

Key areas of improvement

The Power Purchase Agreement

The current PPA forms proposed by NAWEC are deficient in several areas, all of which compromise bankability to some extent or other. The firm is currently hired to redraft the PPA to confirm to international standards and in such a way as to confirm bankability and will deliver the final draft in September.

The improved PPA will address and include at least the following:

- a. **Curtailment / Systems events:** If electricity generated cannot be physically taken by NAWEC due to a system outage output is curtailed; will electricity be calculated and paid for on a deemed delivered basis or what will the arrangement be.
- b. **Tariff indexation:** mechanism for tariff adjustment over time to palliate for to inflation
- c. **Currency.** While payment is calculated in USD, it is proposed to be paid in Dalasi at the Central bank rate. This might not be the rate at which the Project Sponsor might be able to convert to dollars in the open market. Further investigation needs to be undertaken as to what the liquidity risk is of non-conversion (i.e. no liquidity).
- d. **Termination and compensation provisions:** A provision for a buyer default termination payment and remedy for termination in favour of the seller. It will also include a definition of a compensation event in favour of the seller where the PPA makes provision for subrogation and step in rights for the lenders and the Guarantor (UNCDF).
- e. **Force majeure and Political Risk:**
 - a. Currently there is no make whole provision for the Seller in the case of Force Majeure, which is normal, but the requirement for Political Risk Insurance will be considered.
 - b. The agreement should excuse the seller from performing its obligations if a force majeure event prevents such performance - currently it just addresses termination
 - c. Force Majeure definition includes
 - i. 'strikes or labour disputes (except strikes or labour disputes by the employees of the Party affected which are not part of a general labour action involving other employers);
 - ii. other judgments, official actions of any governmental authority, the expropriation or nationalization of any assets, the absence, suspension, termination, interruption, denial or failure of renewal of any permit or authorization';
 - d. These should be revisited as buyer events of default in the case of buyer labour action and other governmental action (as the latter is covered in any event in the Giepa Legislation of 2015)

- f. **Governing Law and Arbitration:** This area will be subject to a consideration of legal process in Gambia against bankability by the legal advisors to be appointed. It will be very difficult to receive debt funding on a PPA (in the absence of an implementation agreement) whose governing law is that Gambia, regardless of whether International Arbitration is a backstop. It will also be impossible to fund on an agreement which is subject to the courts of Gambia. This will probably be replaced with England or New York.
- g. **Arbitration and Dispute Resolution:** The form and location of arbitration has recently been addressed in a draft unofficial insertion as the ICC but it is also suggested that a fast track dispute resolution be documented in the PPA. This has become the norm in the bankable PPA agreements elsewhere in Africa
- h. **Testing and commissioning:** A testing and commissioning paragraph is desirable and will include provisions for an early operating period and provision for payments in this period. For example, responsibility after delays in commissioning should be apportioned in a separate paragraph.
- i. **Generation:** Provisions for generation forecasts in the PPA from the Seller to the Buyer will be included.
- j. **Payment and invoicing:** Consideration of use of system charges (Transmission and Distribution) will be included in the agreement.
- k. **Metering:** The testing and verification protocols in the current PPA will be strengthened.
- l. **Transfer of assets** at the end of the PPA