investors to own and operate power generation plants.

The power distribution concession agreements must define a "concessioned area" within which the concessionaire is obliged to provide the distribution services to regulated customers and the concessionaire is granted the exclusive right to serve such customers. As explained above, during the privatisation process that took place during the 90s the distribution network, was split between three power distribution companies: Elektra Noreste, SA and two other companies under Unión Fenosa control, Metro Oeste and Empresa de Distribución Eléctrica Chiriquí, SA. Metro Oeste, serves the western part of Panama City and the central region of the country and EDE Chiriquí distributes power in the area close to the Costa Rican border. Elektra Noreste, SA serves certain parts of Panama City and other regions. Currently, no other distribution companies have received concessions to provide power distribution services.

As discussed elsewhere in this report, power generation business can be carried out by private investors. As such, the design and construction of a power plant is a pure private project and does not need to abide to public government procurement rules. In turn, power transmission services are provided by the ETESA. As a state-owned enterprise, ETESA must follow, in all of its procurements and purchases, public procurement rules.

## **5 What types of market participants may operate in the market? Must they provide payment guarantees to back their obligations in the market? What type of security is acceptable?**

Broadly speaking market participants are: generators, distribution companies, ETESA, co-generators, and self-generators. Foreign generators could be sellers or purchasers in connection with exports or imports of energy.

Although generators are normally expected to be sellers of capacity, energy or other products in the market and the distribution companies are naturally expected to act as purchasers, sometimes, a generator may be a purchaser and a distribution company may be a seller in the market due to the economic dispatch model that is followed in Panama rather than a physical delivery scheme. In addition, generators may enter into reserve contracts, whereby one generator agrees to sell power to another generator to back up the latter's delivery obligations under a PPA, for instance. In this case, the purchaser leg of the deal acts as purchaser in the energy market even if it is a generator.

The spot market rules require market participants to post performance bonds and other guarantees issued by duly licensed insurance companies to back up their payment obligations for spot sales. In addition, power purchase agreements entered into between generators and distribution companies and large customers (customers that qualify to purchase capacity or energy directly in the market and not as regulated users), normally require the purchaser party to post a performance bond or other acceptable guarantees.

Currently, the applicable regulations do not authorise entities to act solely as energy traders.

## **6 What is the role and function of the regulator? Would you describe the regulator as being independent?**

The main government agencies involved in the energy market are: the National Secretariat of Energy (SNE), ASEP and ETESA. The SNE is responsible for proposing a national energy policy that ensures the rational, efficient and sustainable use of resources and energy.

ASEP, in turn, acts as the regulator of the power sector. Under the law, ASEP is an autonomous and independent agency of the Panamanian government whose functions and powers include granting power generation and distribution concessions and generation licences, establishing the methodologies and formulas for setting tariffs for distribution and transmission

services, issuing regulations and rules applicable to the energy sector and imposing sanctions and fines to violators of the energy law and its regulations.

ETESA's role in the Panamanian energy sector is threefold. First, it owns and operates the national transmission line. Second, ETESA's Planning Unit is responsible for the generation and transmission expansion plans for the National Interconnected System, forecasting the overall energy requirements of Panama and determining ways to satisfy such energy requirements. Third, ETESA operates the National Dispatch Centre (CND), the entity responsible for planning, supervising and controlling the integrated operation of the National Interconnection System and for ensuring its safe and reliable operation.

Generators, as expected, sell capacity and/or power in the market whether through long term power purchase agreements or in the spot market. Notwithstanding, generators may also be required to purchase capacity and/or power to honour their commitments under their PPAs whenever they are not dispatched by the CND.

## **7 Is there an open market for off-takers in your jurisdiction or are there restrictions on the sale of electricity?**

Power generation plants may sell capacity and/or energy to regulated or unregulated customers. "Unregulated customers" is defined as any individual or legal entity with a minimum demand equal to or above 100Kw that opts to be unregulated. Regulated customers are all customers other than unregulated customers.

Unregulated customers are free to purchase capacity or energy from any generator and are not required to comply with any specific procedure when entering into power purchase agreements or to enter into such agreements at all, other than specifying the interconnection points with the power grid. Therefore, if the off-taker qualifies as an unregulated customer it could enter into a power purchase agreement with any generator to purchase its capacity and energy requirements.

Regulated customers can only purchase their capacity and/or energy requirements from the distributors granted concessions in the particular area where such customers are located.

## **8 If the sale of power is to a public utility as offtaker, are such entity's payment obligations backed-up or guaranteed by the government?**

Sales of power to a public utility are not backed up or guaranteed by the government.

## **9 Does the market have an independent system operator? If so, what are the ISO's tasks and duties?**

The CND run by the state-owned ETESA is the entity responsible for planning, supervising and controlling the integrated operation of the national interconnection system and for ensuring its safe and reliable operation.

## **10 How are electricity rates set and what cost components affect such rates?**

Generators are not subject to tariffs or rates in their sales of power. They are free to set the prices for their products based on the terms and conditions freely agreed upon with their respective purchasers.

On the other hand, distribution and transmission services are subject to tariffs for their services that are set by ASEP for four-year periods. The law grants ASEP the authority to establish, in advance, the criteria, methodology and formulae to be used in determining such tariffs.

Under the law, the tariff-setting process for distribution companies must be guided by the following principles: financial sufficiency, economic efficiency, equity, simplicity and transparency. In addition, distribution tariffs must compensate distributors for the "distribution value added", a concept that takes into account the cost that an efficient distribution company would incur to serve the concessioned area, administration costs, operation and maintenance costs of the distribution system, acceptable power distribution losses, depreciation costs and opportunity costs. In determining the distribution tariffs, ASEP must also establish an acceptable rate of return for the distribution companies, which shall not exceed 2 per cent above the average annual nominal rate (determined based on the rates for the previous 12 months) payable under 30-year US Treasury bonds plus a premium of 8 per cent. This rate is then applied to the net fixed assets of the concessionaire.

Similarly, ETESA's transmission tariffs must cover the investment costs and administration, operation and maintenance costs of the national transmission network necessary to meet demand growth under conditions of reliability and quality but excluding financial costs resulting from credit facilities contracted by ETESA.

## 11 What approvals are required to build and operate a power project? Are these easy to obtain? Please describe the salient features of the relevant licence conditions and the grounds for revocation. What levels of fines can be imposed for failure to comply?

Power generation projects based on hydro and geothermal sources require a concession. Power generation projects based on all other technologies must obtain licences. Concessions and licences are granted by ASEP.

In order to obtain a concession or a licence, the applicant must provide, among others, the following requirements:

- a sworn statement identifying the applicant's beneficial owners;
- a bank letter certifying the company economic and financial solvency;
- a letter of intent of the company in charge of the construction and the company in charge of the operation;
- an environmental impact study;
- a performance bond for every mW, which will depend on the type of energy; and
- the authorisation to access the interconnection system.

A concession or a licence can be revoked based on the terms and conditions of each particular concession or licence. Some common grounds for revocation include:

- failure to start the construction or operation of the power project at the commencement date;
- delay in the project chronogram;
- bankruptcy or dissolution of the concessionaire or licence-holder; and
- breach of the terms and conditions of the concession agreement or the licence, the law and other rules or legislation.

The law authorises ASEP to impose fines for violations of the law ranging from US\$1,000 to US\$20 million.

## 12 Is the government or the ISO conducting public auctions to award long-term power purchase agreements to public and private offtakers? Are the auctions open to any source of power, or are they focused on specific sources and technologies?

As stated above, generators are free to set their prices based on market conditions. Transmissions and distribution tariffs are approved by ASEP. For greater details regarding the tariff-setting process, see question 9.

The law provides that the operation and administration of the wholesale electricity market is managed by the CND. The electricity wholesale market comprises all transactions among market participants (which includes generators, self-generators, co-generators, distributors and large clients) for the sale of capacity, energy or ancillary services resulting from contracts with competitive prices, bid processes or spot market sales with hourly prices for settling transfers of electricity for uncontracted capacity and/or energy.

The CND generally dispatches generating units in accordance with a merit order based on each generator's variable costs:

- in the case of thermal units, variable costs (in US\$/MWh) are calculated based on incremental fuel costs and non-fuel costs, such as a thermal unit's administration, operation and maintenance costs, and its facility heat rate.
- in the case of run-of-river hydroelectric facilities, wind and solar facilities variable costs are considered to be zero.
- in the case of reservoir hydroelectric facilities, variable costs correspond to the opportunity value of water, which is calculated based on a dispatch model incorporating stochastic dynamic programming (SDDP) model. The CND uses the SDDP model to calculate the expected thermal generation cost saved in the future by the conservation of marginal amounts of water by a hydroelectric generator, taking into account projected operations of the national interconnected power system over the medium and long term.

The planned dispatch is revised continuously by the CND in response to any changes affecting the system (eg, demand, actual generator availability and system restrictions) that may take place throughout the day. Additionally, each week, the CND meets with representatives of the generators to discuss the expected dispatch order for the following week.

The spot market involves transactions of energy or capacity or both that are not subject to contracts, and consists of the energy spot market and the capacity spot market. Variances between a generator's actual dispatch and contracted energy volumes are settled through the spot market. The energy spot price is set by the order in which generators are dispatched. The CND ranks generators according to their variable cost (thermal) and the value of water (hydroelectric), starting with the lowest value, thereby establishing on an hourly price basis a merit order in which generators will be dispatched the following day to meet expected demand. The price on the energy spot market for all generators is set by the more expensive generator dispatched every hour, which becomes the clearing price for energy.

### 13 What percentage of the country's power output comes from renewable power sources and does your jurisdiction have any specific targets or milestones for renewable energy projects?

At the end of 2017, the installed generating capacity in Panama, including auto-generators, was 3,425.595MW of which 64.85 per cent (2,221.804MW) was composed of renewable energy and 32.7 per cent (1,212.242MW) was composed of thermal plants of different technologies. Within the renewable energy sector, hydroelectric plants made up 80.45 per cent (1,787.582MW), while the remaining renewable energy such as wind represents 17.07 per cent with 379.394MW of the total installed and photovoltaic was 2.46 per cent with 54,828MW. ASEP is obliged to grant preferences to certain renewable energies in all public bids for the sale of capacity and/or energy to regulated customers as part of a strategy to incentivise the use of cleaner generation facilities.

### 14 Is there a different regulatory regime for renewable energy projects? Are there any government programmes that foster the development of these projects?

In general, renewable power generation sources are subject to the same regulatory regime applicable to other generators. This notwithstanding, the National Assembly has passed various laws that grant special tax incentives and other benefits for wind, photovoltaic and natural gas-based power generation projects. There are no government programmes conferring additional benefits or incentives not considered in special regulations.

### 15 Are there any tax incentives for power projects and, in particular, for renewable power projects?

Power generation regulations grant special tax benefits, most of them applicable to all types of renewable projects. Among the tax exemptions available are:

- wind and photovoltaic power and generation based on natural gases are allowed to apply an accelerated depreciation method;
- a company that develops new projects or increases the energy production capacity of mini hydroelectric, wind and photovoltaic power generation projects based on natural gas, and whose capacity does not exceed of 10MW, may use a 25 per cent of the direct investment cost applicable as payment of the total income tax;
- a company that develops new projects or that increases the energy production capacity of small hydro, wind and photovoltaic power and generation based on natural gases with a power station systems of more than 10MW, may use 25 per cent of the direct investment cost applicable as payment of the total 50 per cent income tax;
- five per cent discount on income tax of a specific period for investment on facilities developed for public domain (not applicable for biofuel and biomass generation and thermoelectric power generation);
- full exemption of custom duties applicable to:
  - Equipment or materials used for the development of the power generation project;
  - importation of fuel needed for electrical and renewable power generation; and
  - for distributors that introduce equipment destined for the project of wind power central into Panama;
- exemption from value added tax (VAT) on importation of a specific list of items for solar generation projects that will be covered by this exemption. Generation based on natural gas and thermoelectric power is not exempt from VAT on imports;
- wind power generation regulations established a special exemption on VAT for importation made by distributors of equipment's that are destined for this type of project.

In addition, there is a special exemption on all national taxes for local manufacturers of equipment, products, machinery commercialised within Panama for use in wind power projects and generation based on natural gas. This full exemption is limited to 15 years and 20 years respectively.

### 16 Are there any investment vehicles or structures that permit the maximisation of investment in a power company, such as tax equity, master limited partnerships, real estate investment trusts (REITs) or yield cost?

No. Except for the tax incentives describe above for certain renewable projects, general income tax rates apply to companies carrying out power generation projects in Panama. Most legal persons are subject to the standard 25 per cent corporate income tax rate. Dividends payable by the project company are taxed at a 10 per cent rate.

Some US investors prefer to operate in Panama through a limited liability company instead of using a corporation in order to claim check-the-box status under US tax laws. This decision is not driven, however, by Panamanian tax considerations but by US tax law.

## **17 Are there any governmental subsidies, benefits (other than tax-related) or incentives for investment in power projects and, in particular, renewable power projects?**

Yes, in addition to the tax incentives previously mentioned, special regulations established other non-tax benefits, such as:

- exemption of payment of distribution or transmission fees for direct sales or spot market trading. This incentive applies for: mini hydro, small hydro (for the initial 10MW) and wind power generation;
- all renewable power projects operating in isolated system will have a special right to produce energy, transmit it, distribute and market it in accordance with the applicable provisions of the law; and
- all renewable power projects will have access to transmission and distribution grids for the sale of energy produced in their generating plants, in accordance with the technical provisions that ASEP dictates.

## **18 Are there any capital controls or other regulations in your jurisdiction that prevent investors from repatriating investments in a power project?**

No.

## **19 Is there a market for emission reduction certificates or clean energy certificates in your jurisdiction?**

In 1998, Panama approved the Kyoto Protocol. The authority responsible for approving projects for the reduction of emission gasses is the Environment Ministry. Any person interested in obtaining either a no objection letter for a clean development mechanism project or a national approval for projects in relation to the clean development mechanism, both under the Kyoto Protocol, must file a petition before the Environment Ministry. Such petition is evaluated by the Climate Change and Desertification Unit, which will issue a technical report. Based on the technical report, the Environment Ministry then issues either the no objection letter or the approval. Emission reduction certificates have been issued in the past.

## **20 Which renewable power sources have been most successful in your jurisdiction and what is the medium to long-term outlook for them?**

Hydroelectric plants are the predominant power generation facilities in the country, representing 57 per cent of total installed generation capacity. Solar and wind power generation sources account for a smaller percentage of the power generation matrix. As discussed elsewhere in this chapter, certain laws have granted special preferences for renewable generation sources for up to 5 per cent.

## **21 Are there any non-regulatory factors that affect the development and financing of power projects in your jurisdiction, such as social, environmental, political or security concerns or rights of third parties?**

Yes. When it comes to the financing of power generation projects, particularly those that may involve flooding, resettlement of communities, deforestation of certain areas and the establishment of easements or rights of ways in certain forests or reserves, particular attention must be given to social or environment issues. Improper handling of these issues by the project company could significantly delay the start of the commercial operation phase and in some cases may even jeopardise the viability of the project itself.

## **22 Are subsurface rights separate from land rights? If so, what factors must a project take into consideration in determining whether an owner of subsurface rights could create issues for a project?**

Under Panamanian law, subsurface rights are not separate from land rights; however, any salt pans, mines, underground and thermal waters, hydrocarbon deposits, quarries and deposits of all kinds found in the subsurface belong to the state and cannot be privately owned. Therefore, if a private company is going to develop a power generation project that relies on the use or consumption of these subsurface resources, it must obtain a concession from the state specifically permitting such exploitation.

### **23 How are wheeling tariffs set and are there any differences based on the power source and technology used? Is there a postage-stamp wheeling tariff in your jurisdiction?**

Wheeling or transmission tariffs charged by ETESA are established by ASEP for four-year periods. Under the law, the transmission tariffs must cover investment costs as well as administration, operation and maintenance costs of the national transmission network necessary to meet demand growth under conditions of reliability and quality but excluding financial costs resulting from credit facilities contracted by ETESA. The wheeling tariffs must also allow ETESA to have a reasonable return on its net fixed assets. The reasonable rate of return shall not differ by more than 2 per cent of the sum of the annual interest rate of the 30-year US Treasury bonds plus 7 per cent.

### **24 Are there any open access rules for transmission? If so, how is access determined? Are there private transmission lines to which open-access rules don't apply?**

ETESA must provide access to the transmission network to all market participants on a non-discriminatory basis, subject to such participant's payment of the wheeling fees and compliance with technical rules.

### **25 Are cross-border power exchanges regulated?**

Yes. Panama has borders with Costa Rica and Colombia. In the case of energy sales to Costa Rica and other Central American countries, Panama has ratified the treaty that establishes the regional electricity market (MER) in Central America. This treaty designates the executive unit of the Central American Interconnection System (SIEPAC), the Regional Commission on Electric Interconnection, the Enterprise Owner of the Net, the Regional Operator Entity and the Director Council of the MER as supranational bodies in charge of operating and administering the MER. These entities are responsible for owning, operating and regulating the MER and its associated transmission network.

With regards to Colombia, there is no treaty governing the sale of energy between both markets. Notwithstanding, both countries has incorporated an entity named Interconexión Eléctrica Colombia-Panamá, SA ICP to design, build and operate a transmission line to connect the power grids between the two countries. This project is still in the planning phase. Once the interconnection transmission line has been built it will allow exchanges of energy in both directions between Colombia and Central America.

### **26 Are merchant power projects financeable in your jurisdiction?**

In general, most if not all, power generation projects that have been financed to date have secured in advance power purchase agreements with at least one off-taker. We are not aware of any power generation project that has been built and financed relying solely on sales to the spot market.

### **27 What are the biggest obstacles in obtaining debt financing for renewable power projects?**

There are no major obstacles, as such, to the financing of power generation projects. Panama is a liquid regional financing centre. Most lenders, however, will pay particular attention to the following factors in deciding whether or not to finance a project:

- the reputation and experience of the project sponsor;
- whether or not the project company has secured a power purchase agreement or other long-term contract for a significant part of the plant's capacity with off-takers that have an adequate credit rating;
- the type of technology used by the plan and its particular order of dispatch;
- acceptable debt to equity ratios for the project; and
- the quality and track record of the engineering, procurement and construction contractor.

### **28 What are currently the most significant obstacles to the growth of the electricity market in your jurisdiction?**

Currently, growth in the power supply has been constrained by capacity limitations in ETESA's transmissions lines, which do not allow the transfer of all the energy generated in the western part of the country, near the Costa Rican border, to the eastern part of Panama, where Panama City is located.

Other than the Changuinola II project, which is now in the process of public tendering, no other significant reservoir-based power generation projects are expected in the future. Therefore, the new generation of large power generation projects most likely will either be thermoelectric plants or plants that rely on natural gas or other clean sources for generation.

Broadly speaking, the regulations do not impose any constrain or limitation for the construction of new power generation plants. In fact, there are laws granting tax and other incentives for clean power generation projects.

## **29 What are the biggest growth areas in the electricity market in your jurisdiction?**

There is a significant number of power generation projects in the pipeline that have either obtained concessions or licences or are in the process of securing such permits.

On the demand side, the construction of Panama City Metro has incorporated into the system a new significant customer. In addition, some mining projects that have been granted by the state could have such large energy needs that the relevant concessionaire may even build its own dedicated power plant.

## **30 Please describe any recent trends observed in your jurisdiction affecting the structuring of investments and financings in power projects.**

In terms of financing and structuring of investments, the main trends observed have been:

- small power generation projects have been financed mainly by local banks;
- the predominant legal structure used to finance power generation projects has been project finance; and
- some local banks have structured financings for power generation projects as capital markets transactions involving the public offering by the project company of bonds placed through the Panama Stock Exchange in order to take advantage of tax exemptions afforded by Panama's securities law to interest and fee payments made under the registered bonds.

## **31 How actively involved are foreign and local development banks and multilateral agencies in the financing of power projects in your jurisdiction? Are there any non-traditional sources of financing available to project sponsors?**

Foreign banks have been actively involved in the financing of the largest power generation projects in Panama. In turn, multilaterals, such as the International Finance Corporation, the Central American Development Bank, the Inter-American Development Bank and others have also been involved in the financing of power generation projects. Although, the involvement of a multilateral somewhat tends to slow the negotiation process and closing due to multilateral's more stringent policy's requirements, their role in the financing mix is generally to grant the borrower or the project company somewhat longer terms for the repayment of their debt thus allowing maximisation of shareholder return. Also, the multilateral also provides an "invisible" hedging of political risk in the sense it is perceived that the host country is less likely to take an arbitrary action against a project company if a multilateral to which the host country is a member state has granted financing.

In addition to the above, in some cases, financing of power project has been granted by sector-specific or specialised investment funds.

## **32 Are debt offerings on the capital markets becoming a more common tool in your jurisdiction to refinance construction financing?**

As stated, some projects have been financed through public bond offerings. Usually, the bond offering documents contemplate the issuance of at least two series of bonds. One series is issued by the project company to raise funds for the construction of the plant and such series is usually repaid in full when the project starts commercial operation with the proceeds from the issuance of the second series of the bonds, which represent the long-term debt. It is also common for the offering documents to provide that the first series of bonds does not need to be fully placed at once but instead is placed in various issuances that match disbursement needs in the construction stage, in order to minimise negative carry for the project company.

## **33 Are power purchase agreements in your jurisdiction denominated in local currency or US dollars?**

Power purchase agreements are denominated in US dollar, the currency of legal tender in the Republic of Panama. Therefore, foreign investors in Panama need not be concerned with convertibility or exchange control risks.

### **34 Are there regulatory limitations on foreign investment in, or control of, electric generation, transmission or distribution assets?**

Not for generation. In the case of distribution and as discussed above, the government maintains an important stake in all power distribution companies and an important minority participation in four power generation companies. Private investors that purchased the shares of said companies during the 90s have, however, been granted operational control of them.

In general, the law grants the state-owned ETESA a monopoly on providing transmission services.

### **35 How active in your jurisdiction is the M&A market for power assets?**

It is very active in the generation sector. In recent years, power generation projects have been developed or purchased by (i) large and mid-size international energy groups, whose core business is the energy sector; or (ii) international private equity energy firms that have teamed up with either local investors or investors described (i) for the purchase of power generation projects; (iii) solely by local investors; or (iv) some suppliers of equipment that have taken a stake (usually a minority one) in the project. Equity shares in power generation projects are regularly sold and purchased by local and international investors without major restrictions.

The number of authorised distributors remains fixed and therefore there has not been much M&A activity in this sector.

### **36 What are the most common dispute resolution mechanisms under local law-governed power purchase agreements in your jurisdiction?**

The standard form of power purchase agreements provides for disputes to be settled through arbitration before the ASEP as arbitrator tribunal. Most dispute settlement clauses incorporate alternative dispute settlement mechanisms that could be activated by the parties before initiating arbitration proceedings.



## **Estif Aparicio**

Arias, Fábrega & Fábrega

Estif Aparicio joined the firm in 2000 and became a partner in 2011.

He is a skilled corporate lawyer, currently specialising in complex financing of private and public major construction and infrastructure projects, with a focus on energy, public transportation, airports, ports, health and other social infrastructure.

Mr Aparicio has outstanding deal management and broad expertise setting up a variety of financial structures, having represented creditors in the biggest and perhaps most complex transactions in Panama in recent years, including the expansion of the Tocumen International Airport; the first and second line of the Panama City Metro; Cinta Costera phases I, II and III; and Metro Bus, Panama City new public transportation system.

He possesses a unique insight to the power generation industry and the Panamanian government “green energy” policy favouring wind, solar, gas, and hydro-electric generation, having represented the lenders that have provided financing to close 35 per cent of the total generation capacity of the country.

Mr Aparicio has an LLM from University of Houston Law Center and an LLB from University of Panama. He was a Fulbright scholar. He is admitted to the bar in Panama and New York.

2004–2006: Chief Trade Negotiator of all bilateral and multilateral free trade agreements of the Republic of Panama.

2006–2007: Worked for the law firm of Sullivan & Cromwell LLP in New York, participating in capital markets, M&A and project finance transactions.



Established in 1914, Arias, Fábrega & Fábrega has been at the forefront of the legal profession, advising leading international financial institutions and multinational corporations, as well as some of the largest companies in Panama, for over 100 years.

Our legal teams organised in 30 practice areas led by truly specialised lawyers, offer our clients comprehensive and integrated legal services with a multidisciplinary approach. Our legal practice covers capital markets, banking and finance, mergers and acquisitions, corporations, regulatory work, government contracts, trade, competition and antitrust, real estate, environmental matters, employment relations, trust and estate planning, litigation, taxation and intellectual property.

We are proud of our distinguished reputation for consistently providing the highest quality legal advice and for our unparalleled expertise in structuring complex, innovative and sophisticated transactions in Panama and the Latin American region.

ARIFA Building, 10th Floor  
Santa María Business District  
PO Box 0816-01098  
Panama  
Tel: +507 205 7000

**Estif Aparicio**  
eaparicio@arifa.com

[www.arifa.com](http://www.arifa.com)