

# Enhancing Investment in Grid- Connected Solar PV in The Gambia

## **Regulatory Assessment**



*Empowered lives.  
Resilient nations.*

For:

United Nations Development Programme (Gambia)

Prepared by:

Climate Mundial Limited

Date:

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## Definitions & Acronyms

Term	Definition
COD	Commercial Operating Date
COP	Conference of the Parties to the UNFCCC
DPP1	Detailed Preparation Phase One
DPP2	Detailed Preparation Phase Two
Financing Concept	The selected method of financing of the Project within this NAMA
GMD	Gambian Dalasi
GTG	Government of The Gambia
HFO	Heavy Fuel Oil
IPP	Independent Power Producer
MRV	Monitoring, Reporting and Verification
NAMA	Nationally Appropriate Mitigation Action
NAWEC	National Water & Electricity Company of The Gambia
NSO	NAMA Support Organisation, being UNDP
PCB	Paris Climate Bond
PPA	Power Purchase Agreement
SPV	Special Purpose Vehicle
The Project	Enhancing Investment in Grid-Connected Solar PV in The Gambia
UNDP	United Nations Development Programme
USD	United States Dollar

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## Executive Summary

Climate Mundial has prepared this assessment as part of its engagement with UNDP for the first Detailed Preparation Phase (DPP1) for the NAMA Enhancing Investment in Grid-Connected Solar PV in The Gambia.

The specific deliverable within the Terms of Reference of the engagement, dated 8 June 2018, is as follows:

*Carry out legal and regulatory due diligence to ensure compliance of the financing structure with local and international rules.*

In order to ensure this is delivered, Sections 2 and 3 of this report are dedicated to describing the Project as well as the Financing Concept. In Section 4 we then define the key legal and regulatory questions with regard to the Financing Concept and address these questions. The Financing Concept has been identified as a means to addressing a number of specific risks faced in implementing the Project. The key risks include, but are not limited to, the following:

- Development and construction risk, including delays and cost overruns
- Sponsor insolvency risk, leading to a credit default
- Remittance risk, including restrictions placed on the availability of foreign currency and/or international transfers of foreign currency by the host state
- Market risk on currency exchange rates
- Delayed payment risk, due to late payment under power purchase agreement
- Delayed payment risk due to power purchase agreement counterpart insolvency
- Delayed payment risk due to project underperformance
- Civil war, insurrection and asset expropriation risks, including actions undertaken by the host country or state authority

The conclusion of our due diligence is that the Financing Concept is broadly feasible, in accordance with relevant rules. At the end of Section 4 we make some recommendations for incorporation into development of the Financing Concept.

It is important to note that this assessment is not designed as a justification of the Financing Concept, nor any decisions taken in its design. It is also not an investigation on legal and regulatory provisions that may affect the aforementioned risks, such as the existence of Bilateral Investment Treaties and/or powers afforded to the Central Bank of The Gambia to restrict flows of foreign currency into and out of the country. Consideration of regulatory parameters and agreements affecting risk will be considered in subsequent stages of DPP1.

Finally, the due diligence included a review of the Central Bank Act 2005. We understand though that a Central Bank (Amendment) Bill 2018 passed the national assembly on Tuesday 31 July 2018<sup>1</sup>. We are in the process of obtaining a copy of the Bill to assess whether any amendments impact our findings.

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<sup>1</sup> Reported on 01/08/2018 at <https://allafrica.com/stories/201808020337.html>

# 1 Introduction

The Gambia is a sovereign state in West Africa that is classified as a Least Developed Country (LDC). Private sector development is a key component of the national approach to the alleviation of poverty. The World Bank reports that economic growth in the country has fallen in recent years following the Ebola crisis, though there is much optimism that the country can recover.

## 1.1 General Investment

As highlighted by UNCTAD's Investment Policy Review in 2017<sup>2</sup>, The Gambia has accordingly adopted a commendably open policy with regard to encouraging both Foreign Direct Investment (FDI) and private sector engagement.<sup>3</sup>

The Gambian Investment and Export Promotion Agency Act of 2015<sup>4</sup> contains specific provisions and incentives for private sector renewable electricity generation projects, where such investments are above USD 250,000.

Notwithstanding, UNCTAD does caution that the Government of The Gambia (GTG) has frequently made interventions in private sector development that have had unintended consequences. This tendency still requires attention.

## 1.2 Electricity Sector Investment

The GTG has developed an Energy Sector Roadmap to promote implementation of a number of key energy policy objectives and to stimulate investment in new electricity generating capacity. There is currently only around 99MW of installed electrical generation capacity in the country, much of which is run using Heavy Fuel Oil (HFO) and often unavailable leading to widespread power outages.

The World Bank has launched an Electricity Restoration and Modernization Project that, in large part, aims to restore financial sustainability to the National Water and Electricity Company (NAWEC). NAWEC's current borrowings are estimated at around USD 220 million, regarded as being largely unsustainable and inevitably requiring restructuring.

One of the ultimate aims of the Electricity Restoration and Modernization Project is to prepare NAWEC over the next two years to be in a ready position to enter into agreements with Independent Power Producers (IPPs): including for renewable energy generation, such that private investment can be encouraged.

This depicts a challenging environment in which to propose a new investment into private sector driven solar photovoltaic investment and is one of the key reasons why the NAMA Facility has chosen to support the Project. It is within this context that the regulatory assessment of the Project investment takes place.

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<sup>2</sup> United Nations Conference on Trade and Development (2017), Investment Policy Review – The Gambia

<sup>3</sup> The World Bank (2018), Gambia Electricity Restoration and Modernization Project

<sup>4</sup> The Gambian Investment and Export Promotion Agency Act, 2015

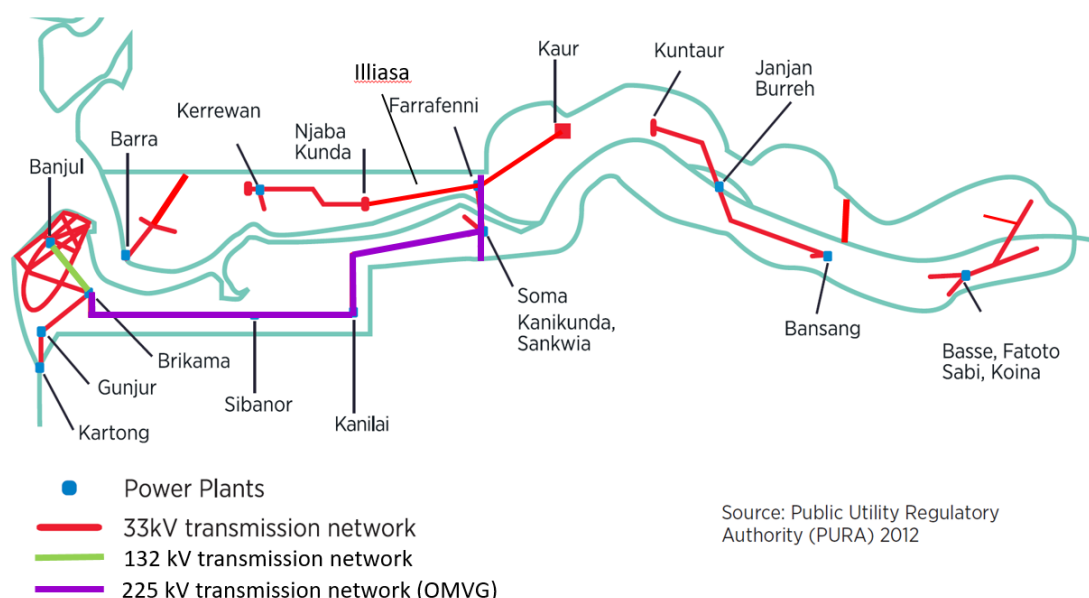
## 2 Key Design Parameters for the NAMA

Crucial to comprehensive legal and regulatory due diligence is definition of the Project. This section provides the key Project elements that influence the due diligence.

### 2.1 About the Project

The Project involves design, construction and operation of 12MW solar PV power plant at up to two sites by a single independent power producer (IPP); on the north and potentially south banks of the Gambia River connected to the grid. Below in Figure 1 is a diagram of the high voltage electricity grid, including funded transmission additions underway and for commissioning by 2020.

Figure 1 - High voltage electricity grid, including funded transmission additions, by 2020



The estimated all-inclusive capital cost of the Project is approximately EUR 25.8 million and will include a 20-year, take-or-pay, Power Purchase agreement (PPA) with NAWEC. While the precise tariff of the Project has not yet been agreed, it is worth noting that, during a meeting with NAWEC as part of a technical mission to The Gambia earlier this year, it was recommended that the final tariff include a component in USD and another component in GMD.

### 2.2 NAWEC Debt Restructuring

As mentioned in Section 1, NAWEC has been suffering from unsustainable debt management for many years. It is currently engaged with the World Bank in a large-scale debt restructuring, which targets NAWEC being in a position to commence entering into PPAs from 2020 and attract private sector participation in the Gambian energy sector. This is generally consistent with the timetable for implementation of the NAMA.

### 2.3 Availability of NAMA resources

The NAMA facility has earmarked up to EUR 10.8 million of grant-equivalent funding to support de-risking the Project to facilitate private sector financing to be leveraged utilising the PCB concept and implementation partners. NAMA funding need not be repaid, though the conditions of the Facility constrain the Project from selling carbon emission units until end of initial five-year support period (NSP).

### 2.4 Independent Power Producers (IPP)

Consultations with reputable international IPPs suggest that there is general awareness of the GTG's work with the World Bank to restructure NAWEC. Accordingly, there is likely to be market interest in bidding on the Project and investing equity, provided that the project can be delivered by a single entity and on a maximum of two sites and Project documentation is well prepared. These consultations suggest that lower than normal loan to value ratios (i.e. equity of more than 50%) may be possible to allow construction financing to be secured.

### 2.5 Additional Considerations

The Project is a major investment initiative for The Gambia. As mentioned earlier, the country currently only has approximately 99MW of installed electrical capacity. Therefore 12 MW increases this by approximately 10%.

The capital cost allowance of EUR 25.8 million is substantial for 12MW (in one project over two sites) based on the falling cost curve for solar PV. This is largely because we had originally thought the 12MW would be used for up to seven individual projects due to constraints on interconnection between regional grids. Notwithstanding, The Gambia remains a challenging environment for a private sector investor to build a solar PV power plant, so allowing for a degree of financial contingency is a prudent course of action.

As and when more concrete estimates for the cost of the Project come in, these figures can be revised, though we are also allowing for an option to increase the Project capacity to 14MW.

### 3 NAMA Financing Concept

In order to address the Project design parameters and take account of the concessional resources nominally available, the Financing Concept is described in this section, below.

#### 3.1 Phase I – Getting to Financial Close

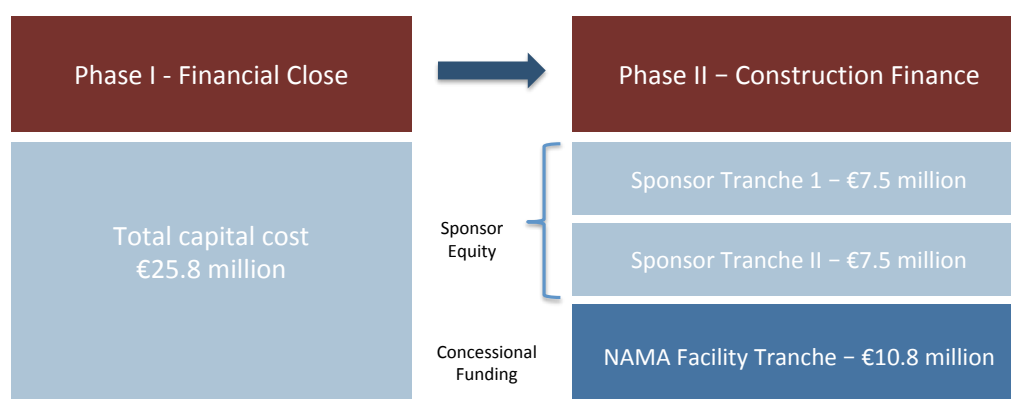
Some NAMA Facility resources are likely to be needed after DPP2 and in the lead-up to financial close in order to prepare IPP bid documentation, draft PPA contracts, grid connection agreements and land-concession agreements, all of which are essential to giving confidence to the IPP market. These expenditures, as well as other critical fees, including the NSO capacity development and workshops and work fees for implementation, shall be through what we call a **NAMA Facility Tranche**, which shall form EUR 10.8 million of the total overall investment estimated at EUR 25.8 million. All-in investment costs, including all fees referred to above, will be included in the financial model delivered in DPP1.

#### 3.2 Phase II - Construction Finance

Construction financing solution shall include two **Sponsor Tranches** of EUR 7.5 million each (i.e. EUR 15 million in total) and the NAMA Facility Tranche of EUR 10.8 million. The aim of construction finance is to provide the IPP sufficient flexibility to share risk with another equity partner and to have access to sufficient resources to ensure the Project can reach commercial operation.

A diagrammatical representation of the transition between Phase I and II is provided in Figure 2.

Figure 2 – Financing Concept transition from Phase I to II



The Sponsor Tranches shall be used to capitalise a Special Purpose Vehicle in the Gambia with limited liability. The NAMA Facility tranche would be placed into a custodial account held in the United Kingdom and will be drawn down by the eventually selected IPP during construction based on pre-agreed milestones.



### 3.3 Phase III - Commercial Operation

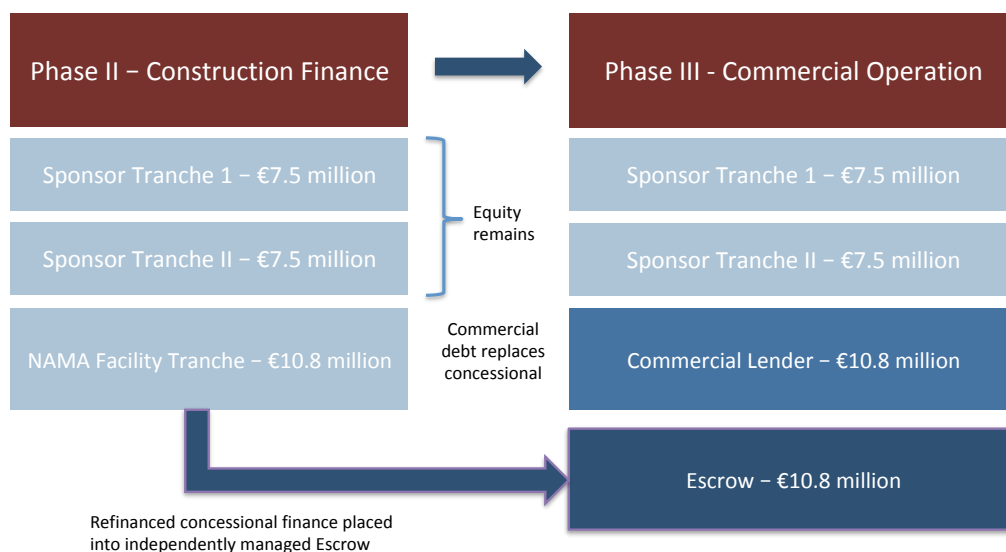
Upon reaching the commercial operation (COD), the **NAMA Facility Tranche** shall be refinanced in its entirety and replaced with international commercial debt. The NAMA Facility Tranche shall then be placed into independently managed Escrow account for the duration of the NSP (“**Escrow**”).

The **Commercial Lender** shall be permitted to access Escrow for defined breaches of undertaking. Circumstances under which the funds can be called shall broadly be defined as instances in which the sponsors default on repayments, where such defaults are due to factors that are outside their direct operational control. For example, a case in which NAWEC breached the PPA by failing to pay would be regarded as one such factor.

Coverage may also extend to political events such as currency conversion or availability events, asset expropriation and/or civil war and insurgency risk. However, these specific risks can also be insured.

If affordable commercial political risk insurance is confirmed as available for the Project, these events will be removed from the schedule of events for which the **Commercial Lender** can call the Escrow funds.

Figure 3 – Financing Concept transition from Phase II to III



The **Commercial Lender** would be based outside the Gambia, most likely in the United Kingdom. The **Escrow** would be held in the United Kingdom as well.

### 3.4 Phase IV - Refinancing

The **Commercial Lender** shall have the option to assign the outstanding loan balance at any time between COD and the end of the NSP to the PCB Investment Vehicle. The option is to provide flexibility and optimise the PCB portfolio.

It shall also have an option to refinance a proportion of the two Sponsor Tranches with PCB debt provided that the Project's *Loan-to-Value* ratio is not lower than 40:60. The PCB Investment Vehicle would be located outside The Gambia, most likely in the United Kingdom.

### 3.5 Additional Considerations

A total of EUR 15 million in sponsor equity is quite a lot for a EUR 25.8 million investment. It does provide significant comfort for lenders that sponsors have a large stake in the long-term operational success of the Project. However, it may cause the eventual tariff to be unnecessarily high. These parameters will therefore remain under review until further, more detailed costing information is obtained.

If, as could be the case at the end or nearing the end of the five-year NSP, the Escrow funds have been unused, they shall be used to invest in scaling-up of the Project or aligned activities to the NAMA to be agreed with stakeholders.

## 4 Regulatory Assessment

There are several key questions that must be answered as part of the due diligences, which are as follows:

Is it possible for one or more foreign investors to establish a limited liability company, constituted in and under the laws of The Gambia and are there any constraints on the payment of dividends to the foreign investors including, but not limited to, remittances in foreign currency and repatriation of funds?

Is it possible for a limited liability company, constituted in and under the laws of The Gambia, to borrow funds from abroad and repay those borrowings?

Do international financial institutions, located in foreign jurisdictions such as the United Kingdom, need a license to lend funds to a limited liability company constituted in and operating under the laws of The Gambia?

Results of the due diligence, including responses to these questions, are provided in the sections below. In completing the sections below, Climate Mundial sought advice from international law firm and PCB partner, Baker & McKenzie.

### 4.1 Establishment of Company in The Gambia with Foreign Investment

*Is it possible for one or more foreign investors to establish a limited liability company, constituted in and under the laws of The Gambia and are there any constraints on the payment of dividends to the foreign investors including, but not limited to, remittances in foreign currency and repatriation of funds?*

Part V of The Gambia Investment and Export Promotion Agency Act of 2015<sup>5</sup> (section 31) specifies that one or more foreign investors may establish and own limited liability companies under the laws of The Gambia.

There is a provision that allows the GTG to take an ownership stake in such companies if its industry of operation is deemed to be strategic, though this is limited to mining and petroleum related investment activities.

Section 5 of the Companies Act, 2013 requires that there should be at least two shareholders in a company. Section 250 of the same Act requires that at least one of the directors shall at all times be ordinarily resident in the Gambia. Therefore, while a company can be wholly-owned by foreign investors, it should have at least two shareholders and at least one director resident in the Gambia.

Under Part VII of the same act, the foreign investors may apply for a Special Investment Certificate (SIC). The purpose of the SIC would be to qualify for investment incentives, the broad categories of which are also defined under the Act.

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<sup>5</sup> The Gambian Investment and Export Promotion Agency Act, 2015

Under Schedule 1 of the Investment and Export Promotion Agency Act of 2015, foreign-owned or controlled companies may transfer funds related to profits and dividends out of The Gambia without limitation, provided the enterprises concerned are operating in accordance with all other rules and regulations applicable, including bankruptcy, criminal charges and and/or other court judgements. The Central Bank of the Gambia does, however, have some powers to restrict foreign currency flows into and out of the country<sup>6</sup>.

## 4.2 External Commercial Borrowing

*Is it possible for a limited liability company, constituted in and under the laws of The Gambia, to borrow funds from abroad and repay those borrowings?*

The Gambia has several pieces of legislation that deal with loans to private enterprises, including those with foreign ownership or control. This includes the Central Bank of The Gambia Act 2005, the Banking Act 2009 (repealing the Financial Institutions Act 2003)<sup>7</sup> and the Gambia Investment and Export Promotion Agency Act of 2015.

External commercial borrowing by private enterprises is permitted, provided that the enterprises concerned are operating in accordance with all other rules and regulations applicable, including bankruptcy, criminal charges and and/or other court judgements. Under Schedule 1 of the Investment and Export Promotion Agency Act of 2015, foreign-owned or controlled companies may transfer funds related to repayments of external commercial loans out of The Gambia without limitation, provided enterprises concerned are operating in accordance with all other rules and regulations applicable.

Finally, the Central Bank (Amendment) Bill 2018 passed the national assembly of The Gambia on Tuesday 31 July 2018<sup>8</sup> and is currently awaiting presidential assent and gazetting. The Central Bank Act 2005 will be repealed by the new act. We are in the process of obtaining a copy of the Bill to assess whether any amendments impact our findings.

## 4.3 Licencing requirements for external commercial lending

*Do international financial institutions, located in foreign jurisdictions such as the United Kingdom, need a license to lend funds to a limited liability company constituted in and under the laws of The Gambia?*

Subject to our review of the new, aforementioned Central Bank of the Gambia Act, the Central Bank does not regulate external commercial lenders (i.e. that do not operate within The Gambia). Regulations and licencing for these activities are therefore applied by the jurisdiction of domicile and operation of the external commercial lender.

<sup>6</sup> Central Bank of The Gambia Act 2005

<sup>7</sup> Banking (The Gambia) Act 2009

<sup>8</sup> Reported on 01/08/2018 at <https://allafrica.com/stories/201808020337.html>

## 4.4 Summary & recommendations

Activities described within the Financing Concept are broadly permissible within the context of international and local rules. In respect of the applicable rules in The Gambia, investment activity of a solar PV plant would qualify for a Special Investment Certificate under the Investment and Export Promotion Agency Act of 2015. Contact has already been established with the Gambian Investment and Export Promotion Agency (Mr Lamin Gaye, Enterprise Support Manager).

Our recommendation is that further consultation be undertaken with the Gambian Investment and Export Promotion Agency, most likely as part of DPP2, with a view to making a future application for a SIC.

We also recommend that the tax and other incentives likely to be obtained as a result of gaining the SIC be considered and taken into account, wherever possible, within the financial model to be completed in subsequent stages of DPP1.

Finally, as noted in Section 4.2, the Central Bank (Amendment) Bill 2018 passed the national assembly of The Gambia on Tuesday 31 July 2018 and is currently awaiting presidential assent and gazetting. The Central Bank Act 2005 will be repealed by the new act. We are in the process of obtaining a copy of the Bill to assess whether any amendments impact our findings.

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