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Sierra Leone: Unlock the Potential for Grid-Connected Solar Power through Private Sector Investment

Gap analysis of legal & regulatory framework for solar IPPs

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**Economic Consulting Associates
ITPEnergised
AGES**

Economic Consulting Associates Limited
41 Lonsdale Road, London NW6 6RA, UK
tel: +44 20 7604 4546, fax: +44 20 7604 4547
www.eca-uk.com

Lead author: Giedrius Sabaliauskas (AGES)

Contributors: Federico Hinrichs, David Williams,
Paul Lewington, David Lockhart (ECA)

Executive Summary

This report is prepared at the request of the Government of Sierra Leone as part of the World-Bank-funded project on *Unlocking the Potential for Grid-Connected Solar Power through Private Sector Investment Sierra Leone*. This report provides the gap analysis of legal and regulatory framework for IPPs with particular focus on grid-connected solar generation. This report builds on the ongoing relevant work of MCC on the Power Sector Roadmap and Coordination Activity and their recommendations made in early 2018.

The report provides an overview of legal framework, with specific focus on grid-connected solar projects and unsolicited proposals (USP); it presents the up-to-date mapping of institutions involved in carrying out such projects; it looks at how the legal framework reviewed in this report is currently applied in practice, highlighting key differences and views of the private sector; also, it explores specific issues raised in this report and previous MCC work, and makes recommendations for tackling them; and finally, the report provides draft recommendations on specific regulations for USP, encompassing the analysis made earlier.

The following most important regulatory issues have been identified. Recommendations for the specific approaches to their mitigation have been recommended in this study:

- ❑ National policy statements on renewable energy generation targets are insufficiently aligned across various documents, lacking emphasis on the medium-sized solar projects, links to firm thermal generation development (hybridization¹) and transmission network developments;
- ❑ Implementation procedures of the Collection Account, established in the Electricity Act amendments in 2018, and its operation rules/manuals are missing; as a result, the Collection account is managed by MOF and there is insufficient payment certainty for IPPs; proper alignment of the Collection Account procedures with the entire PPP selection process will be critical to bankability of all IPPs;
- ❑ EWRC (i) approval procedures of PPAs as provided for in the Electricity Act and (ii) IPP licensing procedures are not in place, or are still there in a provisional regime;
- ❑ Application of the PPP Act and procedures to the IPP process, as opposed to public procurement is not sufficiently clear; especially after adoption of the new Public Procurement Act 2016; more emphasis should be placed on IPP implementation using simplified PPP procedures under the PPP Act, rather than Public Procurement Act 2016, due to significant gaps in order to be applied to the IPP process;

¹ The term 'hybridisation' is often used to indicate the upgrade of existing thermal power stations (diesel, heavy fuel oil, etc.) with the renewable energy production sources (solar, wind). This upgrade allows to reduce carbon footprint of such stations, as well as the reduces various risks associated with fuel procurement, storage and usage, and leads to more competitive electricity production costs.

- ❑ PPP Act procedures provide for quite complex process of approvals and procedures to be efficiently applied for small to medium size IPP projects, and simplified procedures for IPPs are missing;
- ❑ USP framework in the PPP Act provides a good initial USP framework, but needs to be much more detailed in order to be efficiently used for IPPs;
- ❑ Approval procedures for issuing Government guarantees (when relevant) are not aligned with PPP contracting process;
- ❑ Planning for an approving the multiannual financial exposure of the Government is not aligned with the PPP (and IPP) procurement and structuring process, especially as it may relate to the support obligations of the Collection Account;
- ❑ MOF policy or guidance on the sovereign and payment risk mitigation measures that may be available for IPP projects is not developed and unclear;
- ❑ Practical implementation of the import duty, GST and other incentives under Finance Act is not sufficiently coordinated between various institutions involved;
- ❑ The issue of recognition of the foreign arbitration awards on the territory of Sierra Leone through the New York Convention of 1958 remains unsolved;
- ❑ Penalties that may be imposed under Local Content Agency Act for any new IPP, may become a serious deterrent for investment (due to high risk of project cancellation, and size of penalties).

These and other aspects of the regulatory environment are analysed in more detail in this report. It also provides the detailed institutional mapping of the public institutions involved in the IPP process in Sierra Leone with the key emphasis on the need to align their expertise and involvement in various stages early in the IPP process in order to achieve the best quality projects and lowest tariffs.

The study also reviews how the existing practices in structuring IPP projects differ from those provided in the legislation and what improvements to this process are suggested by the private sector actors, with the main emphasis on better coordination of the process between the institutions, adequate demand analysis being conducted, and concerns about sustainability of EDSA payment obligations.

In addition, the study explores in detail several specific issues and gaps identified in this and previous regulatory gap assessments concluded by MCC, analysing the underlying issues behind the USP regulation, public procurement regulation versus PPP regulation, recognition of international arbitration awards and applicable law. All of these issues are presented in more detail in order for the GoSL to take informed decisions on the possible ways forward.

Finally, this study provides a draft structure and sample clauses with the key considerations in relation to the USP process, that could be regulated by the IPP Regulations. This work goes beyond the rapid legal and regulatory gaps assessment envisioned in the Terms of Reference of this assignment, however, we believe it was

important for us to contribute this section in an effort to show examples of how some of the recommendations of this report can be applied in practice. These draft clauses and considerations for USP Regulations will of course require much more work and cross-institutional consultations, but it may be a good basis to initiate substantial discussions on the ways to improve development of the grid-connected solar IPPs in Sierra Leone.

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Abbreviations and acronyms

AG/MOJ	Office of the Attorney General and Ministry of Justice
BOSL	Bank of Sierra Leone (also BoSL)
CA	Connection Agreement
CLSG	Interconnector for Cote d’Ivoire, Liberia, Sierra Leone and Guinea
ECA	Economic Consulting Associates
ECOWAS	Economic Community of West African States
ECREEE	ECOWAS Centre for Renewable Energy and Energy Efficiency
EDSA	Electricity Distribution and Supply Authority
EGTC	Electricity Generation and Transmission Company
EOI	Expression of Interest
EPA	Environment Protection Agency
EPC	Engineering, Procurement and Construction
EREP	ECOWAS Renewable Energy Policy
ERERA	ECOWAS Regional Electricity Regulatory Authority
ESRR	Electricity Sector Reform Roadmap
ESRR AP	Electricity Sector Reform Roadmap Action Plan
EWRC	Electricity and Water Regulatory Commission (also SLEWRC)
FIT	Feed-in Tariff
GOSL	Government of Sierra Leone (also GoSL)
GST	Goods and Service Tax
IA	Implementation Agreement
IEC	International Electrotechnical Commission
IPP	Independent Power Producer
IRP	Integrated Resource Plan and Tariff Study
ITPE	ITPEnergised
LCA	Local Content Agency
MCC	Millennium Challenge Corporation
MLHE	Ministry of Lands, Housing and the Environment
MOE	Ministry of Energy
MOJ	Ministry of Justice
MOU	Memorandum of Understanding
MOF	Ministry of Finance
MOPED	Ministry of Planning and Economic Development
MW	Megawatt
NPA	National Power Authority

NPPA	National Public Procurement Agency
NRA	National Revenue Authority
NREAP	National Renewable Energy Action Plan
OPII	Office of the President Infrastructure Initiative
PPA	Power Purchase Agreement
PPIAF	Public-Private Infrastructure Advisory Facility
PPP	Public Private Partnership
PPPU	Public Private Partnership Unit
PV	[Solar] Photo-Voltaic
REASL	Renewable Energy Association of Sierra Leone
SLEWRC	Sierra Leone Electricity and Water Regulatory Commission (also EWRC)
USP	Unsolicited Proposals
WAPP	West Africa Power Pool
WB	World Bank

1 Introduction

1.1 Report scope

Background of the project: Unlocking the Potential for Grid-Connected Solar Power through Private Sector Investment

The Government of Sierra Leone (GoSL) recognises that the country is endowed with a significant solar energy resource. This potential however remains largely untapped. The government intends to let the private sector lead the development of the generation segment, expecting that blended finance could apply (e.g. private capital and concessional or soft loans). In terms of solar PV, several MOUs with the government have been signed but no sizable projects have been implemented.

At the request of GoSL, the World Bank with funding support of PPIAF, is supporting the government to carry out the needed analysis, develop the framework and standard documents, and enhance the capacity of the stakeholders that will help unlock the potential for grid-connected solar power through private sector investment and provide a sound basis for scaling-up on a fast track deployment of solar power technologies in Sierra Leone.

A consortium of Economic Consulting Associates (ECA), ITP Energised (ITPE) and Africa Growth & Energy Solutions (AGES) was selected to undertake the assignment. The project commenced in February 2019 and is planned to conclude by the end of the year.

Objectives of the project

The objectives of this project are to conduct the needed analysis and build capacity that will help address the constraints to private sector investment to unlock the country's potential and provide a firm basis for the scaling-up of the deployment of solar energy by the private sector in Sierra Leone.

The scope of work for the assignment will focus on pipeline project screening, document preparation, knowledge and experiences sharing and capacity building for local stakeholders. The specific tasks include:

- ❑ Grid-connected solar power project screening and development
- ❑ Gap analysis of legal and regulatory framework to improve the PPP enabling environment in power generation
- ❑ Development of standard procurement and implementation documents
- ❑ Stakeholder capacity building

Objectives of this Report

In this report, the Consultant carries out an assessment of the PPP enabling environment with particular focus on the legal, institutional and regulatory elements, and their application on the ground to identify binding constraints for PPP in the solar power generation segment. A draft version was shared with the World Bank (WB) and discussed with the Ministry of Energy (MOE) and a wide range of other public and private sector stakeholders during the training workshop that took place in Freetown, on the 6th June 2019. Please refer Annex 0 for the workshop Agenda and Attendance list.

It is important to note that this report builds on the previous work already done in this area, in particular the work of MCC under the Electricity Sector Reform Project, including their *Review of legal framework for electricity generation in Sierra Leone and institutional analysis*.² While MCC work provided a comprehensive analysis of the existing regulation in the power sector and identified important legal gaps and inconsistencies between the legislation, this report will focus on taking this work a step further by analysing in more detail key specific regulatory aspects identified by MCC (like the choice of law or arbitration regulation).

Also, this report will map-out and analyse the existing practices of IPP contracting, which was not extensively covered by MCC, and will provide more practical steps that could be required for materializing projects and accelerate market delivery of solar power plants in the specific regulatory and institutional context of Sierra Leone.

1.2 Report structure

The structure of this report is as follows:

- ❑ **Section 2** provides an **overview of policies, strategies, laws and regulations currently in place** to provide a comprehensive context to the IPP framework and building on the previous assessments, identifies some additional weaknesses and gaps inhibiting private sector investment in the IPP field;
- ❑ Section 3 presents mapping of institutions involved in carrying out PPP transactions and analysis of their functions and roles;
- ❑ Section 4 provides analysis of how the framework introduced in Section 2 applies to solar IPPs in practice
- ❑ **Section 5** explores the specific issues/gaps raised in Section 2 and makes **recommendations** for tackling them, with reference to international best practice. It also summarises the report and identifies key IPP regulatory constraints and provides recommendations for the proposed improvements.

² Power Sector Roadmap and Coordination Activity Reports: “Process for the solicitation of IPPs - Task 4.1”, and its Appendix 2 - Review of legal framework for electricity generation in Sierra Leone; “Draft IPP Framework - Task 4.5”; “IPP Training Workshop Report - Task 4.7”, Adam Smith International, Jan-Apr 2018.

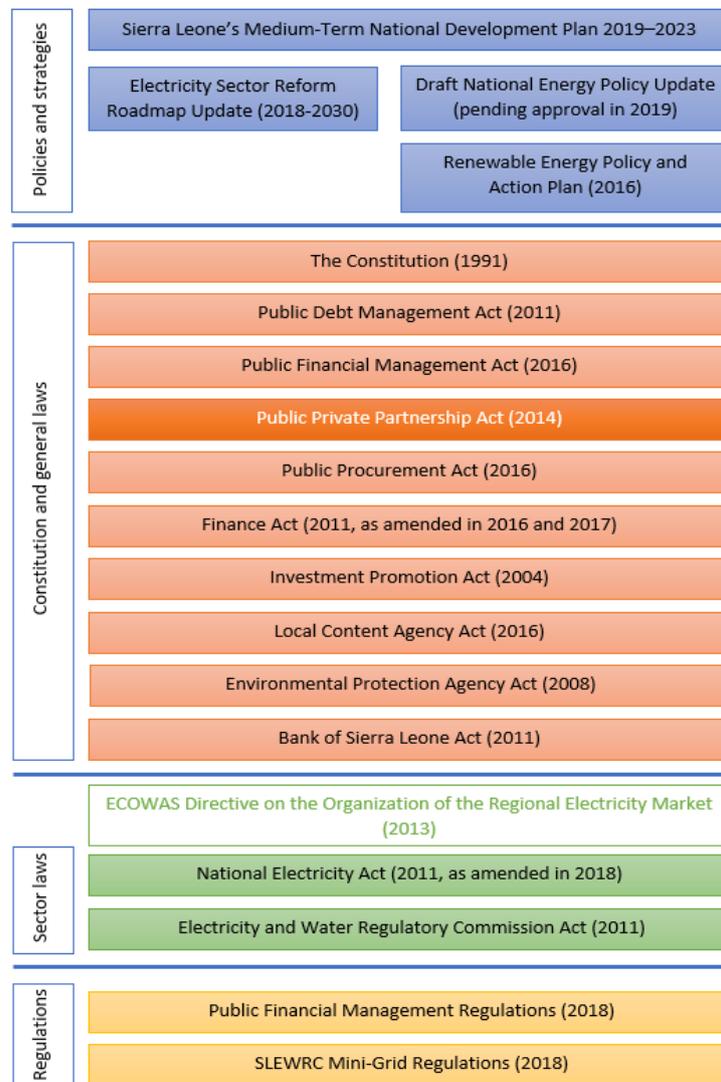
2 Overview of Sierra Leone’s legal & regulatory framework for the development of solar IPPs

This section will focus on Sierra Leone’s regulatory environment on PPP that has the most impact on the development, selection and delivery of IPP projects, with focus on solar PV.

Substantial analysis about this subject has already carried out by MCC in early 2018³. Therefore, this section provides (i) a rapid and systematic overview of the legal system related to PPPs, with a focus on solar IPPs; and (ii) additional insights that build on the analysis of MCC and will be useful in further improving regulatory environment.

The system of main policies, laws and regulations reviewed is illustrated below.

Figure 1 Key policies, laws and regulations relating to IPPs in Sierra Leone



³ Please refer to Power Sector Roadmap and Coordination Activity Report “Process for the solicitation of IPPs - Task 4.1”, Appendix 2, Jan 2018, Adam Smith International on behalf of MCC.

2.1 Strategies and policies

There are several important policy and strategy level documents that govern the energy sector in Sierra Leone, that are directly or indirectly touching on the matters relevant to solar IPPs.

2.1.1 Medium-Term National Development Plan 2019–2023

This is one of the key documents on the overall national development strategy of Sierra Leone, including, among other areas – the energy and solar generation sector. It is a recent document, indicating the actual strategic direction of the Government with clear targets and policy actions. Although some of the information and targets of this strategy document could be clearer or better aligned with the other policy documents, nevertheless it is a nationally-driven strategy that has the most significant political buy-in from all the political levels of governance and it serves as a good platform for more detailed dialogue on the sector-level strategies and action plans.

According to the Plan, the key targets to be reached by 2023, which are relevant for solar IPPs, are:

- ❑ Restore electricity in all district headquarters and cities.
- ❑ Increase installed electric capacity from the current 100MW to 350MW;
- ❑ increase the country's capacity for renewable energy (solar and hydro) contribution to 65 percent;
- ❑ 20 villages and 8 towns in each district connected to the national grid or off-grid standalone schemes.

The figures above are quite general and may be subject to a more detailed scrutiny in relation to their exact meaning or alignment to previous studies. However, they still give a good idea to the informed investor on the possible renewable energy market in Sierra Leone, its depth and possible development trend in the short to medium term.

We note that this Plan does not send a clear signal on the preferred mode of delivering energy capacity – public or private, but from the context of Sierra Leone and looking into the existing power sector developments, combined with the lack of financial capacity of the public sector, it is quite clear that these targets should be driven mainly by the IPPs, together with significant donor support.

What message this strategy does send though, is that in order to reach financial close and construct the desired projects by 2023, in the immediate months of 2019 and 2020 the need for contracting viable solar and hydro (or other renewable) projects across the country could be in the range of **200-250MW** (65% of 350MW).⁴

⁴ Interestingly, one of the hydro projects in the pipeline – Bumbuna II alone was estimated to bring up to 250MW of hydro power, but it is yet unknown when this project will reach Financial Close and COD.

In addition, this renewable energy target raises some questions on its linkage with the conventional thermal generation plans. The intermittent nature of generation from renewable sources (including solar) would have to be well coordinated with the parallel development of the firm capacity on the grid. The Development Plan, however, does not elaborate on this aspect.

2.1.2 Electricity Sector Reform Roadmap Update (2018-2030)

Another key energy sector strategy document is **Electricity Sector Reform Roadmap Update (2018-2030)** of 30th October 2018 (ESRR). This is also a recent document that updates a previous Electricity Sector Reform Roadmap of 2017-2030, released in September 2017. The updated strategy is aimed at accelerating the implementation of a radical electricity sector recovery plan by turning sector policy, legal and institutional framework into concrete actions. It was prepared with the help of MCC, for the use of the MOE.

ESRR systematically and comprehensively targets the most important elements of the entire electricity sector reform, including:

- ❑ strategic electricity sector planning;
- ❑ defined procurement framework, **specifically mentioning FIT for small projects, and the possibility of a USP approach for larger projects;**
- ❑ improving sector financial sustainability, including establishment of the sector-wide Collection Account⁵ and cost reflective tariffs;
- ❑ strengthening the institutional capacity of the regulator - EWRC;
- ❑ promotion of the mini-grids and off-grid solutions.

Some of the key measures of the ESRR include:

- ❑ The MOE to issue procurement framework guidelines that map the unsolicited and solicited process. Most likely the unsolicited procurement process would cover the small scale IPPs (less than 3-5 MW) with a feed-in tariff policy, and the large scale IPPs (more than 50 MW) with a preferred bidder approach. Between 3-5 MW and 50 MW a solicited consultation process is the preferred approach, but also does not exclude unsolicited projects;
- ❑ The development of procurement contract/concession for power generation including (i) a single concession agreement with off-grid concessionaire for towns over 20,000 inhabitants (with transfer of public assets owned by public utilities), (ii) a single PPP contractor for towns below 20,000 inhabitants, (iii)

⁵ Collection account established in accordance with the Electricity Act amendment of 2018 and is an instrument for the receipt, administration and distribution of all revenue collected by EDSA from customers; collection account receives all payments of customers and ensures the payment of creditors within the supply chain according to a waterfall payment priority.

the outsourcing from EDSA to private operators for the cities of Freetown and Lungi;

- ❑ The division of the electricity supply market into (i) an on-grid centralized market and a (ii) decentralized off-grid market, allowing the distribution of licenses for the isolated mini-grid and off-grid market;
- ❑ The implementation of a policy to develop low-cost RE capacity by private investments, which seeks to update existing RE-related policies and regulation, namely the Energy Policy of 2009, the Policy Letter of 2016, the Renewable Energy Policy of 2015;
- ❑ The goal to reach financial viability by (i) creating a single EDSA collection account (financed by tax/levy from tariffs and providing subsidy; that it, the Collection Account that has been established), (ii) commissioning of new generation and distribution capacity, (iii) introducing short-term fuel tax exemption for thermal generation and (iv) long-term tariff restructuring measures.

ESRR is critical for the entire energy sector development and its long-term sustainability, it also provides general direction in relation to specific technologies like solar energy. Also, it places stronger emphasis on the small, up to 3-5 MW projects with the recommendation for them to be built under FIT regulations, and also off-grid mini-grid installations.

For the context of this study the following policy formulations of the ESRR relating to solar are important:

- ❑ The MOE will detail a **feed-in tariff policy** that will specify maximum feed-in tariffs for specific technologies (hydro, solar PV, solar thermal, wind, biogas, biomass, marine) and different capacity ranges between 500 kW (minimum capacity) and 3-5 MW (maximum capacity yet to be decided) and the connection modality (on grid / off grid).
- ❑ In any case, the price should never be above the long-term marginal generation cost of the grid as proposed by EWRC (using the Integrated Resource Planning) and decided by the MOE;
- ❑ A premium may be granted for firm capacity supply (possibly on specific time bands) against a penalty for defaulting;
- ❑ There will be a cap on the maximum intermittent capacity that may be connected to the grid in order to comply with the capacity limit of the national grid for absorbing intermittent generation (linked to the thermal generation capacity under automatic control of the frequency of the network).

These policy statements provide a good start and guidance on the strategic approach for solar (and other renewable) generation in the country, but it should be expanded and detailed in the upcoming regulations or policy documents. For example, ESRR measure on development of procurement contract/concession for power generation could be clearer in defining suggested forms of the documents (concession, vs PPP agreement, vs outsourcing) and reasoning behind it. Also, it would be good to detail further the above-

mentioned provision of ESRR on FIT tariff cap in relation to the long-term marginal generation cost: in some cases, small solar would have some benefits of the avoided network expenditure costs which are typically also accounted for in setting up the FIT tariff cap.

We understand that the following key actions of ESRR, relevant to legal framework of IPPs have already been implemented or are nearing implementation:

- ❑ Establishment of the sector collection account commenced through the amendments adopted in the Electricity Act in 2018.
- ❑ Draft IPP Framework prepared in 2018, providing guidelines and considerations on the potential approaches to IPP procurement via tender and USP; elaboration of the proposals indicated in the framework would be needed into the specific legal instruments (IPP Regulations).
- ❑ Draft contract templates have been also prepared and would have to be adapted to specific technologies and tender specifics by the transaction advisers.
- ❑ Mini-grid regulations have been drafted and adopted by EWRC, but are still pending approval by the Parliament through MOJ.

Bearing in mind the tight timelines to achieve the targets in the National Development Plan to 2023, the remaining important policy recommendations of ESRR should be translated into practical regulations by the Government as soon as possible.

2.1.3 Sierra Leone Energy policy

The third important strategic document relevant to the IPP regulatory framework is **Sierra Leone energy policy**. It was adopted in 2009 and now nearing a complete review and update in 2019. While the initial document of 2009 only modestly addressed renewable energy aspects, the latest draft of 2019 makes more specific policy statements. Some of the key relevant provisions include the following:

- ❑ GOSL will formulate statutory instruments to implement the renewable energy policy (e.g. feed-in-tariff regulation in order to encourage developers of small-scale renewable energy projects to feed power into the national or local grid).
- ❑ GOSL will promote the implementation of sustainable renewable energy through the establishment of appropriate financial and fiscal instruments including public-private partnerships (PPPs) schemes.
- ❑ GOSL will remove barriers hampering the effective development, implementation and dissemination of renewable energy technologies.

Also, the draft Energy Policy estimates that Solar PV generation capacity in Sierra Leone is expected to start at **31 MW in 2020** and increase to **156 MW by 2023**.

2.1.4 Renewable Energy Policy

With regards to specific renewable energy-specific policies, the **Renewable Energy Policy of 2016** marks the initial steps of aligning national plans with the regional Renewable Energy Policy (EREP) of the ECOWAS. It also mandates the implementation of the **National Renewable Energy Action Plan (NREAP)**.

The NREAP for the period 2015-2020/2030 establishes targets for the development of renewables (see Table 1) and specific needs of the electricity sector in the context of the on-going electricity reforms and public private partnership (PPP) policies. In this regard, among the objectives of the NREAP is to promote investments and development of the renewable energy sector, with substantial PPP projects.

Table 1 Target capacity for grid-connected renewables

Targets	2010	2020	2030
Total installed capacity (MW)	97	1,260	1,882
Total renewable energy capacity (MW)	56	659	1,229
Solar PV (MW)	0	73	95
Fraction of solar PV capacity on total capacity	0%	6%	5%

Source: NREAP, 2015

What is evident from the estimates in the NREAP and other strategic documents mentioned above is that the **estimated solar (and renewable energy) capacity numbers vary quite significantly** – both in terms of absolute figures and their % levels – in the total mix of electricity; the NREAP targets are much lower. Hence, the review of this policy and action plan would be beneficial to better align it with the other policy and strategy documents mentioned above.

2.1.5 Key observations on policies

Despite some inconsistencies, there are quite clear general trends and directions that could be distilled from the policy-level documents (including their drafts that are nearing adoption) on solar IPPs:

- ❑ **The Government, through the ESRR is recognizing the key underlying factors for successful energy reform, such as sector unbundling and capacitating, independent regulator, financial sustainability and clarity of procurement procedures;**
- ❑ **National policies and strategies have strong focus on and commitment to renewable energy generation in the short and long term, with the estimated targets of renewable generation capacity in the range of 200-250 MW by 2023.**
- ❑ **The share of solar in the renewable target mix (as well its delivery mode) is not very clear and due to the intermittent nature of such generation, its relationship to the firm capacity available on the grid must be well understood and recognized; coordination and alignment between the firm**

and intermittent capacity development (including potential impact of the CLSG line) are not yet elaborated;

- ❑ The Government encourages private sector-driven renewable generation through PPPs and other innovative financial and fiscal instruments; FITs are considered as one of the preferred modalities for small 0.5 MW to 3-5 MW solar installations, while larger projects are left for the tenders or USP process, with little further elaboration.

2.2 Laws and regulations

2.2.1 Energy-sector legislation

National Electricity Act 2011 (and Amendment of 2018)

The primary law regulating energy sector in Sierra Leone is the National Electricity Act 2011 ("Electricity Act"). This Act incorporates EGTC and establishes EDSA, both of which started operations in 2015. It also sets the legal provisions under which those entities are governed, managed, functioning and are funded. EDSA's (Disco) role being distribution and sales of electricity purchased from EGTC (Transco and Genco) and from IPPs.

Electricity Act also defines the IPPs: they are public or private entities, or public and private partnership entities other than EGTC, licensed by the EWRC to connect to the national electricity grid for the purpose of producing and selling electricity.

The Act also indicates that EDSA shall purchase electricity from EGTC and IPPs, and that IPP shall sell electricity to EDSA, subject to PPA approved by EWRC.⁶ Up until recent changes in 2018, this provision and its prevailing interpretation prevented IPPs from selling power directly to the large commercial customers and all sales had to be done only with EDSA. However, following the recommendations of ESRR the Electricity Act was amended in 2018 with the objective to improve the efficiencies of EDSA and EGTC. The Amendment provided for the creation of revenue collection accounts by EDSA and EGTC, enabled the operation of EGTC and EDSA assets by the third parties and the establishment of a class of eligible customers that may be able to directly purchase electricity from EGTC and other IPPs.

These amendments effectively opened the possibilities for some exceptions from the single-buyer electricity market model, subject to special Regulations issues by MOE (that are yet to be passed).

Under ESRR it is envisaged that GoSL in the long run (after 2025) will implement a variety of additional legal reforms, including EGTC being split into a transmission company and a generation company, change of the single buyer model arrangement into a completely decentralized market, etc. When this reform is fully implemented the existing Act will be replaced with the new act.

⁶ Electricity Act 2011, Sections 35 and 52(a)

It is noteworthy that the Act (since its enactment in 2011) established the Energy Asset Unit within Ministry of Energy “to manage all government energy facilities”.⁷ However, no more details as to the meaning or practical implementation of this function are provided in the Act or any regulations. We understand, that this Unit has been dismantled in the MOE, but left behind some unfinished processes in relation to the completion of the unbundling of the National Power Authority (NPA) and other work.

Key features and observation in relation to the Electricity Act (as amended in 2018) relevant to IPPs are:

- ❑ **The Act unbundles the public electricity utility into EDSA and EGTC, with the prevailing single-buyer model (and some exceptions to this model for the eligible customers);**
- ❑ **The Act explicitly recognizes IPPs as the mode of generation delivery;**
- ❑ **The role of EGTC in the Act is also not sufficiently clear: on one hand EGTC acts in accordance with the Act as public company, and on the other hand EGTC acts as IPP and competes with other IPPs;**
- ❑ **It establishes the sector-wide electricity sales Collection Account, to improve financial creditworthiness of EDSA and the sector;**
- ❑ **Introduces exceptions from the single-buyer model (eligible customers, that are not existing customers of EDSA, that may be allowed to purchase electricity directly from IPPs, subject to Ministry regulations, that are not yet in place);**
- ❑ **The Act establishes the important role of EWRC in the energy sector, including its authority to (a) approve PPAs and (b) license IPPs;**
- ❑ **The Act provides the possibility for EGTC and EDSA to outsource management and operation of its decentralised assets (mainly - thermal generators, that could be easily hybridized given the right contractual arrangements);**

Electricity and Water Regulatory Commission Act (2011)

This Act was enacted in 2014 and came into actual implementation in 2015, coinciding with the establishment of EDSA and EGTC. The EWRC Act details the composition of the Commission, appointment of its commissioners and management, licencing obligations and EWRC rights and functions.

The Act establishes EWRC regulatory authority, its independence in the electricity and water sector, and provides rules in relation to the monitoring and oversight of public utilities and other regulated suppliers.

The Act, however, is not very clear when detailing EWRC's functions in relation to the privately-operated energy and water providers. On one hand EWRC is given a clear mandate to license such private providers, which is reasonable (no person shall sell,

⁷ Electricity Act, 2011, Section 54(b)

provide, arrange, or otherwise supply access to electricity and water services; construct, install, or operate any facility for the sale, provision or supply of electricity and water services; engage in the business of transmission, wholesale supply, distribution or sale of electricity, water, or related products, unless that person holds a licence granted by EWRC⁸.

However, at the same time EWRC is also given quite strong powers to intervene in the daily operations of such service providers that would be more appropriate only for the public utility monopolies like EDSA or EGTC, e.g. EWRC has the right to issue written directives to utilities to incorporate technological advancements that may result in improved service delivery. Since IPPs are typically structured so that operational, efficiency and similar risks are transferred to the private partner, it would be unusual for EWRC to intervene or regulate IPPs in the same manner as for public entities.

For example, the Act empowers EWRC to “set or otherwise determine rates for the electricity and water services, as well as carry out regular reviews of rates and charges for regulated and unregulated services.”⁹ It is not clear such provision may be used by EWRC to review the agreed PPA tariff after some time of power plant operation. In practice this provision should be implemented in such a way that EWRC should be mandated by the licensee (IPP) first (in the PPA) in order to review tariff within certain restrictions and clear rules.

These and other similar provisions would benefit from some better clarity that could be easily provided by the Regulations. They would create more stability and predictability in interpretation of the EWRC powers and limits to intervene in the IPP operations after the commencement of the project.

To our knowledge, up to date, the only relevant regulation that has been adopted by EWRC are Mini-Grid Regulations (2018).

The following observations are important in relation to this Act, in the context of solar IPP development:

- ❑ **The Act provides a good initial legal framework for EWRC to carry out sector regulatory functions and issue relevant licenses;**
- ❑ **The Act is silent on many typical functions of the regulator and also the ones found in other Acts, like PPA approval functions, functions in relation to electricity grid code (approval, monitoring, etc), solving disputes between the market players, market monitoring, etc.**
- ❑ **Also, the Act is not very clear in terms of limits of interventions into the operations of IPPs that have long-term PPAs, as opposed to the ones that act without them (for example EGTC, or private IPPs that act only based on license); if current EWRC powers in the Act are interpreted too widely, they may disrupt the PPA arrangements and their bankability; therefore, the Act would benefit from clearer distinction of powers and approval procedures towards the IPPs (public or private entities) that do not have any long-term**

⁸ Section 29(1) of the EWRC Act.

⁹ Section 11 of the EWRC Act.

PPAs and those IPPs that have signed PPAs and obtained approval from EWRC (such clarification could potentially be done in a form Regulations).

2.2.2 PPP-related legislation

Public Private Partnership Act 2014

This Act was enacted to promote, facilitate and streamline conclusion and implementation of all public private partnership agreements by all contracting authorities (Ministries, public agencies, etc) in the country. The PPP Act defines the PPP agreement and establishes a Public Private Partnership Unit, an agency under the Office of the President. It further defines functions of other institutions involved in the PPP process, as well as provides for the detailed procurement procedures (tender and unsolicited) of the PPP projects.

It should be noted the PPP Act does not provide a separate definition of the IPP, although most IPPs will fall under the generic PPP definition provided by the Act. Nevertheless, since electricity sector laws are using IPP definition extensively, it would be useful to have a unified view (in a form of regulation, policy document or amendment to laws) to clarify cross-references between these definitions.

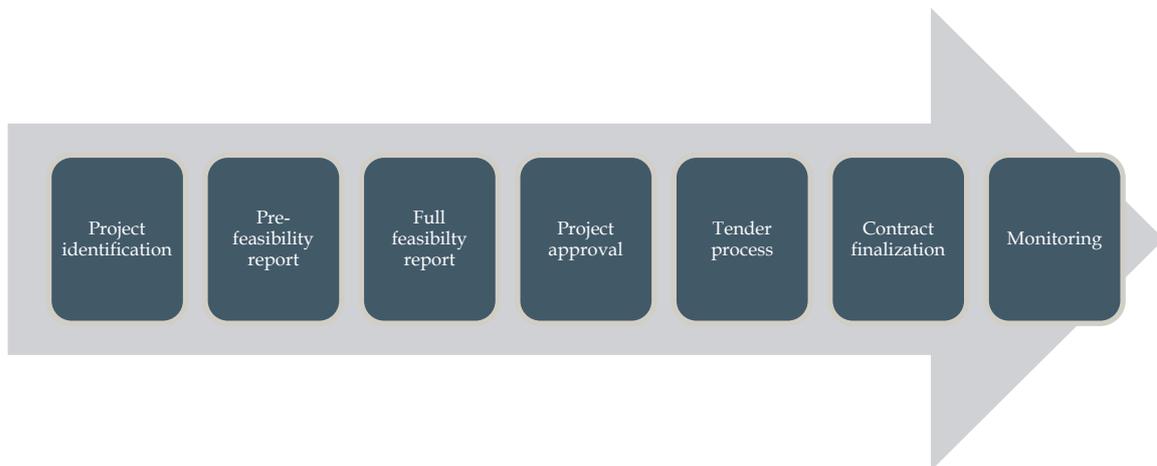
The PPP Act is a rather complex and lengthy document, that defines, and balances the functions and roles of numerous key stakeholders and authorities involved in the PPP process:

- ❑ **the President** – may determine certain projects to be priority PPP projects;
- ❑ **the Parliament** – ratifies all PPP agreements;
- ❑ **the Cabinet** – takes approval decisions during the main stages of the PPP structuring and approves simplified guidelines for smaller PPP projects;
- ❑ **PPP Unit** – reviews PPP feasibility studies, coordinates PPP procurement, evaluation and structuring process of among institutions and processes all unsolicited PPP proposals;
- ❑ **Minister of Finance** – provides recommendations on PPP projects and their feasibility to the Cabinet and makes PPP-related regulations;
- ❑ **Contracting Authorities (sector Ministries, etc)** – take the lead in structuring and managing all PPP stages;
- ❑ **National Procurement Authority** – monitors PPP procurement procedures for transparency and compliance;
- ❑ **Sector regulator** – monitors PPP implementation process.

The PPP Act describes in detail various phases of PPPs: from identification, procurement, finalization to implementation. These include a single phase or two-phase bidding procedure, as well as cases when unsolicited PPP Agreements may be negotiated directly.

The GoSL-initiated competitive PPP process according to the PPP Act is illustrated below.

Figure 2 GoSL initiated PPP Tender process under PPP Act, 2014.



Although this procedure generally corresponds to the best international PPP procurement practice, it may require substantial funding, institutional capacity to manage the process and significant time to complete it.

Therefore, development of IPP projects, and especially solar PV would benefit from more simplified and adapted procedures that could be enacted by the Regulations under the PPP Act.¹⁰ Such Regulations could differentiate between different procedures of project preparation of smaller projects with less requirements for Cabinet approvals and project feasibility preparation and approval steps. Please refer to Annex A1 of this report on more details on such Regulations.

Finally, one of the aspects to note in the PPP Act is the enforceability of the PPP Agreements if they are approved and entered into without following the procedures prescribed in in Parts VI and VII of the Act (these Parts provide for the detailed Cabinet approval procurement procedures, including the USP). The Act explicitly indicated that, if a contracting authority enters into a PPP Agreement with a private partner without having received the required approval from Cabinet, as set out in Parts VI and VII the PPP Agreement shall be null and void and unenforceable as against either the contracting authority or the private partner.¹¹

This provision may cause some issues during the lender's due diligence process of the PPAs, in cases when the PPAs are negotiated, approved and signed without strictly adhering to the procedures of the above-mentioned Parts VI and VII of the Act. Although these parts provide some flexibility in the form of Cabinet approvals, they still provide for quite specific process to follow in terms of feasibilities, public notices and market tests. These uncertainties could also be resolved by more detailed IPP or USP Regulations that would provide some derogations from the cumbersome aspects of the PPP Act.

¹⁰ For example, similar PPP Regulations can be found in Kenya (The Public Private Partnership Regulations of 19th December 2014); less elaborate, but also relevant provisions could be found in the Public Partnership Regulations of Tanzania (3rd June, 2011), etc.

¹¹ Section 64, PPP Act 2014

A more detailed and specific analysis of the USP procedures of the PPP Act, is done under Section 5 of this report.

In summary, the PPP Act provisions deliver the following important aspects for IPP development:

- ❑ **The Act provides for a detailed, yet quite a complex framework for the PPP procurement and structuring;**
- ❑ **It does not directly reference PPAs and IPPs, but many PPAs (especially with BOT, or Rehabilitate-Operate-Transfer structures) would fall under this law and generic PPP definition;**
- ❑ **The Act provides the Cabinet and the Minister of Finance with the right to pass simplified regulations for certain PPP projects; such regulations could be used for IPPs, to better respond to sector specifics;**
- ❑ **the Act defines important balance of functions of all key institutions involved in the PPP process from the Parliament to sector Ministries and other agencies; yet for efficiency purposes these functions could be better aligned and tailored to the IPP specifics in the IPP Regulations;**
- ❑ **the Act provides for the USP framework that generally follows international practice and recommendations; combined with the discussion points recommended in the IPP Framework drafted by MCC, this should be further detailed into the full IPP or USP-specific regulations to fast-track the process;**
- ❑ **There is still a significant overlap between the PPP Act and Public Procurement Act 2016 in relation to PPPs in general and PPAs in particular: the PPP Act makes references only to the old Public Procurement Act 2004 and after passing the new Public Procurement Act 2016 - most such references became unclear or obsolete - new Public Procurement Act 2016 is completely silent on PPPs, and this may cause confusion in interpretation as to its applicability; this aspect should be clarified by Regulations and amendments to both acts.**

Public Procurement Act 2016

This Act is meant to make provision for the continuance in existence of the National Public Procurement Authority, to further regulate and harmonise public procurement processes in the public service, to decentralize public procurement to procuring entities, to promote economic and to provide for other related matters.

The most important aspect of this Act is its applicability to IPPs and more importantly to electricity purchase. The Act indicates that it is applicable to the procurement of goods, works and services by public bodies or organizations. And the goods under the Act are also defined as “objects of every kind and description, including commodities, raw materials, products and equipment, and objects in solid, liquid or gaseous form, **and electricity**, as well as services incidental to the supply of the goods, if the value of those

incidental services does not exceed that of the goods themselves".¹² The mentioning of electricity under the definition of the goods may become problematic in determining which Act should be applicable to IPPs – the Public Procurement Act or PPP Act. This aspect again should be resolved by additional legislation or Regulations.

In most cases PPA transactions are more complex than simple procurement of goods and adapting the public procurement rules to PPAs may be more difficult than adaptation of the PPP rules for PPAs. For the smaller electricity generation projects (3-5MW) PPA structuring under the public procurement rules may be possible, in certain cases, however larger projects (above 5MW) may be more complex. Public procurement typically deals with 3 rather distinct categories of purchases: goods, works and services. PPAs will be dealing with a special category of goods (electricity), that will require significant adaptation and in addition may involve more elements, that may be hard to fit-into the public procurement framework. For example:

- ❑ standard procurement procedures may be difficult to adapt to the build-operate-transfer (BOT) or rehabilitate-operate-transfer (ROT) structures that are quite often used in case of PPAs for larger solar plants;
- ❑ the question of building and owning the interconnection facilities needs to be adapted;
- ❑ also, numerous times after reaching commercial close of PPAs, a second stage of negotiation or PPA tailoring will be involved following the lender's due diligence in order to reach the financial close.

Please also refer to Section 5 of this report for a more detailed analysis of the choice of applicable law for IPPs between the PPP Act and Public Procurement Act.

The following aspects in relation to the Public Procurement Act should be noted:

- ❑ **The new version of the Act does not contain the provision of its previous version explicitly excluding PPPs from its purview; although the context and some provisions of the PPP Act still maintains the separation of these two concepts and limits NPPA to only a monitoring function; the uncertainty created by the new Act may lead to unnecessary interpretations;**
- ❑ **The confusion may be further amplified by the fact Public Procurement Act 2016 mentions electricity as one type of good, the procurement of which the Act would be applicable; however it would be very hard to apply the current public procurement framework to most PPAs, due to their much more complex nature compared to simple purchase of other goods; hence, clarification of these issues through regulatory instrument like IPP regulations, or legislative amendment, would be very important.**
- ❑ **Should the Public Procurement Act be considered for use in procurement of IPP projects, several provisions should be addressed in order to streamline the Act to (i) the specifics of electricity as a commodity and delivery and financing mechanisms; (ii) cross-sector institutional collaboration needed in planning and procuring such projects; (iii) authority and approval powers**

¹² Section 2, Public Procurement Act 2016

of such projects above a single entity and (iv) design of model procurement documents.

2.2.3 The constitution and other general laws

The Constitution

In the context of PPAs the Constitution of Sierra Leone, Public Debt Management Act 2011 and Public Financial Management Act 2016 are important due to their provisions for management and approval of GoSL contingent liabilities arising out of the PPP Agreements in the form of sovereign guarantees or other support instruments.

The Constitution sets a general rule that a loan can be raised by the Government on behalf of itself or any other public institution or authority only through the adoption of an **Act of Parliament**. The same provision provides for quite broad definition of the **loan**: any moneys lent or given to the Government on condition of return or repayment, and **any other form of borrowing**, in respect of which moneys from any fund by whatever name called established for the purposes of payment or repayment whether in whole or in part and whether directly or indirectly may be used for payment or repayment¹³ Based on that definition some forms of PPAs (depending on the financing conditions) may be subject to the approval of the Parliament.

In addition, the Constitution establishes an important role of the Attorney-General and Minister of Justice (same person) "who shall be the principal legal adviser to the Government."¹⁴ The Law Officers Department under this Ministry is mandated to give legal advice to the Government and taking responsibility for all legal matters in which the state has an interest. Therefore, the role of the Office of the Attorney General and the Ministry of Justice must be also recognized in the IPP process.

Public Debt Management Act

Public Debt Management Act, 2011 provides for the authority of the Minister of Finance and the Parliament to issue **any forms of GoSL guarantees** for the benefit of any person or project, on the conditions set by the Parliament. It also requires that prior to issuance of any Government guarantee, the risk to Government of such guarantee must be assessed. For that purpose and other related functions the Public Debt Management division is established in Ministry of Finance.¹⁵ Although the PPP Act makes a reference to recommendations to the Cabinet made by the Minister of Finance on PPP projects, the decisions and assessments indicated in the PPP Act and the Public Debt Management Act under the provisions above are not detailed or coordinated any further.

Public Financial Management Act

The Public Financial Management Act, 2016 is quite a recent act and integrates well the concept of the PPPs and procedures of their approval. The Act requires that the heads

¹³ Article 118.

¹⁴ Section 64, the Constitution of Sierra Leone,

¹⁵ Section 13 of Public Debt Management Act, 2011

budgetary agencies make proposals for and ensure appropriate implementation of PPP projects, that fall under their responsibilities. However, it leaves the screening, evaluation, selection, and implementation of PPP projects to be done in accordance with the Public-Private Partnership Act, 2014.

More importantly, the Act provides for the rules of assuming the “**multi-annual commitments**” (that may be required to support payment obligations under PPAs). According to the act such commitments shall be **subject to prior approval by the Minister of Finance** and only, when they are (a) within the available appropriation and allotment; (b) the legality of such expenditures has been verified and (c) such commitment does not cause any ceiling of expenditures and Fiscal Strategy documents.¹⁶

In addition, this Act requires the Ministry of Finance to establish a medium-term budgetary framework which includes multiannual **ceilings on expenditures for at least 3 years prescribed in the Fiscal Strategy Statement** and budget call circular as a basis of preparation of the State budget for the following years.¹⁷

Finally, the Minister of Finance is required to annually prepare and submit as part of the State budget documents, a **Public Investment Programme, that includes all ongoing and new PPP projects and multiannual commitments** approved by the Minister.¹⁸

This Act is also detailed in the Public Financial Management Regulations 2016.

Even though this Act is quite well linked to the PPP Act, the procedures on how these references should be implemented in practice are missing. Since the sovereign guarantees, support agreements and any other forms of GoSL support commitments constitute the critical aspect of PPA bankability, the aspects of aligning PPP project planning, identification and selection (under the PPP Act, Electricity Act and this Act) are key for an effective IPP process.

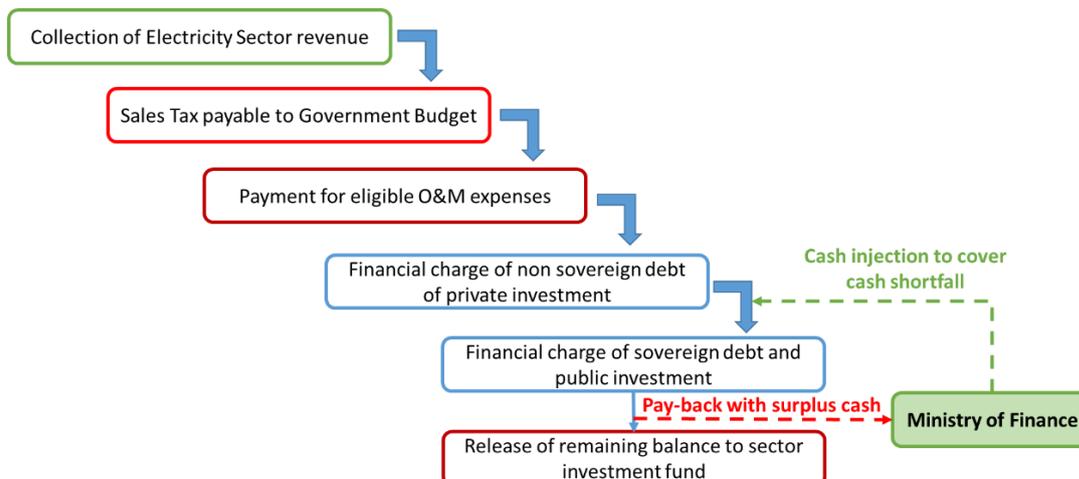
In this regard it is important to highlight the Collection Account, established by the Electricity Act, 2018 and its principles of payment mechanism. The payment flows of the Account, as illustrated below, follow the ‘waterfall model’ of priorities – from the collection of all revenues into the electricity sector, to paying taxes due to government as a first priority, and all the way down to the private and public investment payments.

¹⁶ Section 60, of Public Financial Management Act, 2016

¹⁷ Section 30 (1) (c), of Public Financial Management Act, 2016

¹⁸ Section 35 (1)(a)(iii), (vi) of Public Financial Management Act, 2016

Figure 3 Payment flows of the collection account



Source: "Investing in the electricity sector of Sierra Leone", Pascal Habay, MCC, 2018

As illustrated above, in case there is a shortage of funds to service payment obligations of private or public investment, a "cash injection" is planned by the GoSL (Ministry of Finance) to cover the shortfall of potential payment obligations of the collections. Such commitments most likely will be treated as multi-annual commitments under the Public Financial Management Act 2016 and their approval should follow the procedure prescribed therein.

The linkage between the planning and approval of new IPPs into the Collection Account system (via PPP Act, and other regulations) should be well coordinated with the procedures under the Financial Management Act 2016 and other Acts mentioned above. We understand the significant preparatory work was already ongoing in drafting the Collection Account Operations Manual, which was supposed to be legislated under special regulations or another statutory instrument, however this document has not been yet finalised.

When legislated, such Operations Manual would form one of the most important components of the IPP process, therefore it should be very well aligned not only with the financial management provisions, but also other laws governing the entire sector and IPP approval process.

To sum up, the Constitution 1992, Public Debt Management Act 2011 and Public Financial Management Act 2016 provide for the following important provisions related to the IPP framework:

- ❑ **The Constitution and Public Debt Management Act require any form of borrowing or any form of guarantees on behalf of the Government to be approved by the Minister of Finance and the Parliament. More details are needed in a form of regulations or similar instrument to clarify that borrowing and guarantees in relation to the PPPs (and/or PPAs), as well as their approval process in-line with the approval process of the entire PPP project, come within this approval;**
- ❑ **Public Finance Management Act incorporates references to PPPs and provides general rules in relation to approving and monitoring their**

financial exposure to the GoSL (including multi-annual commitments); however, the process of approving these commitments is not sufficiently elaborated in the Act and would benefit from better alignment of procedures between the PPP Act, and this Act.

- ❑ **Special consideration should be given to the alignment of operations of the Collection Account, that was established under the Electricity Act to provisions of the Constitution, Public Debt Management, Public Finance Management Act and other laws related to PPPs.**
- ❑ **MOF policy or guidance on the sovereign and payment risk mitigation measures available for IPP projects is not well developed and clear.**
- ❑ **Due to its Constitutional mandate, the role of the Office of the Attorney General and the Ministry of Justice should also be recognized in the IPP process.**

Finance Act 2011, as amended in 2016 and 2017

The Finance Act, 2011 was amended in 2016 to provide that the importation of PV system equipment and low energy or energy efficient appliances that meet relevant International Electrotechnical Commission (IEC) global standards for **resale or use by third parties** shall be duty free.

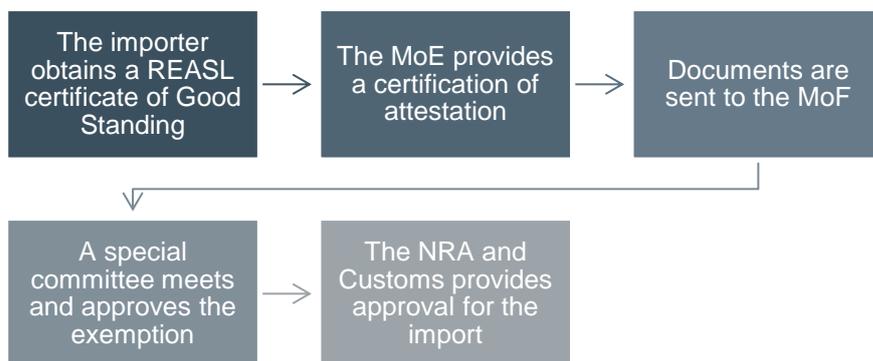
Interestingly, this act mentioned only resale and use by third parties. Although most IPPs will use EPC contractors to complete their installations, some IPPs might be importing the equipment for their own usage, including the maintenance and replacement parts. Also important is that only PV technology is supported in such a way, and no other renewable or solar technologies (like concentrated solar, hydro, etc.).

The Ministry of Energy is mandated to keep and regularly update the list of products, equipment and appliances that meet the IEC standards in consultation with the solar private sector. Practical implementation of this provision is more complex and often relates to ad-hoc application and approval process between the MOE, MOF, REASL, NRA and Customs.

In addition to these duty-free imports, the Finance Act amendment of 2017 provided that importation and sale of Photovoltaic System Equipment and low energy or energy efficient appliances that meet IEC global standards are exempt from the Goods and Service Tax (GST), that normally is 15%.

The process of importing IEC compliant products usually follows the steps illustrated below.

Figure 4 Process of applying duty and GST exemptions for solar PV in practice



Despite these duty-free and GST exemptions for the solar PV equipment in Sierra Leone, the process of its application is reported to take quite long and more streamlining and clear procedures of collaboration between the institutions is needed.

Analysing the GST application to the entire energy sector, there may be a risk that MOF collects GST along all the value chain and does not offset any GST payments that have been already paid until the final product is presented to the market. The result, therefore, may be that the GST that applies to the entire electricity sector (including solar IPPs) is much higher than 15%. This aspect should also be streamlined in the consistent policy or regulatory document.

It should be noted too, that the Finance Act 2011 provides for the general Corporate tax incentive for PPP projects. According to the Act all income derived from any undertaking under the PPP Infrastructure Projects in excess of 20m USD shall enjoy a corporate tax relief for 15 years.¹⁹ According to the comments from the private sector, the practical application of this provision, the rules of calculating the investment value, the date from which the relief application is commenced and other practical aspects are not sufficiently clear and could be elaborated in a guidance document for IPP developers.

Finally, the Finance Act 2011 was amended 2 times in 2018 and once in 2019 in order to increase GoSL revenue mobilization and reduce revenue leakages through numerous tax exemptions. In the attempt to better streamline all of the amendments of the Finance Acts over the recent years, it would be very useful to articulate all the available incentives for the solar IPP development in a single guidance document, approved or endorsed by MOF. The role of REASL in combining and disseminating such a document would also be important.

Investment Promotion Act 2004

This Act applies to all investments in Sierra Leone and provides some important investment protection provisions found also in other countries:

- ❑ Free remittance of profits abroad (for corporate and personnel salaries);

¹⁹ Clause 23 (1).

- ❑ Protection of investments from nationalisation or expropriation;
- ❑ International disputes resolution by arbitration under the UNCITRAL rules or, in the case of a foreign investor – within the framework of bilateral investment treaties or through submission to multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties;
- ❑ Income tax exemption – infrastructure projects with development costs exceeding US\$20 million will exempt from income taxes for 15 years (practical application and implementation of this particular provision is unclear, as Income tax is applicable to natural persons, rather than corporations, that are subject to Corporate tax, rather than Income tax).

While this Act provides for several important foreign investment promotion instruments, one key aspect of investment promotion – fast recognition of the foreign arbitration awards on the territory of Sierra Leone remains inadequately regulated; this issue has been highlighted in numerous reviews and gap assessments;²⁰

Please refer to the Section 5 for a more detailed analysis of this regulatory issue.

Local Content Agency Act (2016)

This Act is important for its explicit application to the energy sector – it expressly states that “notwithstanding anything to the contrary contained in any other enactment, this Act shall apply to all matters pertaining to Sierra Leone Local Content with respect to operations or transactions carried out in or connected with the Sierra Leonean industries in the mining, petroleum, [...] manufacturing, health and **energy** sectors”.²¹

This Act establishes the Local Content Agency to appraise, evaluate and approve the Sierra Leone local content plans and reports submitted to the Agency in compliance with this Act; award certificate of authorisation, review the Sierra Leone local content plans and reports submitted to the Agency in compliance with this Act and make recommendations to the Minister.

According to the Act the first consideration shall be given to Sierra Leonean companies bidding for and procuring materials, products and goods for ministries, departments and agencies. The companies in implementing this provision are required to comply with the requirements stipulated in the National Public Procurement Act 2004 (that is no longer valid).²²

In addition, in any call to **tender or in direct negotiations for any right, licence, concession, permit** or interest and before carrying out operations or commencing a project in the sectors covered by this Act, an operator shall submit a Plan to be known as the Sierra Leonean Content Plan to the Agency and thereafter annually demonstrating compliance with the Sierra Leonean content requirements of this Act.

²⁰ See: Power Sector Roadmap and Coordination Activity, Process for the solicitation of IPPs - Task 4.1, 2018; also Justice Sector Reform Strategy and Investment Plan III;

²¹ Section 2 of the Local Content Agency Act 2016

²² Section 38 of the Local Content Agency Act 2016.

The Act prescribes in detail numerous other approval stages by the Local Content Agency for operators and contractors in the above-mentioned industries for their planning and contracting process. For example: for all proposed projects, operations, activities, contracts, subcontracts and purchase orders estimated by the operator to be in excess of two hundred and fifty thousand United States Dollars (\$250,000.00) equivalent in Leones the operator **shall provide to the Agency for approval advertisements, pre-qualification criteria, technical tender documents, technical evaluation criteria and the proposed list of persons who have placed tenders.**²³

Most importantly, **the penalties established by the Act for non-compliance of all the detailed pre-approvals and local content requirements can make almost any investment project, and in particular IPP project, non-bankable.** According to the Act an operator or contractor who carries out any project contrary to this Act commits an offence and is liable upon conviction to a fine of **5% percent of the project sum** for each project in which the offence is committed, and if an operator or contractor continues to carry out any project contrary to this Act, after being fined under provision above, shall have investment incentives associated with the project to the value of 10% percent of the project sum withdrawn or **shall result in the cancellation of the project.**²⁴

These detailed requirements under the Act for various approvals in each stage of the investment project will present a serious impediment to the implementation of the project, and proportionally high penalties for non-compliance will be likely to result in serious bankability issues to any investment project including IPPs.

One option to address this issue could be introduction of the certificates of compliance, providing for the detailed procedure of warnings and cancellation of the certificates in cases of breach, thresholds and rights to appeal.

Environment Protection Agency Act (2008)

This Act will play a significant role in the development of the IPP framework due to several reasons. First, Environmental and Social Impact Assessments (EISA) of IPP projects will be necessary to secure funding or lending support requested by most international funding institutions. Second, detailed and quite well-established procedures of the Act require an Environmental licence for all "power plants".²⁵

Therefore, significant advanced planning and funding is required in order to obtain the EISA licence from the Environmental Protection Agency (EPA), therefore the timing of this process needs to be taken into account in the IPP Regulations in order to ensure sufficient balance between the delivery obligations of the IPP investors and the commitments made on the side of GoSL.

In practice, the full licencing process for solar IPP project under the Act might take up to 6-9 months, therefore a thorough coordination between the EPA and MOE would be required in the process, in order to fully approve the project. Preferably, a general set of guidelines specific to certain size of the projects (e.g. up to 5 MW and above 5 MW) could be developed in order to facilitate the process. In any case however, international

²³ Section 43 of the Local Content Agency Act 2016.

²⁴ Section 69 of the Local Content Agency Act 2016.

²⁵ First Schedule, Section 25 (e) of Environmental Protection Agency Act 2008.

guidelines of the Environment Impact Assessment²⁶ should be observed, if the project will be entering into the international agreements with DFIs.

Bank of Sierra Leone Act (2011)

In the context of the IPP framework it is important to take proper consideration of the foreign exchange regime of the country. Bank of Sierra Leone Act sets the key provisions in relation to the foreign exchange regime and mandates the Bank of Sierra Leone to formulate and execute the exchange rate policy of Sierra Leone.

In addition, the BoSL may issue guidelines for the purpose of regulating the **purchase, sale, holding or transfer of foreign exchange**. Finally, BoSL may, in order to achieve stability of the prices or to avert a foreign exchange crisis, temporarily restrict the purchase, sale, holding or transfer of foreign exchange.

Currently BoSL has quite strong discretionary rights for all foreign currency purchase and transfer issues. BoSL has published Guidelines on Current Account Transactions and Capital Account Transactions, that impose some restrictions on foreign exchange transfer abroad and several other guidelines and regulations.²⁷

In case of foreign currency shortage, the commercial banks are able to buy the currency from BoSL at the Wholesale Foreign Exchange Auctions that are organized weekly and their volumes are determined by BoSL.²⁸

Therefore, it is important to note the role of BoSL in planning the IPP framework and especially management and operation of the Collection Account and engage BoSL early in the planning and licensing process of the IPPs, as the availability of foreign exchange in the country will be an important factor in facilitating development of new projects.

2.2.4 SLEWRC regulations

Mini-Grid Regulations (2018)

These Regulations have been passed by SLEWRC to regulate the licensing process of small, off-grid electricity networks with generation **capacity of up to 1MW**. These Regulations therefore do not fall within the scope of this study; however, they are a good example of the recent modern regulation the principles of which could also be applied in regulated grid-connected IPPs, including licensing procedures, licensing conditions, interconnection rules, quality of service, interconnection rules and others.

²⁶ Especially the IFC Performance Standards on Environmental and Social Sustainability, 2012.

²⁷ <http://bsl.gov.sl/Legislation.html>

²⁸ Typically, the amount offered in recent months is approx. 3 million USD per week. For example, in the 13th Wholesale Foreign Exchange Auction held by BSL on 17th April, 2019, the amount of USD 3,000,000.00 was offered and USD 2,999,600.00 were sold to the commercial banks at the rate of Le 8,689.70.

Additional secondary legislation

The ESRR states the priority actions in terms of secondary legislation needed to further improve the electricity sector. The following statutory instruments of the SLEWRC were prioritised:

Statutory instruments	Priority
Technical criteria and required standards of performance for Licences (interim grid code) (in the process of preparation as at June 2019)	Priority 0 (2018)
Procedures for determining and revising tariffs for the sale and purchase of electricity (in the process of preparation as at June 2019)	Priority 0 (2018)
Regulatory decision concerning the rules and procedures for fixing electricity tariff	Priority 1 (2019)
Consultation process for establishing a grid code	Priority 1 (2019)
Final Grid code	Priority 3 (2020-2025)
Decision on the 1st revision of wheeling tariff that will follow the legal unbundling of EGTC and the enabling of Eligible Customers.	Priority 3 (2020-2025)

Source: ESRR

It is our understanding that these regulations and codes are in development stage and are yet to be approved by SLEWRC.

Additional documents to be developed, as per the ESRR, include:

- ❑ IPP procurement framework guidelines to map both the unsolicited and solicited process. We understand that the draft IPP guidelines have been prepared by MCC and are to be formally introduced by the MOE in the near future;
- ❑ EWRC is to develop additional regulatory adequacy instruments, in order to encourage a timely capacity adequacy; these instruments are yet to be developed.
- ❑ In preparing and approving such regulatory documents though, it would be important to take into account the coordination of procedures among all of the acts mentioned in this section above.

2.3 Summary of issues in legal and regulatory framework

The following key regulatory issues and gaps in relation to the current IPP regulation have been reviewed in this section:

- ❑ Insufficiently aligned national policy statements on renewable energy generation targets, lacking emphasis on medium size solar projects, links to firm thermal generation development (hybridization) and transmission network development.
- ❑ Implementation procedures of the Collection Account, established in the Electricity Act amendments in 2018, and its operation rules/manuals are missing; as a result, the Collection account is managed by MOF and there is

insufficient payment certainty for IPPs; proper alignment of the Collection Account procedures with the entire PPP selection process will be critical to bankability of all IPPs.

- ❑ EWRC (i) approval procedures of PPAs as provided for in the Electricity Act and (ii) IPP licensing are not in place.
- ❑ Distinction between EWRC powers to intervene in the activities of public utilities and private IPPs after signing PPA is not sufficiently clear (especially on rights to review tariffs after signing PPAs).
- ❑ Application of the PPP Act and procedures to the IPP process, as opposed to public procurement is not sufficiently clear; especially after adoption of the new Public Procurement Act 2016.
- ❑ PPP procedures provide for too complex process of approvals and procedures to be efficiently applied for small to medium size IPP projects; a Feed-in Tariff regulations for certain small projects could be considered to resolve this issue.
- ❑ USP framework in the PPP Act provides a good initial USP framework, but needs to be much more detailed in order to be efficiently used for IPPs.
- ❑ Public Procurement Act presents significant gaps in order to be applied to the IPP process (specifics of the electricity as a commodity and delivery and financing mechanisms; cross-sector institutional collaboration needed in planning and procuring such projects; authority and approval powers of such projects, that are above a single procuring entity and design of model procurement documents).
- ❑ Approval procedures for issuing Government guarantees (when relevant) are not aligned with PPP contracting process.
- ❑ Planning for and approving the multiannual financial exposure of the Government is not aligned with the PPP (and IPP) procurement and structuring process, especially as it may relate to the support obligations of the Collection Account.
- ❑ MOF policy or guidance on the sovereign and payment risk mitigation measures available for IPP projects is not well developed and clear.
- ❑ The role of the AG/MOJ is not detailed sufficiently in the process of approval of PPP projects (and PPAs).
- ❑ Practical implementation of the import duty, GST and other incentives under Finance Act is not sufficiently coordinated between various institutions involved.
- ❑ Recognition of foreign arbitration awards in the territory of Sierra Leone remains inadequately regulated.

- ❑ Guidance on the application of Sierra Leone law in the PPA transactions is missing that would provide adequate balance between the bankability requirements and adherence to Sierra Leone laws.
- ❑ Penalties that may be imposed under Local Content Agency Act for any new IPP may become a huge deterrent for investment (due to high risk of potential project cancellation).
- ❑ Alignment of EPA licensing procedures to the PPP/IPP selection process is missing.
- ❑ Alignment of BOSL procedures on securing sufficient foreign exchange (at market prices) for Collection Account bank and IPP banks in the PPP/IPP selection process is missing.

3 Mapping of institutions involved in carrying out PPP transactions

This section reviews involvement of various institutions under the existing legislation in the development of PPPs in Sierra Leone. We review the current institutional set-up and build on the previous studies done on this topic in 2018 by MCC. This present analysis however, is more focused on the grid-connected solar IPPs framework (rather than mini grids, or carbon fuel projects) and placing into the institutional map numerous additional entities, which in our view may be critical for the bankability of IPPs in the current legislative framework and their role should be well understood.

3.1 Institutional structure

The aim of this analysis is to develop a comprehensive and up-to-date map of all public institutions that are, or may be, involved in IPP project development in Sierra Leone. In addition, the most critical non-public stakeholders and other counterparties are placed into the structure in order to provide a better context of the environment.

As illustrated in the chart below, solar IPPs are not a solo venture by the MOE or MOF; rather they require extensive coordination and collaboration between a large number of Ministries, government institutions, private and regional stakeholders.

Electricity Act 2011 is at the centre of the entire institutional structure, providing for the sector restructuring, with the creation of EGTC, EDSA and the regulatory commission EWRC. Diagram below provides the detailed institutional and stakeholders' structure related to grid connected solar IPPs as per the current laws.

3.2 Roles and responsibilities of key institutions

The table provides a summary of the roles and responsibilities of the key institutions indicated in the diagram above:

Table 2 Details of institutions and stakeholders and their roles

Institution	Role in the Energy Sector
The President	The Head of State, providing political leadership and holding the executive power, directly or through members of the Cabinet. The President may set certain projects as Priority PPPs.
Office of the President Infrastructure Initiative (OPII)	The initiative of the Office of the President (through the Office of the Vice-President) to accelerate project delivery of infrastructure development, enabled through the political championing of key projects.
The Parliament	Ratifies the PPP agreements.
The Cabinet	Provides approval in major stages of PPP project, including the final contract; it may approve simplified regulations of certain PPP projects
Ministry of Energy (MOE)	Ministry leading and coordinating energy sector development, also and responsible for policies and programs for the provision of affordable and sustainable energy services.
Ministry of Finance (MOF)	Ministry responsible for the public debt and public finance management, approval of multiannual liabilities, liaising with multinational donor organisations on PPPs and issuing concurrence for PPP approval by Cabinet.
Attorney-General Office and Ministry of Justice (AG/MOJ)	Advising Government on all legal matters and issuing concurrence for PPP approval by Cabinet.
Ministry of Planning and Economic Development (MOPED)	Formulation of the National development programs of the country, including the strategies and priorities of the energy sector.
Ministry of Lands, Housing and the Environment (MLHE)	Allocation (lease) of land for implementation IPP projects, in cases when private investor is not able to secure land from the private owners.
Bank of Sierra Leone (BOSL)	Implementing monetary policy in the country and managing availability of the foreign exchange.
Electricity and Water Regulatory Commission (EWRC)	Independent regulatory authority responsible for formulating, implementing, monitoring quality and compliance, providing tariff guidelines, licenses and implementing regulatory frameworks for the safe, secure, affordable and reliable supply of water and electricity.
Electricity Distribution and Supply Authority (EDSA)	State-owned authority, reporting to the MOE, that purchases and distributes electricity from the bulk supply (IPPs and EGTC) to the consumers and sells electricity.
Electricity Generation and Transmission Company (EGTC)	State-owned company, reporting to the MOE and is responsible for generation and transmission of electricity as well as selling electricity to EDSA.
Public Private Partnership Unit (PPPU)	Unit in the Office of the President, responsible for review of PPP feasibilities, providing technical support to the Ministries and EDSA in negotiating and procuring PPP agreements.
National Public Procurement Authority (NPPA)	Responsible for regulation and monitoring public procurement and advise to the Government on issues relating to public procurement.

National Power Authority (NPA)* <small>*not present in the structure above</small>	Vertically integrated national power authority, that was created by an Act of Parliament in 1982 and in 2016 unbundled into EDSA and EGTC. Although NPA <i>de facto</i> is no longer operational, its unbundling process, is not formally completed yet.
Local Content Agency (LCA)	Semi-autonomous agency under Government to strengthen the local economy by creating linkages between Foreign Direct Investments; implements Local Content Agency Act.
Independent Power Producers (IPP)	Private power generation companies contracted to produce electrical power and sell it to EDSA or Eligible customers
Cote d'Ivoire, Liberia, Sierra Leone, Guinea electricity line Transmission Company (CLSG Transco)	Supranational company established by international treaty to finance, construct, operate, maintain, own and develop the electricity interconnection line among the 4 Member States.
ECOWAS Regional Electricity Regulatory Authority (ERERA)	The regional regulator for cross-border electricity interconnections in West Africa.
Eligible consumers	Introduced in Electricity Act in 2018, new large electricity customers (e.g. mining companies) that may be allowed by special regulations to off-take electricity directly from IPPs.
Other Ministries	In certain cases other ministries may play a role in the development of solar IPPs, which is mostly limited to coordination and setting of priorities; such ministries may include Ministry of Local Government and Rural Development, Ministry of Mines and Mineral Resources; Ministry of Works and Public Assets, Ministry of Water Resources and regional Resident Ministers of Sierra Leone.

Analysing the practical involvement of all these institutions in the IPP process, we observe several important aspects:

- ❑ **Some institutions indicated in the structures above - EDSA and EGTC - are undergoing important structural and operational changes after the unbundling from NPA, and have less capacity and resources to engage fully in the IPP process;**
- ❑ **Critical institutions for the sector like EWRC are still in the early stages of organizational development, and their capacity for IPP engagement or regulation is relatively small; we note that significant work in this regard is being done by MCC;**
- ❑ **Some entities, like Bank of Sierra Leone are rarely, if at all, being engaged in the planning structuring process of IPPs, although their impact on IPP projects may be critical;**
- ❑ **The role of entities like the Local Content Agency may be also important for the bankability of the IPPs (looking at the potential penalties that may be imposed on the project), therefore their role should be carefully assessed;**
- ❑ **The CLSG Transco and ERERA so far have very little practical impact on IPPs in Sierra Leone, due to still ongoing formation of the West Africa Power Pool and its rules of operation in each country; however, in the long-run these institutions will play increasingly important role both in the planning and technical aspects of the electricity grids, therefore they cannot be ignored;**

- ❑ **Finally, the role of some entities like NPPA is unclear in relation to the PPPs and IPPs, due to the insufficient and conflicting regulation in the PPP Act and the Public Procurement Act 2016.**

All of these aspects significantly complicate the development of IPP projects in practice at the moment. Government's focus on meeting the strategic electrification objectives as soon as possible, coupled with the significant lack of capacity in some of the institutions above, may result in structuring IPP projects that are either not sustainable or not bankable. Complexity of the current institutional structure and lack of coordination another contributing factor to the lack of progress. IPPs often find themselves applying to various institutions above separately and getting very different responses in terms of process, technical or commercial issues.

These aspects could be well addressed by the design and approval of a single set of IPP-specific documents, indicating a simple decision making and coordination procedure for the IPP structuring (via tender or unsolicited proposals) and their approval. The recommendations made by MCC study on the IPP Framework, provide for a good solution to these aspects in Sierra Leone context – establishment of the IPP Steering Committee and IPP Task Force.

Please refer to Annex A1 of this report on more details for such Regulations and a draft suggestion of the institutional structure, which is building on MCC recommendations.

4 Application of legal & regulatory framework in practice

4.1 Practice of IPP transactions under the current framework

Despite the existing gaps, the current legal, regulatory and institutional framework of IPPs in Sierra Leone provides for quite a comprehensive and detailed environment for structuring private sector-led power generation projects. National and sector strategies, Electricity Act, Electricity and Water Regulatory Commission Act, PPP Act, Public Financial Management Act and others form a relatively strong legal basis for IPPs. In addition, important institutions, like the unbundled public utilities, EDSA and EGTC, sector regulator EWRC, the PPP knowledge hub PPPU and all the key Ministries form a good environment for IPPs.

Analysing how the existing IPP legal frameworks are used by MOE and other institutions in practice, we have noted that they have evolved somewhat differently from the procedures prescribed in the laws. We observe that the current process of structuring IPPs is centred around MOE and is more based on ad-hoc procedures customary practices developed over the several past years. This may have been influenced by two main reasons:

- 1) Lack of certain and clear procedures in the laws, specifically adapted for the IPP projects, and even some conflicting legal Acts (Public Procurement Act and PPP Act);
- 2) Human capacity and institutional effectiveness required to implement the prescribed procedures around IPP process are still not sufficiently developed in some institutions.

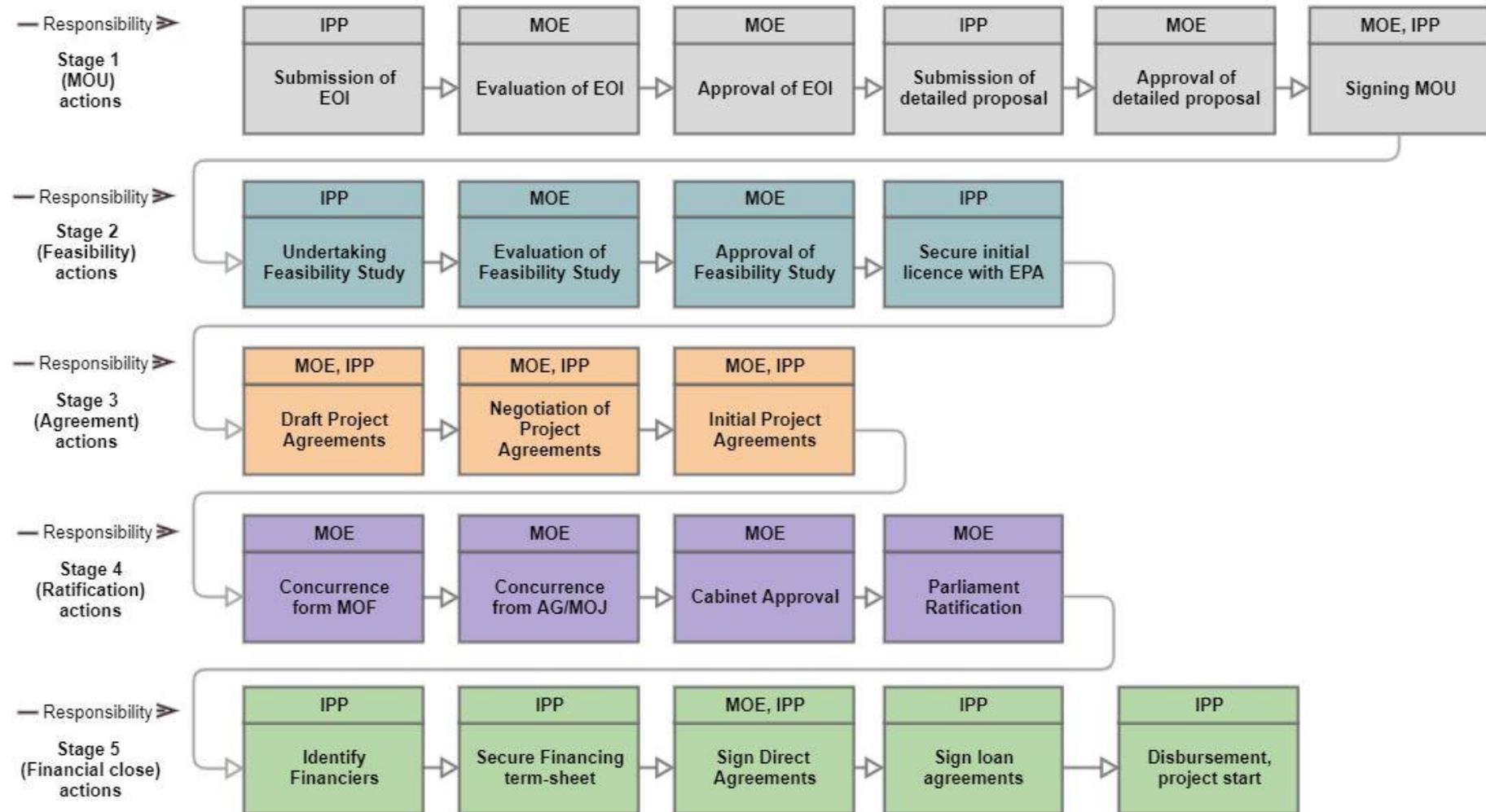
It is important to analyse and understand these procedures, in order to understand better the strengths and weaknesses of the system and adapt recommendations for possible solutions to the context of Sierra Leone.

There are not so many IPP projects that have completed the full cycle from project identification, appraisal, negotiations and approval, including Parliament ratification. To our knowledge there are only 4-5 such projects and none of them have yet achieved financial close. Although the practice and circumstances of each project being analysed in this study is quite diverse, there are trends and general practices that can be analysed for the purposes of this study.

Current practice of structuring the IPPs through the USP process typically entails the following 5 stages: MOU stage, Feasibility stage, Agreement stage, Ratification stage, Financial close stage.

These stages are illustrated in more detail by the flowchart below.

Figure 6 Existing practices of structuring IPP transactions in Sierra Leone



Looking at the flow chart above, several important features should be highlighted in relation to the existing IPP formulation practices:

- ❑ **Prevailing USP approach:** the practice of considering USP for structuring IPPs is more common compared to tender based approach;
- ❑ **Usage of MOUs:** MOU is one of the initial steps and documents considered for signing between the MOE and the private investor; such a document, while non-binding, typically forms a framework for the exchange of information between the MOE and private investor and highlights the process of IPP feasibility study preparation to progress to the contracting stage;
- ❑ **MOE in the lead:** MOE usually takes the lead role in negotiating and evaluating the USP and driving the process of IPP structuring;
- ❑ **Concurrences:** although there is some inter-institutional coordination, the stakeholders like MOF or MOJ are usually involved in the IPP process at the later stages of negotiations in a form of providing concurrence to the draft documents;
- ❑ **Lack of capacity:** due to lack of human or financial capacity, some institutions like EWRC, EDSA and others cannot keep-up with relatively large number of requests for MOUs and IPP development.

Overall, the following observations and recommendations should be made in relation to the procedures highlighted above:

- ❑ **It's all in the details:** although in general, the stages of the existing USP process are quite standard and similar to USP practices in other countries, the difference between success and failure of the project will come from the details and quality of each stage and activity performed; some of these details are illustrated in the subsequent points below;
- ❑ **Decision on EOI:** the early decision on the EOI should be made not only by the MOE, but by much broader involvement of the other stakeholders, including the EWRC and EDSA, it is critical to understand early conformity of each EOI to the up-to date IRP of the country (or another credible demand analysis) and general demand trends, in order to avoid losing public resources – especially available limited human capacity – on evaluating detailed proposals that are not in line with overall strategic documents and demand projections; in addition, the experience and profile of the private partner is critical at this stage – it is important to have a detailed due diligence on the EOI proponent and verify its conformity to the minimum qualification requirements for projects of this kind;
- ❑ **Non-binding MOUs:** to increase chances of successfully reaching financial close, it is critical to ensure that MOUs are only governing general and non-binding aspects of USP process, like general concept of the project, provision of the technical information to the private partner, feasibility preparation timelines; any binding obligations in relation to the tariff, risk allocation or other project details must not be part of the MOU and should be left to later stages;

- ❑ **Standard templates of Project Agreements:** it is important to present the standard PPA, IA and CA documents to the private partner early in the process and insist on keeping them as close to the original draft as possible; any major deviations in terms of risk allocation may negatively impact possibilities to achieve the financing of the project;
- ❑ **Early involvement of other stakeholders:** current practice of obtaining concurrences from other institutions should be improved by more strong involvement of other institutions in the process; ensuring their commitment and participation can be achieved by passing special IPP regulations at the cabinet level, and increasing their importance in decision-making;
- ❑ **Financial close may require additional amendments:** after all project documents are signed, it may be required for them to be reviewed again after the project lenders have reviewed them and provided comments; this process, although not necessarily a must in all cases, should still be recognized in the process.

Implementing these recommendations may be easier if IPP regulations governing the entire process of the IPP structuring would be passed by the Cabinet (or responsible agency). The sample provisions and more details on such regulations is provided in Annex A1 of this Report.

4.2 Private sector views on possible improvements to IPP practices

In order to get a full picture of the existing IPP practices we have also consulted the private sector players in Sierra Leone, who are or have been involved in the process of structuring IPPs. Due to confidential nature of the commercial transactions involved, below we are providing an overview of the generalized comments relating to the IPP system, rather than individual transactions.

The following are some of the key comments and observations made by the private sector:

- ❑ **Multi-institutional approach to IPPs:** structuring bankable IPPs requires early involvement not only of the MOE in the process, but other institutions like MOF, MOJ, EDSA and EGTC.
- ❑ **GoSL to use consultants:** professional consultants assisting GoSL would speed up the process and better align market-level expectations on both sides.
- ❑ **Importance of demand assessment:** one of the key questions to be addressed in the initial stages of the IPP development is – the demand for electricity in the specific area (in case of the off-grid development) or demand of the grid-connected customers, including realistic expansion estimates; in most cases such demand assessment is not done or available.
- ❑ **Ratification of New York Convention:** one of the “non-negotiable” aspects for improvement of the IPP framework that was also mentioned by the

stakeholders included ratification of the New York Convention 1958 by Sierra Leone, that would enable easier enforcement of international arbitration awards; please refer to Section 5.3 for more detailed analysis of this aspect.

- ❑ **Using FIT approach:** in order to avoid numerous negotiation rounds, feasibility preparation and other time-consuming approval processes, the small-scale solar IPP projects (5-10MW in size) would be developed by fully standardized FIT regulations; IPPs would be required to fulfil all the FIT conditions in advance (EWRC licence, EPA license, full project design, etc), before they could benefit from the FIT.
- ❑ **Assistance with land:** it would be beneficial if GoSL could assist in obtaining suitable land for the development of solar IPPs, including helping with the negotiations with local communities for land lease; however, the land lease itself could also be left to the IPPs to solve themselves if this option would be faster.
- ❑ **More details on Collection Account operating procedures:** currently the Collection Account establishment is an important step forward to bring more transparency in the sector, but more details are needed in terms of Operation procedures in order to take full advantage of this instrument.
- ❑ **Sector-wide liquidity facility:** for most small scales solar IPPs to be bankable some liquidity facility (supporting at least 6 months of payments to IPP) should be established by GoSL/MOF. Setting up such a facility for individual projects may be quite complicated, therefore a sector-wide liquidity facility could be a good option. This facility could be supported by WB and other donors.
- ❑ **More clarity on procedures:** current legal procedures for approval of IPPs are not sufficiently clear and better alignment of all decision processes is needed, including taking account of Commercial and Financial Close stages of the project.

These observations are in line with our gap assessment and recommendations of this report and they are incorporated in the recommendations in the sections below, including sample IPP Regulations provisions provided in Annex A1.

5 Gaps and recommendations to improve IPP procurement framework

This section builds on the assessment of the regulatory and institutional frameworks for the development of the grid-connected solar IPPs in Sections 2 to 4 above and also provides more detailed analysis on several specific gaps identified in the previous diagnostic studies and reports on the electricity sector reform, specifically by MCC under the Power Sector Reform Roadmap and Coordination Activity.

5.1 Unsolicited proposals procedure under the PPP Act

In order to adapt a more responsive approach to IPP development it is also important to analyse the possibilities to utilise the USP procedures that are available under the current legislation. We have taken a more detailed analysis of these procedures as they are regulated in the PPP Act and compared them to good international practices.

The PPP Act provides for several important rules on USP procedures:

- ❑ The Act indicates that a contracting authority may receive, consider, evaluate and accept unsolicited proposals for PPP Projects, which shall be considered and implemented, upon approval of the Cabinet, **only after the submission of an independent feasibility study** and compliance with good governance transparency obligation and procurement provisions and the laws of Sierra Leone.²⁹
- ❑ The Act provides for a relatively open list of situations when the PPA Agreement may be negotiated directly, without procurement procedure: Section 53 indicates that subject to the **approval of Cabinet** and with the support of the PPP Unit, **a contracting authority may negotiate a PPP Agreement** without using the procurement procedure in case where the Cabinet authorises such an exception **for compelling reasons of national or public interest**.
- ❑ Also, the Act details the process that must be undertaken during such direct negotiations: where a PPP Agreement is negotiated without Competitive selection process, the PPP Unit shall:
 - ❑ undertake or commission a pre-feasibility study and a feasibility study;
 - ❑ cause a notice, of its intention to commence negotiations in respect of the PPP Agreement, to be published in the prescribed manner;
 - ❑ engage in negotiations with as many persons as the Unit considers capable of carrying out the PPP Project, as circumstances permit; and

²⁹ Section 60, PPP Act 2014.

- ❑ establish evaluation criteria against which proposals shall be evaluated and ranked.
- ❑ in all cases of non-competitive procedures good governance and transparency will prevail and the public and stakeholders will be informed by the Government for the reasons applied in the exception to the procurement rules in this Act.³⁰
- ❑ Finally, the Act mandates the Cabinet to refer all unsolicited proposals to the agreed 'Swiss Challenge' or similar **market test procedures**, except they may be deemed unnecessary by the Cabinet on the important grounds. In any case to support transparency the contracting authority will set out the basis for the decision to the public.³¹

Many of these provisions follow the recommended international best practices for the USP, but they should be made clearer and more specific in the policy or Regulations document in order to be applied in practice in a more uniform and smooth manner.

In this regard in 2018 World Bank has published comprehensive Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects ('USP Guidelines').³² This document captures most recent developments and best practices on USP in PPP projects, that may be also applied for the IPP projects. Some of the key recommendations of this documents are summarised below, in addition providing comments on the Sierra Leone context.

USP Guidelines provide 5 high-level recommendations on **policy decisions** for the Governments considering USP, as shown in the table below.

³⁰ Section 53, PPP Act 2014

³¹ Section 25(4)(d), (e) and 25(5), PPP Act 2014

³² <https://ppp.worldbank.org/public-private-partnership/library/policy-guidelines-managing-unsolicited-proposals-infrastructure-projects>

Table 3 Recommendations on policy decisions for governments considering USP

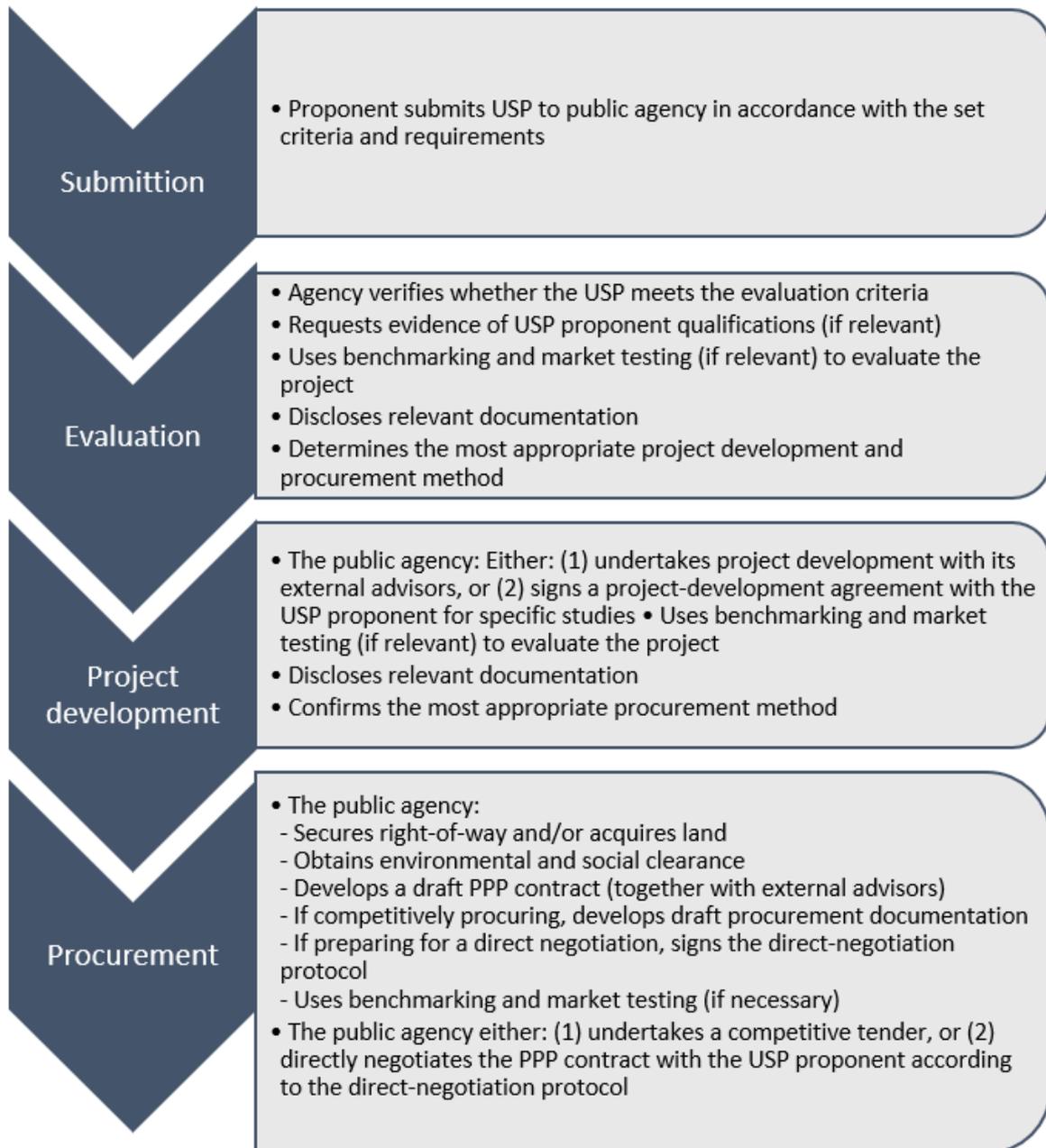
WB USP high-level Policy Recommendations	Context of Sierra Leone	Conformity of Sierra Leone provisions
Policy decision 1: Governments must first decide whether to allow USPs.	PPP Act 2014, Sect. 60 sets key conditions for USP.	✓
Policy decision 2: Governments must determine the extent to which they will define the parameters of the USPs (e.g. USPs that address specific infrastructure challenges, geographies, sectors or technologies)	No policy decisions yet.	✗
Policy decision 3: Governments must determine how to incorporate the USP policy in the existing regulatory framework (into procurement laws, PPP laws, stand-alone policy, etc.)	USP rules incorporated in the PPP Act, but no further details or policy.	~
Policy decision 4: Governments must determine the extent to which the USP proponent may be involved in project development:		
(1) project development by the public agency (with external advisors); or		
(2) project development by the public agency and the USP proponent, whereby specific public-interest studies are undertaken by the public agency (and its external advisors), and the public <u>agency and its advisors undertake a detailed review of any studies developed by the USP</u> proponent.	PPP Act 2014, Sect. 53 generally follows this option	✓
Policy decision 5: Governments must determine which procurement methods and incentives will be allowed (only tender with bonus system, direct negotiations, or "market test")	PPP Act 2014, Sect. 25 allows for all of these possibilities.	✓

Source: WB, Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects, 2018; Conformity meanings: ✓ - conforms; ✗ - does not conform; ~ - partially conforms.

It can be seen from the above, that Sierra Leone’s USP structure in PPP Act generally follows the recommended international practice, however there is a strong need of a more specific policy document or regulation adapted to specifics of the Energy sector.

USP Guidelines further indicate 4 main stages of the USP process. These stages are detailed in the flowchart below.

Figure 7 Main stages of the USP process



Furthermore, several important recommendations for each of these USP stages indicated above, may be elaborated in the Regulations:

Recommendations for Submission stage:

- ❑ Specifying the documentation and information that private entities need to provide as part of their USP submission helps increase the quality of proposals

- ❑ Centralizing the submission process in a single agency creates clarity for the private sector and minimizes coordination challenges in the public sector.
- ❑ Introducing a dedicated time window for USP submissions helps governments plan for additional resources needed to review USPs, thereby streamlining USP processing
- ❑ Requiring the USP proponent to submit a review fee may discourage private entities from submitting poor-quality, incomplete or opportunistic USPs.
- ❑ Instituting criteria for assessing the USP proponent – including integrity-due-diligence criteria and requests for past qualifications – helps the public agency assess the reputation, experience and integrity of the USP proponent.
- ❑ Specifying how the government will address requests to protect proprietary or confidential information will minimize requests from the USP proponent for unnecessary protections that reduce transparency.
- ❑ Prior to starting the official evaluation process for a USP, governments are advised to check the compliance of the USP submission

Recommendations for Evaluation stage:

- ❑ Introducing clear evaluation criteria and procedures helps the public agency efficiently process USPs and ensures that the accepted USPs are aligned with public objectives.
- ❑ Evaluation criteria should cover public-interest, project-feasibility, PPP suitability, and affordability considerations.
- ❑ Using benchmarking to evaluate the USP project allows the public agency to compare the terms of the project with similar projects.
- ❑ Disclosing parts of the USP submission and evaluation process helps enhance transparency and accountability.

Recommendations for Development stage:

- ❑ Allowing the USP proponent to develop feasibility studies and structure the project limits competition during a competitive tender.
- ❑ Equal bidding conditions are maximized when project development is undertaken by the public agency (assisted by external advisors).
- ❑ Requiring that any involvement by the USP proponent in project development be governed by a project-development agreement maximizes transparency.
- ❑ Disclosing information about the project allows stakeholders to hold public agencies accountable and allows potential bidders to familiarize themselves with the project.

Recommendations for Procurement stage:

- ❑ In jurisdictions with well-developed tender procedures, referring to existing procurement procedures helps ensure transparency and accountability for USP projects.
- ❑ Competitively tendering USP projects is most likely to result in a well-structured PPP contract that maximizes value for money.
- ❑ Providing a short period for competing bidders to submit bids (usually less than six months) limits competition.
- ❑ It is challenging to create equal bidding conditions when a USP proponent has a strong strategic advantage over its competitors.
- ❑ Developing a direct-negotiation protocol helps ensure that a negotiation process is well managed.
- ❑ Disclosure of key documents is critical for both competitive tenders and direct negotiations.

Overall observations on USP process:

- ❑ Public agencies face challenges related to managing large numbers of low-quality USPs and stimulating competition in tenders for USP projects.
- ❑ Governments that lack the technical and financial capacity to implement projects experience challenges with USPs due to the same lack of capacity.
- ❑ PPP projects initiated as USPs but developed by the public agency and competitively tendered appear to perform no better or worse than publicly initiated PPPs.

In relation to USP process in the IPP sector of Sierra Leone, MCC has prepared in 2018 a draft detailed **IPP framework** that captures both – Tender and USP process of IPP structuring. The USP procedures incorporate the following stages and steps, capturing some of the above-mentioned WB-recommended process:

- ❑ The USP should submit an application for a generation licence that is assessed for soundness by EWRC;
- ❑ The USP should demonstrate that it can meet the technical and financial tests that it would need to pass similar to the pre-qualification criteria for a competitive proposal;
- ❑ The USP should be provided with the following template project documents: PPA, Implementation Agreement, Connection Agreement and asked to mark up each of these agreements
- ❑ The USP should also submit a feasibility study and a Financial Model which the Bidder should have had audited by an approved auditor;

- ❑ The audited financial model for the project should be assessed by the PPPU (with assistance from their transaction advisor) and if the project fits the overall strategy of the GoSL and the tariff is competitive against market testing then detailed negotiations can start.
- ❑ Detailed negotiations will start with the mark up of the major project documents. The IPP will also be expected to progress the Generation Licence application and the application for the environmental clearances under the EPA.

IPP framework also details the roles and responsibilities of stakeholders and suggests establishment of an IPP Steering Group - to take over some of the Cabinet approval functions in the PPP Act, and IPP Task Force for the coordinated, multi-institutional engagement with the private partners. The IPP Steering group might indeed be very useful in fast-tracking decisions in the PPP process that are to be taken by the Cabinet.

The efficiency of the IPP Task force, however might become problematic, due to lack of single point of responsibility and focus among so many institutions. IPP Task force could serve as a great coordination mechanism among all institutions and the private sector, however, taking regulatory decisions (for example on the selecting the preferred bidder or USP evaluation) may be more efficiently done by a single (or leading) institution.

The IPP Framework captures numerous important practical points on the IPP procurement and tendering, however it still is a framework and in numerous sections remains a discussion-level document. **In order for it to be actionable - this important document and its recommendations should be structured into IPP Regulations (single or several documents) that systematically govern the entire IPP structuring and procurement process.**

5.2 Choice of law between PPP Act and Public Procurement Act for IPPs

One of the recommendations in the previous analysis done by the MCC under the Power Sector Reform Roadmap and Coordination Activity was a requirement to conclude a legal review of the Public Procurement Act, to assess any gaps or barriers it presents with respect to IPP solicitations.³³ The analysis in this sub-section elaborates on this recommendation in more detail.

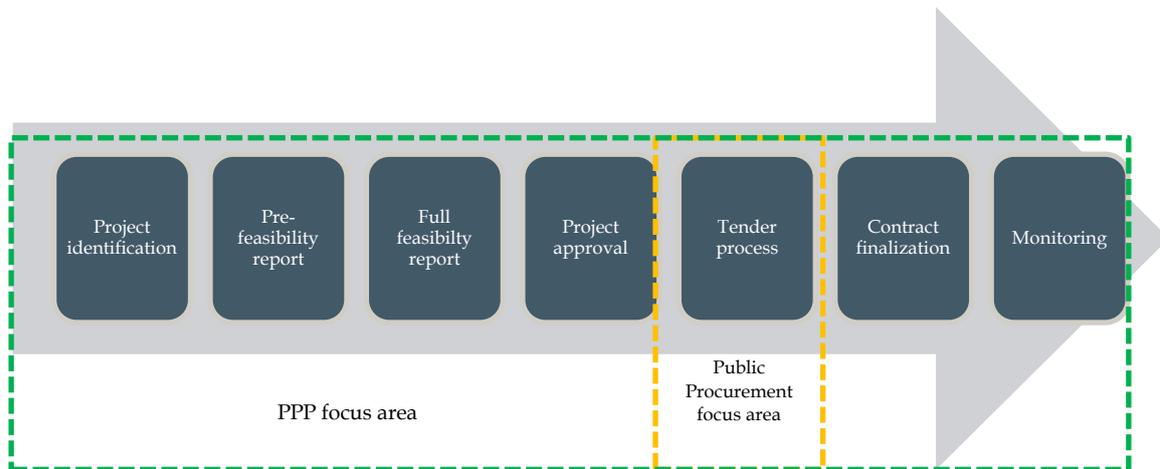
As mentioned under the PPP Act analysis, the uncertainty between the PPP and Public procurement regulation was further amplified when adoption of this Public Procurement Act 2016 did not deal with any of the references from previous Public Procurement Act 2004 to other acts like PPP Act. Previous Public Procurement Act of 2004 had explicitly provided that it shall not apply to the selection process of private partners in PPP Agreements made under the Public Private Partnership Act, 2014. The current version of the Public Procurement Act 2016 however does not have any such provision. Although from the context of the PPP Act it seems that original intent of regulating PPP

³³ Report on Task 4.7, "IPP Training Workshop Report", Recommendation 5.4.1.

procurement separately from public procurement act remains the same, more legislative clarification in this regard would be very useful.

As illustrated below, the differences in project structuring and procurement approach between the PPP Act and the Public Procurement Act is that PPP Act deals in more detail with the project identification, preparation, feasibility and approval stage, before it goes out to tender, while the Public Procurement Act regulates almost exclusively the tendering aspect of it.

Figure 8 Regulation focus areas of PPP vs Public procurement



Assessment of gaps and barriers of Public Procurement Act application to IPPs

Below we provide a more detailed analysis of the current Public Procurement Act to assess the gaps and barriers for IPP solicitation:

- ❑ **“electricity”** is only mentioned once in the entire Act, under the definition of goods in **Section 2**; given the complexity of electricity as a commodity more elaboration and clarification would be very important in order to address at least the comments and gaps indicated below;
- ❑ **Regulations** under this Act (in **Section 2**) are defined as regulations issued by **NPPA** to fulfil the objectives and to carry out the provisions of this Act. In order to regulate the procurement of electricity, detailed regulations would be required, however, from the practical point, the authority of the NPPA required to regulate the complex procedures between the MOE, MOF, EDSA, EWRC and other players may be too limited in order to ensure smooth collaboration and compliance of the process, therefore such Regulations should be issued either by the Cabinet or the one of the Ministries; it may be possible for NPPA to regulate and approve only the standard bidding documents for Electricity purchase, without elaborating more on the inter-ministerial nature of the procedures, but this would create additional risk or gaps and uncoordinated approach in the long run; the current Public procurement act now only provides for the possibility to pass the Regulations by the NPPA and not the Ministry or Cabinet;

- ❑ **Section 14** of the Act regulates the **functions of the NPPA**. According to this clause, the NPPA is established to regulate and monitor public procurement in Sierra Leone and to advise the Government on issues relating to **public procurement**. Current wording of the PPP Act (Section 38 (c)) requires NPPA to monitor **PPP procurement procedures** for transparency and compliance (to the PPP Act procedures). Therefore, this provision related to the authority and functions of the NPPA should be clarified.
- ❑ **Section 17, subsections (2) and (3)** indicate that the procuring entity, including its concerned officials, shall be responsible for procurement **with the funds at its disposal**. The procuring entity shall not commence a procurement activity for which funds are not available or for which the Ministry or supervising authority has not issued a **written confirmation of budgetary allocation** that the required funds shall be made available in a timely manner and in the amount required. Should the PPAs be procured under the Public Procurement Act, the long-term nature of the PPAs will require adaptation of these provisions to reflect the realities of the electricity sector at the moment, and also more detailed definition of the budgetary allocation to meet the payments under the PPAs. In addition to the payments, the payment security and government support aspect should be also addressed in this context;
- ❑ **Section 18 (1)** indicates that a procurement **committee shall be established in every procuring entity**. In practical terms it would mean that EDSAs procurement committee would be responsible for the selection and procurement of IPPs. Given the Sierra Leone context, and EDSA capacity, it may be very difficult to ensure coordination and true involvement of such important stakeholders as MOE, MOF, EWRC, PPPU and others in the process of decision making of such committee, especially taking into account the subsection (2), which requires the procurement committee to be appointed by the head of the procuring entity, following its strict composition requirements for **all members to be from that procuring entity** (additional members being invited only to provide technical or legal expertise). Section 19 (5) provides for the possibility to set up sub-divisions (stand-alone) procurement units, however they would still be a division of EDSA and may have too little authority for inter-ministerial coordination; this provision would have to be changed in order to be able to form inter-ministerial and inter-agency high level procurement committees, in order to reflect the specifics of IPPs.
- ❑ **Section 29** requires all procuring entities to undertake procurement planning in accordance with the criteria of indicating “contract packages”, “estimated costs”, etc. These requirements are standard and easy to implement for procurement of any other goods; but planning for electricity procurement will require much more complex procedures, coordination and reporting. Also, the same section requires procuring entity to submit to the Ministry of Finance their **annual procurement plans** for the coming financial year to the Ministry for review and approval. This procedure should be coordinated with the IPP planning and approval process should this act be applied;
- ❑ **Section 30** indicates that the procuring entity shall be responsible for the administration of contracts into which it enters, as well as the **monitoring of**

the performance of such contracts. This provision does not cater for the potential roles of the EWRC, MOE, MOF, PPPU in the monitoring of IPPs.

- ❑ **Section 46** provides for a very restrictive and exhaustive list of cases when the sole-sourcing would be possible. In the context of electricity and IPPs, the only sub-sections that may be applicable are these:
 - ❑ when only one **supplier has the exclusive right to realise manufacture of the goods**, carry out the works, or perform the services to be procured and no suitable alternative is available; Comment: this exception would not be applicable to IPPs;
 - ❑ for **additional deliveries of goods** by the original supplier which are intended either as part replacement for existing goods, services or installations, or as the extension of existing goods, services or installations where a change of supplier would compel the procuring entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services; Comment: this exception would not be applicable to IPPs;
 - ❑ when **additional works**, which were not included in the initial contract have, through unforeseeable circumstances, become necessary and the separation of the additional works or services from the initial contract would be difficult for technical or economic reasons; Comment: this exception would not be applicable to IPPs;
 - ❑ in cases of **extreme urgency**, provided the circumstances which gave rise to the urgency were **neither foreseeable** by the procuring entity **nor the result of dilatory conduct** on its part; Comment: possible in some rare cases of IPPs;
 - ❑ when the **services** require that a particular consultant be selected due to his unique qualifications, or when it is indispensable to continue with the same consultant. Comment: possible in some rare cases of IPPs.

According to this section the use of sole-source procurement on the grounds referred to above shall be subject to prior approval by the procurement committee.

This section of the Procurement act does not leave almost any options for the sole-sourcing or unsolicited proposal procedure for the IPP, with the approval rights vested to the procurement committee of the entity. This provision should be adapted to the context of electricity generation in Sierra Leone and the approval rights that that are above a single entity.

- ❑ **Section 49** requires that the procuring entity shall use the appropriate standard bidding documents specified in the Act. However, electricity-specific procurement documents are missing, and the existing standard documents are tailored exclusively for the delivery of physical goods. This section allows though, that in exceptional circumstances, the Authority may, on an application by a procuring entity, approve in writing, the usage of other formats or variations to the standard bidding documents. Although the

standard IPP procurement documents should be approved by the NPPA, the critical role of other institutions in this procurement should be also recognized.

Overall, applying Public Procurement Act to IPP structuring may be quite complicated and require several amendments to this Act, and also development of additional Regulations by the NPPA with the standard documentations and procedures. For these reasons and based on the experience in other countries we would advise against using the Public Procurement Act for IPP procurement, and apply the PPP Act, with some additional simplified regulations instead.

5.3 Choice of International arbitration in PPAs

Provisions of the Investment Promotion Act 2004 provide for the basic rules on the international arbitration of the investment contracts. One option indicated under this act is resolution of the investment disputes under the UNCITRAL rules. However, recognition and enforcement of such awards remains difficult and unclear.

The main domestic law regulating arbitration in Sierra Leone is the Arbitration Act 1960, which is outdated and not adequate to address the international arbitration. It does not have the basic provisions required for stay nor enforcement of foreign arbitral awards. State Proceedings Act 2000 that regulates jurisdiction matters against the Government, also does not address international arbitration awards either.

One of the key international instruments in this regard is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") and Sierra Leone is among a small number of remaining countries in the world that have not yet become a member to it.

The New York Convention regarded by international investors as one of the most important pillars of international arbitration. Its significance is illustrated by the mere fact of countries that have ratified it. In May 2019 this convention had 156 member states, including 35 out of 54 African countries.

The practical importance of adapting this convention in Sierra Leone in the context of the PPAs would be significant - currently Sierra Leone is only a party to one multilateral instrument that enables recognition of arbitration awards - the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention). This convention provides facilities for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states. There are many benefits and advantages of this convention and its implementation, however by some investors is regarded as more cumbersome, restrictive and difficult to apply.

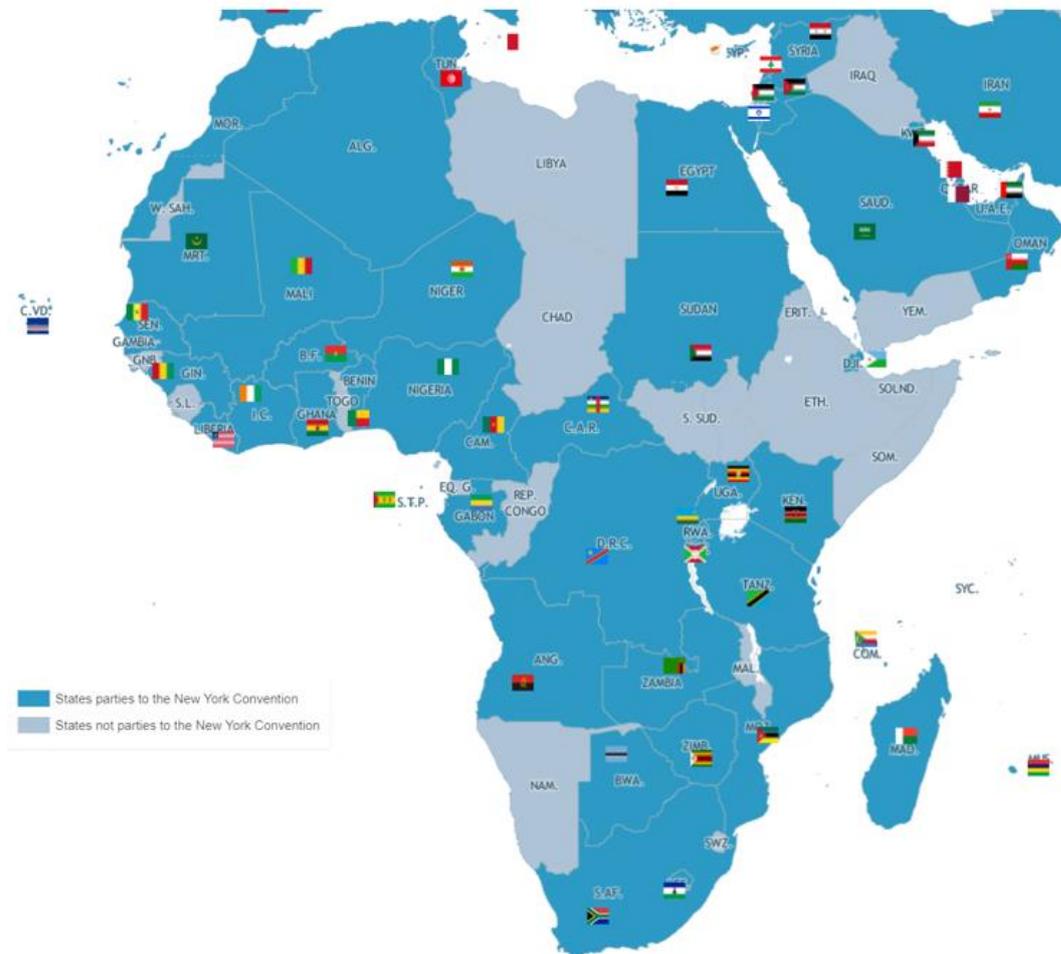
One of the major concerns around the convention usually relates to the jurisdiction of the ICSID Centre over the investment disputes. The Convention indicates that jurisdiction of ICSID Centre is as extending to "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,

which the parties to the dispute **consent in writing** to submit to the Centre.³⁴ The consent of the parties has been described as the "cornerstone" of the jurisdiction of the ICSID Centre and in number of occasions ICSID Centre rejected the disputes due the lack of express consent of the other party for arbitration.

For these reasons New York Convention serves an important instrument, enabling them to choose alternative forums of arbitration – such as London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) International Court of Arbitration, and others.

Below is the map of New York convention members in Africa and neighbouring regions:

Figure 9 Member states of the New York Convention in the region



Source: <http://newyorkconvention1958.org>

The New York Convention's main objective is to facilitate the recognition and enforcement of arbitration agreements and international arbitral awards among the member states. In particular, it aims to reduce impediments to the recognition and enforcement of foreign arbitral awards.

Becoming party to the New York Convention has two general legal effects:

³⁴ Article 25(1) of the ICSID Convention

- 1) the courts of country that became the contracting state must **uphold valid international arbitration agreements** and refrain from additional national court proceedings in respect of matters which the parties have agreed to be resolved by arbitration³⁵; and
- 2) subject to some very restricted exceptions, a country must **recognise a foreign arbitral award** within the scope of the New York Convention as binding and provide for their enforcement³⁶

Under the New York Convention, the procedure for the enforcement of foreign arbitral awards in Contracting States is quite straightforward. There are a minimal number of formalities with which the party seeking to enforce a foreign arbitral award must comply, in order for the foreign award to be enforced. Typically, a local new legislation is passed in order to translate the implementation practicalities of the convention into the national legislation. This would also be a good opportunity for Sierra Leone to overhaul its arbitration regulations and we understand that such initiatives have been in consideration already for some time (through the revision and update of the Justice Sector Reform Strategy and Investment Plan III).

It is important to note that New York Convention application is not limited to only investment disputes (that are mainly between the state/state companies and investors), as is the case with ICSID Convention, but also it applies to arbitration awards in any other commercial contracts.

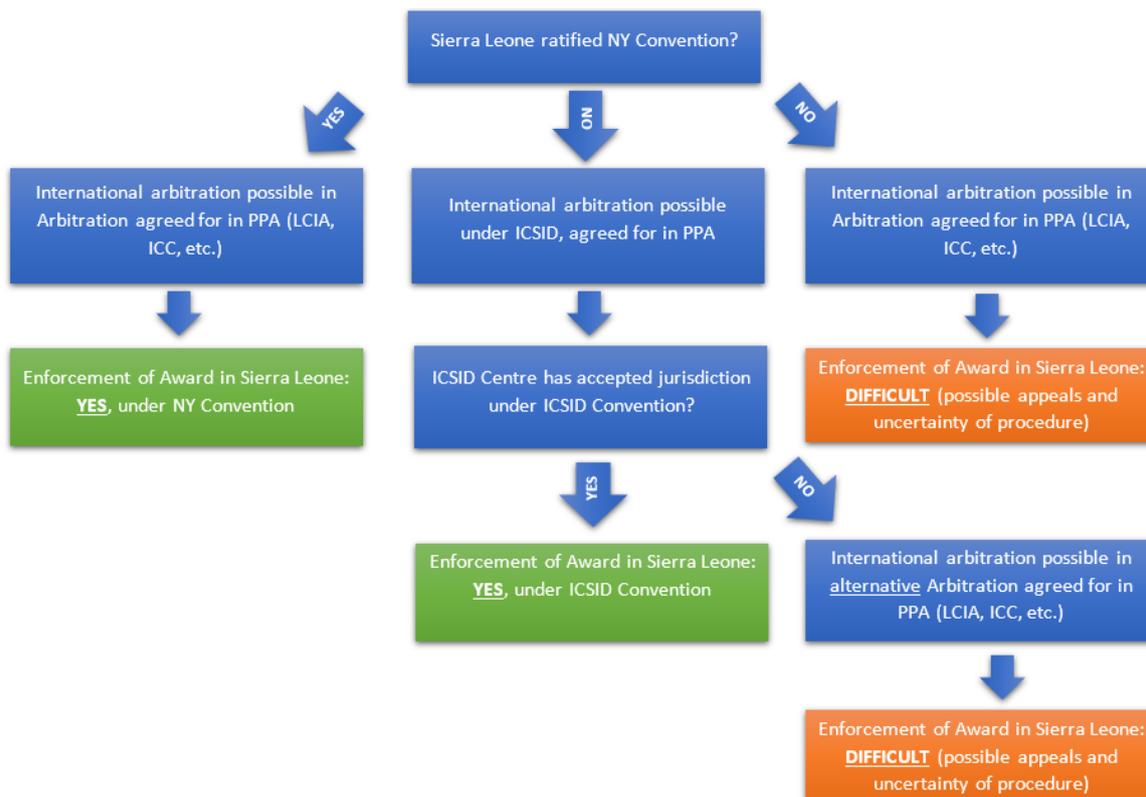
The significance of the New York Convention to the overall investment climate cannot be underestimated.

In this regard the illustration below shows the summary of possible scenarios in the choice of the international arbitration options specifically in the PPAs. We understand, that such a model has been already adopted in more than one PPA that has been negotiated approved in Sierra Leone.

³⁵ Article 2, of the NY Convention.

³⁶ Article 3 of the NY Convention

Figure 10 Scenarios in the choice of the international arbitration options in PPAs



The flow chart above shows, that due to the absence of New York Convention ratification, in cases when ICSID Centre rejects its jurisdiction, the IPP investors may be left unprotected and would have to rely only on the outdated local law procedures for the enforcement of awards. Being certain about the full protection of the PPA and its enforcement is one of the fundamental, underlying conditions for any IPP. Although ICSID does provide the procedures and rules for arbitration and enforcement – it exposes IPP to only a single choice of dispute settlement mechanism. **Such fundamental risks and issues will be seen by many investors as critical for the bankability of projects, especially when it relates to international finance institutions during the IPP Lender Due diligence process.**

There are advantages and disadvantages on both ICSID and New York Convention systems, different lawyers favouring different regimes. These differences and similarities of both the New York Convention and ICSID Convention are detailed in the table below.

Table 4 Comparison of New York Convention and ICSID Convention

	New York Convention	ICSID Convention
What awards can be enforced?	Pecuniary and non-pecuniary foreign arbitral awards issued by both ad hoc and permanent arbitral bodies are subject to certain treaty- based and national limitations such as limiting enforcement to awards issued in other ratifying states and/or dealing with commercial subject matter.	Pecuniary awards only issued under the Washington Convention
How will the award be enforced?	While enforcement must be subject to the same national rules as for domestic arbitral award enforcement – no more expensive or onerous – contracting States still tend to require that awards be formally “recognized” before enforcement.	Awards are “automatically” enforceable in any ratifying State as a final judgment of the national courts. In case of Sierra Leone – there is no practice of such recognition yet and coupled with the out-dated Arbitration Act this presents a serious challenge.
What can be done to resist enforcement?	There are seven discretionary and exhaustive grounds for refusing recognition or enforcement of an award: - Lack of a valid arbitration agreement. - Violation of due process. - Exceeding the tribunal’s authority. - Irregularity in the composition of the tribunal or its procedures. - The award is not yet final or binding. - The award has been set aside or suspended. - Public policy reasons.	Arbitral appeal mechanisms are limited to annulment, revision or interpretation of an award. At the enforcement stage, grounds for resisting enforcement are exceptionally limited to those available for resisting enforcement of final judgment of a court of that State, and therefore can vary from State to State according to domestic law.

Source: Adapted, based on Norton Rose Fullbright; www.nortonrosefulbright.com

Looking at the various considerations above, it clear that it would greatly benefit the investment environment and IPP process if the choice of both regimes is available in Sierra Leone, as it is in more than 150 countries already.

Taking the process forward, during the consideration of accession to the New York convention the following practical aspects should be considered³⁷:

- ❑ **Reservations:** A State party to a treaty may seek to exclude or modify the legal effect of that treaty by making a reservation. Generally, the other State parties to the treaty can object to any reservation and declare whether or not as a result of their objection, the treaty, or that particular part of the treaty, will not apply between them and the reserving State. In the case of reservations expressly authorised by treaty, however, no such objection is possible. The New York Convention contains two authorised reservations:
 - ❑ The 'reciprocity' reservation – a State may limit the application of the New York Convention to foreign arbitral awards that are made in the territory of a Contracting State (rather than any State). Roughly two thirds of Contracting States have made this reservation. Of course, as more and

³⁷ Adapted, based on Helbert Smith Freehills. “The implications of accession to the New York Convention”

more countries become Contracting States to the New York Convention, this Reservation has less practical effect.

- ❑ The ‘commercial’ reservation – a State may declare it will only apply the New York Convention to differences arising out of legal relationships which are considered as commercial under the national law of the reserving State. Approximately one third of Contracting States to the New York Convention have applied this reservation.

Other reservations may be also made. For example, the Democratic Republic of Congo (“DRC”), which acceded to the New York Convention on 3 February 2015, made a reservation that the Convention will not apply to arbitral awards which deal with real estate located in the DRC.

It should be noted, however, that while reservations provide some flexibility for a Contracting State, the more extensive or numerous the reservations, the more the chance of objections to them, and the more the effectiveness of the treaty is potentially reduced.

- ❑ **Formal procedure requirements:** The formal procedures for accession will depend on Sierra Leone’s national legislative requirements. Once a formal decision for accession has been made by the GoSL (with any necessary Parliamentary approval), then the formal accession instrument may be prepared for lodging with the depository – the UN Secretary-General. The New York Convention would enter into force 90 days after deposit of this instrument.
- ❑ **Local legislation:** Prior to accession, however, Sierra Leone will need to ensure that any necessary implementing legislation is in place, in order for it to comply with its international obligations under the New York Convention. This may require the adoption of new legislation. In this context, the United Nations Commission on International Trade Law (“UNICTRAL”) has published a Model Law which provides a solid starting point for the drafting of national legislation. Many States have based their arbitration legislation on the Model Law, with relevant amendments and exclusions to take account of any particular national circumstances.

5.4 Application of Sierra Leone law to PPAs

Another aspect to note in relation to the international arbitration and the development of IPP frameworks is the law applicable to PPAs.

Current legislation of the PPPs indicates that a PPP Agreement shall be governed by and construed in accordance with the laws of Sierra Leone, unless agreed otherwise expressly by the parties in the PPP Agreement.³⁸ Based on this provision the prevailing position of the Government in the previously signed PPAs was to adopt the Sierra Leone law as much as possible. However, due to potential bankability issues some deviations from this approach were also made. The applicable law issue always faces much contention. In

³⁸ Section 5 of the PPP Act 2014.

most cases the Government insists on applying Sierra Leone laws exclusively to the entire IPP project, but because Sierra Leone’s laws are not sufficiently developed to deal with the complexities of project financed infrastructure contracts Sierra Leone, investors and especially lenders, insist that the laws of other jurisdictions be applied.

In any case, the laws of the country where the IPP project is developed cannot be ignored, hence, following approaches have been applied in relation to this issue in the PPAs and Implementation Agreements (IA) in Sierra Leone so far:

- ❑ Only Sierra Leone laws are being applied to both PPA and IA, with no exceptions; arguably this presents serious bankability issues to the IPP projects;
- ❑ Sierra Leone laws are applied only to PPA and English Law is applied to IA;
- ❑ English laws are applied to PPA and IA, with the contractual obligation for the developer to comply with Sierra Leone laws at all times, with exclusion of certain law that may bring some uncertainty to interpretation of PPA.

There is no single best practice solution in relation to the choice of applicable law issue, and the bankability of the project often is the deciding factor. For smaller projects, applying only Sierra Leone laws may be quite feasible, while financing of bigger projects may still require partial application of laws more customary and known to the large international lenders and developers. This aspect should be also considered in drafting the IPP Regulations and similar regulations.

5.5 Key gaps identified in PPP legal framework to improve IPP procurement

Below is the summary of the key gaps identified in this analysis and recommendations for the steps forward.

Table 5 Key gaps identified in and recommendations to improve the PPP legal framework

No.	Issue identified	Recommendation	Importance
1.	Insufficiently aligned national policy statements on renewable energy generation targets across various documents, with emphasis lacking on medium size solar projects, links to firm thermal generation development (hybridization) and international energy transmission development	Update and improve Sierra Leone energy policy statements to include clear policy on solar IPPs	Medium
2.	Implementation procedures of the Collection Account, established in the Electricity Act amendments in 2018, and its operation rules/manuals are missing; as a result, the Collection account is managed by MOF and there is insufficient payment certainty for IPPs; proper alignment of the Collection Account procedures with the	Finalize Collection Account Operational procedures, that are to be regulated by Cabinet and are aligned to IPP selection process (preferably forming the same regulatory package)	High

No.	Issue identified	Recommendation	Importance
	entire PPP selection process will be critical to bankability of all IPPs		
3	Standard documents and procedures on hybridization of existing thermal public generation are not in place (rehabilitate-operate-transfer)	Prepare ROT specific document templates enabling EGTC to commence hybridization of some existing (or upcoming thermal generation)	Medium
4	EWRC (i) approval procedures of PPAs as provided for in the Electricity Act and (ii) IPP licensing procedures are not in place, or are still in a provisional regime	Prepare EWRC approval and licensing procedures; it is critical to NOT to have them in isolation, but rather make part of a wider IPP Regulations	High
5	Distinction between EWRC powers to intervene in the activities of power utilities without PPAs and after the ones with PPAs is not sufficiently clear (especially on rights to review tariffs after signing PPAs)	EWRC role in monitoring compliance with the IPP licence to be elaborated in the EWRC regulations and when practical – in the amendment to the EWRC Act.	Low
6	Application of the PPP Act and procedures to the IPP process, as opposed to public procurement is not sufficiently clear; especially after adoption of the new Public Procurement Act 2016	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	High
7	PPP procedures provide for too complex process of approvals and procedures to be efficiently applied for small to medium size IPP projects	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	High
8	USP framework in the PPP Act provides a good initial USP framework, but needs to be much more detailed in order to be efficiently used for IPPs	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	High
9	Public Procurement Act presents significant gaps in order to be applied to IPP process (specifics of electricity as a commodity and delivery and financing mechanisms; cross-sector institutional collaboration needed in planning and procuring such projects; authority and approval powers of such projects, that are above a single procuring entity; and design of model procurement documents)	Align PPP Act and Public Procurement Act procedures, or clarify that Public Procurement Act does not apply to IPP procurement, by adopting a Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	High
10	Approval procedures for issuing Government guarantees (when relevant) are not aligned with PPP contracting process	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	Low
11	Planning for and approving the multiannual financial exposure of the Government is not aligned with the PPP (and IPP) procurement and structuring process, especially as it may relate to the support obligations of the Collection Account.	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	Medium

No.	Issue identified	Recommendation	Importance
12	The role of the AG/MOJ is not detailed sufficiently in the process of approval of PPP projects (and PPAs)	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	Medium
13	Practical implementation of the import duty, GST and other incentives under Finance Act is not sufficiently coordinated between various institutions involved;	Adopt MOF regulations, aligned to the process of IPP regulating the application of the incentives for solar IPPs (emphasis on solar PV technology only, due to existing provisions in the Finance Act)	Medium
14	Recognition of foreign arbitration awards on the territory of Sierra Leone remains inadequately regulated	Ratify the New York Convention 1958, and initiate Arbitration Act reform	High
15	Guidance on the application of the Sierra Leone law in the PPA transactions is missing that would provide adequate balance between the bankability requirements and adherence to Sierra Leone laws	After consultation with the MOJ issue a guidance note on the choice of law provisions	Medium
16	Penalties that may be imposed under Local Content Agency Act for any new IPP, may become a huge deterrent for investment (due to high risk of potential project cancellation)	Review penalties and remedy policy under this Act and provide more balanced and clear approach; consider instituting system of certificates of compliance, with revocation and appeal mechanisms	High
17	Alignment of EPA licensing procedures to the PPP/IPP selection process is missing	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	Low
18	Alignment of BOSL procedures on securing sufficient forex (at market prices) for Collection Account bank and IPP banks in the PPP/IPP selection process is missing.	Adopt Cabinet-level simplified Regulations specifically for IPP procurement and inter-institutional coordination	Medium
19	GoSL / MOF policy or guidance on the sovereign and payment risk mitigation measures available for IPP projects is not well developed and clear (for example, sector-wide IPP liquidity facility)	The study on the GoSL and private/donor funded financial support instruments for small scale grid-connected solar IPPs should be undertaken. This study should include a full draft structure of at least one specific facility adapted to and taking into account such aspects of Sierra Leone context as the small size of a typical solar IPP projects, Collection Account Management and Operation rules, approval of multiannual commitments, Sierra Leone borrowing caps and its adjustments, the best practices for such instruments in other countries, and emerging new non-government instruments like Scaling Solar, African GreenCo, African Energy Guarantee Facility, etc.	High
20	FIT policy for small-scale IPP projects is not in place	Determine the maximum size of the project eligible for the FIT scheme and develop standard FIT documents	High

No.	Issue identified	Recommendation	Importance
		and policy in accordance with best practices.	

The list of the main laws and regulations that would require review, clarifications or new drafting as part of implementing the recommendations above is presented below:

No.	Law, regulation or guidance	Comment
1.	Simplified PPP Regulations for Solar IPP projects	New document, in accordance with the recommendations above and Annex 1
2	FIT Regulations for Solar IPP projects – new document	New document, in accordance with the recommendations of MCC and this Report
3	Public Private Partnership Act, 2014	Align the procedures related to Public procurement, simplification of small PPP projects and
4	Public Procurement Act 2016	Align with PPP Act 2014 and remove references to electricity
5	Guidance on the tax and duty incentives applicable to Solar IPP projects	Consolidated document, providing consolidated guide to incentives for Solar IPP projects and procedure of their application; this document may be provided by MOF as part of the IPP negotiations process
6	Amendments to Local Content Agency Act 2015 and Regulations/ guidance on Local Content Agency act application to solar IPP projects	It is critical to avoid uncertainty in the scope of application of penalties under this Act
7	Regulations for issuing EISA license for Solar IPP projects above 1MW	Similarly to the existing regulations for small projects, the projects above 1MW should be addressed
8	EWRC IPP licensing regulations for Solar projects above 1MW	It is critical to address question of EWRC power and role in monitoring IPP operations after the PPA and IA is signed (EWRC should not have discretion to change or review commercial terms of power plant operation during the term of PPA, unless there is a breach of obligations by the IPP)
9	Collection Account Management and Operation Manual and Guidance on the Sovereign support measures for solar IPP projects	Clarity of available instruments and procedures by MOF, and alignment to the IPP selection process by MOE and other stakeholders is of paramount importance to the bankability of Solar IPP projects in the future.
10	Ratification of the New York Convention 1958, and initiation of the Arbitration Act reform.	Pease refer to sections above in this Report for more details.
11	National Energy Policy Update 2019	Align the policy statements in relation to Solar energy generation between the Electricity Sector Reform Roadmap (2018-2030), Sierra Leone Medium-Term National Development Plan (2019-2023) and Renewable Energy Policy and Action plan 2016

No.	Law, regulation or guidance	Comment
12	Electricity Act 2011 amendments in relation to CLRG line	Address implementation of ECOWAS Directive on Regional Electricity Market (2013) in the national legislation

5.6 Cutting through complexity: Recommendations for the next Steps

Looking at the whole range of issues that have been discussed and identified by this Report in the legal framework relating to the PPPs and Solar IPP development, we would like to highlight certain key steps that in our opinion would lay the foundation and fast-track the delivery of Solar projects in Sierra Leone:

- 1) Establish a strong Minister-level buy-in for the Solar IPP development priority at MOF (establishing institutional and individual representation of MOF)
- 2) Establish of Minister-level IPP Steering Group and technical-level IPP Task Force, combining the key institutions and *at least* high-level representatives from MOF and MOE (please refer to key provisions and draft considerations in the Annex below).
- 3) Commence drafting PPP Regulations for small solar PV projects (please refer to key provisions and draft considerations in the Annex below)
- 4) Commence drafting GoSL / MOF policy or guidance on the sovereign and payment risk mitigation measures available for IPP projects; as well as guidance note on the available tax and investment incentives for solar IPP projects; and initiate strategic discussion with donor community on the potential support to such projects;
- 5) Commence drafting Collection Account Manual and operation rules;
- 6) Commence drafting the FIT Regulations for the small-scale solar projects
- 7) Taking strategic decision (IPP Steering Group level; top-down approach to set the threshold of MWs to be installed) on the approximate scale of the first batch of the non-FIT grid-connected solar PV projects (for example 3-4 projects of 5-10MW each), that would be financially affordable for GoSL and would meet the most immediate demand needs across the country (target completion date approx. 2021);
- 8) Invite developers that already have existing MOUs with MOE for solar PVs to present their short concept notes (similar to EOI) in response to the threshold established by IPP Steering Group, with the special emphasis on the suggested project Financing strategy and management of demand risks (for example phasing the projects, etc.);
- 9) Align the findings of Study on the Sovereign and payment risk mitigation measures available for IPP projects (points 4 and 5 above) and initial Concept

Notes from the private sector (point 8 above); take strategic and well-informed decision on the solar energy demand needs (in consultation with EWRC, EDSA and EGTC – include hybridization possibilities; grid-connected projects and stand-alone projects) and risk mitigation measures available to IPP contractors (for example Sector-wide liquidity instrument in consultation with WB or other donors);

- 10) Take strategic decision on the procurement approach – to fast track the process – direct negotiations with the most responsive Concept Note providers can be initiated and as a first deliverable – Feasibility study (right-sizing of the particular power plants) should be done by the engaged private partner (under the framework of amendment to MOU; provide draft PPA and IA (prepared by MCC) and tailored to the findings under point 9 (payment risk mitigation measures); consider including Performance bond to be issued by the selected developer to achieve Financial close within a given time, in order to ensure interest from competent developers only and long-stop dates in the contracts, so that they don't last indefinitely;
- 11) Assess the Feasibility studies for the particular projects at IPP Task force level and IPP Steering committee level and negotiate final text of the PPA and IA (following the procedure available in PPP Act for unsolicited proposals and more details in sub-section 5.1 of this report) and submit the document for the final approval by the Cabinet (Parliament approval to be pending Lenders' due diligence and final comments before Financial close).
- 12) Collaborate with the private developer at the IPP task force and IPP Steering committee level – actively support developer with relevant data, documents and decisions needed to reach financial close (with special emphasis on providing up-to date data on the planned HFO power generation projects, transmission upgrade and construction projects, ongoing re-habitation and upgrade works on the grid, including international grid, land lease facilitation, community engagement, local content polity obligations, information on taxation and duty-free policies, etc.)
- 13) Evaluate the final proposed amendments (if any) to the PPA and IA at the IPP Steering committee level and approve the final PPA and IA at the Cabinet and ratify by the Parliament.
- 14) Collaborate with the private developer at the IPP task force and IPP Steering committee level – actively support developer with relevant data, documents and decisions needed to reach financial close – issue of any payment or liquidity facilitation or insurance instruments and fulfilling any other conditions agreed for in PPA and IA
- 15) In parallel, initiate other recommendations in Sub-section 5.5 above in the order of priority and available resources.

Annexes

A1 Draft structure and key considerations for the USP process in IPP Regulations

This Annex provides draft the draft structure, clauses and key considerations to be included in relation to USP process of the IPP Regulations. This work goes beyond the Rapid legal and regulatory gaps assessment envisioned in the Terms of Reference of this assignment, however, we believe it may be useful in showing how the recommendations made earlier in this report could be structured in a practical and systemic way.

These draft clauses and considerations also take into account the recommendations provided in the IPP Framework drafted in the MCC report, adapting them further to Sierra Leone context.³⁹ We fully understand that much more consultations, strategic decisions and drafting will be needed to enact such Regulations, but they could serve as a good starting point to initiate these discussions in the near future.

During the deliberations, we recommend taking note of 2 key aspects that these draft recommendations try to emphasize (they were not elaborated sufficiently in the MCC reports):

- ❑ They place more focus on the proposal (including Feasibility Study) evaluation aspect and the team-work that is required by all institutions in the process; due to the fact that in the USP process for IPPs often the Feasibility Study will not be prepared by GoSL, much more scrutiny should be applied to its evaluation, especially on the risks that may be transferred to GoSL. Therefore, in these draft clauses introduce the concept of so-called “sectoral evaluation”, where each institution will be tasked with providing very specific evaluation of its own area of expertise during the process, with one institution taking the holistic view and integrating all comments. This process by no means should substitute engagement of professional advisers in the process, but in cases where there are no such possibilities, these draft recommendations may provide a more structured approach to Government in-house evaluation process.
- ❑ They take into account realities of project financing, where in most cases, the Commercial close⁴⁰ of the project will be followed by the lenders’ due diligence process and thereafter – the extensive discussions and negotiations between them and the Government in relation to specific project finance arrangements (depending on the financing structure these may be Indemnity Agreement, Direct Agreement, Government support agreement, Put Call Option Agreement, or similar). These negotiations will typically take several months after the Commercial close, and again will require specific evaluation (or even the evaluation of amendments to already-signed PPA, IA and CA). Although not necessarily the rule in all cases, such a practice is not uncommon in most IPPs, including solar projects. Mostly this is due to the ever-changing

³⁹ For numerous additional practical consideration and recommendations please refer to the report “Power Sector Roadmap and Coordination Activity, Draft IPP Framework - Task 4.5”, Adam Smith International, MCC, 2018

⁴⁰ IPP development stage when, after approval by the Cabinet, the Project agreements such as the PPA, IA and CA are signed.

international and private or donor-supported project financing environment (new market trends appear, new minimum project sizes are being established, new products being developed, new funds opening, old windows closing, etc), which makes it very hard to predict the funding options of a particular project at Commercial close to enough detail. Therefore, to be efficient and responsive, GoSL should be well prepared for such market realities and be adapted to review and assess the new set of documents required for Financial close, and with sufficient depth and objectivity evaluate such proposals or changes to the original project agreements. This additional stage of negotiations is often overlooked and not planned for properly in the regulatory frameworks.

No.	Section title / subject	Draft provisions and aspects to take into consideration
1	Interpretation	Definitions and meaning of key concepts (including the “Small scale IPP project”)
2	Legal basis	Make reference to the procurement process under the PPP Act, and that these Regulations are made under Section 2 (2) and Section 63; it is critical for these Regulations to be approved by the Cabinet, otherwise the USP process detailed below may be seen as non-compliant with the PPP Act;
3	Application	<p>Indicate what IPP projects these Regulations will be applied for; for simplicity purposes regulations could first be applied only for the certain size of solar PV IPPs (due to quite standardized specification, procedures and PPA); for example, from 3MW to 25MW; the scope of 1MW to 3MW could potentially be left for FIT schemes;</p> <p>After some time, application may be expanded to other technologies like mini-hydro (the IA and especially PPA, including the risk profile, of hydro projects will be quite different from Solar PV PPA, therefore it is advisable to start with the most simple and manageable IPP projects and then, gradually expand its application;</p> <p>Also, the rule of conflicting provisions should be established in this section (e.g. “These Regulations shall provide for the simplified procedures of the project identification, feasibility, approval, procurement and other procedures established by the Act, specifically applicable to the Small-scale IPP projects. Any other issues related to the small-scale IPP project that are not covered by these Regulations shall be governed by the provisions of the Act and any other applicable legislation”.</p>
4	Institutional arrangements	<p>Establishment of a centre-piece inter-ministerial working group (e.g. IPP Steering Group) with the clear overall responsibility of taking decisions on most aspects of small scale IPP project structuring (identification, procurement, negotiations until the initialing of the PPA); it should include: MOE, MOF, MOJ, EDSA, EGTC, PPU and EWRC. The group should be co-chaired between the Minister of Energy and the Minister of Finance and consist of the Heads of the Institutions. Decisions taken by the IPP Steering group would constitute a “concurrence” of MOF, MOE and MOJ for the purpose of the Cabinet meetings. BOSL should be invited in the meetings of the Steering group when required.</p> <p>In addition, the “early filter” for all solicited and unsolicited proposals should be established – the IPP Task force, mandated with the evaluation of the EOIs, approval of the MOUs, approval of the feasibility studies, issuing standard tender documents and contracts; the Task force would be chaired by the Minister of Energy or his designated person, and would include technical level representatives from MOF, MOJ, EDSA, EGTC and PPU. This working group would be the main counter-party interacting with IPPs. Institutions like EWRC, EPA, LCA should be invited to the meetings to consult and coordinate their licensing process. Decision making procedures of this group should be carefully balanced, but in principle, MOE should have a strongest role in the decision process; while MOF, MOJ and other institutions should have veto on the final IPP Steering group decisions (concurrence).</p>

No.	Section title / subject	Draft provisions and aspects to take into consideration
		<p>The role of EWRC should be carefully considered: it should maintain its independence, however – its IPP licensing procedure should be referenced by these Regulations; situations of EWRC independently “blocking” the IPP project, after it was approved by IPP Task force should be avoided. Its licensing requirements (some may be contingent on the IPP Steering group or Cabinet approval) should be well aligned with regulations. To fast-track the process, they could also be part of these regulations (as the Annex).</p> <p>Similarly, the roles of the EPA and LCA should be carefully considered: the EPA and LCA should issue their simplified and clear requirements for the small scale solar PV generation projects, all of which could be part of these Regulations.</p>
5	Initiating small scale IPP	The process could be initiated either by MOE, EDSA (solicited process) or private partner (unsolicited process);
6	Unsolicited proposal selection and procurement process:	
6.1	Application (EOI)	Private partner shall submit the application to IPP Task Force (in the form provided for in the Annex, with basic figures and data; with the strong emphasis on the private partner profile, strength and experience)
6.2	Go/no-go	Within a fixed-time MOE, EWRC and PPPU will provide their evaluation (“ go/no-go ” recommendation) for the decision to be taken at the IPP Task force; Task force should not be bound by the EWRC or PPPU recommendations; although 3 institutions providing their recommendations may seem excessive, due to capacity constraints of all institutions, such a measure will ensure better quality of the analysis, should the capacity of one of the institutions decrease due to the work-load or other reasons;
6.3	Additional clarifications	Private partner may be asked to present at the IPP Task force and answer additional questions before approval;
6.4	MOU	<p>Upon approval of the application by the IPP Task force, the MOE will sign the template MOU (non-negotiable) with the Private partner.</p> <p>Key provisions of the MOU being:</p> <ol style="list-style-type: none"> (1) short description of the project; (2) obligations of private partner at its own risk and cost to prepare project feasibility study and (3) obligations of MOE to supply (and cause EDSA and EGTC to supply) technical data; (4) MOU should be strictly time-bound with the term extension only by approval of IPP Task force. <p>No binding commitments on the PPA, IA or any IPP project details, including the tariff, should be included in the MOU.</p>
6.5	Feasibility study	<p>Feasibility study must include the following components:</p> <ol style="list-style-type: none"> (1) Technical description of the power generation solution; (2) Demand analysis; (3) EPC contractor selection strategy; (4) Project financing strategy; (5) Project indicative timeline of implementation; (6) Financial Model, prepared in accordance with the template provided by PPPU, (7) Tariff proposal; (8) Land use arrangements (including key environmental considerations) (9) Local content strategy and (10) Comments to the standard GoSL PPA/IA and CA⁴¹ that are provided as Annex to these Regulations;

⁴¹ Please refer to MCC standard document templates prepared and also the outcome of this Study – Task 3.

No.	Section title / subject	Draft provisions and aspects to take into consideration
6.6	Evaluation	<p>Upon receipt of the Feasibility Report the following thematic evaluations must be completed:⁴²</p> <p>MOE, EWRC and EDSA – analysis of the demand assessment and tariff proposal, including project suitability and affordability (IRP and long-term generation costs, etc.)</p> <p>EDSA and EGTC – analysis of the technical aspects (design, location, interconnection, CLSG implications, EPC strategy, technical aspects of PPA, IA, CA, etc.)</p> <p>MOF – analysis of the Financing strategy, Financial Model and the Financial Assumptions and project affordability (including import duties and tax; and project’s potential impact on multiannual liabilities)</p> <p>MOJ – analysis of legal comments to PPA, IA and CA (including choice of law, arbitration, etc.; for bankability reasons it is important to leave some level of flexibility on the applicable law to the agreements, especially the IA⁴³);</p> <p>EPA – aspects to note for EISA license compliance (are there immediate major issues identified);</p> <p>LCA – aspects to note for compliance with simplified local content regulations (providing certainty and predictability to private partner on the local content requirements);</p>
6.6	Feasibility Assessment Report	<p>After receiving of all the evaluations above, the PPPU shall produce a combined Feasibility Assessment Report with recommendations for the MOE and IPP Task force on the major issues identified and recommendations for the: approval of the feasibility; rejection of the feasibility; request of further improvement of feasibility; approval of feasibility, conditional on additional improvements, etc.. All efforts must be made by PPPU to engage external independent consultants to conduct the feasibility assessment above or parts thereof.</p>
6.7	MOE decision	<p>Upon receipt of the Feasibility Assessment Report the MOE will take a final decision, if the Feasibility Study will progress to the IPP Task force (this stage is important for the MOE to be the final ‘gate keeper’ of the Feasibility – if it is not satisfied with it to a reasonable degree, it should not go further into the IPP Task force);</p>
6.8	Negotiations	<p>If the Feasibility Assessment is approved by the MOE, the IPP Task force will:</p> <ol style="list-style-type: none"> (1) make a public notice, of its intention to commence negotiations for the project; (2) formally inform each institution of the IPP Task force of the commencement of the negotiations on the specific project and will invite to appoint their representatives for the negotiations process (although this requirement may seem superficial, in practice this will increase commitment of all institutions and their representative to the specific IPP project and upcoming negotiation process); in absence of specific appointment the IPP Task force members will represent such institution; (3) will engage the private partner to address the issues identified in the Feasibility Assessment and then finalize the negotiations of project agreements; IPP Task force will make all efforts to outsource the external advisors; (4) appoint the lead-negotiator for the specific IPP project, who will coordinate the process on behalf of the IPP Task force during negotiations. <p>Special attention should be given to the level of authority of the negotiating representatives on behalf of the institutions. It should be made clear that their mandate is to communicate positions of their institutions in advance, and resolve as many practical aspects as possible, before the final decision is made on the project by the relevant institution or the Minister.</p>
6.9	Initialling the agreements	<p>The initial negotiations will complete by the decision of the IPP Task force to initial the draft project agreements between the private partner and each of the IPP Task force members (within the authority limits indicated above – meaning</p>

⁴² Please refer to Section 8 of the report “Power Sector Roadmap and Coordination Activity, Draft IPP Framework - Task 4.5”, Adam Smith International, MCC, 2018.

⁴³ Please refer to relevant section of this Report for more analysis on this issue;

No.	Section title / subject	Draft provisions and aspects to take into consideration
		that the initialling of the agreements does not bind the parties in any way, and does not mean approval of the project, but only signifies achievement of such progress in the negotiations where technical-level discussions have been developed to the level sufficient for the relevant authorities to be able to take an informed decision on the project).
6.10	MOE authority to progress documents to IPP Steering committee	Should some of the IPP Task force members not initial agreement, or IPP Task force not take a decision on the negotiations outcome, the MOE will still be entitled to send the draft project agreements for consideration and final approval by the IPP Steering Committee [such or similar provision is important to ensure MOE strategic leadership of the IPP process, in order to avoid delays or procrastinations of the decisions at the technical level; if MOE will manage to convince other colleagues at the Steering committee of the benefits of the IPP project, without technical-level approvals, the project could still go ahead, provided all heads of all institutions, who are members of the IPP Steering group agree to this].
	Report on negotiations	After receipt of the negotiated IPP project by the IPP Steering committee, the PPPU will prepare a report on the negotiation's outcome and its conformity to the Feasibility Assessment Report, highlighting key project risks, their allocation and risk management measures.
6.11	Powers of the IPP Steering committee	<p>IPP Steering committee will take into consideration the following aspects of the IPP project before taking the decision:</p> <ol style="list-style-type: none"> (1) demand analysis for the electricity generated by the project, and measures for managing this risk; (2) tariff level(s) in relation to average generation costs of the country (including avoided costs) (3) project affordability to EDSA and the Government, including the availability of Foreign Exchange (4) government support obligations to the IPP project <p>IPP Steering committee will have the right to request any number of additional studies or review of the project documents as it finds necessary, however, it will take due note of the recommendations of the IPP Task force (if any) and PPPU.</p>
6.12	IPP Steering Committee decision	<p>For the project to be approved by the IPP Steering Committee, each of the Ministers must vote in favour of the project and one additional member of the Committee. The decision issued by the IPP Steering committee. [this rule basically means issuing “no objection” to the project by MOF, MOE and MOJ; however, to account for important role of other members in the committee, one more member should approve the decision]</p> <p>The Parties to the agreements from the Government side will be:</p> <p>PPA – EDSA IA – MOE and MOF (the Government) and EDSA CA – EGTC</p>
6.13	Cabinet decision and Commercial close	Cabinet has the principal authority to approve all PPP projects under the PPP Act. Therefore, after the IPP Steering Committee approval, the project will be passed to Cabinet for final approval. After which all the documents will be officially signed and Commercial close of the project development will be achieved.
6.14	Project financing	After the documents have been approved by the Cabinet the IPP will engage in the financing process. It will depend on the financing strategy developed under the feasibility study, but his provision must deal with the timelines that must be agreed for the project to obtain financing and achieve financial close.
6.15	Lenders agreements	If the project structure and agreements approved by the IPP Steering Committee provides for such a possibility, after Commercial close the IPP will engage the lending institutions in order to obtain financing for the project. Any additional documents required at this stage to be signed with the Governments (for example: Indemnity agreements, Government support agreements, MIGA application, Direct agreements, Put Call Option Agreement, etc.) will have to be approved by the IPP Steering Committee.

No.	Section title / subject	Draft provisions and aspects to take into consideration
		<p>MOF will lead on reviewing such agreements with the view of their impact GoSL multiannual commitments in accordance with the Public Financial Management Act, 2016 and its Regulations. PPPU will provide technical assistance to the IPP Steering Committee. Every effort will be made to outsource such technical advice to the independent third-party consultants.</p> <p>At this stage BOSL shall be involved to provide an evaluation/opinion on the IPP project impact to the Foreign Exchange policy</p> <p>If required, IPP project agreements may be amended at this stage, but only to the extent this is required for the bankability of the project. PPPU and external advisers will have the mandate to advise the IPP Steering committee if the project has changed from its original design and approval to such an extent that the new assessment of the project risks is required by the IPP Task force.</p> <p>If the project financing structure does not require any additional agreements with the financiers, or all of them have been negotiated and approved by the IPP Steering committee together with the PPA, IA and CA, then all such documents will be immediately sent to Parliament for ratification.</p>
6.16	Cabinet approval to Financial documents	After financial documents have been approved by the IPP Steering Committee, the entire project will be submitted to the Cabinet for the final approval.
6.17	Parliament ratification	After the Cabinet has approved the IPP Project and its agreements, the project will be submitted to Parliament for the Ratification, as required by the PPP Act.
6.18	Financial close	<p>After the Parliamentary ratification, all the Project agreements will come into force, and the parties will commence implementation of the condition's precedent to financial close.</p> <p>GoSL and the Private partner will collaborate with each other to complete all requirements agreed to in the project documents to reach financial close. Collaboration from GoSL side will be particularly important in relation to obtaining all the licenses and approvals related to the Project, especially in points 7.2 – 7.6 below.</p>
7	Additional policies and regulations:	
7.1	Government support for small scale IPP projects	<p>Although it may be tempting for the Government to shift most risks of the IPP projects to the private developers (for example, leave all the demand risk to private partner, not to give any Government support instruments, subject them only to local laws, etc.) international experience shows that such projects will either be not bankable or incur very expensive risk mitigation costs that will inevitably translate to higher tariffs. The best tariffs in African countries were achieved by properly managing public sector-related project risks by the governments themselves and leaving to the private sector those risks that are best managed by them (like project implementation, construction, management and operation, efficiencies, financing, etc.).</p> <p>Without some Government or Donor support, most IPP projects, even if approved or signed by the Government and private partners, will often fail to obtain financing and achieve financial close. This will lead to failed expectations and distortions in power sector planning, and maintaining high electricity tariffs; therefore, a realistic balance must be found, and decisions should be made at the highest Ministry level in order to give sufficient comfort to lenders and investors to achieve best financing options.</p> <p>It should also be recognized that structuring international project finance for the relatively small projects will be very difficult at most times. The projects below 10MW will likely be either unattractive to many lenders due to being too small and/or will incur high transaction costs. Therefore, some larger Government support schemes for numerous projects may be developed in order to reduce such costs, for example: a pre-designed and set-up in place in advance of the IPP negotiations a larger-scale Liquidity facility, similar to PRG or LC, that provides, on a revolving basis, 6 months' payment guarantee to projects, and that may be used by several projects, rather than only one project; such a facility of relatively small amount – 2-3M USD – would go a long way in</p>

No.	Section title / subject	Draft provisions and aspects to take into consideration
		<p>improving bankability of the small scale solar IPP projects and may be set up directly by the Government, if needed;]</p> <p>In this regard, it would be advisable to shed more light on GoSL policies in relation to Government support arrangements. For example – indicating that Sovereign guarantees will not be considered, although alternatives and supplements to that in the form of Put Call Option, Government support facility to meet Collection Account shortages, Liquidity facility, MIGA applications, etc could be considered in some cases.</p> <p>As one immediate next step to improve on IPP framework in Sierra Leone (although not specifically related to the regulatory aspect) – the study on the GoSL and privately/donor-funded financial support instruments should be undertaken. This study should include a full draft structure of at least one specific facility adapted to and taking into account such aspects of Sierra Leone context as the small size of a typical solar IPP projects, Collection Account Management and Operation rules, approval of multiannual commitments, Sierra Leone borrowing caps and its adjustments, the best practices for such instruments in other countries, and emerging new non-government instruments like Scaling Solar, African GreenCo, African Energy Guarantee Facility, etc.</p>
7.2	EWRC Regulations on IPP Licensing for small scale IPP Projects	EWRC Regulations on small scale IPP Project licensing should be referenced from these regulations in order to have complete view of the legal framework.
7.3	Local Content Regulations on small scale IPP projects	Local Content requirements on small scale IPP Project licensing should be referenced from these regulations in order to have complete view of the legal framework. Current requirements of Local Content are highly problematic from the funding perspective and should be revised and specified in the context of small scale IPP projects.
7.4	EPA guidelines for small scale IPP projects	For the complete view of IPP regulations it would be very helpful to have EPA guidelines for such projects developed referenced here.
7.5	MOF guidelines on application of the tax and duty incentives for small scale IPP projects	The rules and procedures of implementing the provisions of the Finance Act (incentives for solar PV equipment, etc) should be referenced in this Regulation to form a complete view and efficient implantation.
7.6	BOSL policy on Foreign Exchange for small scale IPP projects	It would very useful to have a reference in these Regulations into Forex regulations of BOSL – indicating: (i) the procedures that commercial banks holding the IPP accounts will have to implement in order to purchase additional foreign exchange in case of shortage; (ii) the rules of setting the exchange rate in such cases; (iii) procedures of transferring Foreign Exchange abroad.

A2 Agenda and Attendance list of the Training Workshop

Agenda for the meeting

Time	Topic	Presenter
08:30 – 09:00	Registration of participants	-
09:00 – 09:15	Opening remarks	MOE
09:15 – 09:30	Round of introductions	
09:30 – 10:30	Presentation of the Report on the legal and regulatory gaps analysis: <ul style="list-style-type: none"> - Part 1: Context of the existing IPP Legal Framework and previous studies in this area - Part 2: Institutional framework for IPPs - Part 3: Existing practices of IPP structuring and private sector views - Part 4: Details on selected key issues and summary of key findings and recommendations 	Giedrius Sabaliauskas (ECA)
10:30 – 11:00	Discussion	
11:00 – 11:30	Coffee break	
<i>Stakeholder engagement – Workshop for the representatives of public institutions and public utilities only</i>		
11:30 – 12:30	Stakeholder engagement workshop on the legal and regulatory gaps, including the discussion and planning next steps. <ul style="list-style-type: none"> - Part 1: Detailed view on the IPP structuring practices, recommendations and MCC IPP Framework 	Giedrius Sabaliauskas (ECA) Federico Hinrichs (ECA)
12:30 – 13:30	Lunch at the Barmoi Hotel	
13:30 – 15:30	Stakeholder engagement workshop on the legal and regulatory gaps, including the discussion and planning next steps (cont.) <ul style="list-style-type: none"> - Part 2: Analysis of best legal practices, selected key issues and planning for the next steps 	Giedrius Sabaliauskas (ECA) Federico Hinrichs (ECA)

Attendance list

Institution/ company	Position	Name	Email address
Public stakeholders and utility			
MOE	Director of Energy	Ing. Benjamin Kamara	benshinoh@gmail.com
MOE	Technical Adviser	Dr Patrick Tarawalli	ptarawalli@msn.com
MOE	Head of Renewables	Robin Mansary	robinmans2010@yahoo.com
MOE	Assist info office	Lahai Kpaka	
MOE	Project development manager	Ngozi B-lines	
EGTC	Ag. Head Generation	Sinneh A. S. Kamara	sinnehkamara@egtc.sl
EGTC	Planning engineer	Focaly Conten	
EDSA	EPPM	James Mogers	
EWRC	Economic regulation	Brima Bah	brimabah@ewrc.gov.sl
EWRC	ICT intern	Fatmata A Soray	
EPA	Assistant director	Beran Forster	beranforster@epa.gov.sl
EPA	Deputy director	Sheick Tunis	sheikhtunis@epa.gov.sl
PPPU	Head of Unit	Abu Kamara	akamara03@aol.com
PPPU	Business Adviser	Mohamed Kamara	medabu@hotmail.com
PPPU	Financial advisor	Aby Bakar Sesay	abukai03@gmail.com
SLIEPA	Investment manager	Hardy Jalloh	hjalloh@sliepa.org
SLIEPA	Investment promotion officer	Fatima Kamara	fkamara@sliepa.org
Development partners			
MCC	Energy lead	Sanira Deen	sanira.deen@mccu-sl.org
MCC	Energy advisor	Pascal Habay	pascalhabay@gmail.com
Private sector			
Solar Era	Country Director	Sophie Johnson	sophie@solarera.eu
Joule Africa / Seli hydro	Project Coordinator	Will Lunn-Rockliffe	william@jouleafrica.com
Globeleq		Harold Kallon	harold.kallon@globeleq.com
Western Area Off-grid	CEO	Sam Zoker	
Consultants			
		Giedrius Sabaliauskas	
		Federico Hinrichs	
		Sophie Johnson	

Comments received and addressed in this report

Institutional issues

- ❑ Need to mention that the NPA unbundling process is not yet complete (Ngozi)
- ❑ MOPED not included in stakeholder map – their role (per explanation of the MOPED person in the room): updating NDP and identifying and planning key/priority projects
- ❑ Ministry of Lands and Country Planning, as well as Local Governments, also have an involvement in issues of land (Ngozi)
- ❑ With support from DFID, the GoSL is setting up a “National Investment Board”. This could provide a one-stop shop for IPP investments. (mentioned by PPPU)

Legal & regulatory framework

- ❑ List (as summary) all Acts that are mentioned as requiring amendments (Ngozi)
- ❑ There’s a new Finance Act 2019 (Ngozi)
- ❑ Concern about regulations relating to waste management and land-use change related to solar PV (e-waste and battery disposal?) – how should this be handled? (EPA)
- ❑ Mention GLSG/transco regulations (PPPU) (not sure what this comment means – but remember Pascal mentioning that GoSL will not be equipped with a proper legal and institutional framework to trade with WAPP by the time the CLSG interconnector is finished... there is no transmission system operator in place)

Key gaps

- ❑ GoSL cannot given sovereign guarantees given financial restrictions imposed by IMF (Ngozi thinks)
- ❑ If possible, provide more clarity on the sector-wide liquidity issues (PPPU)

Private sector views

- ❑ “GoSL to use consultants” – please elaborate on this. For what activities (feasibility studies, transaction advice, etc)? (EPA)

IPP procurement process

- ❑ GoSL has no resources to conduct feasibility studies – which favours USP approach (Patrick)
- ❑ Need to provide recommendations to “cut through the complexity” in the short term and deliver solar PV projects urgently (Pascal)

- ❑ EWRC participates in the approval of PPAs but a clear process has not yet been developed – this EWRC comment only confirms what you had already identified
- ❑ What should happen to projects with MOUs that don't reach financial close? (Ngozi question) – recommend timeline for MOUs to lapse.